



## **Convergence of Restorative Justice and *al-'Afwu*: Reforming Criminal Procedure Law in Indonesia**

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**Abstract:** The legal regulation on restorative justice in Indonesia, which allows for the forgiveness of perpetrators of criminal acts and the termination of their cases, is still limited to internal law enforcement regulations, not at the level of law, except in relation to the juvenile criminal justice system. The practice of this theoretically problematic regulatory model is feared to give rise to disparate practices in handling cases, which could undermine justice and legal certainty, making the renewal of criminal procedural law a necessity. Regarding this reason, this conceptual article explores the forgiveness of perpetrators of criminal acts through restorative justice, aiming to find common ground with the concept of *al-'afwu*, as outlined in Islamic law, for the renewal of criminal procedural law in Indonesia. This article is included as socio-legal research, utilising a statutory, conceptual, and religious approach (Islamic legal studies). Its analysis is descriptive and prescriptive, drawing on primary and secondary legal materials collected and inventoried, particularly in relation to several emerging concepts regarding restorative justice and *al-'afwu*. The research results found, *First*, legal regulations regarding the forgiveness of perpetrators of criminal acts need to be regulated in law. *Second*, it can only be applied to specific criminal acts. *Third*, forgiveness occurs when the victim or the victim's family forgives. *Fourth*, forgiveness must be determined by a judge. *Fifth*, forgiveness does not eliminate the perpetrator's criminal liability, but it can reduce or mitigate the punishment.

**Keywords:** restorative justice; *al-'afwu*; criminal procedure law.

**Abstrak:** Pengaturan hukum tentang *restorative justice* di Indonesia, yang memungkinkan adanya pemaafan terhadap pelaku tindak pidana berikut penghentian perkaranya, masih sebatas pada aturan internal penegak hukum, bukan pada tatatan undang-undang, kecuali terkait sistem peradilan pidana anak. Praktik atas model pengaturan yang problematik secara teoritik tersebut dikhawatirkan akan menimbulkan praktik disparitas penanganan perkara yang akan mengesampingkan keadilan dan kepastian hukum, sehingga pembaruan hukum acara pidana adalah

suatu keniscayaan. Untuk itu, artikel konseptual ini memilih isu pemaafan terhadap pelaku tindak pidana melalui *restorative justice* dan mencoba mencari suatu titik temu dengan konsep *al-'afwu* menurut hukum Islam untuk pembaruan hukum acara pidana di Indonesia. Artikel ini termasuk sebagai penelitian *socio-legal* dengan menggunakan pendekatan perundang-undangan, konseptual, dan agama (studi hukum Islam) dan analisisnya bersifat deskriptif-preskriptif melalui bahan hukum primer serta sekunder yang dikumpulkan sekaligus diinventarisasi, khususnya berkaitan dengan beberapa konsep yang berkembang mengenai *restorative justice* dan *al-'afwu*. Hasil penelitian menemukan, *Pertama*, pengaturan hukum mengenai pemaafan terhadap pelaku tindak pidana perlu untuk diatur dalam undang-undang. *Kedua*, hanya dapat diterapkan untuk tindak pidana tertentu. *Ketiga*, pemaafan terjadi karena memang dimaafkan oleh korban atau keluarga korban. *Keempat*, pemaafan harus ditetapkan oleh hakim. *Kelima*, pemaafan tidak menghapuskan pertanggungjawaban pidana pelaku, tetapi dapat mengurangi atau mengganti pidana.

**Kata Kunci:** *restorative justice*; *al-'afwu*; hukum acara pidana.



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## Introduction

The concept of forgiveness can be found in criminal law, for example, when discussing the reasons for mitigating or eliminating criminal penalties. Doctrine in criminal law recognises the existence of reasons for forgiveness (*schulduitsluitingsgronden*). Reasons for the elimination of criminal penalties, which are grounds for forgiveness, absolve the perpetrator of their mistakes.<sup>1</sup> This suggests that the perpetrator does not deserve punishment but rather forgiveness.<sup>2</sup> The judge provides forgiveness through his decision.<sup>3</sup> Reasons for forgiveness, as outlined in the 1946 Criminal Code (KUHP 1946), encompass several forms. First, the inability to be responsible, which is regulated in Article 44 of the KUHP 1946. Second, coercive power in the narrow sense, which is regulated in Article 48 of the KUHP 1946. Third, excessive coercive defence is regulated in Article 49, paragraph (2) of the KUHP 1946. Fourth, invalid office orders are regulated in Article 51 paragraph (2) of the KUHP 1946.<sup>4</sup> However, the problem is that the legal regulations and

<sup>1</sup> Bambang Poernomo, *Asas-Asas Hukum Pidana* (Ghalia Indonesia, 1981), 193.

<sup>2</sup> Roeslan Saleh, *Perbuatan Pidana Dan Pertanggungjawaban Pidana: Dua Pengertian Dasar Dalam Hukum Pidana* (Aksara Baru, 1983), 125.

<sup>3</sup> Hamdan, "Alasan Penghapus Pidana," in *Hukum Pidana Materiil Dan Formil*, ed. Topo Santoso and Eva Achjani Zulfa (USAID, The Asia Foundation, dan Kemitraan, 2015), 256.

<sup>4</sup> Poernomo, *Asas-Asas Hukum Pidana*, 193. See also, Sofjan Sastrawidjaja, *Hukum Pidana (Asas Hukum Pidana Sampai Dengan Alasan Peniadaan Pidana)* (Armico, 1995), 218-19.

practices of restorative justice in Indonesia permit forgiveness by overlooking several articles in the KUHP 1946.

In Islamic law studies, the concept of *al-'afwu* is a key area of discourse on forgiveness. In Islamic law, this concept refers to the forgiveness of perpetrators of criminal acts, either in the form of leniency or an absolute pardon.<sup>5</sup> The heirs of the victims<sup>6</sup> and judges<sup>7</sup> can provide *al-'afwu* before the case is decided in court. Meanwhile, leaders can provide *al-'afwu* to perpetrators of crimes, either before the court chooses to or after the court decides, on the condition that the perpetrator has repented. Thus, in the concept of *al-'afwu*, the authority to provide forgiveness for perpetrators of criminal acts can be exercised by various parties, including any branch of power, not just judges, who are the traditional bearers of judicial power. Such a concept warrants further study, and perhaps its values can serve as an inspiration for reforming criminal law in Indonesia, particularly in the area of criminal procedural law. Moreover, Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code (KUHP 2023), in Article 54 paragraph (1) letters j and k, for example, carries the spirit of restorative justice; thus, it requires an update to criminal procedural law that provides legal certainty through a forgiveness mechanism.

The concept of *al-'afwu* discussed in this article is not the same as *rukhsah* in worship. *Rukhsah* is a concession in worship granted by God under certain circumstances. At the same time, *al-'afwu* is an institution of Islamic criminal law that applies only to *qisās-diyāt* (the right of the victim's guardian to forgive) and, to a certain extent, to *ta'zīr* (judgmental discretion). Therefore, *al-'afwu* does not apply to *hudud*, because *hudud* is a divine right that cannot be abrogated by forgiveness.

In the context of Islamic criminal law, the term *al-'afwu* must be understood carefully. It only applies authoritatively to *qisās-diyāt* (the right of the victim's guardian to forgive), while in *ta'zīr* it is more appropriately understood as a reduction in punishment, not an absolute exemption from responsibility. Thus, the perpetrator remains responsible as a *mukallaf*, but the form of sanction can be adjusted according to the severity of the violation, motive, and public interest. *Hudud* remains non-negotiable. Furthermore, silence or helplessness under duress

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<sup>5</sup> See, among other things, Jama'ah min Kibar al-Lughawiyin Al-'Arab, *Al-Mu'jam al-'Araby al-Asasy Li al-Nathiqin Bi al-'Arabiyah Wa Muta'Alimiha* (Larus, 2003), 851; Abdul Karim Al-Lahim, *Al-Muthli' Ala Daqaiq Zad al-Mustaqni'* (Dar Kunuz Isybiliya, 2011), 276.

<sup>6</sup> Wizarah Al-Auqaf, *Mausu'ah al-Fiqhiyah al-Kuwaitiyah* (Wizarah al-Auqaf wa al-Syu'un al-Islamiyah, 1990), 167–80.

<sup>7</sup> Marsaid, *Al-Fikih al-Jinayah (Hukum Pidana Islam)* (Rafah Press, 2020), 193–97.

cannot necessarily be considered consent, as Islamic law clearly distinguishes between consent and acceptance.

The concept of *al-'afwu* in Islamic criminal law is limited to *qīṣās-diyāt* (the right of the victim's guardian to forgive) and, to a certain extent, *ta'zīr* (the discretion of the judge or ruler). Meanwhile, *ṣulḥ* emphasises the mechanism of reconciliation between two parties through a peace agreement. Thus, *al-'afwu* and *ṣulḥ* are related, but not identical: *al-'afwu* is the act of forgiveness, while *ṣulḥ* is the peace contract. Both can function as instruments to stop prosecution, but their scope of application does not include *hudud*, which is a matter of divine right.

In the field of criminal law studies, the concept of forgiveness is reflected in the legal regulations and practices related to restorative justice. Historically<sup>8</sup>, restorative justice has been viewed as a novel approach to addressing dissatisfaction with the current criminal justice system's performance.<sup>9</sup> Focusing on active involvement between perpetrators, victims, and the community.<sup>10</sup> Its implementation is seen as reducing the increase in the number of inmates in correctional institutions and providing solutions to resolve social conflicts, thus presenting substantial justice for victims, perpetrators, and the community<sup>11</sup>. In traffic cases, for example, its implementation is considered adequate, but problematic from a legal aspect<sup>12</sup>, because the resolution must go through an integrated criminal justice system<sup>13</sup> as a consequence of adopting the crime control model,<sup>likewise</sup> in the resolution of domestic

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<sup>8</sup> You can read more, among others, in John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002), 3.; Septa Candra, "Restorative Justice: Suatu Tinjauan Terhadap Pembaharuan Hukum Pidana Di Indonesia," *Jurnal Rectsvinding* 2, no. 2 (2013): 269-70.; Hariman Satria, "Restorative Justice: Paradigma Baru Peradilan Pidana," *Jurnal Media Hukum* 25, no. 1 (2018): 116-19.; I Made Tambir, "Pendekatan Restorative Justice Dalam Penyelesaian Tindak Pidana Di Tingkat Penyidikan," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 8, no. 4 (2019): 555-56.; and Ahmad Faizal Azhar, "Penerapan Konsep Keadilan Restoratif (Restorative Justice) Dalam Sistem Peradilan Pidana Di Indonesia," *Mahkamah: Jurnal Kajian Hukum Islam* 4, no. 2 (2019): 137.

<sup>9</sup> Candra, "Restorative Justice: Suatu Tinjauan Terhadap Pembaharuan Hukum Pidana Di Indonesia," 266; Agung Ardiyansyah, "Implementation of Restorative Justice as an Effort to Resolve Minor Criminal Acts in the Criminal Justice System in Indonesia," *International Journal of Social Science and Human Research* 08, no. 04 (2025), <https://doi.org/10.47191/ijsshr/v8-i4-28>.

<sup>10</sup> Emmanuel Ariananto Waluyo Adi, "Penal Mediation as the Concept of Restorative Justice in the Draft Criminal Procedure Code," *Lex Scientia Law Review* 5, no. 1 (2021): 139-64, <https://doi.org/10.15294/lesrev.v5i1.46704>.

<sup>11</sup> Moch Choirul Rizal, "Mediasi Penal Perspektif Hukum Pidana Islam," *Ulul Albab* 18, no. 1 (2017): 44, <https://doi.org/10.18860/ua.v18i1.4098>.

<sup>12</sup> Usman and Andi Najemi, "Mediasi Penal Di Indonesia: Keadilan, Kemanfaatan, Dan Kepastian Hukumnya," *Undang: Jurnal Hukum* 1, no. 1 (2018): 68.

<sup>13</sup> J.E. Sahetapy, *Hukum Pidana* (Liberty, 1996), 7; Nurul Putri Awaliah Nasution et al., "The Concept of Restorative Justice in Handling Crimes in the Criminal Justice System," *European Journal of Law and Political Science* 1, no. 5 (2022): 32-41, <https://doi.org/10.24018/ejpolitics.2022.1.5.37>.

violence.<sup>14</sup> Behind the success story that is narrated<sup>15</sup>, the fact that there are no regulations in law, limitations on the types of criminal acts that can be addressed through the restorative justice approach, and the clarity of the division of authority in resolving them need to be discussed further.

Previous studies, descriptively, can explain the contribution of restorative justice (which is regulated and practised in Indonesia), which is quite significant in alternative mechanisms for resolving criminal cases. However, instead of providing a clear prescription regarding the nature of restorative justice, the legal regulations and their implementation relatively open up space for disparities in the handling of criminal cases, potentially leading to abuse of authority. This problem, if left unaddressed, can lead to corrupt actions that are highly disruptive to the pursuit of justice through legal means. Therefore, updating the regulation of restorative justice is a necessity, as it involves tracing the concept of *al-'afwu* in Islamic law to explore its values. This article addresses three primary issues. First, the mechanism of forgiveness through restorative justice. Second, the mechanism of forgiveness in Islamic law. Third, the possibility of convergence between the concept and practice of restorative justice and Islamic law on the issue of forgiveness for perpetrators of criminal acts, as a means to renew the criminal procedure law in Indonesia. Thus, this article, in turn, provides a prescription regarding alternative mechanisms for resolving criminal cases (in the renewal of criminal procedural law) that do not only rely on the concept of restorative justice, but also receive significant input from the values in *al-'afwu*.

This article departs from the theoretical framework that forgiveness of perpetrators of criminal acts can only be regulated by law, and only judges have the authority to forgive. This means that the authority to implement it lies with the judicial power, specifically the judge, not with other law enforcement officers, such

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<sup>14</sup> From 2015 to 2018, at the Makassar District Police, it was recorded that 40 out of 256 cases were completed without any criminal charges being imposed by the court. See, Andi Rahmah and Samsiar Arief, "Implementasi Mediasi Penal Dalam Penyelesaian Kasus Kekerasan Dalam Rumah Tangga (KDRT)," *Petitum* 6, no. 1 (2018): 15–16. In the same period, at the Sidoarjo District Police, there were 59 out of 67 cases of domestic violence resolved through penal mediation. This "success" was based on the background of social interactions that prioritize the principles of family, kinship, and cooperation. Such a community profile fosters a sense of tolerance, is not difficult to forgive, and also prioritizes common interests. Read more, Emy Rosnawati et al., "Mediasi Penal Sebagai Alternatif Penyelesaian Perkara Kekerasan Dalam Rumah Tangga," *De Jure: Jurnal Hukum Dan Syari'ah* 10, no. 2 (2018): 61–71. See also, Aria Zurnetti and Nani Muliati, "Customary Criminal Law Policy on Domestic Violence Settlement Through Restorative Justice," *Cogent Social Sciences* 8 (2022): 1–12, <https://doi.org/10.1080/23311886.2022.2090083>.

<sup>15</sup> Other cases include adultery, theft, abuse, insults, and embezzlement, which can be read in full in Moch Choirul Rizal, "Konsepsi Mediasi Penal Dalam Rancangan Undang-Undang Tentang Hukum Acara Pidana Di Indonesia," *Jurnal Peradilan Indonesia Teropong* 8 (2020): 34–39.

as the police or the prosecutor's office. Thus, there is no termination of the investigation or inquiry process when there is a possibility that the perpetrator of the crime will be forgiven. This limited theoretical framework, in addition to providing important affirmation on the aspects of legal certainty and the achievement of justice, is also intended to reduce disparities in the handling of criminal cases and the abuse of authority in the application of restorative justice. Therefore, this article is compiled using a socio-legal research method, allowing for the intertwining of legal and non-legal aspects to address the issues outlined above. Consequently, the approaches used are more diverse, namely legislation, conceptual, and religious (referring to Islamic law studies). To address the issues studied, secondary and tertiary data were collected, inventoried, and utilised as a theoretical basis for conducting descriptive and prescriptive analysis.

### **Mechanism of Forgiveness Through Restorative Justice**

Restorative justice views that what is meant by victims is not only victims of criminal acts but also society, the state, and the offenders themselves.<sup>16</sup> The meaning of restoration in restorative justice is broader than just providing compensation to victims. The impact of a criminal act extends not only to the suffering experienced by the victim but also to the community.<sup>17</sup> Criminal acts are violations of human rights and human relations.<sup>18</sup> Restorative justice focuses on solutions that restore social relations and promote social justice when these have been violated.<sup>19</sup>

According to restorative justice, direct participation from the perpetrator, the victim, and the community is key to resolving criminal cases.<sup>20</sup> Whatever the

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<sup>16</sup> Usman and Najemi, "Mediasi Penal Di Indonesia: Keadilan, Kemanfaatan, Dan Kepastian Hukumnya," 77.

<sup>17</sup> Nurul Putri Awaliah Nasution et al., "The Restorative Justice: Ideality, Reality, and Problems in The Indonesia Criminal Justice System," *Rechtsidee* 10, no. 2 (2022): 10.21070/jihr.v11i0.775-10.21070/jihr.v11i0.775, <https://doi.org/10.21070/jihr.v11i0.775>.

<sup>18</sup> Hanafi Arief and Ningrum Ambarsari, "Penerapan Prinsip Restorative Justice Dalam Sistem Peradilan Pidana Di Indonesia," *Al-'Adl* 10, no. 2 (2018): 174.

<sup>19</sup> Ismawansa et al., "Restorative Justice in Indonesian Criminal Law: Integrating Pancasila Values in Police Discretion Practices," *International Journal of Innovative Research and Scientific Studies* 8, no. 2 (2025): 1978–85, <https://doi.org/10.53894/ijirss.v8i2.5589>.

<sup>20</sup> See, among other things, in Candra, "Restorative Justice: Suatu Tinjauan Terhadap Pembaharuan Hukum Pidana Di Indonesia," 265.; Kristian and Christine Tanuwijaya, "Penyelesaian Perkara Pidana Dengan Konsep Keadila Restoratif (Restorative Justice) Dalam Sistem Peradilan Terpadu Di Indonesia," *Jurnal Mimbar Justitia* 1, no. 2 (2015): 596.; and Walim Walim, "The Concept of Restorative Justice in the Criminal Legal System: A Breakthrough in Legal Benefits," *International Journal of Law Reconstruction* 8, no. 1 (2024): 100–110, <https://doi.org/10.26532/ijlr.v8i1.36726>.

background<sup>21</sup>. This differs from the conventional mechanism, which involves punishment through a court decision.<sup>22</sup> The reason is that the approach to restorative justice is socio-cultural,<sup>23</sup> not normative. Consequently, law enforcement must act progressively. One of the offers is to break the rules to achieve the justice expected by society.<sup>24</sup>

It is hoped that the implementation of restorative justice can provide a more just outcome for victims, perpetrators, and society.<sup>25</sup> Restorative justice transforms the relationship between culture and the government, allowing it to return to its original state before the crime occurred.<sup>26</sup> The involvement of perpetrators, victims, and the community is essential for realising efforts to repair and reconcile, as well as ensuring the sustainability of these recovery efforts.<sup>27</sup> Meetings between interested parties involved in the occurrence of a crime and the period afterwards are the primary application of restorative justice.<sup>28</sup>

Restorative justice also requires collaborative efforts among the parties, the community, and the government to create a harmonious environment, allowing conflicts to be reconciled. *Mutatis mutandis* establishes a sense of security in society.<sup>29</sup> Apart from legal certainty, restorative justice can reduce unrest as a benefit of fair

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<sup>21</sup> Yousra Ibrahim Hasona and Ibrahim Khatib, "Prosecuting Child Soldiers in the Arab World: Between the State, Society, and Retributive and Restorative Justice," *Contemporary Justice Review* 25, no. 1 (2022): 104, <https://doi.org/10.1080/10282580.2022.2028142>.

<sup>22</sup> Bambang Waluyo, *Viktimologi Perlindungan Saksi Dan Korban* (Sinar Grafika, 2011), 8. See also, Laurel Sharpless et al., "Associations Between State-Level Restorative Justice Policies And Mental Health Among Women Survivors Of Intimate Partner Violence," *SSM-Mental Health* 2 (2022): 2, <https://doi.org/10.1016/j.ssmmh.2022.100085>.

<sup>23</sup> Marlina and Mahmud Mulyadi, "Building Restorative Justice in Gampong as a Bottom-up Legitimation of the Protection of Children in Conflict with the Law in Indonesia: Case Study in Aceh," *Cogent Social Sciences* 10, no. 1 (2024): 8, <https://doi.org/10.1080/23311886.2024.2347410>.

<sup>24</sup> Arief and Ambarsari, "Penerapan Prinsip Restorative Justice Dalam Sistem Peradilan Pidana Di Indonesia," 176-78.

<sup>25</sup> Rena Yulia, "Penerapan Keadilan Restoratif Dalam Putusan Hakim: Upaya Penyelesaian Konflik Melalui Sistem Peradilan Pidana (Kajian Putusan MA Nomor 653/K/Pid/2011)," *Jurnal Yudisial* 5, no. 2 (2012): 226.

<sup>26</sup> Joko Budi Darmawan et al., "Incorporating Islah Principles into Restorative Justice: Bridging Contemporary Legal Practice and Islamic Values," *MILRev: Metro Islamic Law Review* 4, no. 1 (2025): 269-94, <https://doi.org/10.32332/milrev.v4i1.10435>.

<sup>27</sup> Muhaimin, "Restorative Justice Dalam Penyelesaian Tindak Pidana Ringan," *Jurnal Penelitian Hukum De Jure* 19, no. 2 (2019): 205.

<sup>28</sup> Achmad Ali, *Menguak Teori Hukum (Legal Theory) Dan Teori Peradilan (Judicial Prudence)* (Kencana, 2009), 247.

<sup>29</sup> Yulia, "Penerapan Keadilan Restoratif Dalam Putusan Hakim: Upaya Penyelesaian Konflik Melalui Sistem Peradilan Pidana (Kajian Putusan MA Nomor 653/K/Pid/2011)," 233.

law enforcement.<sup>30</sup> From the perpetrator's perspective, he is prepared to return to being a good and responsible citizen in society.<sup>31</sup>

Departing from the concepts and practices above, the meaning of restorative justice in responding to a criminal act that occurs involves first identifying and taking efforts to repair the losses caused. Second, the involvement of all related parties, including perpetrators, victims, and the community. Third, seek to transform the relationships that exist after a crime occurs by actively involving the community and the government. In this way, restorative justice in practice emphasises healing, learning, morals, community participation, attention, dialogue, forgiveness, responsibility, and seeking change.<sup>32</sup>

The activity of the parties involved in resolving criminal cases is intended to mitigate negative consequences and increase the likelihood of returning to the original construction. Such practices are viewed as efforts to encourage the peaceful expression of conflicts that arise, promote tolerance and inclusiveness, respect for diversity, and foster responsible societal practices.<sup>33</sup> However, the initial and essential thing is that these efforts are based on the victim's willingness to forgive the perpetrator of the crime. Therefore, in this section, we will examine the regulations regarding forgiveness for perpetrators of criminal acts in Indonesia's legal policies related to restorative justice.

Legal regulations that directly mention the term "restorative justice" can be found in the Circular Letter of the Chief of Police Number SE/8/VII/2018, dated 27 July 2018, concerning the Implementation of Restorative Justice in the Settlement of Criminal Cases (SE Kapolri No. SE/8/VII/2018). There is not a single article in the SE Kapolri No. SE/8/VII/2018, which directly mentions forgiveness for perpetrators of criminal acts (this circular uses the term "criminal perpetrators"). However, investigators can terminate investigations if a resolution of a criminal case is achieved through a restorative justice approach (see, for example, letter c, SE Kapolri No. SE/8/VII/2018). One of the conditions that must be fulfilled is the

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<sup>30</sup> Candra, "Restorative Justice: Suatu Tinjauan Terhadap Pembaharuan Hukum Pidana Di Indonesia," 268.

<sup>31</sup> Yeni Nuraeni and L. Alfies Sihombing, "Kebijakan Hukum Pidana Terhadap Restorative Justice Dalam Perspektif Hak Asasi Manusia," *Jurnal Hukum Positum* 4, no. 1 (2019): 92.

<sup>32</sup> Henny Saida Flora, "Keadilan Restoratif Sebagai Alternatif Dalam Penyelesaian Tindak Pidana Dan Pengaruhnya Dalam Sistem Peradilan Pidana Di Indonesia," *UBELAJ* 3, no. 2 (2018): 147–48. See also, Jahyun Chun, "Enforced Reconciliation without Justice: The Absence of Procedural, Retributive, and Restorative Justice in the 'Comfort Women' Agreement of 2015," *Asian Journal of Social Science* 49 (2021): 86, <https://doi.org/10.1016/j.ajss.2020.09.001>.

<sup>33</sup> United Nations Office on Drugs and Crime (UNODC), *Handbook on Restorative Justice Programmes* (United Nations, 2006), 5.



existence of a statement of peace between the reporter and the reported party (see number 3 letter b SE Kapolri No. SE/8/VII/2018). It can be assumed that in this piece, the victim shows forgiveness towards the suspect.

In number 2 letter f SE Kapolri No. On 8 July 2018, the peace agreement and the revocation of the victim's right to sue require a judge's decision, through the public prosecutor, to revoke the authority to sue both the victim and the public prosecutor. However, the circular gives the authority to terminate investigations or inquiries to the Head of the Resort Police (at the Resort Police and Sector Police level) or the Director of Criminal Investigation (at the Regional Police level or the National Police Headquarters of the Republic of Indonesia).

Furthermore, National Police Chief Regulation Number 6 of 2019, concerning the Investigation of criminal acts (Perkap No. 6 of 2019), was also issued, taking effect on October 4, 2019. There is not a single article in Perkap No. 6 of 2019 that directly mentions forgiveness for perpetrators of criminal acts (this regulation uses the term "reported"). However, restorative justice can be carried out in the investigation process if the material and formal requirements are met (see Article 12 of Perkap No. 6 of 2019), one of which is a statement of peace and settlement between the parties involved in the case. It can be assumed that, in the efforts to reconcile and resolve the case, the victim extended forgiveness to the suspect.

According to Article 12 Letter b, number 3, Perkap no. 6 of 2019, one of the formal requirements that must be met is a recommendation for a special case title that approves a restorative justice settlement. Special case title, according to Article 33 paragraph (1) Perkap No. 6 of 2019, was not implemented for one of them, terminating the investigation. The decision to terminate the investigation can only be obtained through an ordinary case title (see Article 32 paragraph (1) Perkap No. 6 of 2019). This means that the implementation of restorative justice, as stipulated in the regulations according to Perkap No. 6 of 2019, cannot halt the investigation.

The National Police also issued a special policy regarding the implementation of restorative justice, namely the Republic of Indonesia National Police Regulation Number 8 of 2021 concerning the Handling of Criminal Acts Based on Restorative Justice (Perpol No. 8 of 2021). There is not a single article in Perpol no. 8 of 2021 that directly mentions forgiveness for perpetrators of criminal acts (this circular uses the term "perpetrator"). However, handling of criminal acts can be carried out based on restorative justice if formal general conditions are met, one of which is peace between both parties (see Article 6 paragraph (1) letter a of Perpol No. 8 of 2021). The format of the peace agreement letter, which is an attachment to Perpol No. 8 of

2021, states the phrase “apology from one party or mutual forgiveness from both parties”. It can be assumed that in the peace agreement, there is forgiveness on the part of the victim towards the perpetrator.

Article 2, paragraph (5) Perpol No. 8 of 2021 emphasises that the handling of criminal acts based on restorative justice in investigations can be terminated. According to the format of the letter of decision to stop the investigation, which is an attachment to Perpol No. 8 of 2021, the person with the authority to determine is the “Direktur/Kasat/Kanitreskrim.”

Meanwhile, the Prosecutor's Office issued the Republic of Indonesia Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice (Perja No. 15 of 2020), which was stipulated on July 21, 2020. There is not a single article in Perja No. 15 of 2020 that directly mentions forgiveness for perpetrators of criminal acts (this regulation uses the term “suspect”). However, the public prosecutor can terminate the prosecution if a criminal case is resolved outside of court using a restorative justice approach (see Article 3 of Perja No. 15 of 2020). One of the conditions that must be fulfilled is that a peace agreement has been reached between the victim and the suspect (see Article 5 of Perja No. 15 of 2020). It can be assumed that in the peace agreement, the victim forgave the suspect.

According to Article 12, paragraph (4) Perja no. 15 of 2020, the Head of the High Prosecutor's Office (Kejati) has the authority to approve or reject the termination of prosecution based on the application of restorative justice. Except for some instances that receive special attention from the leadership, approval or rejection is the authority of the Attorney General (see Article 12 paragraph (5) Perja No. 15 of 2020). The product of this authority is in the form of a “Decree on Termination of Prosecution” issued by the Head of the District Prosecutor's Office Branch or the Head of the District Prosecutor's Office as a public prosecutor (see Article 12 paragraph (6) of Perja No. 15 of 2020).

The Supreme Court of the Republic of Indonesia (MA) also created internal policies regarding the implementation of restorative justice, namely the issuance of the Decree of the Director General of the General Justice Agency Number: 1691/DJU/SK/PS.00/12/2020, concerning the Implementation of Guidelines for the Implementation of Restorative Justice. General of the General Judicial Agency Number: 1691/DJU/SK/PS.00/12/2020.

In 2024, the MA finally issued regulations related to restorative justice in another form of “packaging”, namely Regulation of the Supreme Court of the

Republic of Indonesia Number 1 of 2024 concerning Guidelines for Trying Criminal Cases Based on Restorative Justice (Perma No. 1 of 2024), which was promulgated on 7 May 2024. There is not a single article in Perma No. 1 of 2024 that directly mentions forgiveness for perpetrators of criminal acts (the regulation uses the term “defendant”). However, forgiveness can also occur implicitly when a peace agreement is reached between the defendant and the victim of a crime during trial. However, this agreement can be made if it meets the requirements, for example, regarding criminal acts as regulated in a limited manner in Article 6 paragraph (1) of Perma No. 1 of 2024. However, according to Article 3 paragraph (2) Perma no. 1 of 2024, the application of restorative justice does not aim to eliminate criminal liability.

The existence of a peace agreement, which can be assumed to involve the forgiveness of the defendant, is a reason to reduce the sentence and/or as a consideration for imposing a conditional sentence or supervision by a judge.<sup>34</sup> This is according to Article 19 paragraph (1) Perma no. 1 of 2024. In fact, according to Article 19 paragraph (2) letter a Perma No. 1 of 2024, the judge, through his decision, can impose alternative sentences other than imprisonment against the defendant.

Legal regulations regarding restorative justice, which allow for forgiveness of perpetrators of criminal acts by each criminal law enforcer in Indonesia, especially the police and prosecutors, actually deviate from several forms of reasons for forgiveness determined by the KUHP. Apart from issues not regulated by law and requiring judicial determination, except for Perma No. 1 of 2024, these legal regulations can lead to disparities in the handling of criminal cases, thereby threatening legal certainty.

### **Forgiveness For Criminal Perpetrators According To Islamic Law**

Fiqh scholars have explained the discourse on forgiveness, also known as *al-‘afwu*, in Islamic law. Etymologically, *al-‘afwu*, according to Ibn Faris, has two meanings, namely, leaving something and demanding something.<sup>35</sup> In *al-Mu’jam al-‘Araby al-*

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<sup>34</sup> Before Perma No. 1 of 2024 was promulgated and regulates such provisions, the criminal justice practice at the District Court of Kediri City, for example, has emphasized that restorative justice in resolving criminal cases is not to provide forgiveness for the perpetrator and then stop the process of inquiry, investigation or examination in court. The application of the concept of restorative justice in criminal justice at the Kediri City District Court actually has implications for the number of prison sentences imposed by judges. Moch Choirul Rizal, *Restorative Justice: Implementasi dan Implikasinya Terhadap Putusan Pemidanaan* (IAIN Kediri Press, 2023), 196–202.

<sup>35</sup> Yusi Amdani and Liza Agnesta Krisna, “Konsep Meminta Maaf Sebagai Hukuman Dalam Perkara Pidana,” *Ius Quia Iustum* 26, no. 1 (2019).

Asasy, *al-'afwu* means to forgive or disappear.<sup>36</sup> Abdul Karim al-Lahim believes that *al-'afwu* means erasure and forgiveness.<sup>37</sup> Other words with similar meanings are *shafh* (to liberate), *maghfirah* (to forgive or close), *isqath* (to abort), and *shulh* (peace). Some of these meanings correlate with one another. Thus, interpreting *al-'afwu* as forgiveness is more relevant, as the word 'forgiveness' encompasses the meanings of forgiveness and release from punishment for mistakes.

The word *al-'afwu* is used in the language of the *Quran* and *hadith*, which is also indirectly used in discussions of Islamic law. Fiqh scholars also explain Islamic law using the term *al-'afwu*, especially in the explanation of the chapter on *jinayah* (a person's violation or crime against religion, reason, body, honour, or property). Epistemologically, *al-'afwu* refers to the pardoning or abrogation of punishment for perpetrators of violations or crimes.<sup>38</sup> According to Abdul Karim al-Lahim, *al-'afwu* is the elimination or forgiveness of the perpetrator of a violation or crime in whole or in part.<sup>39</sup>

The basis of the law of *al-'afwu* is, "So whoever receives forgiveness from his brother, let (the one who forgives) follow it in a good way, and let (the one who is forgiven) pay (*diyat*) to the one who forgives in a good way " (Q.S. al-Baqarah: 178). The meaning of the word '*ufiya* (forgiveness) is giving and giving away. By being forgiven, his sins and punishment will disappear.<sup>40</sup> This verse indicates that if forgiveness (optional) is granted, the procedure must proceed in a proper manner (*bi'l-ma'ruf*), and the payment (*diyyāt*) must be made with *ihsan* (goodwill), not under duress. In other words, forgiveness is the right of the victim's guardian and must be voluntary, while the state or judge may not "force peace".

Then, "Whoever renounces (the right of *qishaash*), then renounces that right (becomes) atonement for his sins (Q.S. al-Maidah: 45)". This verse explains, whoever gives up his right of *qishash* on life and those lower than him on limbs and wounds, namely by forgiving the perpetrator of the crime and the rights that have been determined for him, then this becomes atonement for the perpetrator of the crime. Because humans have forgiven their rights, Allah SWT is also more worthy to forgive. He is also a sin-buster for the forgiver. As he has forgiven people who have done evil to him or those related to him, Allah SWT also forgives his own mistakes.<sup>41</sup>

<sup>36</sup> Al-'Arab, *Al-Mu'jam al-'Araby al-Asasy Li al-Nathiqin Bi al-'Arabiyah Wa Muta'Alimiha*, 851.

<sup>37</sup> Al-Lahim, *Al-Muthli' Ala Daqaiq Zad al-Mustaqni'*, 276.

<sup>38</sup> Al-Auqaf, *Mausu'ah al-Fiqhiyah al-Kuwaitiyah*, 167.

<sup>39</sup> Al-Lahim, *Al-Muthli' Ala Daqaiq Zad al-Mustaqni'*, 277.

<sup>40</sup> Wahbah Az-Zuhaili, *Tafsir Al-Munir* (Gema Insani Press, 2016), 355.

<sup>41</sup> Abdul Rahman Al-Sa'di, *Taisir Al-Karim al-Rahman Fi Tafsir al-Kalam al-Manan* (Dar al-Salam, 2002), 257.

Another legal basis is the *hadith*, namely “No man forgives an injustice unless Allah will add (by forgiving) glory to it (hadith history of *Muslim*). Apart from that, the hadith is in the form of a statement that states that if Rasulullah SAW was not confronted with a matter that required qishas, unless he told him to forgive him (hadith history of *Tirmidhi*). Based on these verses and *hadiths*, *al-’afwu* is *sunnah*.<sup>42</sup>

The *al-’afwu* concept of punishment in *jinayah* or *jarimah*, in general, is something that is recognised (*mu’tabar*) in Islamic teachings. *Al-’afwu*’s recognition of punishment in Islamic law is based on benefit. The recommended aim is to eliminate envy and revenge between the perpetrator’s family and the victim’s family, to strengthen the relationship between the two families, and to maintain social cohesion within society.<sup>43</sup> When a crime occurs, it disrupts societal relations, particularly for the parties involved, so efforts to restore these relations are crucial. It is not uncommon, after court decisions so far, that conflict and resentment remain between the perpetrator and the victim, for example, in cases of abuse and murder.

Islamic law also regulates the validity of *al-’afwu*, so that it is recognised and applies to both parties to the dispute. Rukun *al-’afwu*, namely someone who forgives (*al-’afi*), someone who is forgiven (*al-ma’fu ‘anh*), a statement of will (*sighat*), and the crime of murder (*al-qatl*). Furthermore, the requirements for each pillar are that the person who forgives must be mature, wise, and have the right to forgive (i.e., the victim’s guardians, specifically those with the right to receive inheritance from the victim, regardless of reason or lineage, including both male and female heirs). On the other hand, the conditions for someone to be forgiven are the crime, other than street robbery (*qathi’ al-thariq*) and murder indirectly and with a motive (*al-ghilah*). The requirement for a statement of will (*sighat*), namely that the statement of forgiveness must be clear (*sharih*), such as the victim’s guardian clearly saying, “I forgive from qishas, I don't want qishas, or I abort qishas”. If the statement of intent to forgive is not clear, forgiveness will not occur because the original intention does not exist. If it is unclear, disputes and hostility may arise in the future.<sup>44</sup>

This paper limits *al-’afwu* to the realm of *qīṣāṣ-diyāt* (the voluntary choice of the *wali ad-dam*) and *ta’zīr* (judgmental discretion for the sake of *maṣlaḥah*). All *jarimah ḥudūd*, including adultery, are excluded from the scope of forgiveness: once the *shar’i* proof is fulfilled, *ḥadd* is a right of Allah that is not extinguished by forgiveness. If the evidence is incomplete or there is doubt, *ḥadd* can be rejected not because of *al-*

<sup>42</sup> Al-Auqaf, *Mausu’ah al-Fiqhiyah al-Kuwaitiyah*, 168–70.

<sup>43</sup> Wahbah Az-Zuhaili, *Mausu’ah al-Fiqh al-Islami Wa al-Qadlāyah al-Mu’ashirah* (Dar al-Fikr, 2010), 271–74.

<sup>44</sup> Al-Lahim, *Al-Muthli’ Ala Daqaiq Zad al-Mustaqni’*, 277–87.

*'afwu*, but because of the principle of proof. Therefore, our proposal discourages the condoning of adultery and establishes safeguards to prevent forgiveness from triggering new crimes or normalising criminal behaviour.

Punishment (*'uqubah*) in Islamic law is classified according to the crime committed by the perpetrator, the motive for the crime, and the extent to which the crime was realised.<sup>45</sup> First, *qishas*, which etymologically means cutting or replying. Epistemologically, it means appropriate retaliation imposed on criminals as a sanction for their actions. Second, *diyat*, namely assets that must be paid and given by the perpetrator of a criminal act (murder and abuse) to the victim or their guardian as compensation for damages caused by the criminal act committed by the perpetrator against the victim. So, *diyat* is a punishment in the form of property (*'uqubah maliyah*), which is handed over to the victim or their guardian (family) when the victim dies, not to the government. Therefore, *diyat* is not a stand-alone punishment, but rather an alternative to *qishas*. This means that if *qishas* is not enforced, then *diyat* can be chosen as an alternative.

Third, *had* (*hudud*), in terms of terminology, are prevention or limits, because the punishment is intended to prevent the person being punished from repeating the act for which he was punished. Epistemologically, it is a crime that is threatened with hadd (*limited*) punishment, which has been determined in terms of type and amount to uphold the rights of Allah SWT. So, *had* is a punishment that the syara has chosen, and there is no minimum or maximum limit. The punishment is (to enforce) the rights of Allah SWT alone, such as adultery, being accused of adultery (*qadzaf*), drinking something intoxicating (*shurb al-khamr*), theft (*sariqah*), attack (*hirabah*), rebellion (*al-bughat*), and leaving Islam (*riddah*).

Fourth, *ta'zir*, namely, humiliating criminals because of their shameful criminal acts. *The provisions of Allah SWT and Rasulullah SAW do not determine ta'zir punishment.* Still, the authority is given to the judge (*qadli*) to consider both the form of punishment to be imposed and its level.<sup>46</sup> Violations that are punishable by *ta'zir* are those that are deemed to disturb the lives and property of other people and contain elements that are detrimental to public interests or order.<sup>47</sup>

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<sup>45</sup> Roni Efendi and Leo Dwi Cahyono, "Pengampunan Dalam Hukum Islam," *Madania: Jurnal Hukum Pidana Dan Ketatanegaraan Islam* 12, no. 1 (2022).

<sup>46</sup> Abdul Qadir Audah, *Al-Tasyri' al-Jinai al-Islami, al-Kitab al-Tsani Fi al-'Uqubah* (Dar al-Kutub al-'Ilmiyah, 2010), 609-16.

<sup>47</sup> Enceng Arif Faizal and Jaih Mubarak, *Kaidah Fiqh Jinayah: Asas-Asas Hukum Pidana Islam* (Pustaka Bani Quraisy, 2004), 176-77.

The implementation of *al-'afwu* in Islamic law regarding the jarimah is, firstly, based on the Hanafi and Maliki schools of thought, where *qishas* is the right of the victim's heirs; thus, the only choice is to enforce *qishas* or forgive the perpetrator without any compensation. Forgiveness does not mean paying *diyat* in return, because *diyat* cannot be paid without the perpetrator's willingness. Meanwhile, the Syafi'i and Hambali schools of thought argue that *qishas* are the original punishment and *diyat* is a substitute punishment if the victim's heirs forgive or do not demand *qishas*. However, the Syafi'i school of thought says that *diyat* remains valid even without the consent of the perpetrator. In contrast, the Hambali school of thought says that the victim's heirs have the right to choose between *qishas* or *diyat*.

Second, if the victim's heirs forgive the perpetrator of the murder absolutely without asking for *qishas* or *diyat*, then this is permissible and legal. Third, if some of the victim's heirs forgive the perpetrator of the *qishas* and others do not, then the implementation of the *qishas* cannot proceed. Fourth, if the victim of intentional murder forgives the perpetrator before he dies or the victim forgives the perpetrator of a crime other than the deliberate killing of the body, or initially the crime did not involve the loss of life, then the crime is forgiven. Then it turns out that the victim died as a result of the crime, and then the forgiveness is accepted.<sup>48</sup> Small children who have not been declared capable of accepting legal burdens are free from the legal consequences of *qishas*, but cannot be exempted from *diyat*.<sup>49</sup> *Al-'afwu*, in some of the cases above, applies if the case has not been reached or decided in court.

In *hudud*, *fiqh* experts agree that there is no *al-'afwu* or dispensation if the conditions have been fulfilled, because carrying out *hudud* is mandatory for judges to fulfil Allah's rights. However, in some cases, there are exceptions, and these exceptions fall into the category of *ta'zir*, such as in the punishment of adultery accusers. If the victim forgives the perpetrator in the presence of a judge, then their forgiveness is accepted according to the Syafi'i and Hambali schools of thought. Exceptions also apply to crimes involving intoxicants other than wine, such as drugs, crimes of assault and rebellion, as well as crimes of compensating for losses from cases of theft, so the judge may forgive the perpetrator by reducing the

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<sup>48</sup> Al-Auqaf, *Mausu'ah al-Fiqhiyah al-Kuwaitiyah*, 167-80; Suparno Suparno et al., "A New Restorative Justice Paradigm in the Sociology of Islamic Law in Indonesia: Nahdlatul Ulama and Muhammadiyah's Responses to Corruption Cases," *Syariah: Jurnal Hukum dan Pemikiran* 24, no. 2 (2024): 480-502, <https://doi.org/10.18592/sjhp.v24i2.16221>.

<sup>49</sup> Abdur Rakib, "Mukallaf Sebagai Subjek Hukum Dalam Fikih Jinayah," *Hakam: Jurnal Kajian Hukum Islam* 5, no. 2 (2021).

sentence if the hudud requirements are not fulfilled based on the benefit before the court decides on the sentence.<sup>50</sup>

As for *ta'zir*, absolute forgiveness or forgiveness with leniency before the court decides is in the hands of the judge. Meanwhile, the authorities have the right to stop the case, and provide relief or absolute forgiveness, either before or after the court decides, as long as it does not disturb the victim, the perpetrator has repented, and is not related to Adami rights (*qishas* and *diyat*) because only the victim's heirs have the right to forgive.<sup>51</sup>

The basis for *al-'afwu*'s authority over judges or rulers is a *hadith* that narrates how Muhammad SAW once detained someone who was accused, then released him (hadith narrated by Tirmidhi and Nasai).<sup>52</sup> Then the hadith said by Muhammad SAW, "Forgive those who slip up among good people, except hudud (*hadith* narrated by Abu Dawud)".<sup>53</sup> This *hadith* emphasises the importance of a judge or leader showing mercy to good people who make a mistake, either by mitigating the sentence or granting absolute forgiveness, except in cases involving hudud. This right is based on the *ijtihad* of each judge or leader in their decision.

According to the description above, *al-'afwu* in Islamic law can be understood as absolute relief or forgiveness. The heirs of the victim and the judge can give *al-'afwu* before the case is decided in court. The leader can give *al-'afwu* to the perpetrator of a crime, either before the court chooses to or after the court decides, provided the perpetrator has repented. The position of the doctrine of forgiveness in Islamic law is now recognised as an alternative form of case resolution, aiming to achieve the most ideal punishment goals. Through forgiveness institutions, case resolution can lead to a balanced justice that benefits the perpetrator, the victim, and society as a whole.

In addition to *al-'afwu*, there is the concept of *al-shulhu* in Islamic law. Etymologically, *al-shulhu*, according to al-Jurjani, means reconciliation and mutual peace, as opposed to quarrelling and mutual hostility.<sup>54</sup> Other words with similar meanings are *al-tahkim* (arbitration), *al-ibra'* (release of rights), and *al-'afwu*

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<sup>50</sup> Mushthafa Al-Khin, *Al-Fiqh al-Manhaji Ala Mazhab Imam al-Syafi'i* (Dar al-Qalam, 1992).

<sup>51</sup> Marsaid, *Al-Fikih al-Jinayah (Hukum Pidana Islam)*, 193-97.

<sup>52</sup> Ahmad bin Syu'aid Al-Nasai, *Sunan Al-Nasai* (Dar al-Thawiq, 2008), 721.

<sup>53</sup> Abi Dawud, *Sunan Abi Dawud: Kitab al-Hudud* (Dar al-Kutub al-'Ilmiyah, 1996), 250.

<sup>54</sup> Ali bin Muhamad Al-Jurjani, *Kitab Al-Tarif* (Maktabah Lubnan, 1986), 176; Muhammad Rijaldy Alwy Alwy, "The 'afw Principle and The Indonesian Restorative Justice System," *Jurnal Hukum Islam* 19, no. 2 (2021): 313-28, <https://doi.org/10.28918/jhi.v19i2.4726>.



(forgiveness).<sup>55</sup> The concept of *al-shulhu*, in terminology, refers to an agreement aimed at resolving conflicts to achieve peace and harmony.<sup>56</sup> Thus, *al-Shulhu* encompasses conflict in general in human interactions, thus encompassing a wide range of substantive content.<sup>57</sup>

### **A Convergence For Criminal Procedure Law Reform**

This article chooses to use the concept of *al-'afwu* rather than *al-shulhu* to reconcile and find a convergence with the legal regulations and practices of restorative justice in Indonesia, which differ significantly from the ideal concept of restorative justice proposed by, for example, Albert Eglash. This refers to the internal legal regulations and the practice of implementing restorative justice by the police and prosecutors in Indonesia. Rather than restoring the situation following a crime, restorative justice practices are used as a means to end criminal cases through peace. Such practices are relatively closer to the concept of *al-'afwu*, which in Islamic law is more practical than *al-shulhu*.

Law Number 8 of 1981 of the Republic of Indonesia concerning Criminal Procedure Law (KUHP) does not regulate the procedure for the forgiveness of perpetrators by victims through restorative justice or a similar concept, such as *al-'afwu*. The practice of both concepts is often used to resolve criminal cases. Thus, the renewal of criminal procedure law, especially the KUHP, is a necessity. The convergence between the concept of restorative justice and *al-'afwu* can provide a fundamental idea for the renewal of criminal procedure law, particularly in the context of forgiving perpetrators of criminal acts.

First, the forgiveness mechanism in question must be regulated in law, not internal law enforcement regulations. This is because criminal procedure law is replete with restrictions on human rights, which are only valid if limited by law. Regarding restrictions on human rights by law, first, according to Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia, in exercising their rights and freedoms, everyone is obliged to submit to the restrictions stipulated

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<sup>55</sup> Al-Auqaf, *Mausu'ah al-Fiqhiyah al-Kuwaitiyah*, 323–25; Ramizah Wan Muhammad, "Forgiveness and Restorative Justice in Islam and the West: A Comparative Analysis," *ICR Journal* 11, no. 2 (2020): 277–97, <https://doi.org/10.52282/icr.v11i2.786>.

<sup>56</sup> Al-Khin, *Al-Fiqh al-Manhaji Ala Mazhab Imam al-Syafi'i*, 149; Masahiro Suzuki and Tamera Jenkins, "Redefining Forgiveness in Restorative Justice," *Criminal Justice Studies* 37, no. 3 (2024): 273–89, <https://doi.org/10.1080/1478601X.2024.2349586>.

<sup>57</sup> Muhammad Nawawi Al-Bantani, *Qut Al-Habib al-Gharib* (Dar al-Kutub al-Ilmiyah, 1998), 230.

by law. Second, the laws and regulations that apply nationally<sup>58</sup> and meet the prerequisites as outlined in the constitution are the laws. Third, international and national laws that impose restrictions on human rights can only be implemented through legislation. This is by the Decision of the Constitutional Court of the Republic of Indonesia Number: 140/PUU-VII/2009, dated April 19, 2010, and the Decision of the Constitutional Court of the Republic of Indonesia Number: 56/PUU XV/2017, dated July 23, 2018.<sup>59</sup>

In a narrow sense, a law can also be called a “legislative act”. The use of such a term refers to the role of the legislative institution, which significantly determines the material validity of the regulations in question. In other words, the role of the elected representatives of the people who represent the interests of the sovereign people (from which the sovereignty of the state comes) greatly determines the validity and binding power of the law for the public. In a democratic state, the people are sovereign and have the right to determine state policies that will be binding on all people.<sup>60</sup> The regulation of restrictions by law confirms the involvement of people's representatives with the authorities (government) in its formation, so that it is not a product of government domination. Therefore, it must be declared a violation of human rights if the restrictions are carried out based on statutory regulations below the law.<sup>61</sup>

Considering that criminal law enforcement involves constitutional considerations between individual freedom and the state's right to punish, it is appropriate that its regulation is established in law, rather than internally, which can lead to multiple interpretations and disparities in handling. Such regulations aim to develop a robust and transparent legal framework within the criminal justice system, ensuring that the application of restorative justice aligns with the legal framework and guarantees aspects of legal certainty.

Second, the forgiveness mechanism, which has implications for the punishment of the perpetrator of the crime, only applies to certain crimes. This

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<sup>58</sup> In the jurisprudence of the European Court of Human Rights, restrictions must be based on written national law. See, Mark Hill and Katherine Barnes, “Limitations on Freedom of Religion and Belief in the Jurisprudence of the European Court of Human Rights in the Quarter Century since Its Judgment in *Kokkinakis v. Greece*,” *Religion and Human Rights* 12 (2017): 179. In Germany, restrictions on the right to freedom of religion or belief, for example, cannot be limited by any rules, but by the constitution itself. See, Gehard Roberts, “Religious Freedom in Germany,” *Brigham Young University Law Review* 24, no. 2 (2001): 647.

<sup>59</sup> Constitutional Court Decision No: 140/PUU-VII/2009, Tanggal 19 April 2010 (2010). See also, Constitutional Court Decision No: 56/PUU XV/2017, Tanggal 23 Juli 2018 (2018), 531.

<sup>60</sup> Jimly Asshiddiqie, *Perihal Undang-Undang* (Rajawali Pers, 2010), 32–33.

<sup>61</sup> Siti Aisah et al., *Standar Norma Dan Pengaturan Nomor 2 Tentang Hak Atas Kebebasan Beragama Dan Berkeyakinan* (Komisi Nasional Hak Asasi Manusia Republik Indonesia, 2020).

means that the law determines which crimes the accountability mechanism can lead to the forgiveness of the perpetrator of the crime. Additionally, the formulation of the requirements can refer to the regulations that have been implemented thus far. This is because every standardisation must be accompanied by clear guidelines to support the practice and ensure clarity.<sup>62</sup>

This article offers that the crimes referred to above are: (a) do not cause rejection from the victim, the victim's family, or the community to be resolved using the restorative justice approach and the concept of *al-'afwu*; (b) are not radical and separatist in nature that threaten respect, protection, and fulfillment of human rights; (c) are not a repetition of a crime based on a court decision that has permanent legal force; and/or (d) are not acts of terrorism, crimes against state security, corruption, and/or crimes against people's lives.

Third, the reason for the forgiveness of the perpetrator of a crime is that the victim or the victim's family forgives.<sup>63</sup> The victim is given a voice, choice, and empowerment. Furthermore, the resolution aims to restore social relationships and promote social justice that have been violated.<sup>64</sup> In Islamic law, the purpose of recommending *al-'afwu* is to eliminate malice and revenge between the perpetrator's family and the victim's family, strengthen the relationship between the perpetrator's family and the victim's family, and maintain the social conduciveness of the community.<sup>65</sup>

According to restorative justice, direct participation from the perpetrator, victim, and community is key in resolving criminal cases,<sup>66</sup> regardless of their background<sup>67</sup>. The involvement of the perpetrator, victim, and community is essential in realising efforts to improve, reconcile, and guarantee the sustainability

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<sup>62</sup> Benjamin M. Fisk, "What Are Restorative Justice Services Recording? Qualitative Analysis of Six Restorative Justice Reporting Templates for Offices of the Police and Crime Commissioner in England," *Laws* 12, no. 28 (2023): 21, <https://doi.org/10.3390/laws12020028>.

<sup>63</sup> Natalie Hadar and Tali Gal, "Survivors' Paths Toward Forgiveness in Restorative Justice Following Sexual Violence," *Criminal Justice and Behavior* 50, no. 6 (2023): 911–28, <https://doi.org/10.1177/00938548231162108>.

<sup>64</sup> Tambir, "Pendekatan Restorative Justice Dalam Penyelesaian Tindak Pidana Di Tingkat Penyidikan," 553; Teuku Muttaqin Mansur et al., "Mediating Tradition: The Role of Law Enforcement in Customary Law Disputes," *Jurnal Ilmiah Peuradeun* 13, no. 2 (2025): 1183–208, <https://doi.org/10.26811/peuradeun.v13i2.1921>.

<sup>65</sup> Az-Zuhaili, *Mausu'ah al-Fiqh al-Islami Wa al-Qadlaya al-Mu'ashirah*, 271–74.

<sup>66</sup> Candra, "Restorative Justice: Suatu Tinjauan Terhadap Pembaharuan Hukum Pidana Di Indonesia," 265.; Kristian and Tanuwijaya, "Penyelesaian Perkara Pidana Dengan Konsep Keadila Restoratif (Restorative Justice) Dalam Sistem Peradilan Terpadu Di Indonesia," 596.; and Fatah Chotib Uddin et al., "Stigma of Former Drug Offenders: Islamic and Restorative Justice Perspectives in the Contemporary Era," *MILRev: Metro Islamic Law Review* 4, no. 1 (2025): 440–62, <https://doi.org/10.32332/milrev.v4i1.10460>.

<sup>67</sup> Hasona and Khatib, "Prosecuting Child Soldiers in the Arab World: Between the State, Society, and Retributive and Restorative Justice," 104.

of these recovery efforts.<sup>68</sup> Meetings between parties involved in the occurrence of a crime and the period afterwards are the primary application of restorative justice.<sup>69</sup> In the concept of *al-'afwu*, a person who forgives must be mature, of sound mind, and have the right to ignore (the victim's guardians, namely, people who have the right to receive an inheritance from the victim due to cause or lineage, both male and female). The statement of forgiveness must be clear (*sharih*).

Fourth, although forgiveness of perpetrators of criminal acts can be undertaken at the stage of investigation, inquiry, prosecution, or trial, the validity or otherwise of the forgiveness mechanism must be determined by a judge. This is to avoid disparities in the handling of criminal cases and to provide legal certainty. This concept encompasses various forms and regulations governing reasons for forgiveness, as outlined in the KUHP 1946. Consequently, the forgiveness of perpetrators of criminal acts can only be regulated by law and judges, who have the authority to determine whether the forgiveness is valid or not. This idea was also inspired by Regulation No. 2, letter f, of SE Kapolri. SE/8/VII/2018. In its formulation, peace agreements and the revocation of the right to sue victims must be requested by a judge through the public prosecutor to revoke the authority to sue from both the victim and the public prosecutor.

Fifth, the concept of restorative justice and *al-'afwu* is not intended to stop the process of resolving criminal cases. Although the perpetrator of the crime may be forgiven, it does not eliminate their criminal responsibility; therefore, they still need to be punished, even if their sentence is reduced or commuted. The reason is that the central point in the concept of restorative justice and *al-'afwu* is the active involvement of the perpetrator, victim, community, and law enforcement to restore the situation to its original state before the crime occurred.

The last idea in bringing together restorative justice with *al-'afwu* is relevant to the concept of punishment in the KUHP 2023, for example, the regulation regarding the exception to the imposition of imprisonment, as outlined in the KUHP 2023. According to Article 70 paragraph (1) letter e of the KUHP 2023, imprisonment cannot be imposed if it is found that the defendant has paid compensation to the victim. However, considering that criminal law is a form of public law, the process cannot be stopped simply because there is peace or payment of compensation from the perpetrator to the victim (as is the case with agreements regulated in private

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<sup>68</sup> Darmawan et al., "Incorporating Islah Principles into Restorative Justice."

<sup>69</sup> Ali, *Menguak Teori Hukum (Legal Theory) Dan Teori Peradilan (Judicial Prudence)*, 247.

law). In addition, compensation to the victim should not be a factor that eliminates imprisonment; instead, it should be considered alongside other factors that mitigate the defendant's sentence in court.

## **Conclusion**

The arrangements and practices of restorative justice and *al-'afwu* present ideas that are necessary for reforming criminal procedural law in Indonesia at the statutory level, especially regarding mechanisms for forgiveness for perpetrators of criminal acts. Apart from no longer being regulated in internal law enforcement regulations, in the future, there will be explicit limitation regarding criminal acts, forgiveness can only be achieved with the willingness of the victim or the victim's family, the need for determination by a judge, and does not necessarily eliminate or abort the perpetrator's criminal responsibility, even though the sentence is reduced or replaced. Given the limitations of the approach used to analyse the issues in this article, which undoubtedly affect the intended results, further research is needed to review other methods, including those related to politics, human rights, and justice. In addition, research on the effectiveness, efficiency, impact, and success of implementing restorative justice is needed to strengthen the philosophical, sociological, and legal framework in the renewal of criminal procedure law in Indonesia.

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