

CHAPTER I

INTRODUCTION

A. Background

The settlement of criminal cases in Indonesia can be done through processes and methods that exist in court and outside the court. Settlement of criminal cases outside the court can be pursued through a mediation mechanism that brings together to find mutual agreement. This process is known as victim-offender mediation or penal mediation. Settlement of criminal cases outside the court is often done with the concept of restorative justice. The concept of restorative justice is how to solve cases outside the court. This concept has long existed about twenty years ago as another option for solving criminal cases. John Braithwaite states that restorative justice is a new direction between "*justice*" and the "*welfare model*" and between "*retribution*" and "*rehabilitation*".¹

Countries such as North America, Australia, and parts of Europe have applied the concept of restorative justice at all stages of case resolution starting from the investigation and prosecution process, the adjudication stage, and the execution of imprisonment.² The efforts of other countries to implement restorative justice are increasingly massive such as the United Kingdom, Canada, Australia, Finland, Germany, the United States of America, Canada,

¹ John Braithwaite, *Restorative Justice and Responsive Regulation* (University Press, Oxford, 2020).

² Eriyantouw Wahid, *Restorative Justice and Conventional Justice in Criminal Law* (Jakarta: Trisakti University, 2009), p. 1

South Africa, Colombia, Cambodia, and Jamaica. This effort is carried out because a quo has been regulated in the UN Convention. In the Handbook on Restorative Justice, Programmes published by the United Nations explains that: "*Restorative Justice is an approach to problem-solving that, its various forms, involves the victim, the offender, their social networks, justice agencies, and the community*".³

The law that always develops following social changes encourages Indonesian society to rethink the concept of solving criminal cases. Therefore, the discussion is carried out by looking towards the application of case resolution with restorative justice. The Medium-Term Development Plan (RPJMN) for 2020 to 2024 to Presidential Regulation Number 18 of 2020 has outlined the future direction regarding law in Indonesia. That one of the goals of legal development is to apply restorative justice methods.

The application of restorative justice in Indonesia has been regulated in the Circular Letter (*Surat Edaran, SE*) of the Chief of the Indonesian National Police (*Kepala Kepolisian Republik Indonesia, Kapolri*) No. SE/8/VII/2018 of 2018 on the Application of *Restorative Justice* for the Resolution of Criminal Cases, Regulation of the Chief of Police No. 6 of 2019 on Investigation of Criminal Acts and regulated in Prosecutor's Regulation No. 15 of 2020 on Termination of Prosecution. In addition, the Supreme Court (*Mahkamah Agung, MA*) issued guidelines for the implementation of

³ United Nations, 2006, *Handbook on Restorative Justice Programmes*, New York: United Nations Publication, p. 6.

restorative justice contained in the Decree (*Surat Keputusan, SK*) of the Director General of the General Court Agency (*Direktorat Jenderal Badan Peradilan Umum, Dirjen Badilum*) MA Number: 1691/DJU/SK/PS.00/12/2020 on the Implementation of Guidelines for the Application of Restorative Justice consisting of five pages and 15 annexes signed by the Director General of Badilum on December 22, 2020.⁴

However, the concept of the restorative justice approach is still widely debated. Related to how restorative justice practices are carried out by law enforcement to fight for justice. As stated by the Coordinating Minister for Political, Legal, and Security Affairs (Menko Polhukam), Mahfud MD, the desire to solve cases through restorative justice is only in books. While in direct practice in the field, there is none. That internalization of the values of the exercise of justice does not exist. Mahfud MD illustrated that law enforcement agencies such as the police below have carried out the practice of solving cases through restorative justice, but on the contrary, the top officers do not show the same.⁵

Criminal sanctions are the *ultimate remedy* so that criminal sanctions are not immediately given in a case for these despicable acts. In the settlement of a case, it is known that there are two settlements, namely through litigation

⁴ Sabir Luluhu, 2021, *Supreme Court Issues Guidelines for the Application of Restorative Justice in Criminal Cases*, <https://nasional.sindonews.com/read/288400/13/ma-terbitkan-pedoman-penerapan-keadilan-restoratif-dalam-perkara-pidana-1609639270>, (accessed December 12, 2022, 12:55 PM.)

⁵ Achmad Nasudin Yahya dan dani Prabowo, 2021, *Mahfud: Restorative Justice Tendencies Sometimes Only in Books*, <https://nasional.kompas.com/read/2021/11/04/17474871/mahfud-kecenderungan-restorative-justice-kadang-kala-hanya-ada-di-buku>, (accessed December 23, 2022, 8:25 PM.)

and non-litigation. However, so far the criminal justice system in Indonesia still revolves around criminal solutions that are oriented towards retributive goals, namely retaliation, and do not pay attention to the role of victims who have the right to participate in determining the case process.⁶

Based on the explanation above, a more in-depth study of how the concept of restorative justice is practiced directly by law enforcement. Therefore, the author is interested in discussing this research which is then explained in detail in the form of an Undergraduate Thesis with the title "**RESTORATIVE JUSTICE: ITS CONCEPTS AND APPLICATION ACCORDING TO ISLAMIC LAW AND INDONESIAN LAW**". Through this research, the author focuses on the study of how the application of restorative justice applies in the legal environment in Indonesia and how the concept of restorative justice compares between law in Indonesia and the concept of Islamic law.

B. Research Question

Based on the background of the research above, the author formulates two research questions as follows:

1. What is the concept and application of restorative justice in Islamic Law?
2. What is the concept and application of restorative justice in Indonesia?

C. Research Objectives

1. To know the concept and application of restorative justice in Islamic Law.

⁶ Kanwil jabar, 2021, *Restorative Justice Can Be a Problem Solver Overcrowding in Lapas/Rutan*, <https://jabar.kemenkumham.go.id/berita-kanwil/berita-utama/restorative-justice-bisakah-jadi-pemecah-masalah-overcrowding-di-lapas-rutan>, (accessed December 19, 2022, 10:47 PM.)

2. To know the concept and application of restorative justice in Indonesia.

D. Research Benefits

This research is expected to provide benefits both theoretically and practically. Theoretically, this research is expected to provide benefits to enrich knowledge, especially in the treasures of legal knowledge, and more specifically related to how the concept of restorative justice compares with the concept of Islamic law for students, researchers, lecturers, and educational institutions in Indonesia.

As a practical matter, this research is expected to provide input or thoughts for the State, especially the Government and Law Enforcement who are practically directly involved in solving legal cases. Therefore, the concept of restorative justice in this study is expected to have an important meaning in law enforcement that prioritizes a sense of justice.