

Can Criminal Cases be Settled Amicably? (From the Perspective of Positive Law and Islamic Law)

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ARTICLE INFO	ABSTRACT
Volume: 4 ISSN: 2963-5489 KEYWORD Restorative Justice, Criminal Law, Islamic Law, Peace, Family Settlement, sulh.	This study discusses the settlement of criminal cases through a familial approach from the perspective of positive law and Islamic law. The focus of the study is directed at the interaction between formal legal principles in the Criminal Code (KUHP) and alternative dispute resolution mechanisms, including mediation and restorative justice. Meanwhile, from an Islamic law perspective, the principle of sulh (peace) is an important basis that allows certain criminal cases to be resolved through deliberation. This study uses a normative qualitative approach by examining legal literature, regulations, and the opinions of classical and contemporary scholars. The results of the study show that the settlement of criminal cases through family channels has limited scope in positive law, namely in minor criminal offences, certain criminal offences with complaint offences, and the implementation of restorative justice in accordance with the regulations of the Supreme Court and the Attorney General's Office. Meanwhile, in Islamic law, broader opportunities are provided as long as they are not related to hudud and qishash, but rather jarimah ta'zir, which is entirely at the discretion of the authorities. This researcher concludes that the synergy between positive law and Islamic law in the application of family-based resolution can strengthen the principle of legal benefit in Indonesia.

1. Introduction

The settlement of criminal cases in Indonesia is basically carried out through litigation in court based on the principle of legality. *Nullum delictum nulla poena sine praevia lege poenali*. This means that every criminal act must be resolved through formal legal mechanisms established by the state. However, in practice, it is not uncommon for people to choose amicable settlement as a solution. This raises the question of whether such mechanisms are legally justified under positive law or Islamic law.

In positive law, the fourth paragraph of the preamble to the 1945 Constitution states that the Indonesian state aims to achieve a just and prosperous society in both material and spiritual terms (Efa Rodia Nur, 2016). Meanwhile, from the perspective of positive law, criminal law serves not only to protect victims but also to maintain public order. Therefore, even if the victim and perpetrator agree to reconcile, the state still has the authority to prosecute because the crime is considered to harm the public interest. Thus, criminal acts must be viewed proportionally between the perpetrator and the victim and consider the balance in society. Thus, there are several laws and regulations, including the draft Criminal Code (Hanafi & Amrani, 2019).

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Meanwhile, one appropriate approach to overcoming various legal weaknesses is through restorative justice. The restorative justice approach to resolving criminal cases is considered a new method. Restorative justice is adopted from the concept of justice in the new Criminal Code and Law No. 11 of 2012 concerning the criminal justice system for children (Utami et al, 2023). However, the application of restorative justice certainly has certain requirements, namely the willingness of all parties, a sense of security and freedom from coercion, fair and transparent procedures, the presence of trained facilitators, a focus on accountability and recovery, protection of victims' rights, and the handling of specific cases, because not all criminal cases can be resolved amicably. cooperation with the conventional criminal justice system (Restorative Justice: Definition, Legal Basis, Requirements, and Application, 2025, Legal Information, <https://fahum.umsu.ac.id/info/restorative-justice-pengertian-dasar-hukum-syarat-dan-penerapan/>).

On the other hand, Islamic law or Islamic criminal law (fiqh jinayah) is the Sharia of Allah SWT which regulates legal provisions regarding criminal acts or crimes committed by mukallaf (people who can be burdened with obligations), as a result of understanding the detailed legal arguments from the Qur'an and Hadith (Rosyada, 1992). . Islamic criminal law essentially contains benefits for human life both in this world and in the hereafter. Islamic law, in material terms, contains fundamental obligations for every human being to fulfill. The concept of fundamental obligations in Islamic law places Allah SWT as the holder of all rights (Anggrayni, 2015). Meanwhile, Islamic law itself has long recognized the concept of peace (al-shulh) as a mechanism for dispute resolution, including in criminal cases. Thus, Islamic law strongly emphasizes the resolution of cases outside the judicial mechanism, as can be traced from various concepts in the Qur'an. For example, the concept of islah (peace) as emphasized in (Qs. Al-Hujrat/49: 9)

وَأِنْ طَائِفَتَيْنِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأَصْلَحُوا بَيْنَهُمَا فَإِنْ بَغَتْ إِحْدَاهُمَا عَلَى
الْأُخْرَىٰ فَجَاهِلُوا الَّتِي تَبْغِي حَتَّىٰ تَفِيءَ إِلَىٰ أَمْرِ اللَّهِ فَإِنَّ فَاءَ ت فَأَصْلَحُوا بَيْنَهُمَا
بِالْعَدْلِ وَأَقْسِطُوا إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ ﴿٩﴾

Translation: If two groups of believers are in conflict, reconcile them. If one of them oppresses the other, fight the oppressor until they return to Allah's command. If they return (to Allah's command), reconcile them fairly. Be fair! Indeed, Allah loves those who are fair. Therefore, this study is important to examine the extent to which family-based criminal justice is recognized and limited by the two legal systems.

However, in fact, the concept of restorative justice has begun to be widely applied in various countries, including Indonesia, along with the increasing awareness that criminal punishment is not the only way to resolve legal conflicts (Zher, 2002).

2. Literature Review

Several articles indicate that the settlement of criminal cases through family channels in Indonesia is gaining ground. Modern criminal law must prioritize the protection of society and the restoration of victims' losses, not merely the imposition of punishment. This approach is in line with the spirit of restorative justice (Arief, 2010).

Meanwhile, research by Muladi (2002) explains that restorative justice emphasizes the participation of all parties involved, namely the perpetrator, the victim, and the community. This is in line with the culture of deliberation that exists in Indonesian society, which often prioritizes peace over formal legal confrontation. Restorative justice is an approach to justice based on the philosophy and values of responsibility, openness, trust, hope, healing, and inclusiveness, which focuses on repairing the damage caused by crime, while also encouraging perpetrators to take responsibility for their actions by providing opportunities for those directly affected by the crime, namely the victims, perpetrators, and the community, to identify and address their needs after the crime has occurred, and to seek a solution in the form of healing, reparation, and integration, as well as preventing further harm.

In the context of Islamic law, Az-zuhaili (1997) states that sulh is an agreement to end all forms of quarrels or disputes. Classical scholars such as al-Mawardi (1996) also emphasize that in qisas cases, forgiveness from the victim's family is a form of virtue recommended by Sharia law, replacing it with diyat punishment.

In Islamic law, dispute resolution can be carried out through a familial approach that emphasizes peace and benefit. One of the mechanisms used is *sulh*, which is an agreement to resolve disputes in a familial manner with the aim of achieving peace and harmony. In the Islamic view, *sulh* is an alternative means of dispute resolution to achieve the common good between the perpetrator, the victim, and the community, with complete sincerity, so that the case ends peacefully and fairly, without causing new resentment in the community (Al-Zuhaili, 1985). As Allah says in Surah An-Nisa [4]: 114: "There is no good in most of their secret talks, except for those who enjoin charity, or that which is right, or reconciliation among people."

In Islamic law, there is a concept known as *qisas-diyat*, which provides a space for resolving disputes amicably. *Qisas* is a form of justice in which the perpetrator is punished in proportion to their actions. However, Islamic law also provides leniency in the form of *diyat*, which is a fine, thereby giving the victim's family the option to forgive the perpetrator by accepting *diyat* as a form of amicable settlement (Shihab, 2000). As Allah says in QS. An-Nisa [4]: 92 about *diyat* in cases of unintentional murder, and QS. Asy-Syura [42]: 40 which emphasizes the virtue of forgiveness. The Prophet's hadith also states: "The best resolution is peace" (HR. Abu Dawud).

Contemporary research by Raharjo (2016) also found that the practice of resolving disputes amicably is similar to the principle of *sulh* in Islamic law. Thus, this study is important to see the meeting point between positive law and Islamic law.

3. Methodology

This study uses a normative qualitative approach with a literature review. Primary data was obtained from the Criminal Code, Criminal Procedure Code, National Police Regulations, Attorney General's Office Regulations, as well as classical and contemporary *fiqh* literature. Secondary data was obtained from journals, books, and previous research results.

The analysis was conducted using descriptive-comparative methods. Descriptive methods were used to describe the provisions of positive law and Islamic law related to criminal settlements. Meanwhile, comparative methods were used to examine the similarities and differences between the two, particularly in relation to the scope of cases that can be resolved through a familial approach.

4. Results and Discussion

Under Indonesian positive law, criminal cases can only be settled through family mediation for certain types of crimes. For example, offenses such as defamation or adultery can only be prosecuted if there is a complaint from the victim. If the victim withdraws their complaint, the case can be dismissed (Criminal Code, Articles 72-75). In addition, in minor criminal cases, the police and prosecutors can apply a restorative justice approach in accordance with National Police Chief Regulation No. 8 of 2021 and Attorney General Regulation No. 15 of 2020.

The application of restorative justice in positive law not only provides justice for victims, but also lightens the burden on judicial institutions. For example, minor theft cases involving minors are often better resolved through penal mediation than by bringing the child to court. Thus, the legal objectives of benefit and justice can be better achieved (Arief, 2010).

In Islamic law, the settlement of criminal cases through family channels has a wider scope. In *qishash* cases, the victim's family can choose to demand retribution, forgive unconditionally, or forgive on condition of *diyat*. This choice demonstrates the flexibility of Islamic law in maintaining justice and social harmony.

In *ta'zir* cases, family-based settlements are highly possible because the form of punishment is entirely at the discretion of the judge or ruler. For example, in cases of minor fights, the judge may decide that the parties should reconcile under certain conditions. However, in *hudud* cases such as adultery or theft, amicable settlements are not permitted because they concern the rights of Allah and aim to maintain the public interest (al-Zuhayli, 1997).

Thus, it can be concluded that both Indonesian positive law and Islamic law provide space for the settlement of criminal cases through family channels, albeit with different scopes. Positive law is more limited to certain cases, while Islamic law provides more space except in cases of *hudud* crimes.

5. Conclusion

The settlement of criminal cases through a family-based approach is an important alternative in the legal system. In Indonesian positive law, this is possible in cases of complaint offenses, minor crimes, and through restorative justice policies. In Islamic law, the concept of sulh provides more scope, especially in cases of qishash and ta'zir, with the exception of hudud crimes.

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The settlement of criminal cases through a family-based approach is not only relevant in a practical context, but also reflects the philosophical values that exist within Indonesian society. Within the framework of Indonesian positive law, this approach is in line with the principle of ultimum remedium, which states that criminal law should be used as a last resort after other mechanisms have been exhausted (Muladi, 1995). Furthermore, the policy of restorative justice, which is now being increasingly promoted by law enforcement officials, emphasizes the restoration of social relations, not merely punishment (Zehr, H., 2002). This approach has been widely practiced in cases of minor crimes and complaints, where the role of penal mediation and agreements between the parties can end the legal process (Arief, B.N. 2008).

Meanwhile, in Islamic law, the concept of sulh (peace) has very strong roots in Sharia tradition. Sulh is seen as a mechanism that not only reduces the burden on the courts, but also fosters a spirit of brotherhood and reconciliation among people (Kamali, M.H. 2008). In qishash cases, for example, the victim's family is given the right to forgive the perpetrator in exchange for diyat (compensation), which ultimately removes the obligation to carry out the death penalty (Al-Qur'an Surah Al-Baqarah (2:178). This shows a balance between retributive justice and restorative justice in Islam (Hallaq, W.B. (2009). In ta'zir cases, the scope for reconciliation is broader because it is highly dependent on the discretion of the judge or authority, unlike hudud, which is qat'i and cannot be intervened through family mechanisms (Zuhaili, W. 2011).

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Conflicts of Interest: This article aims to integrate Indonesian positive law and Islamic law in the settlement of criminal cases. The author highlights that national criminal law, particularly the Criminal Code, tends to emphasize retributive or punitive aspects. In contrast, Islamic law opens up opportunities for more humane resolutions through a familial approach, such as sulh (peace), diyat (compensation), and afw (forgiveness).

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