

Restorative Justice For Perpetrators Of Crimes (*Jarīmah*) In The Perspective Of Islamic Law

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Abstract

*Restorative justice is an alternative resolution of criminal cases which aims to create an agreement on the resolution of criminal cases that is fair and balanced for all parties, both victims and perpetrators. This process also focuses on restoring the original situation and restoring patterns of peaceful relations in society through dialogue and mediation. This paper aims to examine whether the process of resolving criminal cases in Islam can implement restorative justice mechanisms? If so, what are the requirements? The answers to these two questions are very important to study considering that the implementation of criminal law in Aceh adheres to the Islamic criminal law system (*Qanun Jināyāt*) which in practice also intersects with the national legal system. This qualitative research is a normative legal study whose presentation uses a descriptive analysis method. Primary data were collected through a literature review from various sources of classical Islamic law references (*fiqh mazhab*) and laws and regulations (positive law). Research results show that The restorative justice for the perpetrators of *jarīmah* in Aceh in the view of Islamic law can be done as long as it has not been included in the formal examination of the case by the Judge. Besides that, The Restorative justice can be applied to *jarīmah ta'zīr* and *hudūd* which are related to the rights of the servant, and not the rights of Allah. The researcher suggests peaceful efforts through Restorative Justice are strongly recommended by Islamic legal system to avoid the emergence of a sense of resentment and injustice as a result of the judge's decision that could arise from the victim or perpetrator. Diversion efforts with a Restorative Justice approach in cases of children in conflict with the law are in line with the spirit of Islamic law which prioritizes the principles of justice for all parties and maintains peace, especially when criminal penalties cannot be imposed due to insufficient age requirements for children in conflict with the law.*

Keywords: *Restorative Justice – Jarīmah – Islamic Law*

Introduction

Restorative Justice is the process of resolving criminal cases by involving the parties involved in a criminal act to find a fair resolution by seeking to restore the crime to its original state and not just seek retribution for the perpetrator.¹

¹ Article 1 number 3 of the National Police Regulation Number 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice (hereinafter referred to as Police Regulation 8/2021) and Article 1 number 1 of the Republic of Indonesia Prosecutor's Office Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, hereinafter referred to as Prosecutor's Office Regulation 15/2020.

Restorative justice is a solution in resolving cases, especially cases of children in conflict with the law through diversion as mandated in Law No. 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA). The practice of Restorative Justice has also long been practiced on adult criminals with various provisions. Namely; materially, cases that are subject to restorative justice are required not to cause unrest and/or rejection from the community; do not have an impact on social conflict; do not have the potential to divide the nation; are not radical and separatist; are not repeat offenders based on Court Decisions; and are not acts of terrorism, crimes against state security, corruption and crimes against people's lives. Formally, it is also required that peace must come from both parties, except for drug crimes; and that there is fulfillment of the rights of victims and the responsibilities of the perpetrators, except for drug crimes.

As a province that implements Islamic law, Aceh has a *Qanun Jināyāt* that specifically regulates several criminal acts termed *Jarīmah*. Linguistically, *Jarīmah* is committing an act or thing that is considered bad or hated by humans because it is contrary to justice, truth and the straight path (religion). According to article 1 number 16, Aceh Qanun Number 6 of 2014 concerning *Jināyāt* Law, *Jarīmah* is defined as an act that is prohibited by Islamic law which in the Qanun is threatened with '*uqūbat hudūd* and/or *ta'zīr*.

Basically, punishment or so-called '*uqūbat* in Islamic criminal law consists of three types. First: Punishment that is proportionate (*qishāsh*) related to the loss of life and/or limbs. Second: Punishment that has limits from Allah and the Messenger (*hudūd*). Third: Punishment whose form and level are left to the authority of the Government to regulate (*ta'zīr*). '*Uqūbat ta'zīr* is very broad, covering all acts that are prohibited by sharia' and are not regulated in '*uqūbat qishāsh* or *hudūd*.

Qanun Number 6 of 2014 concerning Jinayat Law has not regulated all types of '*uqūbat* in Islam. Qanun *Jināyāt* only regulates ten *jarīmah*. namely *Khamar* (Alcohol), *Maisīr* (Gambling), *Khalwat* (Lewdness), *Ikhtilāth* (Intimate and Kissing), Zina (Sex without marriage), Sexual harassment, Rape, *Liwāth* (gay), *Musāhaqah* (Lesbian), and Qadzaf (Accusing someone of committing zina).

From the perspective of Islamic jurisprudence, in addition to the scope of types of violations that have not been fully adopted, the issue of sanctions for perpetrators of *jarīmah* in the Aceh Qanun *Jināyāt* is also not in accordance with the views of the majority of *fuqaha*. For example, there is no distinction in punishment between perpetrators of *muhsan* and *ghairu muhsan* adultery. Apart from these problems, according to the perspective of *siyāsah syar'iyah*, standardizing sanctions for perpetrators of adultery in Aceh for the current conditions is very realistic and does not conflict with the principles of enforcing Islamic law which require stages (*al-marhaliyah*), flexibility (*al-Murūnah*), and priority (*al-Awlawiyyat*).²

² Mutiara Fahmi Razali, *Reconstruction of the Concept of Al Marhaliyah in the Process of Taqin Islamic Law in Aceh*, Doctoral Dissertation, Modern Fiqh Study Program, Postgraduate UIN Ar-Raniry Banda Aceh, 2023, p. 228

The condition of the Acehese Muslims who have not been accustomed to Islamic criminal law for hundreds of years is a challenge in itself in the implementation of Islamic law. Internal factors such as ignorance of the people and moral degradation are also other reasons that can hinder the enforcement of Islamic law in its entirety. Improving the quality of religious understanding, awareness of the needs of the people for Islamic law and intensive socialization of the rules still require a relatively long time to achieve these ideals. The implementation of all Qanun regulations related to the implementation of Islamic law in Aceh - including Qanun Jinayat - needs to be carried out with great care, structured, planned and measured.

On that basis, the implementation of the restorative justice model in resolving criminal crimes in Aceh can be seen as one form of the concept of stages in the application of Islamic law.

Methode

This paper attempts to examine whether the process of resolving criminal cases in the Islamic legal system can apply the mechanism of restorative justice? If so, what are the requirements?

To answer these two questions, this qualitative research is a normative legal study whose presentation uses a descriptive analysis method. Primary data were collected through a literature review from various sources of classical Islamic law references (*fiqh mazhab*) and laws and regulations (positive law). Meanwhile, secondary data were obtained from various references, such as books, journals and scientific works related to this theme. The research approach was carried out with two approaches, namely laws and regulations (statutory approach) and comparison (comparative).

Although not a field research (empirical), the researcher also conducted discussions and interviews with two sources representing Acehese indigenous community leaders to find the suitability between the applicable restorative justice regulations and their implementation by the people of Aceh, past and present.

The benefits of this research are very significant for policy makers, especially judges of the Syar'iyah Court in Aceh and the general civil society. Considering that the implementation of law in Aceh adheres to the Islamic criminal law system (Qanun Jinayat) which in practice is also related to the national legal system.

Discussion

In classical Islamic fiqh literature, the term restorative justice is not found because the term is relatively new, but that does not mean that its practice is not found. In the modern Arabic dictionary, restorative justice is called *al-'Adālah at-Tashāluhiyyah* (العدالة التصالحية).³ Several other meaningful terms are also used, such as *al-Sulh al-Jazā-i* (الصلح الجزائي/penal reconciliation), and *al-Sulh al-Jinā-i* (الصلح الجنائي/criminal reconciliation).

Islamic law has recognized the existence of a reconciliation system in the field of *jināyāt* and *'uqūbat* since several centuries ago, although the term restorative justice itself

³ www.almaany.com/ar/dict/ar-ar/العدالة-التصالحية/

was first introduced by American correctional psychologist Albert Eglash in 1977, who divided the principle of justice into three approaches; retributive justice based on punishment; distributive justice involving therapeutic treatment of the perpetrator; and restorative justice based on restitution with input (consideration) from the victim and the perpetrator.⁴

In the study of Islamic jurisprudence, the practice of restorative justice is known as *al-Sulh* (peace) which is an alternative in resolving civil and criminal disputes by prioritizing justice for victims and perpetrators without leaving any feelings of revenge. The legal basis for this practice can be found in the Qur'an, Sunnah, Ijma' and the opinions of the fuqaha of the madhab.

Scholars define *al-Sulh* (peace) as follows:⁵

1. Hanafiyah scholars call it a contract that raises disputes and decides disputes.
2. Malikiyah scholars define it as the transfer of a right or claim to compensation in order to eliminate a dispute or concern about it.
3. Shafi'iyah scholars define it as a contract aimed at deciding a feud.
4. Hanabilah scholars call it an agreement between two parties to resolve a dispute between them.

From the definition of the scholars above, three things can be underlined. *First*: there is an element of at-taradhi (mutual willingness) between the two parties to the decision which is the result of an agreement. *Second*: that the decision of the agreement has an effect on the resolution of the dispute/feud. This means that to achieve justice in a disputed case does not always have to refer to the decision of the *qādhī* or court. *Third*: all the definitions above in substance and purpose can be equated with the definition of restorative justice in the laws and regulations applicable in Indonesia.

The Quranic Evidence

The concept of as-Sulh (peace) can be found in several verses of the Al Quran, such as the following:

1. Al Quran Surah al-Anfal: 61 concerning the principle of prioritizing the principle of peace with anyone, even non-Muslims.

وَإِنْ جَنَحُوا لِلسَّلَامِ فَاجْنَحْ لَهَا وَتَوَكَّلْ عَلَى اللَّهِ إِنَّهُ هُوَ السَّمِيعُ الْعَلِيمُ ﴿٦١﴾

"(However,) if they incline towards peace, incline you (Prophet Muhammad) towards it and put your trust in Allah. Indeed, only He is the All-Hearing, All-Knowing."

2. Al Quran Surah al-Hujurat: 9-10 regarding the command to reconcile conflicting Muslims.

⁴ Van Ness, Daniel W, Karen Heetderks Strong. *Restoring Justice – An Introduction to Restorative Justice*. 4th ed. New Province, N.J.: Matthew Bender & Co., Inc., 2010: p. 21-22.

⁵ Ismail Syandi, "Ahkam as-Sulh fi al-Dima' fi al-fiqh al-Islamy," *Jurnal al Jami'ah al-Islamiyah*, Vol. 2, 2007, hal. 35

وَأِنْ طَائِفَتَيْنِ مِنَ الْمُؤْمِنِينَ اهْتَكَمَا فَاصْلَحُوا بَيْنَهُمَا فَإِنْ بَغَتْ إِحْدَاهُمَا عَلَى الْأُخْرَى فَقَاتِلُوا الَّتِي تَبْغِي حَتَّى تَفِيَّءَ إِلَى أَمْرِ اللَّهِ فَإِنْ فَاءَتْ فَأَصْلَحُوا بَيْنَهُمَا بِالْعَدْلِ وَأَقْسِطُوا إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ ﴿٩﴾ إِنَّمَا الْمُؤْمِنُونَ إِخْوَةٌ فَأَصْلَحُوا بَيْنَ أَخَوَيْكُمْ وَاتَّقُوا اللَّهَ لَعَلَّكُمْ تُرْحَمُونَ ﴿١٠﴾

"If there are two groups of believers at war, reconcile them both. If one of them commits mistreatment against the other (group), fight the (group) that is persecuting it, so that that group returns to Allah's command. If that group has returned (to Allah's command), reconcile them both fairly. Be fair! Indeed, Allah loves those who act justly." (9) "Indeed, believers are brothers, therefore reconcile your two brothers (who are at war) and fear Allah so that you may be blessed." (10)

3. Al Quran surah An-Nisa': 114

لَا خَيْرَ فِي كَثِيرٍ مِّنْ نَّجْوَاهُمْ إِلَّا مَنْ أَمَرَ بِصَدَقَةٍ أَوْ مَعْرُوفٍ أَوْ إِصْلَاحٍ ۚ بَيْنَ النَّاسِ وَمَن يَفْعَلْ ذَلِكَ ابْتِغَاءَ مَرْضَاتِ اللَّهِ فَسَوْفَ نُؤْتِيهِ أَجْرًا عَظِيمًا ﴿١١٤﴾

"There is no good in many of their secret conversations, except (in secret conversations) those who order charity, (do) good deeds, or make peace between people. Whoever does this because he seeks Allah's approval, we will grant him a very great reward."

All of the verses above indicate that there is a command to prioritize peace negotiations in every case of dispute between Muslims and Muslims, or between Muslims and non-Muslims.

In the case of qishash crimes, the Qur'an Surah Al-Baqarah: 178 and Surah An-Nisa': 92 also allow the *diyāt* system (material fines in lieu of qishash) as an option for the victim's family who have forgiven (العفو). This means that there are two permissible settlement models. *First*: the victim can seek justice that is commensurate by demanding the implementation of *qishāsh* punishment for the perpetrator of the murder. *Second*: the victim can also be given space to forgive so that both parties will get a just and beneficial settlement. The victim or his/her guardian will get compensation (*diyāt*), while the forgiven perpetrator will not be punished with *qishāsh*. With this second settlement model, both parties will get benefits. The substance of the settlement with a compensation (*diyāt*) pattern like that, has similarities with the restorative justice pattern known in the current national legal system. Allah says:

يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ: الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالْأُنثَىٰ بِالْأُنثَىٰ ۚ فَمَنْ عَفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتَّبِعْهُ بِالْمَعْرُوفِ ۚ وَأَدَاءٌ إِلَيْهِ بِإِحْسَانٍ ۚ ذَلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ ۚ فَمَنِ اعْتَدَىٰ بَعْدَ ذَلِكَ فَلَهُ عَذَابٌ أَلِيمٌ ﴿١٧٨﴾

"O you who believe, it is obligatory for you (to carry out) kisas regarding those who are killed. Free people with free people, slave with slave, and women with women. Whoever obtains forgiveness from his brother should follow him in a proper way and should fulfill it in a good way. This is relief and mercy from your Lord. Whoever goes beyond the limit after that, he will suffer a very painful punishment." ⁶

⁶ Al Quran Surah Al Baqarah: 178

وَمَا كَانَ لِمُؤْمِنٍ أَنْ يَقْتُلَ مُؤْمِنًا إِلَّا خَطَاً وَمَنْ قَتَلَ مُؤْمِنًا خَطَاً فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَدِيَّةٌ مُسَلَّمَةٌ إِلَى أَهْلِهِ إِلَّا أَنْ يَصَدَّقُوا
فَإِنْ كَانَ مِنْ قَوْمٍ عَدُوٍّ لَكُمْ وَهُوَ مُؤْمِنٌ فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَإِنْ كَانَ مِنْ قَوْمٍ بَيْنَكُمْ وَبَيْنَهُمْ مِيثَاقٌ فَدْيَةٌ مُسَلَّمَةٌ إِلَى أَهْلِهِ
وَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ فَمَنْ لَمْ يَجِدْ فَصِيَامُ شَهْرَيْنِ مُتَتَابِعَيْنِ تَوْبَةً مِنَ اللَّهِ وَكَانَ اللَّهُ عَلِيمًا حَكِيمًا

"It is not proper for a believer to kill a believer, except because of guilt (accidentally). Whoever kills a believer because of guilt (should) free a believer's slave and (pay) the ransom given to his (killed) family, unless they (the family of the killed) waive the payment. If he (is killed) is from a group that is hostile to you, even though he is a believer, (let the murderer) free the believer's slave. If he (is killed) from the people (infidels) with whom there is an agreement (peace) between them and you, (let the murderer) pay the ransom given to his family and free the believer's servants. Whoever does not get (the servants) should fast for two consecutive months as (a decree) of repentance from Allah. Allah is All-Knowing, All-Wise." ⁷

It should be noted that there is a difference between the concept of forgiveness (العفو) and the concept of *al-Sulh* (peace). Forgiveness is done with compensation or without compensation. While in *al-Sulh* according to the agreement of the *fuqahā*, the victim is obliged to receive compensation from the perpetrator. Another difference is that forgiveness (العفو) which results in the termination of the law comes from the victim or his guardian without the need for an agreement from the perpetrator. Unlike *al-Sulh*, the termination of the law only occurs if there is an agreement between the victim and the perpetrator.⁸

In addition, there is also a difference between *al-Sulh* (peace) and *diyāt*. In terms of the type of crime, *diyāt* only applies to the crime of murder or removal of body parts (*qishāsh*), while *al-Sulh* applies relatively more generally. The *diyāt* compensation that must be paid is the perpetrator or his guardian, in *al-Sulh* it is very dependent on the results of the agreement between the victim and the perpetrator. Sometimes the *al-sulh* compensation is in the form of money, objects, or other certain obligations. This is certainly similar to the concept of restorative justice which is recommended as an approach in handling current criminal acts by involving the parties, so that the law is not always interpreted as revenge.

Evidence from the Sunnah

The concept of *al-Sulh* (peace) can be found in several hadiths of the Prophet SAW, such as the following:

1. The words of the Prophet Muhammad Peace be Upon Him which permits *al-sulh* (peace) in general and that agreements made between fellow Muslims are binding.

وروى أبو هريرة أن النبي صلى الله عليه وسلم قال : الصلح جائز بين المسلمين إلا صلحا أحل حراما أو حرم حلالا.
وقال رسول الله صلى الله عليه وسلم : المسلمون على شروطهم. (رواه أبو داود)⁹

⁷ Al Quran Surah An-Nisa': 92

⁸ Muhammad Abu Zuhrah, *Al-Jarimah wal 'Uqubah fi al-Fiqh al-Islami*, (Cairo: Dar al Fikr al-Arabi), p. 409-440

⁹ Sunan Abu Daud, Hadith no. 3594

"From Abu Hurairah, the Prophet Peace be Upon Him said: "Peace is permissible between Muslims, except for peace that (the contents of the agreement) makes lawful what is haram or makes lawful what is forbidden. The Prophet also said: "Muslims are bound by conditions (between them)." (Hadith narrated by Abu Daud)

This hadith is the basic law that allows agreements to arise in various forms of *muāmalah* among humans, as long as it is not an agreement that is expressly aimed at violating the *Shari'a*, such as making lawful what is haram or vice versa.

2. The behavior of the Prophet Muhammad Peace be Upon Him who reconciled the debt dispute between his friends (*sahābah*)

أن النبي صلى الله عليه وسلم مر بكعب بن مالك وهو يلزم غريما له يقال له ابن أبي حذرد وقد ارتفعت بينهما خصومة، فقال النبي صلى الله عليه وسلم لكعب خذ منه الشطر ودع الشطر¹⁰

"The Prophet Muhammad Peace be Upon Him passed in front of Ka'ab bin Malik who was suing someone he owed, named Ibn Abi Hadrad and there had been a feud between the two. So the Prophet said to Ka'ab: "Take only half of your debt from him and leave (write off) the other half."

In this hadith, the Prophet Muhammad gave a solution to resolve civil cases with a peaceful approach (*al-Sulh*) which has a positive impact in the form of a win-win solution (a solution that is mutually beneficial to both parties). This kind of solution is commonly found in the modern economic system, both in banking circles and in micro, small and medium enterprises (MSMEs) that experience bad debt problems.

3. Hadith of the Prophet which recommends judges to be careful in deciding hudud criminal cases.

عن عائشة أن النبي ﷺ قال : ادروا الحدود عن المسلمين ما استطعتم، فإن كان له مخرج فخلوا سبيله، فإن الإمام أن يخطئ في العفو خير من أن يخطئ في العقوبة.¹¹ (رواه الترمذي)

"From Aisyah ra. That the Messenger of Allah said: "Avoid hudud punishment from the Muslims as much as you can, if there is a way out then let him go. Because indeed a priest who makes a mistake in forgiving is better than a mistake in giving punishment." (Hadith narrated by Turmuzi)

This hadith is the basis for a fiqh principle that states "*Tusqathu al-hudūd bis Syubuhāt* " (a *hudūd* case can be dropped due to doubt/uncertainty). A decision made without strong evidence on the *hudūd* crime will have a very big impact on the suspect because when the decision has been executed it cannot be corrected. For example, in the case of major theft where the punishment is amputation of the hand, the judge must be very careful in deciding a *hudūd* criminal case if it is not based on convincing evidence. An error in the judge's decision that acquits a theft suspect is much better than an error in the judge's decision that sentences him to amputation of his hand but it is proven later that he is not the real perpetrator.

¹⁰ Imam al-Mawardi, *al-Hāwī al-Kabīr fī Fiqh Mazhab al-Imam as-Syafi'i*, www.islamweb.net-ar/library/content/94/2799/مسألة-الصلح-جائز-بين-المسلمين-إلا-صلحا-أهل-حراما-أو-حرم-حلالا

¹¹ Sunan Turmuzi, Hadith no.1424

4. Hadith of the Prophet Peace be Upon Him which recommends Muslims to forgive each other and make peace in hadith issues before they are brought to justice.

عَنْ عَبْدِ اللَّهِ بْنِ عَمْرٍو بْنِ الْعَاصِ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ تَعَاْفُوا الْحُدُودَ فِيمَا بَيْنَكُمْ فَمَا بَلَغَنِي مِنْ حَدٍّ فَقَدْ وَجِبَ ((رواه ابو داود)¹²

"From Abdullah bin Amru bin Al 'Ash that the Messenger of Allah saw. said: "You should forgive each other in the matter of had punishment that occurs between you, because if had reached me then it must be carried out."

This hadith is the legal basis that a hudud case if it has been reported to the *qādhī* or Court, must be processed and can no longer be forgiven. This means that the room for making peace (*al-sulh*) is open as long as it has not entered the realm of examination in the Court. Therefore, the Messenger of Allah saw recommended an attitude of forgiving each other and as much as possible resolving the problem peacefully before taking the legal route.

In a hadith narrated by Abu Daud, Ibn Majah, Nasa-i and Ahmad it is stated as follows:¹³

عن صفوان بن أمية، قال: كنت نائما في المسجد عليّ خميصَةٌ لي ثمن ثلاثين درهما، فجاء رجل فاخْتَلَسَهَا مِنِّي، فَأَخَذَ الرَّجُلُ، فَأَتَيْتُ بِهِ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَأَمَرَ بِهِ لِيُقَطَّعَ، قَالَ: فَأَتَيْتُهُ، فَقُلْتُ: أَتَقَطُّعُهُ مِنْ أَجْلِ ثَلَاثِينَ دِرْهَمًا، أَنَا أَبِيعُهُ وَأُنْسِيئُهُ ثَمَنُهَا؟ قَالَ: هَلَّا كَانَ قَبْلَ أَنْ تَأْتِيَنِي بِهِ

"From Shafwan bin Umayyah he said: I fell asleep in the mosque on a khamisah (a piece of embroidered cloth made of silk or fur) worth thirty dirhams. Then someone stole it from me. That person was caught and brought to the Messenger of Allah. (After being examined) So the Messenger of Allah decided to cut off his hand. Shafwan said: "I went to the Messenger and asked: Are you going to cut off his hand for something worth thirty dirhams? whereas I could have sold the cloth to him and received the price in installments". The Prophet replied: "Why didn't you say this before you brought this (thief) to me."

The hadith above gives the meaning that *hudūd* cases such as theft that have not yet reached the process of being examined by a judge can be agreed upon between the victim and the perpetrator so as to produce justice for both parties. It is different if it has entered into the main case then it cannot be forgiven or stopped.

The fuqaha view that hudud cases that must be upheld because they are related to the rights of Allah cannot be forgiven, given intercession, or dropped if they have reached the Judge and proven with *al-bayyinah* (evidence). They also agree that had zina, and theft are included in the category of Allah's rights.¹⁴

Regarding the *qazaf* radius, the ulama dispute the legal status between the rights of Allah and the rights of servants. Hanafiyah scholars view that crimes of adultery, alcohol,

¹² Sunan Abu Daud, Hadith no. 4376

¹³ See: An-Nasa-i (4883), Ahmad (15310), Ibnu Majah (2595) [https:// hadeethenc. com/ ar/ browse/ hadith/ 58252](https://hadeethenc.com/ar/browse/hadith/58252)

¹⁴ *Al-Mausū'ah al-Fiqhiyyah al-Kuwaitiyah*, vol. 30, p. 184. <https://shamela.ws/book/11430/19105#p1>

theft and *qazaf* cannot be forgiven, reconciled (*al-sulh*), or released if they have been proven by proof, because they are the right of Allah alone. Malikiyah ulama consider that *qazaf* can be forgiven if it has not reached the authorities. Likewise, the view of the Shafi'iyah and Hanabilah scholars states that *qazaf* is the right of servants, therefore it can be forgiven.¹⁵

According to Hanafiyah, forgiveness of *ta'zīr* punishment which must be enforced because it is related to the rights of Allah is permitted, in contrast to Hanabilah who forbid it. Malikiyah scholars also consider it obligatory to enforce the law on *ta'zīr* unless the ruler sees that there is benefit in forgiveness. Meanwhile, Imam Mawardi from the Syafi'iyah group views had punishment as not being able to be forgiven or given *syafā'ah*, but *ta'zīr* punishment is permitted. Based on benefit, the leaders (*waliyul amri*) can assess whether to forgive or apply *ta'zīr* law.¹⁶

Ibn Hazam al-Andalusy narrated in his book *al-Muhalla bil Atsār* that the punishment of *hadd* cannot be enforced except after reaching the sultan. Allowing the perpetrator of the crime or not being brought to the sultan is permissible, as is reporting the perpetrator to the sultan because there is no text or *ijma'* that prohibits it. According to him, forgiving the perpetrator is better, especially if the act was done due to a mistake, but if the perpetrator goes beyond the limit and insists on his crime, then reporting him is better.¹⁷

From the explanation of the hadith above, it can be concluded that the implementation of restorative justice is highly recommended by Islamic legal system. The scholars also agree on the permissibility of the practice of *al-Sulh* (peace) in various cases based on the verses and hadiths that have been stated above.

Caliph Umar bin Khattab firmly advised the judges (*al-Qudhāh*) in various regions:

ردوا الخصوم حتى يصطلحوا، فان فصل القضاء يحدث بين القوم الضغائن¹⁸

"Return the feud so that they can make peace. Indeed, judicial decisions will create hatred and revenge between people (humans)."

Umar's statement is the substance of restorative justice which today is part of the effort to realize dignified justice for all parties.

In the Indonesian legal system, the material process of resolving criminal acts using the restorative justice method is required not to be included in major cases such as radicalism, separatism, terrorism, crimes against state security, corruption and crimes against people's lives. This is in line with Islamic teachings which prohibit forgiveness (*العفو*) in crimes related to the enforcement of *hudūd* law where there are the rights of Allah, such as *hirābah*, *bughāh*, and *riddah*. except for *qishāsh* which has the option of

¹⁵ Al-Mawardi, *al-Ahkam al-Sulthaniyah*, hal. 237, Abu Ya'la, *al-Ahkam al-Sulthaniyah*, p. 266

¹⁶ *Al-Mausū'ah al-Fiqhiyyah al-Kuwaitiyyah*, vol. 30, p. 185. <https://shamela.ws/book/11430/19105#p1>

¹⁷ Ibnu Hazm al Andalūsi, *Al-Muhalla bil Astār*, vol. 12, p. 55. www.islamweb.net/ar/library/content/17/2274/الحدود-قبل-بلوغها-إلى-الحاكم

¹⁸ Ibnu al-Qayyim al-Jauziyah, 'Ilam al-Muwaqqi'in 'an Rabbil 'Alamin, vol, 1, p. 84. www.islamweb.net/ar/library/content/34/40/فصل-الصلح-بين-المسلمين

diyāt because it combines the rights of Allah with the rights of the servant (victim/guardian of the victim).

In the general requirements for resolving criminal acts using the restorative justice method, it is also regulated that the value of evidence or losses caused by the crime is not more than IDR 2,500,000.-. If it is more, then restorative justice cannot be implemented. This provision is also similar to *had sariqah* (thief punishment), one of the conditions for punishment of which is the *nisāb sariqah* for the stolen goods. That is, the value of a quarter of a gold dinar (equivalent to 1,511 grams of gold, or if converted to rupiah, the equivalent of 1,511 grams x 1,395,000 = IDR 2,107,845.- This means that if theft is committed against goods worth more than that, *al-sulh* (peace) or forgiveness (العفو) cannot be applied if it has reached the authority of the Court as in the case of the theft of Safwan bin Umayyah's khamishah cloth during the time of the Prophet Muhammad. even though he has forgiven the perpetrator.

Restorative Justice in Juvenile Criminal Justice

Under the Law on Juvenile Criminal Justice System (SPPA), the handling of children in conflict with the law is different from the handling of adults in conflict with the law. The handling of children's cases prioritizes restorative justice that involves all parties and aims to obtain justice for all. Therefore, diversion must be sought or the transfer of the settlement of children's cases from the criminal justice process to a process outside the criminal justice system.

In accordance with Article 6, Law No. 11/2012 on SPPA states that diversion aims to achieve peace between victims and children; resolve children's cases outside the judicial process; prevent children from deprivation of independence; encourage the community to participate; and instill a sense of responsibility in children.

In Islamic criminal law, the *fuqahā* of the four madhabs agree that boys and girls who have not reached puberty and are of sound mind cannot be punished with the criminal penalty of *hudūd*. This is because the requirement for the punishment of *hudūd* is the existence of *taklīf* (legal burden) on a person, which is realized in the form of *kamāl al 'aql* (the perfection of reason) and *bulūgh* (sufficient age).¹⁹

The proof of this agreement is the hadith of the Prophet peace be upon him narrated from Aisha ra. which states: "The Qalam (record of the law) is lifted (erased) from three groups: the sleeper until he wakes up, the child until he dreams (*balīgh*), and the madman until he comes to his senses."²⁰

This Hadīth indicates that the three groups mentioned in the Hadīth cannot be subjected to the law due to their lack of intellect. The Hadīth also confirms that wet dreams in boys are one of the physical characteristics of puberty. If a child commits a crime such as murder or an offense of *hudūd*, then according to Islamic criminal law the child cannot

¹⁹ See: *Bada-i 'u al-Sana-i* (7/37), *Ahkam al Quran* al Jasshash (5/112), *Ahkam al Quran* Ibn 'Arabi (3/341), *Al Muhazzab* (2/272), dan *Al Raudh al Murabba'* (3/314).

²⁰ Hadith narrated by Abu Daud, no. 3825. <https://ilmuislam.id/hadits/3709/hadits-abu-daud-nomor-3825>

be punished with *qishāsh* or *hudūd*, but can still be punished with guidance (*ta'dīb*) if deemed necessary by the judge.²¹

The measure of puberty in children is marked by certain physical signs that differ between boys and girls. When physical signs do not appear, puberty is measured in terms of the child's age. The Shafi'iyah and Hanbilah state that the age of puberty is fifteen years old. According to the Malikiyah and Hanafiyah, the age of puberty is seventeen years for boys and eighteen years for girls. Meanwhile, in the SPPA Law, a child in conflict with the law is a child who is suspected of committing a criminal offense, has reached the age of twelve years but has not yet reached the age of eighteen years, even if they are married. Similarly, the age of children regulated in Aceh's Qanun *Jināyāt* with a slight difference, namely not yet married

In the Law on Juvenile Justice System (SPPA) children who are not yet fourteen years old can only be subjected to action instead of punishment.²² which includes return to parents, handover to someone, treatment in a mental hospital, and treatment in a Social Welfare Institution (LPKS), obligation to attend formal education and / or training held by the government or private entities, revocation of driving license, and repair of the consequences of the crime. Meanwhile, children who are fourteen years old and above can be sentenced with various punishments. Article 71 paragraph (1) states that the main punishment for children in conflict with the law is in the form of; a.) warning punishment; b.) punishment with conditions; c.) vocational training; d.) coaching in institutions; and e.) imprisonment. Conditional punishment can be in the form of; 1.) coaching outside the institution; 2.) community service; and 3.) supervision. The basic punishment for juvenile is different from the basic punishment for adult in the form of death penalty, imprisonment, confinement, and fine (Article 10 KUHP).

With regard to punishment for children, there are also differences between the SPPA Law and Qanun *Jināyāt* which specifically applies in Aceh. Article 79 paragraph (2) of Law No.11/2012 on Juvenile Justice System (SPPA) stipulates that the punishment for juveniles is one-half of the maximum imprisonment imposed on adults. Meanwhile, Article 67 paragraph (1) of Qanun Aceh No.6 of 2014 on *Jināyāt* Law stipulates a maximum of one-third of the punishment prescribed for adults. In Islamic law, this difference can be understood because children basically cannot be burdened with the law except as *ta'dīb* (guidance), where the form of guidance, the level and the time is very dependent on the judge's decision or the rules of the Government (*waliyul amri*).

The ulama agree that if there is voluntary adultery where the two offenders are children, then both of them cannot be punished with *hudūd*, but they differ in their opinion regarding the obligation to pay the *mahr mithil* for the boy. The Hanafis stated that it is obligatory for the son to pay the *mahr mithil* from his own wealth.²³ Meanwhile, Imam Nawawi of the Shafi'iyah and Imam al Mardawi of the Hanabilah stated that it is not obligatory.²⁴ This is because virginity cannot be destroyed by intercourse with a child

²¹ Fatimah Binti Muhammad al Jarallah, "Ahkam al Thifl fi al Hudud," Jurnal *Majallah al Jam'iyyah al Fiqhiyyah al Su'udiyah*, Vol. 11, Syawal/Muharram 1432-1433 H/2011 M, p. 395

²² <https://pn-palopo.go.id/30-berita/artikel/363-sekilas-tentang-sistem-peradilan-pidana-anak>

²³ *Al Mabsuth* al Sarakhsi (9/128-129), *al Hidayah Syarh al Bidayah* (2/103).

²⁴ *Raudhatut Thalibin* (10/91), dan *al Inshaaf* (10/241).

unless the perpetrator is an adult (*baligh*), or it is done with other aids. At that time, the *mahr mithil* must be paid for committing an offense/*jarimah*. The Hanafiyah opinion on this issue is in line with the pattern of handling criminal cases of sexual abuse by children which prioritizes diversion mediation in order to achieve restorative justice for all parties.

Under Islamic criminal law, a child who takes someone else's property or damages it is obliged to return the property even though the child cannot be punished because he has not reached puberty. If the property has been lost or damaged, it must be replaced in full, according to one opinion among the Hanafiyah, Hanabilah and Shafi'iyah. The compensation is to be taken from the property of the child, according to Ibn Qudamah al Hanbali, or from the property of his guardian, according to Imam Malik.

Deliberate murder committed by a child is not punishable by *qishāsh* but is still obliged to pay *diyāt* from the property of the child or his extended family (*'āqilah*).²⁵ According to the scholars, all criminal offenses intentionally committed by children are equated with the law of wrongful acts committed by adults (*mukallaf*).²⁶ The responsibility for *diyāt* fines or compensation due to the behavior of children who violate criminal law is a form of restorative justice that guarantees justice for all parties, especially when the perpetrator is a child who cannot be convicted. The victim will feel wronged if the perpetrator is completely free from all responsibility.

The process of children's proceedings in court, in the form of investigation, prosecution or trial, is relatively shorter than that of adults. In the process, children in conflict with the law must be accompanied by parents/guardians and other related parties. This is in line with the opinion of the Hanafi and Syafi'ie mazhabs which state that children who are in conflict with the law can be brought to a closed trial if necessary.²⁷

The restorative justice model has also been practiced in Aceh's traditional justice system for a long time. In the past, various criminal cases in the community were resolved through customary law by community leaders before being brought to the judge (*qādhī*) in order to achieve justice agreed upon by all parties, maintain the good name, dignity and family of the victim and perpetrator, maintain community unity and harmony, and avoid the recurrence of future conflicts due to grudges or injustice.²⁸

Along with the strengthening of the positive legal system after independence, the role of customary law in the resolution of criminal cases is getting smaller, and especially in Aceh is currently limited to 18 fields. These include domestic disputes, khalwat, theft within the family, petty theft and light maltreatment, harassment, slander, and various disputes between citizens.^{29 30}

²⁵ *al Kaafi* Ibnu Abdul Barr (1/606).

²⁶ *Al Bahr ar Ra-iq* (8/435), *At Taaju wal Iklil* (6/230), *As Siraaj al Wahhaj* (1/485), *Manaar al Sabil* (2/286), dan *Fatawa Ibnu al Shalah* (2/465).

²⁷ *Hasyiah Ibnu Abidin* (4/78), *Raudhatut Thalibin* (4/253), dan *Mughni al Muhtaj* (2/2014).

²⁸ Interview with Marzuki Muhammad, S. Pd, Head of Mukim Siem, Darussalam, Aceh Besar Regency, July 6, 2024

²⁹ Interview with Asnawi Zainun, SH, Chair of the Aceh Traditional Council (MAA) Aceh Besar Regency, July 6, 2024

The fields regulated in this customary court are actually in line with the principle of peace (*al-sulh*) in Islamic law and the restorative justice approach in resolving various civil and criminal cases in the community.

Conclusion

From the previous discussion, it can be concluded as follows:

1. The restorative justice for the perpetrators of jarimah in Aceh in the view of Islamic law can be done as long as it has not been included in the formal examination of the case by the Judge
2. The Restorative justice can be applied to jarimah ta'zir and hudud which are related to the rights of the servant, and not the rights of Allah.
3. The peace agreement in Restorative Justice must not contain points that violate religious provisions by legalizing the haram or forbidding the halal.

From the results of this study, the researcher suggests the following:

1. Peaceful efforts through Restorative Justice are strongly recommended by religion to avoid the emergence of a sense of resentment and injustice as a result of the judge's decision that could arise from the victim or perpetrator.
2. Diversion efforts with a Restorative Justice approach in cases of children in conflict with the law are in line with the spirit of Islamic law which prioritizes the principles of justice for all parties and maintains peace, especially when criminal penalties cannot be imposed due to insufficient age requirements for children in conflict with the law.

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³⁰ See: Aceh Qanun No. 9 of 2008 concerning the Development of Customary Life and Customs, and Aceh Governor Regulation No. 60 of 2013 concerning the Implementation of the Settlement of Customary Disputes/Disputes

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