

Implementation of Restorative Justice to Corruption Crimes According to The Perspective of Indonesian Criminal Law And Islamic Law

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ARTICLE INFO	ABSTRACT
<p>Keywords : Restoratife Justice; Korupsi; Hukum Pidana; Hukum Islam.</p> <p>How To Cite : Effendi, E., Wahyuni, F., & Suryani, N. (2023). Implementation of Restorative Justice to Corruption Crimes According to The Perspective of Indonesian Criminal Law And Islamic Law. <i>Nagari Law Review</i>, 6(2), 65-71.</p> <p>DOI : 10.25077/nalrev.v.6.i.2.p.65-71.2023</p>	<p>The restorative settlement seems to be the trend of criminal law enforcement today. The restorative settlement model has been practiced by the criminal justice sub-system ranging from the police, and prosecutors to the courts. Restorative settlement is the concept of a settlement where the interested parties meet to resolve the issue together how to resolve the consequences of the violation in the interest of the common future as well. Nowadays new ideas are emerging that the crime of corruption can be solved through restorative justice. However, there is a need for studies on the application of restorative justice for corruption crimes both from the aspect of Indonesian criminal law and from the aspect of Islamic law. This research is normative research that is descriptive-comparative. That is to provide an overview of the implementation of Restorative Justice in corruption crimes by comparing them according to Indonesian criminal law and Islamic law. The data used are secondary data consisting of primary, secondary, and tertiary legal materials. The analysis stage starts with data collection, data processing, and finally the presentation of data by pulling deductively knots. The application of restorative justice is in the typist because it has no juridical legal basis, the prosecutor or the police, and even the court has no right to represent the victims of state losses, but the community is more entitled. If you want a restorative application to the crime of corruption, then there is a need for a mechanism that must involve public figures more broadly. Similarly, in Islam, corruption is not the same as murder which allows for diyat. Corruption is closer to theft where the law is to cut hands.</p> <p style="text-align: right;">©2023 NALREV. Faculty of Law Universitas Andalas</p>

1. Introduction

The corrupt behavior seems endless. Despite the improvement in the quality of eradication by law enforcement ranging from the police, prosecutors, and the KPK, new corruption cases continue to occur. ¹ The criminal sanctions imposed on perpetrators of corruption are quite severe even though no one has been sentenced to death. ² In addition to having to serve a criminal sentence in the form of imprisonment, corrupt convicts are also required to pay a certain amount of compensation which can be added with the penalty of disenfranchisement of certain rights such as the right to politics. In addition to criminal sanctions, civil servants who are proven to be corrupt are also sentenced to quit as civil servants.

¹ Fuzi Narindrani, 'Penyelesaian Korupsi Dengan Menggunakan Restoratif Justice (Corruption Settlement Using Justice Restoratifs)', *Jurnal Penelitian Hukum De Jure*, 20.4 (2020), 605.

² Denny Latumaerissa, 'Tinjauan Yuridis Tentang Penerapan Ancaman Pidana Mati Dalam Tindak Pidana Korupsi', *Jurnal Sasi*, 20.1 (2014), 8-18 <<https://fhukum.unpatti.ac.id/jurnal/sasi/article/view/341>>.

On the other hand, today's theory of retributive classical punishment has shifted considerably from preventive, rehabilitative, and restorative punishment.³ In society, there are two contradictions, namely the desire to punish perpetrators of corruption with the utmost severity and on the other hand to call for punishment to be imposed according to the modern concept of punishment which is no longer retributive.⁴ In the community, for example, there is a meme with a satirical tone "In China, corruptors are cut their necks, in Arabia their hands are cut off, in Indonesia their prison terms are cut off."

Pro-conviction views on perpetrators of corruption crimes, for example, as in the writings of Aradila Caesar Ifmaini Idris⁵ who denounced the leniency of the crime in a corruption case involving a judge. He stated that in the future, the punishment for the perpetrator of corruption by a judge must be the harshest. The contrary view of severe punishment arises from the opinion of Murpraptono Adhi Sulantoro⁶ which puts more emphasis on the eradication of corruption on the aspect of returning state losses. He was of this view because he considered that the cost of resolving state financial losses due to corruption crimes at the time of disclosure of the corruption case itself, was far greater than the losses that could be recovered by a convicted corruption case.

A similar view also emerged from Rida Ista Sitepu and Yusona Piadi who viewed that the retributive justice paradigm that had been used in the eradication of corruption crimes was no longer relevant in the eradication of corruption, but should shift to the paradigm of restorative justice which is oriented towards recovering state losses due to corruption crimes.⁷ In addition to these two views, the view that the paradigm of eradicating corruption in Indonesia today is oriented towards recovering state losses is getting stronger. The paradigm of restorative justice is indeed a trend in the sentencing system in general, not specifically against corruption crimes alone, even not only in Indonesia, but also in foreign countries.⁸

If we explore the paradigm of Islamic law, the principle of restorative justice is also not new. Restorative justice emphasizes the impact of social injustice in a simple way, rather than providing formal justice to the perpetrator while the victim does not receive any justice.⁹ Restorative The idea in Islam is known by the name of *Ishlah* which is the payment of *diyat* in murder cases.¹⁰

Adopting Islamic values in the Indonesian legal system is not a mistake, it can even be considered appropriate because Islam is the majority religion adopted in Indonesia. This step can be expected to have a higher legal compliance impact because when complying with laws that are in harmony and line with Islamic law, the community has naturally implemented and implemented two legal systems at once, namely state law and Islamic law. But the problem is that the concept of restorative or *diyat* in Islamic Law only applies to the perpetrators of the murder. In the case of corruption, Islam does not know the concept of *diyat*.

³ Chandra Noviardy Irawan, 'Penanganan Tindak Pidana Pembunuhan Yang Dilakukan Oleh Anak Berdasarkan Restorative Justice', *Jurnal Usm Law Review*, 4.2 (2021), 672 <<https://doi.org/10.26623/julr.v4i2.4283>>.

⁴ Noveria Devy Irmawanti and Barda Nawawi Arief, 'Urgensi Tujuan Dan Pedoman Pemidanaan Dalam Rangka Pembaharuan Sistem Pemidanaan Hukum Pidana', *Jurnal Pembangunan Hukum Indonesia*, 3.2 (2021), 220.

⁵ Aradila Caesar Ifmaini Idris, 'Eksaminasi Terhadap Putusan Pengadilan Tindak Pidana Korupsi Pada Pengadilan Negeri Jakarta Pusat Atas Nama Terdakwa Amir Fauzi (Putusan', *Jurnal Integrasi*, 3 (2017), 191-213.

⁶ Idris.

⁷ Idris.

⁸ Ivo Aertsen, 'Recalibrating Victimhood through Restorative Justice: Perspectives from Europe', *Restorative Justice*, 5.3 (2017), 352-67 <<https://doi.org/10.1080/20504721.2017.1390997>>.

⁹ Ahmad Agus Ramdlany, 'Restorative Justice in Islamic Legal Philosophy Perspective', *International Journal of Business, Economics and Law*, 24.2 (2021), 109-17 <<http://152.118.58.226>>.

¹⁰ M Latifah, 'Upaya Transformasi Konsep Jarimah Qisash-Diyat Pada Hukum Positif Melalui RUU KUHP', *Negara Hukum: Membangun Hukum Untuk Keadilan ...*, 2.1 (2011), 129-50 <<http://jurnal.dpr.go.id/index.php/hukum/article/view/188>>.

2. Method

This research is normative research that is descriptive-comparative. That is to provide an overview of the application of Restorative Justice in corruption crimes by comparing them according to Indonesian criminal law and Islamic law. The data used are secondary data consisting of primary, secondary, and tertiary legal materials. After the data is collected, the researcher analyzes it in a descriptive-analytical-comparative way, namely by conducting a study on the punishment of corruption crimes by comparing them according to Indonesian criminal law and Islamic law so that similarities and differences will be found between the two. The analysis stage starts with data collection, data processing, and finally the presentation of data by pulling deductively knots. The deductive conclusion in question is a way of thinking in drawing conclusions drawn from something of a general nature that has already been proven that he is correct and that conclusion is aimed at something special so that it is visible the content of the study.

3. Analysis of Discussion

3.1. Restorative Justice in Corruption According to Indonesian Criminal Law

Restorative justice is defined as a concept of thought in the criminal justice system that involves the community and victims to help determine the form of punishment that can be imposed on the perpetrator.¹¹ So far, in the paradigm of the modern criminal justice system, the interests of victims seem to have been represented by the public prosecutor on behalf of the state. That is the consequence of criminal law as a part of public law where the state has the right to determine the appropriate punishment for the perpetrator. With a restorative settlement, the interested parties meet to resolve the issue jointly on how to resolve the consequences of the breach in the interest of the common future as well.¹²

The restorative settlement seems to be the trend of criminal law enforcement today. The restorative settlement model has been practiced by the criminal justice sub-system ranging from the police, and prosecutors to the courts. Article 70 of the New Criminal Code introduced a new concept of punishment where the crime does not have to be imposed if several conditions are met, including if the loss and suffering experienced by the victim is not too great and the perpetrator has paid compensation to the victim.¹³

Of all the concepts of restorative settlement of cases, one thing in common is that punishment includes the role and opinions of victims of criminal acts. The victim's sense of justice is the main consideration for no longer the need for the role of the state in solving problems that occur in society.

But it is necessary to realize that in criminal acts, not all crimes cause human victims. In certain crimes, the victims are not people but the state, government, or society. These crimes include gambling, drug abuse, and corruption. Those who are harmed in the criminal act are not people per person, but the state, government, or society. Thus, there are difficulties in determining who can be considered a victim or represent a victim.

In the criminal act of corruption, who has the right to be regarded as representing a financially aggrieved country? Is it the government or society that is considered entitled to represent the interests of victims of corruption crimes? If the government or society is considered a victim of corruption, if the state's

¹¹ Irawan.

¹² Hildayastie Hafizah and Surastini Fitriasih, 'Urgensi Penyelesaian Dugaan Kesalahan Medis Melalui Restorative Justice', *Jurnal USM Law Review Vol*, 5.1 (2022), 205–23 <<https://doi.org/http://dx.doi.org/10.26623/julr.v5i1.4884>>.

¹³ Kemenkumham RI, RUU KUHP FINAL, 2022 <<https://webcache.googleusercontent.com/search?q=cache:BDsuQOHoCi4J:https://media.neliti.com/media/publications/9138-ID-perlindungan-hukum-terhadap-anak-dari-konten-berbahaya-dalam-media-cetak-dan-ele.pdf+%&cd=3&hl=id&ct=clnk&gl=id>>.

losses have been returned to the state, the corruption crimes no longer need to be processed by law. Article 4 of Law Number 31 of 1999 as amended by Law Number 20 of 2001 states that the return of state losses does not eliminate the unlawful nature of corruption crimes.

In practice, the provisions of Article 4 seem to be construed defiantly by law enforcement. At the police level, the Chief of Police's Letter No. Pol.B/3022/XII/2009/SDEOPS on the concept of Alternative Dispute Resolution (ADR) was issued, in the first point determining that in the handling of criminal cases that have minor material losses, the settlement can be directed through the ADR concept which prioritizes deliberation between the parties involved. The Circular does not expressly specify that the settlement of corruption crimes can be carried out with the concept of ADR, but the Circular letter can be used to resolve corruption crimes in a restorative manner.¹⁴

In the Prosecutor's Office, the Attorney General's Office issued a Circular letter that the Attorney General's Office of Special Criminal Crimes Number: B113/F/Fd.1/05/2010 which emphasizes that for people who commit corruption crimes with small losses (below Rp. 100,000,000) and have returned their losses, the concept of restorative justice can be used.¹⁵

The existence of circulars from the police and prosecutors that allow the resolution of corruption crimes by restorative means still leaves questions in terms of two aspects, namely the juridical aspect and the practical aspect.

Judging from a juridical aspect, the circular alone does not have strong enough legal force. Judging from the legal basis in the form of a Circular, although it can be considered as part of the legislation, the postulate of the enactment of the circular is very easily broken by the argument of *lex superior derogate legi inferior*. Article 4 of the Typographical Law should be able to defeat the applicability of the Circular.

Furthermore, judging from a practical aspect is about how to determine the feelings of victims of state losses in this case the state that is considered a victim of corruption crimes. In criminal acts in general, it is acceptable to have a mechanism that brings the perpetrator together with the victim where the victim's sense of justice is questioned and asked to help determine what punishment can be imposed on the perpetrator.

In the criminal act of corruption, whether the state's sense of justice about the state's losses has been adequately represented by the prosecutor's office or the police or the courts as victims who can determine that the state has ceased to have suffered losses and is satisfied with the returns made by the perpetrators of corruption. The author rejects that argument because law enforcement should not be able to represent the state in the event of a criminal act of corruption. In essence, those who are harmed in corruption cases are not just the state but the people as the owners of state power. The state money taken by corruptors is people's money because, in a democratic country, the people are the real owners of this country.

If indeed restorative settlements are considered applicable in corruption crimes, then ideally not only the government let alone law enforcement can represent victims of state losses to agree that returns can abolish criminal convictions in corruption cases. But it must involve the opinion and satisfaction of the House or the representatives of the people whether the people have been able to accept the restoration or recovery of the country's losses. In essence, what is harmed by corruption is not just the state, but the people in its largest part. It is supposed that the determination of the sense of justice about the recovery of losses in corruption cases should be repatriated to the sovereign owners, namely the people.

If it is acceptable that the determination of the sense of justice of victims of corruption crimes is represented by the DPR, the following question that arises is whether the DPR can be a trustworthy

¹⁴ Helena Hestaria, Made Sugi Hartono, and Muhamad Jodi Setianto, 'Tinjauan Yuridis Penerapan Prinsip Restorative Justice Terhadap Tindak Pidana Korupsi Dalam Rangka Penyelamatan Keuangan Negara', *Jurnal Komunitas Yustisia*, 5.3 (2022), 112-28 <<https://ejournal.undiksha.ac.id/index.php/jatayu/article/view/51892>>.

¹⁵ Hestaria, Hartono, and Setianto. Ibid

institution to represent the people as victims. There may be an abuse of the people's trust by the House by seeming to have approved it without really paying attention to the opinions and interests of the people it represents.

As a middle ground, a restorative mechanism can be proposed in corruption crimes involving the opinions and views of public figures such as academic groups, religious leaders' groups, indigenous leaders' groups, mass media groups, student and youth groups, community organizations groups to help determine whether, in a case of corruption, the return of state losses can be an antidote to the sense of justice for society?

3.2. The System of Punishment for Corruption in Islamic Law Concerning Indonesian Criminal Law on Corruption

Textually, the term corruption is not explicitly deciphered by the Qur'an. However, if one interpreted the meaning of corruption and its forms, one will find acts commensurate with corruption that are prohibited in Islam. These deeds include *ghulul*, *al-suht*, *hirabah*, and *al-sarq*.¹⁶ Ahmad al-Shawi defines *ghulul* with the meaning of treason, as someone who takes property, valuables, and so on that has value. The Prophet himself expanded the meaning of *ghulul* into two forms: (a) Commission, that is, the act of taking something income beyond the salary that has been given. The Prophet stated that anyone who is appointed to one position and given a salary, then something that is received outside his salary is corruption (*ghulul*). (b) A gift, i.e. a gift obtained by a person because of the position attached to him or herself.¹⁷

Furthermore, what will be discussed in this article is how the system of punishment in Islamic law is against corruption. The system of sanctions in Islamic Law includes three things, namely (1) Jarimah Hudud which applies to crimes that violate the rights of Allah or the public interest, such as stealing or apostasy. (2) Jarimah Qishas which linguistically means to cut, while in terms it means punishment for people who commit crimes concerning human rights such as killing. (3) Jarimah Ta'zir, derived from the word 'azzara which according to language means to denounce, that is, the prohibition regulation whose criminal acts and threats of punishment are not expressly mentioned in the Qur'an, but are left entirely to the wisdom of the judge/ruler.¹⁸ Looking at the punishment system in Islamic Law, the legal sanctions of *qishos* certainly cannot be applied, because corruption is different from the crime of theft which has been legalized in *nash* (Qur'an).¹⁹

By not being able to equalize the punishment of corruption either by theft or murder, the legal system of *qisos* and *hudud* cannot be applied to corruption crimes, so the concept of restorative or *diyat* also cannot be applied to corruption crimes. If corruption is equated with theft, then sura al-Maidah verse 38 applies: It means: "men who steal and women who steal, cut off the hands of both (as) retribution for what they do and as a torment from Allah. And Allah is Mighty and All-Wise. (Q.S al Maidah/ 5: 38). In the corruption case three elements can be taken into consideration for the judge in determining the amount of punishment, first, depriving others of property, second, treason and abuse of authority, third, cooperation in committing crimes.²⁰ With the inability to equate corruption with murder, the concept of restorative justice in corruption cases should not be applied. Because corruption in Islam is closer to theft, treason, and bribery, the punishment that should be imposed is the punishment of cutting hands whereas, in the application of the law of cutting hands, there is no known restorative settlement, but must be carried out as it is.

¹⁶ Syaiful Ilmi, 'Melacak Term Korupsi Dalam Al-Qur ' an Sebagai Epistemologi Perumusan', Journal Khatulistiwa-Journal of Islamic Studies, 1.1 (2011), 1-14.

¹⁷ Ilmi. *Ibid*

¹⁸ *Ibid*

¹⁹ Syamsul Anwar, 'Korupsi Dalam Perspektif Hukum Islam', Jurnal Hukum IUS QUIA IUSTUM, 15.1 (2008), 14-31 <<https://doi.org/10.20885/iustum.vol15.iss1.art8>>.

²⁰ Havizal Wendra, 'Disparitas Pidana Kasus Korupsi Dalam Pandangan Hukum Islam Dan Hukum Positif Indonesia (Studi Pidana Terhadap Kasus Korupsi Di Pengadilan Negeri Jakarta Selatan)', UIN Syarif Hidayatullah Jakarta, 2010.

4. Conclusion

Based on the discussion above, the settlement of corruption through the restorative justice model has no legal basis judging from the statutory order in which the Circulation Letter of the Attorney General of Edaran should not be able to defeat the Law. The prosecutor's office or the police do not even have a strong argument to represent the state as a victim of corruption. If it is indeed seen as such a necessity to resolve corruption cases in a restorative manner, then the determination of victims' opinions must include broader public figures. Similarly, when viewed from the perspective of Islamic law, the settlement of corruption crimes by restorative justice also does not have a strong legal basis because corruption crimes are not the same as murder whereas the concept of restorative settlement through the concept of *diyat* is only possible to be applied in murder cases.

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