

The 'afw' Principle and The Indonesian Restorative Justice System

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Abstract

This paper explains the implementation of the 'afw' principle, a forgiveness principle known in Islamic criminal law, as an objective of Restorative Justice. Although the restorative justice has not been regulated in specific and comprehensive legislation in Indonesia, the restorative justice is currently regulated in at least three different institutional regulations, including the Circular Letter of the Chief of the Indonesian Police Number SE/8/VII/2018 (SE Kapolri), the Regulation of Indonesian Attorney Number 15 of 2020 (Perja), and the Decree of the Director General of the General Judiciary Body Number 1691/DJU/SK/PS.00/12/2020 (SK Dirjen Badilum). The three regulations provide a broad and slightly different explanation of how restorative justice objective is, which is likely to be interpreted in different means. However, the three institutional regulations have a similar approach to reconcile the victim and the perpetrator. The reconciliation seems to be a predominant restorative justice objective to enforce a criminal offence in Indonesia. This research uses a doctrinal methodology by analysing primary data sources, such as Indonesian legislation and Islamic sources of law, and secondary sources from relevant literature. The result indicates that there has not been comprehensive Indonesian legislation on restorative justice, particularly in terms of the objective. Incorporating the 'afw' principle as a restorative justice objective will provide more sense of justice for the victim and the alleged offender.

Keywords: *the 'afw' Principle ; Islamic Criminal Law; Restorative Justice.*

Abstrak

Paper ini menjelaskan penerapan asas pemaafan, asas pengampunan yang dikenal dalam hukum pidana Islam, sebagai tujuan dari Restorative Justice. Meskipun restorative justice belum diatur dalam peraturan perundang-undangan yang spesifik dan komprehensif di Indonesia, namun restorative justice saat ini setidaknya diatur dalam tiga peraturan kelembagaan yang berbeda, antara lain Surat Edaran Kapolri Nomor SE/8/VII/2018 (SE Kapolri), Peraturan Kejaksaan Republik Indonesia Nomor 15 Tahun 2020 (Perja), dan Surat Keputusan Direktur Jenderal Badan Peradilan Umum Nomor 1691/DJU/SK/PS.00/12/2020 (SK Dirjen Badilum). Ketiga peraturan tersebut

memberikan penjelasan yang luas dan sedikit berbeda tentang bagaimana tujuan keadilan restoratif, yang kemungkinan besar akan ditafsirkan dengan cara yang berbeda. Namun ketiga peraturan kelembagaan tersebut memiliki pendekatan yang sama untuk mendamaikan korban dan pelaku. Rekonsiliasi tampaknya menjadi tujuan utama keadilan restoratif untuk mengakkan tindak pidana di Indonesia. Penelitian ini menggunakan metodologi doktrinal dengan menganalisis sumber data primer, seperti perundang-undangan Indonesia dan sumber hukum Islam, dan sumber sekunder dari literatur yang relevan. Hasil penelitian menunjukkan bahwa belum ada peraturan perundang-undangan Indonesia yang komprehensif tentang keadilan restoratif, terutama dari segi tujuannya. Memasukkan prinsip 'afw' sebagai tujuan keadilan restoratif akan memberikan rasa keadilan yang lebih bagi korban dan tersangka pelaku.

Kata kunci: *Hukum Pidana Islam; Keadilan Restoratif; Prinsip Pemaafan.*

Introduction

Restorative Justice is arguably a new legal mechanism in the Indonesian legal system. The implementation of restorative justice in the Indonesian criminal justice system, particularly in the juvenile criminal justice system, beginning in 2012. Nevertheless, the development of restorative justice in Indonesia continues to get more public intention, and then restorative justice becomes a concept implemented in the juvenile criminal case and the general Indonesian criminal law cases. Although restorative justice has not been regulated in specific and comprehensive legislation, restorative justice is currently regulated in three different institutional regulations, including the Circular Letter of the Chief of the Indonesian Police Number SE/8/VII/2018 (hereinafter 'SE Kapolri'), the Regulation of the Indonesian Attorney Number 15 of 2020 (hereinafter 'Perja'), and the Decree of the Director General of the General Judiciary Body Number 1691/DJU/SK/PS.00/12/2020 (hereinafter 'SK Dirjen Badilum').

Given that in conventional criminal law enforcement, the victim is rarely involved actively in the enforcement process, restorative justice is perceived as a goal to provide such a chance to the victim so that the victim is able to be involved directly in criminal enforcement (Cornwell, 2007). On one side, almost every victim desire to have a chance to speak directly to delivering their feelings. On the other side, the offender of a crime also has a similar desire with the victim to be able to speak and repair the harm of the victim (Shapland, 2016). In the most common perspective, the restorative justice is conducted by a so-called "victim-offender mediation" mechanism, where the victim meets the offender

in an informal session guided by a trained facilitator (Gardner & Weber, 2018). Hence, it is argued that the mechanism is seen as an alternative to criminal law enforcement with deterrence-oriented, and the mechanism is now widespread in the Indonesian legal system that is regulated in the three different institutional regulations.

The three institutional regulations are a new legal base for the practice of the restorative justice in Indonesia. The restorative justice policy regulated in the respective regulations has a slightly different view on the RJ's objective. For instance, the SE Kapolri set that the restorative justice mechanism is to encourage the offender to remorse, to apologise, and to repair the damage and the harm suffered by the victim. In contrast, such a mechanism is not found in the Perja and the SK Dirjen Badilum, so that the mechanism and the objective of restorative justice do not have a similar perspective among the three regulations, from the investigation conducted by the Indonesian Police to the trial process in the court. However, the three regulations have a similarity in terms of reconciliation between the victim and the offender. Reconciliation can be formed when the victim meets the offender in a conference to seek justice.

According to Shapland, the victim feels more satisfied when be placed in a forum conference to meet the offender. The victim will have the opportunity to speak and express his feeling about the impact of the crime, and the victim wants to hear how the offender responds to the crime committed (Shapland, 2016). It pointed out that the victim seeks a deep objective more than dealing reconciliation with the offender, which is to hear the offender's respons on what he committed to the victim. When the victim wants to hear the offender's response, and the offender want to respond to what was committed to the victim, these can be implied as a process to seek so-called "apologising-forgiveness". However, in the process of RJ, the victim should not be a force to forgive the offender, but the forgiveness must be spontaneously and willingly did by the victim (Van Stokkom, 2008). Hence, the conference between the victim and the offender is an attempt to seek apologising and forgiveness as an objective of the RJ.

As one of the sources of law practised in Indonesia, Islamic law has a principle related to criminal law enforcement, known as the '*afw*' principle, a forgiveness principle. The '*afw*' principle states that the offender of crime against life, body, and/or property can be forgiven by the victim as long as the offender intends to repent and is willing to pay for

finer or other forms of responsibility (Prajā, 1995). In Islam, it pointed out that forgiveness from the victim needs to be encouraged to give a sense of justice because it leads to the process of apologising and remorse from the offender, and the victim consciously wants to forgive the offender. Therefore, if the victim accepts the apology from the offender, the reconciliation will be realised, and the criminal law enforcement will not continue to the trial for sentencing the offender (Ropei, 2020). So then, the *'afw* principle is in line with restorative justice to form a reconciliation between the two parties.

This article believes that the *'afw* principle is necessary to be implemented as one of the objectives in the RJ's process in Indonesia. The implemented *'afw* principle will provide an adequate opportunity for the victim and the offender to reconcile and fix their relationship so that the reconciliation can be formed without any force. The first explanation of this article is on the framework of the restorative justice regulation in Indonesia. This article will also examine how the *'afw* principle could be implemented as an RJ's objective in Indonesia, giving the victim and the offender more sense of justice. Likewise, this article will discuss the potential Indonesian law reform to incorporate the *'afw* principle with the reconciliation into the RJ's predominant objective.

Method

This research uses a doctrinal method to analyse the existing norm based on normative and theoretical approaches (Dobinson, I., & Johns, 2007). The method will be qualitative research by analysing the primary data, including Indonesian legislation and other regulation related to the restorative justice system such as SE Kapolri, Perja, and SK Dirjen Badilum, and the Islamic law sources, such as Al-Quran, hadits, and Ijma. It will also analyse the secondary data from relevant literature, such as law textbooks, legal law reviews, legal articles and other relevant literature regarding the *'afw* principle and restorative justice.

Discussion

1. Restorative Justice Framework in Indonesia

Restorative justice has been implemented as one of the criminal law approaches in Indonesia after the enactment of Law Number 11 of 2012 on the Juvenile Criminal Justice

System (SPPA). The SPPA regulates the restorative justice process through a so-called scheme diversion, the transfer of juvenile settlement to the outside criminal justice system, so the criminal case faced by a juvenile can be enforced without criminal sanction (Hardjaloka, 2015). The diversion process is a mandatory phase that the law enforcers must carry out in dealing with the criminal case committed by a juvenile around 12 to 18 years old. The process is conducted by a mechanism of deliberation among the children, the children's parents, the victim, the victim's parents, community counsellor, and professional social workers with a restorative justice approach.

According to Article 7 of the SPPA, the diversion process is conducted in every phase of the criminal law process, particularly on the punishable offence with not exceeding seven years of imprisonment and not a recidivist. It pointed out that the investigator from the investigation process must implement the restorative justice process through diversion. If the diversion does not work and does not meet the reconciliation in the investigation process, the prosecutor must implement it in the prosecution process. Likewise, if the restorative justice process does not succeed in the prosecution, it must be implemented in the trial by the judge. If all the process does not reconcile the victim and the perpetrator, the criminal law process continues as regulated by the law.

Restorative justice also applies to the general offences in the Indonesian criminal justice system based on three different institutional regulations. The first institutional regulation is the SE Kapolri on implementing restorative justice in the settlement of criminal cases, which was enacted in 2018. The SE Kapolri is the first restorative justice regulation in the Indonesian criminal justice system to implement restorative justice in the investigation process. The investigation is an initial phase of criminal law enforcement so that restorative justice could be used as a manifestation of the principle of simple, fast, and low-cost justice, given that the earlier restorative justice can be realized, the earlier the criminal law process can be complete.

It is argued that the implementation of restorative justice in the investigation process, as in the SE Kapolri, is a penal mediation approach (Mahendra, 2020). It attempts to use a mediation concept to enforce the criminal case, so restorative justice in this phase aims to restore the balance of human life affected by the offender's crime. Restorative

justice encourages the offender to apologize and return the damage and loss arising from the crime committed to the victim. It means that restorative justice in the investigation process can be done through the offender's awareness of the crime that harmed the victim so that the offender wants to apologize. Apologizing from the offender is deemed can provide more sense of justice for the victim since the offender intends to take responsibility for the harm by apologizing and repairing the damage that occurred.

The second institutional regulation that implements restorative justice is the Perja which was enacted in 2020. One of the basic considerations for the enactment of this Perja is to restore and protect the interests of victim and perpetrator without a retributive process. As a community need, such a view needs to be built by the Indonesian prosecutors in the prosecution process. The consideration is present as a new concept of criminal enforcement in the prosecution, where restorative justice is seen as an alternative to retributive criminal sanction as regulated in the Indonesian criminal justice system. Therefore, law enforcement with a restorative justice approach needs to be put forward to provide protection better and balance the interests of the victims and the perpetrators.

In the Perja, restorative justice is a fair settlement effort realized through a reconciliation process offered by the prosecutor to the victim and the suspected without any pressure, coercion, or intimidation. At this stage, the offered reconciliation can result in two possibilities, whether or not the victim and the suspected agree to reconcile. If the victim and the suspected agree to reconcile, the prosecutor with his authority will close the case based on the public interest through a restorative justice approach, and the case is considered closed. However, if both parties do not agree upon the reconciliation in this stage, the prosecutor will continue the criminal law enforcement to the trial process in the court. Therefore, the purpose of restorative justice in the Perja, therefore, is arguably to encourage reconciliation between the victim and the suspected.

The third institutional regulation is the SK Dirjen Badilum, which serves as a guide for implementing restorative justice in the adjudication stage. In essence, restorative justice in the SK Dirjen Badilum is intended to provide recovery for the victims who have suffered from crime in several forms, namely compensation to victims, reconciliation, the offender willingness to do social work, or other agreement between the victims and the offenders. Likewise, the restorative justice provision in the SK Dirjen Badilum has a similar

purpose as in the Perja, to seek reconciliation between the victim and the offender. The judges carry out the reconciliation effort with or without compensation by involving the offender, the victim, the victim/offender's family, and the related community leaders.

The three institutional regulations on restorative justice have similarities and differences. The similarities are that the three regulations have similarities in terms of implementing restorative justice as an alternative to retributive criminal justice in the Indonesian criminal justice system. It can be seen from the fact that the three institutional regulations become a guideline binding to the respective institutions. First, the SE Kapolri is a guideline for investigators to apply restorative justice in the investigation process.

Second, the Perja is applied as a guideline for prosecutors to implement restorative justice in the prosecution stage. Also, the SK Dirjen Badilum is a binding guideline for judges to implement restorative justice in criminal trials. Another similarity among the three institutional regulations is that the purpose of restorative justice is to seek reconciliation between the victim and the offender, which are carried out by conferencing the two parties.

Although the three institutional regulations have similarities in the reconciliation process, there are different mechanisms in seeking such reconciliation. The SE Kapolri emphasizes in its consideration that restorative justice aims to restore the balance of life between the victim and the offender in the community. So, it encourages the offender to admit his fault and apologize to the victim for the crime. However, such consideration is not found in the Perja and the SK Dirjen Badilum because the two regulations do not further regulate the substance of the reconciliation as an aim of restorative justice. Hence, the Perja and SK Dirjen Badilum do not regulate the offender's awareness as to the fault and how the offender is encouraged to apologize for what was committed to the victim, as regulated in the SE Kapolri consideration.

Furthermore, the three institutional regulations have a different objective scheme in implementing restorative justice. For instance, in the SE Kapolri, restorative justice applies to all offences categorised as general offences unless the offence is causing a human victim. In the Perja, restorative justice applies to punishable offences with a fine or a maximum of five years imprisonment and do not cause harm or loss not exceeding IDR 2,500,000. In contrast, the SK Dirjen Badilum limits the implementation of restorative

justice only to the light offences as regulated in s 364, 373, 379, 384, 407, and 482 of the Indonesian criminal code with a loss value of not more than IDR 2,500,000.

Two primary differences from the three regulations can cause investigators, public prosecutors, and judges to implement restorative justice differently. This different perception emerged because restorative justice has not been comprehensively regulated in Indonesian legislation as a guide not only for one element of law enforcers but also as a legal guide for all elements, including investigators, prosecutors, and judges in applying restorative justice. In comparison, such a regulation model has been implemented in the SPPA, which has integrated restorative justice in every stage of criminal law enforcement, binding the investigators, the prosecutors, and the judges to enforce.

In addition, the process to achieve the restorative justice objective in each regulation has not been regulated comprehensively. Although each regulation emphasizes reconciliation, the process to get into the reconciliation and the basis of realizing the reconciliation has not been regulated in detail. For instance, Number 3 point (c) of the SE Kapolri concerning the mechanism of restorative justice only regulates the existence of a reconciliation agreement between the two parties without any explanation of what underlies the reconciliation agreement. Likewise, in the SK Dirjen Badilum, the process of realizing restorative justice is not described and regulated in detail. In contrast, although the Perja regulates the condition underlies the reconciliation, according to Number 5 Point (6) of the Perja, by returning, repairing and compensating the harm to the victim, it does not regulate the concept of apologies and forgiveness between the parties.

Therefore, the existing regulations on restorative justice have a similar objective to reconcile the victim and the offender. Nevertheless, the policy and regulation on what underlies the reconciliation agreement, including forgiveness from the victim and apologies from the offender, has not been regulated in the existing regulations. Therefore, it is necessary to enact comprehensive legislation as to restorative justice that emphasizes the reconciliation and the conditions that underlie such reconciliation, including the forgiveness concept.

2. The *'afw* Principle as a Restorative Justice Objective

The *'afw* principle, a forgiveness principle, is one of the principles known in Islamic

criminal law. In general, *'afw* is known in the application of rules related to *qishosh*. *Qishosh* is one of the Islamic criminal law forms other than *hudud* and *ta'zir*, regulates that the criminal offender must receive punishment in the same way and proportion as he did to the victim (Kamali, 2019). *Qishosh* focuses on crimes that befall a person, so crimes that befall a person must be punished based on the similarities between the crime and his action (Marsaid, 2020). *Qishosh* is regulated in Quran Chapter two verse 178:

"O you who have believed, prescribed for you is legal retribution for those murdered— the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother [i.e., the killer] anything, then there should be a suitable follow-up and payment to him [i.e., the deceased's heir or legal representative] with good conduct. This is an alleviation from your Lord and a mercy. But whoever transgresses after that will have a painful punishment".

Along with being the basis for the application of *qishosh* in Islamic criminal law, this verse is also a basis for the concept of giving forgiveness to a person who has committed murder (Sabiq, 1995). It pointed out that, in *qishosh*, an alternative to criminal sanction can be given to the offender on the condition that there is forgiveness from the victim or the victim's family with the obligation to perform *diyat* in a good way as a gift from Allah (Katsir, 1999). Ash-Shabuni, regarding this verse, argues that in determining a rule on criminal law, Islam also encourages its adherents to love to forgive so that the regulation of retaliation also provides an opportunity for forgiveness (Ash-Shabuni, 1980). Therefore, the forgiveness given by the victim to the offender is an alternative to the enforcement of *qishosh*, so that if the victim forgives the offender, the offender can be free from *qishosh* sanction.

Qishosh and the concept of forgiveness are applied to enforce crimes against the body and/or human life. In Islam, crimes against one's own life are seen as crimes whose recovery affairs are left to the victim or the victim's family (Santoso, 2016). It can be implied from the choice provided for the victim in response to the crime, whether the offender will be punished by *qishosh* or the victim party will forgive the offender. If the offender gets forgiveness from the victim, the offender must be responsible for paying *diyat* in a good way. Therefore, whether the offender will get *qishosh* or forgiveness followed by paying *diyat* is completely left to the victim party.

It is argued that although the *'afw* principle is regulated in the regulation of *qishosh*, the *'afw* principle can also be applied to other forms of crime, such as *ta'zir* and *hudud* (Ali Tajuddin et al., n.d.). Forgiveness in criminal sanction is one of the examples of the Islamic

criminal law objectives, that is not only to protect individual interest but also to protect the interest of community and state (Mardani, 2019). The forgiveness given by the victim will not only fulfil the victim's rights from the responsibility of the offender but also allow the offender to return to the community and live as before committing the crime without any sense of revenge from the victim.

The existence of forgiveness provision in Islamic criminal law indicates that Islamic criminal law does not merely focus on revenge and retaliation (Santoso, 2016). Meaning that Islam does regulate retaliation and retributive mechanism as a legal consequence for the commission of crimes, but Islam also provides an opportunity for the victim and the offender to reconcile in response to the crime. The reconciliation can be implemented through an apology from the offender to the victim and forgiveness given by the victim to the offender. If the victim has forgiven the offender, then the offender consciously must give *diyat* to the victim as a substitute for retaliatory sanction (Al-Amin M, 2001).

In a criminal act, the victim on one side directly suffers the impact of the crime and brings various feelings directed to the offender, such as rage or forgiveness. On the other side, the offender may feel fearful, bitter, or remorseful after committing the crime affecting the victim (Toews, 2016). It pointed out that, in essence, all parties in a criminal act tend to respond to the crime through their feelings. Even though the victim suffers and feels difficulties due to the crime committed by the offender and feel upset and resentful towards the offender, the victim has a tendency to forgive the offender. Likewise, the guilty feeling and remorse will arise to the offender after committing the crime to the victim, so the guilty feeling will continue, and a genuine apology from the offender to the victim can express that feeling (Petrucci, 2002).

According to such situations, there are two concepts in the *'afw* principle as an alternative to the criminal sanction. First, the offender needs to be encouraged to admit the guilty plea by apologizing to the victim for the criminal act. It is a form of Islamic value implementation, which is to immediately apologise after committing a wrongful act to the victim, as stated in Hadith Bukhari Number 2449. Prophet Muhammad, peace be upon him, advised everyone who had committed a wrongful act to others to immediately apologize even on the same day when he committed such an act before the day comes when wealth will not be able to make up for his mistake (i.e. the resurrection day/*yaumul*

qiyamah). It pointed out that Islam encourages all offenders to remorse and immediately apologize to the victim.

Second, Islam also encourages the victim to open themselves to forgive those who have committed a wrongful act to the victim. The concept of forgiveness is seen as a form of practicing the value of *taqwa* as stipulated in Quran Chapter three verse 134, namely, “Who spend [in the cause of God] during ease and hardship and who restrain anger and who pardon the people – and God loves the doers of good”. Ibn Katsir explained that the meaning of forgiving others means that one refrains from doing bad things and forgives those who have committed a wrongful act to him (Katsir, 1999). It indicates that, in Islam, forgiving others for a mistake is one of the good values, and everyone is encouraged to be able to forgive the mistakes of others.

Referring to the restorative justice concept, which attempts to bring together the offender and the victim in dealing with criminal offence occurred by repairing the relationship between the victim and the offender (Van Ness, D. W., & Strong, 2014), the *‘afw* principle can be implemented as a part of the restorative justice objectives. Although the main objective of restorative justice can be defined as a reconciliation between the victim and the offender, the forgiveness needs to be a part in realizing such reconciliation. According to findings that there are approximately eleven percent of the victims desire to forgive the offenders (Borton, 2009). Thus, communication process built through restorative justice mechanism can be a facility for the victim to provide forgiveness for the offender.

Moreover, in addition to providing an opportunity for the victim to communicate with the offender, restorative justice also allows the offender to communicate with the victim. The process of direct communication between the two parties distinguishes the restorative justice process from the criminal justice process, wherein in criminal justice, the offender can only communicate directly to the judges as a public representative, not to the victim. The opportunity to be in a conference with the victim to conduct a restorative justice process will allow the offender to communicate directly with the victim (Shapland, 2016).

Communication between the victim and the offender also provides an opportunity for the victim to ask why the offender committed the crime (Borton, 2009) so that the

offender can explain to the victim why the offender committed the crime. With such opportunity, the offender will be able to convey the reason and/or confession of the crime commission that caused the harm to the victim. Recognition and confession of these faults need to be encouraged in a restorative justice process to raise the offender's awareness of remorse and apologize to the victim for the fault. Likewise, it is argued that the victim's forgiveness may help the victim to go out from the cycle of hurt and to release recovery or self-resurrection after suffering impact of the crime (Blyth, 2016). The *'afw* principle, therefore, can be applied to realize reconciliation between the victim and the offender through the concept of apologize-forgiveness.

3. Incorporating the *'Afw* Principle into the Indonesian Restorative Justice

Incorporating the *'afw* principle into the restorative justice system in Indonesia can be applied based on the three elements of the legal system as presented by Lawrence M. Friedman, namely substance, structure, and culture (Friedman, 1975). The first application of the *'afw* principle is on the substance element of the Indonesian legal system. The substance element is a substantive rule and rules governing how an institution should act (Friedman, 1975), so it can be implied that substance focuses on incorporating the *'afw* principle into the material law and procedural law. Therefore, the *'afw* principle needs to be included in the legislation on the restorative justice policy and practice substantively.

Substantially, the *'afw* principle can be used as the basis for realizing reconciliation between the victim and the offender. The three existing institutional regulations aim to reconcile all parties in a criminal offence. However, what underlies the realization of such reconciliation has not been comprehensively explained, particularly concerning the apology from the offender and the forgiveness from the victim. For instance, in the SE Kapolri, the mechanism for realizing reconciliation in the investigation stage is based on the request from the two parties for reconciliation. Then the two parties sign it on the stamp without any process precedes the reconciliation. It pointed out that reconciliation seems to be a formal condition of restorative justice during investigation.

Another example is as stipulated in the Perja. Number 5 point (6) of the Perja regulates how restorative justice can be implemented. One of the conditions is that the

offender should have restored the situation after the crime into the previous situation by returning the goods, compensating for the loss, compensating costs and/or repairing the damage caused by the crime committed by the offender to the victim. Nevertheless, it is likely that the regulation only focuses on a material-restoration approach through repairing and compensating the losses suffered by the victim. Meanwhile, a moral-restoration approach through confession, remorse and apology for what has been done has not been emphasized explicitly in the Perja.

Likewise, in the SK Dirjen Badilum, the provision for reconciliation in the mechanism of restorative justice at the trial is not explicitly regulated. The main reason to achieve reconciliation in this phase is not explained in detail. Thus, as long as the victim and the offender agree to reconcile and sign the reconciliation agreement, the reconciliation is deemed to be achieved. The existing regulations do not explain the basis of the reconciliation, particularly concerning the apology and forgiveness concept as in the *'afw* principle. Therefore, further regulation on such a basis of reconciliation needs to be enacted.

This article believes that the *'afw* principle is necessary to be incorporated into the legal substance of the restorative justice system. Regulation on reconciliation as a predominant objective of restorative justice needs further explanation, especially on the prerequisite to the reconciliation that should be met by the victim and the offender. The prerequisite as regulated in the Perja, such as repairing and compensating, is essential to be implemented in every stage of criminal law enforcement. However, the *'afw* principle through the apology and forgiveness is also important to be implemented to complement such a prerequisite. Therefore, by implementing the *'afw* principle, restorative justice will not merely focus on fulfilling the formal condition but also fulfilling the material condition, by which the victim and the offender have a balanced relationship in the community.

According to the legal structure, the *'afw* principle can be implemented by applying a restorative justice mechanism conducted by the involved parties in assisting the conference of restorative justice between the victim and the offender. The structure element is a legal system is an institutional body related to the person involved and what roles the person has (Friedman, 1975). Therefore, the structure element in implementing

the *'afw* principle can be understood as a role of the institution to implement and encourage the *'afw* principle in the restorative justice system.

As a concept of conferencing between the victim and the offender in a forum, Restorative justice is seen as a concept that is in line with the principle of deliberation as in Pancasila. Pancasila is five Indonesian fundamental principles, i.e. the belief in one supreme God, just and civilized humanity, the unity of Indonesia, democracy led by the wisdom of deliberations among representatives, and social justice for all Indonesians. A deliberation process needs a neutral party or so-called a trained facilitator (Brooks, 2017) who assists in conducting the deliberation of restorative justice. Thus, the neutral party will encourage the victim and the offender to agree with reconciliation and encourages them to agree with the prerequisite underlies the reconciliation through the *'afw* principle, namely encouraging the offender to remorse and apologize and encourage the victim to forgive the offender.

The involvement of a neutral party can apply to two conditions as stipulated in the existing regulations. First, involving the law authorities during handling cases in every law enforcement stage, such as the investigator in the investigation, the prosecutor in the prosecution, and the judge in the trial stage. Then, each law enforcer can encourage reconciliation based on the offender's apology and the victim's forgiveness. Second, the involvement of community representatives plays an essential role to implement the *'afw* principle, given that the community has a role in ensuring the well-being of its members, including the victim and the offender (Peterson Armour, M., & Umbreit, 2006). The concept will provide more appropriate legal process because it will be based on social value (Ropei, 2020). Therefore, structurally, the law enforcers and the community representatives play an essential role to implement the *'afw* principle in the restorative justice process.

Furthermore, in terms of the cultural element, the *'afw* principle can be implemented as part of the legal awareness and culture of the community, particularly when the victim conflicts with the offender of a crime. To develop an understanding of the *'afw* principle, it needs the role of the law enforcer and the community representative to educate and promote society concerning the *'afw* principle as part of the restorative justice objectives. Therefore, with the public's understanding of the restorative justice objectives, many people will understand how to deal with a criminal law problem through the

restorative justice mechanism.

Conclusion

In conclusion, the three different institutional regulations on restorative justice in Indonesia do not have a similar perception regarding the realisation of reconciliation. The regulations need to be explained how reconciliation between the victim and the offender can be achieved through comprehensive national legislation. In order to achieve and realize the reconciliation in restorative justice, the *'afw* principle, known as a forgiveness principle in Islamic criminal law, can be implemented as part of the restorative justice objectives through the concept of the offender's apology and the victim's forgiveness. Therefore, the *'afw* principle can be incorporated into the Indonesian legal system, whether as part of the legal substance by enacting in the legislation, the legal structure by involving the law enforcers and the community representatives, or the legal culture by educating the community on the *'afw* principle as a restorative justice objective.

Bibliography

- Al-Amin M. (2001). *Tafsir Hadaiq ar-Raub wa ar-Raihan*. an-Najah.
- Ali Tajuddin, H. H., Hussin, N., & Zawawi, M. (n.d.). Restorative justice in Islamic law: application in Malaysian legal history and the criminal justice system. In *Research Handbook on Islamic Law and Society* (pp. 250–270). Edward Elgar Publishing. <https://doi.org/10.4337/9781781003060.00019>
- Ash-Shabuni, M. A. (1980). *Tafsir Ayat Al-Ahkam*. Maktabah al-Ghazali.
- Borton, I. M. (2009). *Effects of Race, Sex, and Victims' Reasons for Victim-Offender Dialogue*. *Conflict Resolution Quarterly*. <https://doi.org/https://doi.org/10.1002/crq.256>
- Brooks, T. (2017). *Punitive Restoration and Restorative Justice*. *Criminal Justice Ethics*. <https://doi.org/https://doi.org/10.1080/0731129X.2017.1358930>
- Cornwell, D. J. (2007). *Doing Justice Better: the Politics of Restorative Justice*. Waterside Press.
- Dobinson, I., & Johns, F. (2007). *Qualitative Legal Research* (M. McConville & W. H. Chui (Eds.) (Ed.)). Edinburgh University Press.
- Friedman, L. M. (1975). *The Legal System: A Social Science Perspective*. Russell Sage Foundation.
- Gardner, M., & Weber, M. (Eds.). (2018). *The Ethics of Policing and Imprisonment*. Springer International Publishing. <https://doi.org/10.1007/978-3-319-97770-6>
- Hardjaloka, L. (2015). Criminal Justice System of Children: an Overview Restorative Justice Concept in Indonesia and Other Countries. *Journal of Dinamika Hukum*, 15(1), 73–81. <http://dinamikahukum.fh.unsoed.ac.id/index.php/JDH/article/view/365/359>
- Kamali, M. H. (2019). *Crime and Punishment in Islamic Law*. Oxford University Press.
- Katsir, I. (1999). *Tafsir Al-Quran Al-'Azhim*. Dar Thayyibah li An-Nasyri wa At-Tawzi'.

- Mahendra, A. P. (2020). Mediasi Penal Pada Tahap Penyidikan Berlandaskan Keadilan Restoratif. *Jurist-Diction*, 3(4), 1153. <https://doi.org/10.20473/jd.v3i4.20200>
- Mardani. (2019). *Hukum Pidana Islam*. Kencana.
- Marsaid. (2020). *Al-Fiqh Al-Jinayah (Hukum Pidana Islam)*. Rafah Press.
- Peterson Armour, M., & Umbreit, M. S. (2006). *Victim Forgiveness in Restorative Justice Dialogue. Victims and Offenders*. [zhttps://doi.org/https://doi.org/10.1080/15564880600626080](https://doi.org/https://doi.org/10.1080/15564880600626080)
- Petrucchi, C. J. (2002). *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System. Behavioral Sciences and the Law*. <https://doi.org/https://doi.org/10.1002/bsl.495>
- Praja, J. S. (1995). *Filsafat Hukum Islam*. LPPM Universitas Islam Bandung.
- Ropei, A. (2020). The Resolution Of Criminal Cases through A Restorative Justice Approach in Islamic Law Perspective. *Jurnal Hukum Islam*, 18(2).
- Sabiq, S. (1995). *Fiqh Sunnah*. PT. Al-Ma'arif.
- Santoso, T. (2016). *Asas-Asas Hukum Pidana Islam*. Rajawali Pers.
- Shapland, J. (2016). Forgiveness and Restorative Justice: Is It Necessary? Is It Helpful? *Oxford Journal of Law and Religion*, 5, 94–112.
- Toews, B. (2016). Architecture and Restorative Justice. In T. Gavrielides (Ed.), *International Handbook of Restorative Justice*. Routledge.
- Van Ness, D. W., & Strong, K. H. (2014). *Restoring Justice: An Introduction to Restorative Justice. In Restoring Justice: An Introduction to Restorative Justice: Fifth Edition (Fifth)*. Anderson Publishing.
- VAN STOKKOM, B. (2008). Forgiveness and Reconciliation in Restorative Justice Conferences. *Ethical Perspectives*, 15(3), 399–418. <https://doi.org/10.2143/ep.15.3.2033158>

