

Research Article

An Alternative for Conflict-Based Criminal Settlement Based on Positive Law and Islamic Law

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Procedural criminal law proceedings were seen to be ineffective and could even trigger a deeper conflict in Indonesia. This study aimed to identify an alternative for the settlement of criminal acts that originate from horizontal conflicts, based on positive law and Islamic criminal law, considering that Muslims make up the majority of the Indonesian population. This is crucial, considering Indonesia has more than 1,300 tribes and ethnicities. This study used a normative method with a philosophical and conceptual approach. The study results showed that, first, from the positive law perspective, criminal proceedings can be done through restorative justice, such as giving more attention to victims in the criminal justice process; penal mediation; peace; reconciliation, and political decisions. From the Islamic law perspective, settling by forgiveness; Islah; and political decisions are possible.

Keywords: Alternative; Criminal Act; Conflict; Restorative Justice; Islam

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1. Introduction

Indonesia is a large country with a population of more than 269 million people[1] with more than 1,300 ethnic groups or tribes.[2] Meanwhile, based on 2019 data collection, the Ministry of Home Affairs stated that there were 420,381 registered community organizations.[3] In terms of religion, the Indonesian population is also divided into different religions, wherein there are at least six recognized religions. Based on such a demographic picture, Indonesia has tremendous potential for horizontal conflict.

Horizontal conflict is a conflict that occurs between social groups in the society that have the same position. This conflict can occur because of a lack of communication, or a clash of points of view between fellow groups. This conflict can be seen in conflicts between ethnic groups, races, religions, and conflicts between certain groups. Conflict

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itself means a process or situation in which two or more than two parties try to thwart the achievement of the goals of each party due to differences in opinions, values or demands from each.[4] Meanwhile, based on Law Number 7 of 2012 on Handling of Social Conflicts, it is stated that Social Conflict, hereinafter referred to as Conflict, is a feud and/or physical clash with violence between two or more community groups that lasts for a certain time and has a wide impact which results in insecurity and social disintegration so as to disrupt national stability and hinder national development (Article 1 point 1 of Law Number 7 of 2012 concerning the Handling of Social Conflicts).

Horizontal conflicts take various forms, ranging from mere arguments to the form of actual criminal acts. Some conflicts that lead to the expression of criminal acts such as brawls, persecution, murder, destruction of goods, can even lead to serious human rights violations such as crimes against humanity and even genocide. The conflict in Sampit between the Banjar tribal community and Madura, or for example the horizontal conflict in Dili before and after the referendum, became a red record in the history of the Indonesian nation.

Horizontal conflicts or social conflicts in society in the form of criminal acts have a very large potential. In this situation, it is important to take a political approach to criminal law enforcement. Rigid enforcement of criminal law on perpetrators who commit criminal acts because they are triggered by conflict, sometimes it is like oil being sprinkled on a fire. The law may be normatively enforceable, but the conflict is getting stronger.

On the other hand, ignoring criminal acts that occur in conflict situations is also not a wise move either, bearing in mind the fact that Indonesia is a state of law. In a state of law, everyone is guaranteed legal protection without exception. With this omission, the state is ignoring the obligation to protect that should be granted to every citizen.

In addressing the dilemmatic situation above, an appropriate alternative settlement must be found . Conflict cannot be avoided completely, but if it has escalated and is expressed in the form of a criminal act, the state must firmly take effective measures to handle it. Based on the aforementioned problem, it is interesting to study how criminal law resolves conflict-based crimes in the perspective of positive law and Islamic law? This paper intends to review various alternative settlements of conflict-based criminal acts based on positive law as well as Islamic law that may be taken by the authorities.

2. Methods

This study was conducted using a normative method by means of a literature study. The focus of the study is on conflict-based crimes and alternative methods of solving the said crimes effectively. The approaches used are philosophical, conceptual, and statutory approaches. The data used are secondary data in the form of primary and secondary legal materials which refer to the results of previous studies that can be found in relevant books and journal articles related to non-crime, social conflict and restorative justice.

3. Conflict-Based Criminal Acts

3.1. Criminal Acts

Criminal acts are actions that are prohibited by the rule of law which are accompanied by threats (sanctions) in the form of certain crimes, for anyone who violates the prohibition.[5] Moeljatno formulates in detail the elements of a criminal act as follows:

1. Behaviour and consequences (actions)
2. Matters or circumstances that accompany the act
3. Additional circumstances that are aggravating the criminal
4. Elements against the objective law
5. Elements against the law are subjective[5]

Criminal acts are based on objective facts the act committed is associated with the existence of unlawful nature. Thus, to identify the presence or absence of a criminal act, it is sufficient to look at the *actus reus*. This is a dualistic view that separates actions and consequences from criminal responsibility (*mens rea*).[6]

As Leo Polak puts it, punishment is after all an unwelcome suffering. In addition to suffering, punishment also means a bad stigma for the convict. If this stigma cannot be erased after sentencing, then he is the same as being sentenced to life in prison.[7] Due to the nature of such a crime, efforts to find answers regarding the nature and purpose of punishment in order to obtain justification for its application continue to be carried out. This statement will lead us to the study of criminology which has the basic

question what are the criteria for forming the law in determining an act to be the act that is punishable? Next, the question will follow up on what are the objective requirements of a prohibition of an act because it is a criminal act?

Sudarto suggested four aspects that must be considered before giving criminal threats: 1. The purpose of criminal law; 2. Determination of unwanted actions; 3. Comparison between means and results; and 4. The ability of law enforcement agencies.[7]

As for the objective conditions for the prohibition of an act, it refers to the act and the person who did it. In criminal law, the principle of legality and the principle of guilt are known. The principle of legality concerns the act while the second principle concerns the person who does it.[7] Then it becomes clear that the basis for determining a criminal act is not only because it is substantially prohibited, but also because legally the act has been declared prohibited (the principle of legality) and that the perpetrator of the act is guilty.

3.2. Conflict-Based Criminal Acts

A person committing a criminal act can be ascertained to have motivation. In other words, a criminal act must be fuelled by a certain cause, one of which is a conflict. For example, in the incident a group of people attacking each other. One of the characteristics of social conflict is the difficulty to identify the root of the problem. There are many factors behind the conflict. This has resulted in the justification or excuse mentality of the parties involved. In the end, the resolution of this social conflict is not easy. Oftentimes, partial decisive decision-making, in fact, triggers a wider conflict. The approach for settling horizontal or social conflict does not have to be done holistically.[8]

In a study conducted by Samsul Rizal Pangabeian, the presence of a national power policy does not have a significant role in conflict resolution. Even when the legitimacy and public trust in the institutions of national power is low, the intervention in the conflict that occurs makes the problem even more complex.[9] The power position of a power actor becomes significant when it is able to consistently deliver law enforcement and security guarantees indiscriminately. However, this is a challenge that is not easy to overcome, considering that in a conflict situation, negative issues are as easy to blow as it is harmful. Post-conflict follow-up action is needed to maintain the existing peace. Improvement and engineering of interaction and communication between parties in a peaceful situation, is the key to bring about sustainable peace.[8]

Crimes that arise in conflict situations must receive special attention. A rigid normative legal approach actually has the potential to make the conflict even worse. Likewise, complete neglect of criminal acts that occur will further weaken public confidence in the law. In this situation, alternative settlements of criminal acts through a restorative approach find a place.

3.3. Restorative Perspective in the Settlement of Conflict-Based Crimes

3.3.1. Philosophy of Punishment as the Basis of Thought

The philosophy of punishment has evolved from being oriented towards retaliation or retributive to rehabilitative, and finally criminal settlement with a restorative perspective. Retributive is based on condemnation in the past, rehabilitative is based on what we must do to encourage law-abiding behaviour in the future, while restorative emphasizes on how the perpetrator can atone for what he has done to the victim?[10]

The penal policy is oriented towards the judicial process and the imposition of a crime, while the non-penal policy is oriented towards the peace process, mediation and reconciliation and others. In criminal law there are several forms of sanctions that have a criminal orientation or purpose, broadly divided by Muladi and Barda into two streams of punishment.[11] This is important to be explored to gain legitimacy for various forms of criminal sanctions that will be applied must refer to the purpose of the criminal determination. *First*, absolute theory. According to this theory, punishment is imposed solely because people have committed crimes or criminal acts. Crime is an absolute consequence that must exist in retaliation for those who commit crimes. This theory was first put forward by Immanuel Kant in *Philosophy of Law*, Kant became known as the father of positivism with his famous teaching of pure legal theory. He argues that crime is not a means to an end, but reflects justice.[11]

Second, the relative theory. Crime is not just to retaliate or reward people who have committed a crime, but crime has certain useful purposes. Therefore, even this theory is often referred to as the utilitarian *theory*. Therefore, the basis of justification for the crime is in its purpose. Criminals are imposed not because people commit crimes, but so that people do not commit crimes.[11]

Based on the thought of the purpose and function of criminal law, the forms of criminal sanctions also vary. At least in positive criminal law (which is regulated in the

Criminal Code and outside the Criminal Code) there are three types of punishment, namely principal punishment, additional punishment and action-based punishments. The principal punishment can be in the form of capital punishment, imprisonment, confinement, fines and imprisonment. Meanwhile, additional punishment can be in the form of revocation of certain rights, confiscation of certain goods, or announcement of judge's decision. The action-based punishment can be in the form of placement in a mental hospital, placement in a state workplace and others according to the judge's consideration.[11]

In the case of a crime resulting in damage or loss, Andi Hamzah stated that the form of punishment can be in the form of:

1. Requiring the convict to repair the damage, if the court considers the convict to be able to do so.
2. Require the convict to pay for the damages if the damages are not more than one hundred rubbles.
3. Require the convict to apologize publicly to the victim or the collective members, in the manner determined by the court, if the offense is directed at the dignity or integrity of a person or to the rules of socialist society and there is no material damage caused by the offense.[12], [13]

Based on the explanation above, it is very relevant when the non-criminal settlement model is not singular. Especially when the crime has a complex socio-cultural background such as a horizontal conflict.

3.3.2. Restorative Justice

Restorative justice is rooted in the understanding that there is a social contribution from a crime that arises.[14] In the concept of determinism, humans basically do not have absolute freedom to determine their behaviour. Every person's behaviour is an inseparable part of influences from outside himself, so that the guilt of a criminal cannot be absolutely charged to one person. There are family, environmental and social factors that contribute. This restorative justice is based on the assumption that the crime stems from a social situation and recognizes that the offender has also been injured. Therefore, society must take responsibility for correcting the conditions that have given rise to crime and also work to cure it.[14]

The principle of resolving criminal acts with a restorative justice approach, among others, is continuous participation between perpetrators, victims, and community groups in resolving a crime. The measure of justice is no longer based on the victim's revenge against the perpetrator, whether physical, psychological or other punishments, but painful acts are healed by providing support to the victim and requiring the perpetrator to be held accountable, and if necessary with the help of the family or community.[14]

The settlement of criminal acts through restorative justice does not necessarily ignore legal guarantees or certainty. Therefore, the process of resolving criminal acts with a restorative justice approach must be sought to be integrated into the criminal justice system. Beyond that, a definite legal umbrella is needed when the criminal act restoration process is carried out outside the criminal justice system, considering that the legitimacy of the settlement results is the primary element.

The following are some of the principles of restorative justice proposed by Mackay that are in line with the practice of law enforcement through the criminal justice system[14]:

1. Voluntary participation;
2. Non-discrimination;
3. Accessibility to relevant aid agencies (including recovery)
4. Protection of the vulnerable in the process;
5. Accessibility to conventional methods of dispute/case resolution;
6. The privilege of information disclosed prior to trial;
7. Civil rights and respect for individual rights;
8. Personal safety protection.

3.4. Alternative Settlement for Conflict-Based Crimes Based on Positive Law

3.4.1. Strengthening Direct Attention and Services to Victims

The biased character of social conflict between perpetrators and victims makes it important to place the perpetrators and victims in a proportional view. So far, in the criminal justice system, victims are placed as mere instruments to bring justice to

the perpetrators.[15] With the basis of restorative justice, basically the criminal justice system can be perfected in order to be able to present a situation that is more just and proportional to the parties in each process. Several studies show that there is increased satisfaction in victims when the law enforcement process provides a balanced proportion and does not only focus on the perpetrator.[16]

Normatively, the direction of placing the victim as an important party in the settlement of criminal acts is increasingly visible. For example, the provision of restitution or compensation, in special crimes or those that have an impact on the victim's direct loss. Restitution or compensation is widely practiced for financial losses. Meanwhile, there are still many non-financial losses that have not been appreciated and decided by the court. Hence compensation is a way out to bring recovery to the victim.[17]

Giving compensation from the perpetrator to the victim enables the restoration of the relationship between the perpetrator and the victim. For victims they have the right to information, consultation, respect, and to be made intact, rights related to information justice, procedural, interpersonal, and distributive justice.[18] With the fulfilment of this right, the victim will easily forgive and feel more open to open new relationships with the community and with the perpetrator. For the perpetrator, the granting of restitution and various social obligations that may be given to the victim, is able to bring awareness of mistakes and make it easier to achieve repentance. Thus, the peace process in society will be effectively expected to be able to unravel existing social conflicts.

3.4.2. Penal Mediation

Penal mediation is the settlement of criminal cases through deliberation with the help of a neutral mediator, attended by victims and perpetrators along with their parents and community representatives, with the aim of recovering for victims, perpetrators, and the community.[19] The settlement of criminal cases through penal mediation is seen as being able to fulfil the values of justice and benefit but relatively not with certainty values. This is because penal mediation encourages the rebuilding of equality of the parties, decisions that can be accepted by the parties, and harmony in society. On the other hand, there are no firm and adequate rules regarding the possibility of a peaceful settlement between the perpetrator and the victim.[19]

In indigenous peoples, penal mediation is a common practice to solve almost all problems, including criminal acts. The community accepts the practice of the penal

mediation mechanism as part of the community's need in realizing restorative justice as an alternative in resolving criminal cases that occur in the Mongolian village in order to avoid the difficulties that exist in the formal criminal justice process. Factors from the community itself are the driving force for the effectiveness of the implementation of this penal mediation. The implementation of this settlement practice is still considered a forum for admitting guilt, forgiveness and responsibility of the perpetrator to the victim, a forum for settlement that involves the overall interests of the parties in order to reach an agreement, as well as a reflection of the resolution of village community conflicts like the character of rural communities in general in Indonesia, which still maintains values. culture in everyday life.[20]

The problem that arises is the legal umbrella for the existence of penal mediation which is less firm.[21] However, along with the development of thinking and the application of restorative justice, a settlement model outside the criminal justice system in general has developed to obtain a peace agreement between the conflicting parties. For example, the settlement of criminal acts committed by children, or the issuance of a policy to stop criminal proceedings by law for certain crimes (the regulation of attorney general Number 15 of 2020 on the termination of indictment based on restorative justice). This is a positive development, thus in the future legal firmness is needed that criminal acts that arise due to social conflicts can also be resolved by penal mediation.

3.4.3. Political Approach

Political approach can be adapted to resolve criminal acts that occur due to social conflict. One model of political settlement is by holding reconciliation efforts. In practice, reconciliation is a non-penal alternative to settle conflicts, including grave violation of human rights in the past. This concept of reconciliation tries to marry truth and justice in a restorative justice orientation, namely justice oriented to the recovery of victims.[22]

Ildal Kasim provides a summary of the requirements for reconciliation, in which there is an effort to reveal the truth, there is an acknowledgment to victims that they are victims, provide reparations or compensation to victims, and carry out reforms to institutions that are considered responsible for violations to ensure similar violations will not happen again in the future without punishing the perpetrators. This does not mean that there is no action against the perpetrator. The maximum effort that can be done is to expose responsible actors to the public, and even then, they are usually *the most responsible*

perpetrators. Even perpetrators who are accommodative in the process of revealing the truth can be recommended to obtain forgiveness (amnesty).[23]

This political approach can be said to be effective and has both philosophical and sociological legitimacy, but it still has weaknesses. One of them lies in the problem of legal certainty. The result of a political peace agreement does not have solid legitimacy. Parties who disagree with the peace process can still sue or sue through legal channels.[23]

3.5. Alternative Settlement of Conflict Based Crimes Based on Islamic Law

Islamic criminal law is part of Islamic law. Criminal acts in Islam are divided into three broad categories, namely hudud, qishas diyat, and takzir. Hudud has the main characteristic of a violation of public rights, so the settlement is certain. There is no possibility of forgiveness. For example, adultery, theft, or drinking. While qishash diyat occurs in two categories namely murder and persecution.[24] Takzir is an open form of criminal act, where the government has the authority to determine the form of action and sanctions.

In the event of a conflict-based crime, there are several approaches to settlement in Islamic law that can be used as a reference, namely through the forgiveness of the victim, peace or *islah*, and political settlement. Basically, the spirit of criminal settlement in Islam is restorative, the existence of retributive criminal sanctions is an exception.[25]

3.5.1. Involvement of Direct Victims in Qishash Diyat

The victim's conversion directly to the perpetrator of the crime of murder or molestation, can remove the criminal conviction of *qishash* for the perpetrator, and is replaceable with *diyat*. [26] *Diyat* is a punishment as well as compensation established on the basis of an agreement between the perpetrator and the victim when the victim forgives the perpetrator from imposing the *qishas* sanction. This process is seen as similar to the concept of penal mediation, where there is an emphasis on the role of the victim to be actively involved in the resolution of criminal acts.[27]

The concept of forgiveness in *diyat* can be a model for resolving conflict-based criminal acts. Because when there is direct involvement between the perpetrator and the victim, it is hoped that a substantive settlement can be obtained. However, the weakness

of this model lies on the fact that the concept of *qishash diyat* is only applicable in the context of the criminal act of murder and persecution only.

3.5.2. Ishlah

Ishlah is a three-party settlement mechanism which include the perpetrator, the victim, and there are peacemakers. *Ishlah* has a solid legal basis found in the Quran Surah *Al Hujurat* verses 9-10. *Ishlah* is an effort for peace by preventing conflict from occurring so that the two sides do not cross paths. In the event of a dispute, *ishlah* means finding a solution that can benefit both parties with the principle of *ukhuwah Islamiyah*. This is because the principle applied in the process of *ishlah* is not condemnation, but rather dispute resolution.

3.5.3. Political Approach Through Peace (the experience of Hudaibiyah and Fath of Makkah)

One of the popular historical political occurrences in Islam is the *Fath* of Makkah. The Islamic *Ummah*, led by the Prophet Muhammad SAW, conquered Makkah in the wake of a breach of the *Hudaibiyah* peace treaty. This event is known as *Fathu Makkah* or *Fath* of Makkah. According to one narrative, Makkah was under the hands of at least 10,000 Muslim soldiers without any blood being spilt. In fact, it is conceivable that attempts at retaliation or condemnation of the Makkah Quraish will be made once Muslims successfully seize possession over Makkah. Prophet Muhammad SAW, however, underlined that there is no bloodshed since that momentum is one that establishes the existence of love or peace.[28]

Fath of Makkah is a political event. The confrontation between the Muslims of Medina and the Quraish community of Makkah was settled by the declaration of peace of Prophet Muhammad. Similar circumstances occurred recently in South Africa when Nelson Mandela put an end to the crimes committed under the apartheid system. A political choice that addresses the issue of conflict-based criminality is to choose to reconcile through the Truth and Reconciliation Commission.[29]

4. Conclusion

Crimes that arise from the situations of social conflict must be viewed differently from ordinary crimes. The settlements can be carried out by considering the best interests in the context of resolving conflicts, not only being oriented to the resolution of criminal acts. Some alternatives that can be done is to give more attention to the victim by prioritizing the peace process between the interested parties with a restorative justice approach and finally with the political policies of the power holders. From an Islamic perspective, it is possible to encourage compensation for an incident by starting the process of forgiveness from the victim. Second, the involvement of third parties through the concept of *ishlah*. *Islah* can be done by presenting the conflicting parties, companions and peacemakers. The last is the settlement through political decisions as demonstrated in the event of *fathu* Makkah.

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