

Article 340 Indonesian Penal Code on premeditation murder: “*The person who with deliberate intent and with premeditation takes the life of another person, shall being guilty of murder, be punished by capital punishment of life imprisonment or a maximum imprisonment of twenty years.*”

As seen from the formulation of the articles, the nature of criminal sanctions is retaliation, while the primary goal of criminal sanctions is deterrence,⁵ aimed at the offender himself as well as to those who have the potential to become the offender. It also aims to protect people from all forms of crime and educate or repair for the offender.

2.2 Criminal Cases Settlement in The Perspective of Islamic Law

2.2.1 The Form of Cases Settlement in Islamic Criminal Law

'Fiqh Al-Jinayat' (Islamic Criminal Law) is the law that regulates *jarimah* (the crime) and *uqubah* (the punishment). In 'Fiqh Al-Jinayat,' it is also discussed about the settlement of criminal cases viewed from various *jarimah*. 'Fiqh Al-Jinayat' divides crimes into 3 (three) categories: *jarimah hudud* (crimes against God – the punishment is fixed in the Quran and Hadiths); *jarimah qisas-diyat* (crimes against an individual or family – the punishment is equal retaliation in the Quran and the Hadiths); and *jarimah ta'zir* (crimes whose punishment is not specified in the Quran and the Hadiths, and is left to the discretion of the ruler or judge).⁶

⁵ For Bentham and contemporary thinkers, a distinction is drawn between *individual* and *general* deterrence. Individual deterrence is said to occur when someone finds the experience of punishment so unpleasant that they never wish to repeat the infraction for fear of the consequences. On the other hand, the idea of general deterrence is that offenders are punished not to deter the offenders themselves, but to discourage other potential offenders. See EAMONN CARRABINE, et.al., *Ibid.*, p. 233.

⁶ *Hudud* (plural of *hadd*, a “limit” set by God), the contravention of which leads to a prescribed and mandatory penalty. The second, *ta'zir* (chastisement), comprises those crimes not included among the *hudud* because their punishment is discretionary. *Ta'zir* implies the correction or rehabilitation of the culprit; hence, punishment is left to the judge and might vary depending upon who inflicts it and upon whom it is inflicted. The third category, *qisas-diyat* (retribution), is concerned with crimes against the person such as homicide, infliction of wounds, and battery. Punishment by retribution is set by law, but the victim or his next of kin may waive such retribution by accepting blood money or financial compensation (*diyah*) or by forgoing the right altogether. See FARHAT J. ZIADEH, “Criminal Law,” Oxford Islamic Studies, Oxford University Press. Access from <<http://www.oxfordislamicstudies.com/article/opr/t236/e0170>>.

Quran (Al-Quran) is the religious text of Islam, which Muslims believe to be a revelation from God. Hadith(s) is a report, story, or tradition about what Muhammad (the historical founder of the Islamic religion) said or did and about he did not say or do. See JUAN E. CAMPO, *Encyclopedia of Islam*, (New York: Facts on File, Inc, 2009), p. 278.

2.2.2 The Principles of *Sulh* in Islamic Law

There are three principles that must exist in *sulh*: the disclosure of the truth; there must be the victim(s) (or the heirs of the victim) and the offender(s) as the conflicting parties, while the other is neutral third party to help the conflicting parties communicating to each other and lower the tension; and then *sulh* is a voluntary process without coercion, promoting the balance of rights and obligations. Also, *sulh* or conciliation is conceptually not necessarily erase mistakes that the offender has committed, but the nature is to give the offender commutation.

Revealing the truth is a crucial thing that the offender has to be done. Quran Surah Al-Hujarat verse 6 clearly states how important a truth must be revealed in order not to do injustice to other people.⁷ Then, there are two parties that are able to be identified in a process of *sulh*, the conflicting parties and the third party as a *mushlih* (people who conciliate the conflicting parties). Last but not the least, the parties in the conflict are the parties who actually have the interest in it, which is between the victim (or the heirs of the victim) and the offender. *Sulh* is a process of agreement between the parties to get an understanding so that no longer conflict occurs. Therefore, the existence of the victim and the offender is absolute.

There are also specific terms and conditions for the existence of the offender and the victim: The victim in the context of Islamic law is the direct victim, the person harmed or suffer from the crime committed by the offender. Aside from being a direct victim, the victim that is able to perform *sulh* should be in a position to be responsible for his actions, that he is an adult, not in a state of mad, drunk, or in a state of distress or forced. Then, for the offender he must be personally responsible for the crime he had committed, in which if there is no *sulh* then he will be punished according to regulations. In *sulh* it is not allowed to have representations for the offender by other parties. The last one, the *mushlih* role. The *mushlih* here is the independent party who actively assist the settlement between the victim and the offender. The actual position of the *mushlih* in the process of *sulh* is conditional. If in the process of *sulh*, there is a possibility for something worse to happen, such as pressures both from the offender or the victim, then it becomes crucial to have a *mushlih*. Parties that can act as a *mushlih* in *sulh* is not limited whether it is a person or institution. The role of *mushlih*

⁷ Quran Surah Al Hujarat verse 6: “O believers, if an evildoer comes to you with some news, verify it (investigate to ascertain the truth), lest you should harm others unwittingly and then regret what you have done.” See AHMAD RAMZY, “Perdamaian dalam Hukum Pidana Islam dan Penerapan Restorative Justice Dikaitkan dengan Pembaruan Hukum Pidana di Indonesia,” (Thesis University of Indonesia, Jakarta, 2009), p. 31

himself, from authors perspective, should be performed by judges, so that the decision later will have executorial power. Then, in this process there must also exist the balance between rights and obligations. The victim (or the heirs of the victim) is prohibited to demand the compensation beyond the ability of the offender, the offender himself is also prohibited to delay the payment of compensation or decrease of indemnity or compensation that has been determined. Islam reminds that in the context of society, in solving problems that arise in society should be using the principle of proportionality.⁸

This is the essence of punishment using *sulh* which provides a two-way balanced solution, with a goal of true peace: the loss of the burden of sin for the offender, and the loss of the sense of anguish and resentment for the victim (and his families). Peace is a command from God that should be sought fairly as a grace from God, who loves peace.

2.2.3 The Categorization of Crime Allowed to be Settled by *Sulh*

According to the teachings of ‘Hanafi madhhab,’⁹ *jarimah qisas* is divided into five categories: intentional murder, quasi-intentional murder, unintentional murder, intentional maltreatment and unintentional maltreatment. This means that crimes which can be replaced with an amicable settlement are heavy crimes.¹⁰

2.3 The Concept of Justice

2.3.1 Retributive and Restitutive Justice towards Restorative Justice

Retributive justice has several meanings, but are able to be understood as a concept of justice that holding on principles: (1) actors who have the intention of doing several types of crime, generally serious crimes, morally punishable proportionally; (2) intrinsically, morality is good when the legitimized officers do the sentencing to criminals according to the regulations; (3) it can not be morally permissible to deliberately punish innocent people, nor impose disproportionate punishment to criminals.¹¹

⁸ AHMAD RAMZY, *Ibid.*, p. 38.

⁹ Derived from the Arabic verb *dhabhal yadhhabu* (lit. went/to go), the verbal noun *madhhab* generally means that which is followed, and more specifically, the opinion or idea that one chooses or adopt. *Madhhab* also means a group of jurists and legists who are loyal to a distinct, integral, and most importantly, collective legal doctrine attributed to an eponym, a master-jurist, so to speak, after whom the school is known to acquire particular, distinctive characteristics. Thus, after the formation of the schools, jurists began to characterized as Hanafi, Maliki, Shafi’i, or Hanbali. See WAEL B. HALLAQ, *The Origins and Evolution of Islamic Law*, (Cambridge: Cambridge University Press, 2005), p. 150-152.

¹⁰ AHMAD HANAFI, *Asas-Asas Hukum Pidana Islam*, (Jakarta: Bulan Bintang, 1986), p. 8.

¹¹ “Retributive Justice.” Access from <<http://plato.stanford.edu/entries/justice-retributive/>>

Restitutive justice is a rights-based approach to criminal sanctions which views crime as an offense by one individual against the rights of another calling for forced reparations by the criminal (offender) to the victim. This is a sharp departure from the two predominant sanctioning theories-retribution and crime prevention. Rights-based analysts have criticized this approach for fighting to include *mens rea*, or criminal intent into the calculation of sanctions, thereby ignoring the traditional distinction between crime and tort.¹²

The change of paradigm of justice in criminal law is a phenomenon that is being worldwide today, where the paradigm of restorative justice now gets its own special place. International society is more aware of and agree that it is necessary to change the mindset in dealing with criminal cases settlement. The criminal justice system based on retributive justice and restitutive only give the authority to the state (delegated to law enforcement officers: police, prosecutors, judges). The offender and the victim have a little opportunity to deliver a version of justice they want. The state determines the degree of justice for the victim by giving imprisonment to the offender. Not surprisingly, a crime committed by the offender is increasing because in prison they actually received additional knowledge to commit a crime and then recruit others to follow.

In the view of Jim Considine, one of the pioneers of restorative justice from New Zealand, the concept of retributive and restitutive justice, based on punishment and vengeance, is counter productive that it fails to rehabilitate, is expensive and leads people to re-offend very quickly. In restorative justice, the aim is healing for both the victim and the offender.¹³

The comparison among retributive, restitutive, and restorative justice are as follows :

Table 1 The Comparison among Retributive, Restitutive, dan Restorative Justice

No.	Differences	Retributive	Restitutive	Restorative
1.	Philosophical Foundation	Achieving justice with a retaliation to the person who	Correcting mistakes by repairing	Forgiveness is the basic in repairing

¹² RANDY BARNETT, “The Justice of Restitution”. Access from <<http://www.bu.edu/rbarnett/25amer117.htm>>

¹³ GEORGE M. ANDERSON, “Restorative Justice: Interview with Jim Considine.” Access from <<http://americanmagazine.org/issue/277/article/restorative-justice-interview-jim-considine>>. See also JIM CONSEDINE, *Restorative Justice: Healing the Effects of Crime*, (Lytelton: Ploughshares Publications, 1995), p. 11.

		caused harm		human relationships.
2.	Ways	Punishment for the offender is equal with the harm he caused.	The victim receives compensation.	The offender regrets the harm he caused, promise not to repeat, and give the victim compensation if needed
3.	Focus	The offender	The victim	The offender and the victim

Source: Dean E. Peachey, "Restitution, Reconciliation, Retribution: Identifying the Forms of Justice People Desire", in Restorative Justice on Trial: Pitfalls and Potentials of Victim Offender Mediation-Internationa Research Perspectives, eds Messmer, H and Otto, H.U., (Dordrecht: Kluwer Academic Publishers,1992), p. 552 – 553.

From the table above, it is clear that restorative justice offers a more comprehensive solution for victims and offenders such as awareness-raising actions, forgiveness, recovery of victims and necessary compensation. It is not found in the values of retributive and restitutive justice.

2.3.2 Restorative Justice in Criminal Justice System

Criminal actions are no longer considered as an attack against the state, but it is a crime committed against someone else. Restorative justice is based on the conception of humanity on both sides, the offender and the victim. Restorative process aimed at healing injuries for all parties by the crime. Alternative solutions are explored with a focus on repairing the damage that caused by the crime.¹⁴

Criminal cases settlement is actually very simple. Applying the elements of restorative justice in settling cases between the victim and the offender, by:¹⁵

¹⁴ JIM CONSEDINE, *Ibid.*, p. 158.

¹⁵ DS. DEWI and FATAHILLAH A. SYUKUR, *Mediasi Penal: Penerapan Restorative Justice di Pengadilan Anak Indonesia*, p. 34.

1. Organizing the meetings for the conflicting parties (the victim and the offender) and the families that support them;
2. Giving the opportunities for all parties to tell how the crime has happened and proposing solutions or action plans;
3. Giving the offender and his family the opportunity to propose a final solution that can be agreed by all presenting parties, Once they have listened to the opinions of others;
4. Supervising the implementation of the proposal, particularly in regard to the compensation for the victim.

2.3.3 Restorative Justice in Laws and Regulations in Indonesia

Based on the fourth principle of Pancasila,¹⁶ decisions are taken by deliberations (prioritizing deliberations in making decisions for the common good). Deliberations to reach consensus filled with a spirit of brotherhood, so that the philosophy of "deliberations" should contains the elements as follows: (1) *conferencing* (meeting to hear each other and express opinions), (2) *search solutions* (finding solutions on the issue that is happening), (3) *reconciliation*, (4) *repair* (fixing for all the consequences arising), and (5) *circles* (mutual support).¹⁷ These principles are exactly as required and be the keywords in the conception of restorative justice so that any constitutional basis of restorative justice find its feet.

In recent developments, the conception of restorative justice have started to be introduced in the Draft Law on Indonesian Criminal Code as well as the positive criminal Code in Indonesia. The principle of restorative justice is applied in juvenile criminal justice system in Indonesia, as contained in Article 8 of Act No. 11 of 2012 on Juvenile Criminal

¹⁶ Pancasila is the official philosophical foundation of the Indonesian state. Pancasila consists of two Old Javanese words (originally from Sanskrit) which means five principles. It comprises five principles held to be inseparable and interrelated:

1. Belief in the one and only God (in Indonesian, *Ketuhanan Yang Maha Esa*).
2. Just and civilised humanity (in Indonesian, *Kemanusiaan Yang Adil dan Beradab*).
3. The unity of Indonesia (in Indonesian, *Persatuan Indonesia*).
4. Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives (in Indonesian, *Kerakyatan Yang Dipimpin oleh Hikmat Kebijaksanaan, Dalam Permusyawaratan dan Perwakilan*).
5. Social justice for all of the people of Indonesia (in Indonesian, *Keadilan Sosial bagi seluruh Rakyat Indonesia*).

¹⁷ KUAT PUJI PRAYITNO, "Restorative Justice untuk Peradilan Pidana di Indonesia (Perspektif Yuridis Filosofis dalam Penegakan Hukum *In Concreto*," *Jurnal Dinamika Hukum* Vol. 12, No. 3 (September 2013). Access from <<http://fh.unsoed.ac.id/sites/default/files/fileku/dokumen/JDH2012/JDHSeptember2012/3.pdf>>

Justice System.¹⁸ This conception of restorative justice, it is not impossible in the future to be applied more widely in criminal laws and regulations in Indonesia.

2.3 Compatibility of The Implementation of Conciliation in Islamic Criminal Law in the Context of Law in Indonesia

In reality within the society, the practice of conciliation between the victim and the offender done not only in violation of Adat Law but the Criminal Law in general as well. Resolution of conflict in amicable way is the cultural value owned by Indonesian society, as stated by Daniel S. Lev cited by Wukir Prayitno that the legal culture in Indonesia in resolving the conflict has its own characteristics due to its cultural values. Maintaining peace is a commendable effort, so that it can solve the conflict in the form of compromise.¹⁹

In Indonesian Adat law, regulation concerning the judge of peace set in Article 3 *Reglement op de Rechterlijke Organisatie en het Beleid der Justitie* (Regulation on the Composition of The Judiciary and Court Policy). There are still many indigenous peoples in Indonesia who use this system.

The values in society that upholds peace is the law that lives in society and the law that lives in society is the real law. The Law that lives in society should be explored through legal discovery (*rechtsvinding*) by judges. Adat Law as the unwritten law can also be a source of law.

The aspects of criminal law in the teachings of Islam which currently a discourse for the criminal law reform in Indonesia is an absolute thing, it is expressed by Dr. Abdul Gani Abdullah, S.H., in his writing. According to him, there are three things that become the basis for it:

1. Philosophical, a substantial injection of normative aspects of Islamic teachings produce epistemological attitudes which give great contribution to the growth of the outlook on life, the ideal of morality and the ideal of law in socio-cultural life of the people of Indonesia.

¹⁸ Article 8 Act No. 11 of 2012: “(1) Diversion process done through consultations involving children and parents/guardians, the victim and/or parents/guardians, Supervising Social and Professional Social Worker based approach Restorative Justice; (2) If necessary, consultations referred to in section (1) may involve the power of Social Welfare, and/or community; (3) Diversion process shall take into account: a. the interests of victims, b. child welfare and responsibilities, c. avoidance of negative stigma; d. avoidance of retaliation; e. harmonious society, f. propriety, morality, and public order.”

¹⁹ ALEF MUSYAHADAH, “Kedudukan Perdamaian Antara Korban dengan Pelaku Tindak Pidana dalam Sistem Pidana”, (Thesis University of Diponegoro, Semarang, 2005), p. 1.

2. Sociological, histories of Indonesian Islamic community showed that ideals and legal awareness in the life of Islam have a sustainable level of actuality.
3. Juridicial, Indonesian legal history is very deep with religious substances that finally give a characterization of the nation of Indonesia.²⁰

3. Conclusion

Speaking of criminal law reform in Indonesia, it has a close relation to the purpose of criminal punishment. It is not easy to find out the purpose of criminal punishment explicitly from the Indonesian Criminal Code. Thus, the attempt to see the purpose of criminal punishment are able to be done by analyzing other regulations or law doctrines. As in the previous discussion, the tendency of using retributive justice is still high in Indonesia, although the use of restorative justice is much more in line with the concept of justice in Indonesian society. It is also in line with the implementation of criminal cases settlement using *sulh* as in Islamic Criminal Law. The concept of *sulh* that is offered by the Islamic Criminal Law has a good prospect for Indonesian criminal law reform, for in the case of murder, for example, it is much more fair if families of the victim receive compensation for the harm caused by the offender, instead of punished in prison for years. It will also be a great idea if the concept *sulh* becomes the source in the draft of Indonesian Criminal Code and Indonesian Code of Criminal Procedure (Act No. 8 of 1981).

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