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## Reconstructing criminal sanctions and victim protection in sexual violence crimes: Islamic perspective of *Islah* in Indonesia's legal framework

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### Abstract

Efforts to resolve sexual violence crimes currently do not show any legal protection for victims of the crime. Although in the context of law enforcement the number of such crimes is increasing day by day, in reality these crimes do not reflect justice for the parties. This is because the resolution of sexual violence crimes is more oriented towards winning or losing through the criminal justice system. The approach method used in this study is normative juridical. Efforts to resolve sexual violence crimes, if they have met the requirements above, can be resolved through restorative justice which in the context of Islamic law is almost the same as the concept of *Islah*. On the other hand, legal protection for perpetrators of sexual violence crimes also has the right to receive restitution, if the crime committed is more than four years. Furthermore, victims of sexual violence crimes also have the right to have an abortion, if they experience pregnancy before the age of 6 weeks calculated from the first day of the last menstruation. This is based on Articles 75 and 76 of Law No. 36 of 2009 concerning Health.

**Keywords:** Reconciliation, crime, sexual violence, victims

### Introduction

The discussion on the form of the Indonesian state is expressly stated in Article 1 paragraph (3) of the 1945 Constitution. In this article, it is expressly stated that "The State of Indonesia is a State of Law" (Azhari, 2012)<sup>[3]</sup>. The discussion on the identity of the state of law for the Indonesian nation can be seen from the consensus of the Indonesian nation since the 1945 Constitution was established as the constitution of the Indonesian nation. Based on this agreement, in its development, it later became the ideals of the Indonesian nation. These state ideals are commonly referred to as state philosophy or *staatsidee* (state ideals) which function as the basis or philosophical foundation and common platforms in building the goals of the nation and state (Ridlwan, 2011)<sup>[26]</sup>.

The consequence of using Indonesia is a state of law that results in all actions, both in the context of actions, rights, and obligations of society and its entirety must be based on law. Law is all rules (norms) that must be followed in the behavior of actions in social life with the threat of having to compensate for losses if violating these rules will endanger oneself or property, for example people will lose their freedom, be fined and so on (Wantu, 2022)<sup>[32]</sup>. In line with that, Utreach also explains that law is a collection of life instructions (commandments and prohibitions) that regulate order in a society, and should be obeyed by members of the community concerned (Moho, 2019)<sup>[20]</sup>.

Criminal Law is one part of the Law. Criminal Law according to Mustafa Abdullah and Ruben Ahmad is the law regarding crimes that are threatened with criminal law. Likewise, criminal law consists of norms that contain obligations and prohibitions that (by the legislators) have been linked to a sanction in the form of punishment, namely a special suffering (Dwiyanti *et al.*, 2024)<sup>[7]</sup>. The discussion of criminal law in principle regulates acts, both in the form of orders and prohibitions which if the act is violated can be subject to criminal sanctions. Based on this, efforts to enforce criminal law are divided into two parts, namely material criminal law which relates to acts, while the other part is regulated in formal criminal law which regulates the perpetrators and procedures for enforcing the law.

Based on this reality, referring to the definition of law enforcement according to Satjipto Rahardjo is an effort to realize ideas and concepts into reality. Law enforcement is a process to realize legal desires into reality.

Legal desires are the thoughts of the legislature formulated in legal regulations (Sumirat, 2020) <sup>[29]</sup>. In this regard, law enforcement efforts are a series of efforts to investigate, investigate, prosecute, examine in court, and implement the execution of court decisions in correctional institutions as in the criminal justice system. In the context of efforts to resolve criminal acts through the criminal justice system, of course, it often does not provide justice for the parties, considering that law enforcement efforts will certainly result in winning and losing which will lead to injustice for the victims. In this context, the crime of sexual violence is in principle regulated in Law No. 12 of 2022 concerning the Crime of Sexual Violence. In this context, the crime of sexual violence is regulated in Articles 5 to 14. Discussions related to the crime of sexual violence generally have criminal sanctions in the form of imprisonment and fines (Zubaidi & Yanis, 2020; Indah & Dwiyatmi, 2024) <sup>[12, 37]</sup>.

The existence of criminal sanctions in the form of imprisonment and fines, although intended to provide retribution and suffering for the parties, in reality often does not provide justice for the victims. This is because, although Article 16 paragraph (1) of Law No. 12 of 2022 concerning Criminal Acts of Sexual Violence states that "In addition to imprisonment, fines or other criminal penalties according to the provisions of laws and regulations, judges are required to determine restitution costs for criminal acts of sexual violence that are threatened with imprisonment of four years or more." However, even though there are such regulations, in reality victims of criminal acts often do not receive such restitution costs, considering that the provision of restitution costs can only be given when the threat of criminal punishment for the perpetrator of the crime of sexual violence is four years or more (Khoeriyah *et al.*, 2024) <sup>[16]</sup>.

Referring to criminal sanctions in the form of imprisonment and protection for victims in the form of restitution as discussed above, it is certainly necessary to carry out reconstruction, considering that the existence of imprisonment which functions as retribution for perpetrators of sexual violence crimes, on the other hand actually causes financial losses for the state. This is based on data submitted by the Directorate General of Corrections (Ditjenpas) of the Ministry of Law and Human Rights stating that detention centers or correctional institutions in Indonesia have exceeded capacity, considering that in September 2022 the number of prisoners had reached 276,172, so that prisons in Indonesia were already 109%. The discussion on imprisonment causes financial losses to the state, considering that let's say each person per day needs Rp. 30,000.00 to provide food, then the state must need Rp. 8,285,160,000.00 (eight billion two hundred eighty five million one hundred and sixty thousand).

Law enforcement efforts starting from investigations to the implementation of court decisions certainly also require a lot of money, so that the implementation of law enforcement also becomes a burden on state finances. Therefore, the discussion on the imposition of criminal sanctions for sexual violence crimes must reflect legal protection for victims, so that the rights of victims must be fulfilled. Islam teaches about *Islah* (peace) as one of the efforts to resolve criminal acts. However, the outline of the implementation of *Islah* also does not neglect how the protection and rights that should be received by the victim. This study aims to analyze the application of *Islah* in resolving sexual violence crimes and protecting the rights of victims.

## Research methods

The research method used in this study is normative juridical using a statutory approach. The data needed is related to secondary data which will later be analyzed using qualitative data analysis. The research method used in this study is normative juridical with a statutory approach. This approach focuses on the study of legal norms contained in applicable laws and regulations, as well as legal interpretations that are relevant to the problems being studied. The data used in this study are secondary data, which include laws and regulations, literature, legal documents, and relevant previous research results. The data will be analyzed using a qualitative data analysis method, which aims to explore an in-depth understanding of the implementation of laws and related policies and their impact on society. Through this approach, it is hoped that the research can contribute to understanding the legal problems being studied and provide useful recommendations for the development of more effective laws.

## Research Results and Discussion

The purpose of Islamic law is explicitly to realize the happiness of life for all living beings in the world and the hereafter by taking what is beneficial and preventing harm (Rochman, 1996) <sup>[27]</sup>. Several scholars of ushul have grouped several general intentions and made the law tasyrik into three groups (Ishak, 2014) <sup>[14]</sup>. Maintaining all things that are dharuri for humans in their lives. Dharuri matters are all matters that are needed for human life, which if not obtained will result in the destruction of life, the emergence of chaos, and the development of damage. Perfecting all that is experienced by humans. Matters that are experienced by humans. Matters that are experienced are everything that is needed by humans to facilitate and bear the damages of taklif and the burdens of life. Realizing beauty for individuals and society. In this case, what is meant by beautifying matters is everything that is needed by a sense of humanity, morality, and uniformity of life. In order to realize this goal, Islamic Law recognizes Maqashidus Syariah as an important part of realizing happiness in life. According to Zubaidi & Yanis (2020) <sup>[37]</sup>, Wahbah Zuhaili, maqashidus Sharia are the values and targets of Sharia that are implied in all or the largest part of the law. These values and goals are seen as the goals and secrets of Sharia which are stipulated by Sharia' in every law (Mutakin, 2017) <sup>[21]</sup>. As stated by Imam Syatibi, maqashidus Syariah includes five things (Nasuka, 2017) <sup>[23]</sup>.

- a) *Hifdzu al-Diin* (maintain religion).
- b) *Hifdzu al-Nafs* (guard the soul).
- c) *Hifdzu al-aql* (keep your mind sane).
- d) *Hifdzu al-Nasl* (take care of the offspring).
- e) *Hifdzu al-Maal* (guarding property).

Referring to the five contexts of maqashidus sharia, one of the important matters regulated in it is hifdzu al-nasl, namely protecting descendants. In the context of Islamic Criminal Law, protecting descendants is one of the important matters that must be maintained considering that it is related to morality. In this context, Islamic criminal law also recognizes penal policy which aims to prevent and overcome the occurrence of sexual violence crimes. "Penal policy" is a science and art which ultimately has a practical goal to enable positive legal regulations to be formulated better and to provide guidance not only to lawmakers, but also to courts that apply laws and also to organizers or

implementers of court decisions (Nasuka, 2017) [23]. In this context, the criminal policy against sexual violence crimes is regulated in Law No. 12 of 2022 concerning Sexual Violence Crimes. In the Law, the discussion of sexual violence crimes refers to Article 4.

Sexual violence crimes include various forms of violations that harm victims physically, emotionally, and psychologically. These forms of violence include physical sexual harassment, such as molestation and rape, as well as non-physical sexual harassment, which involves words or actions that degrade the victim's dignity. Forced contraception and sterilization, which violate the victim's reproductive rights, are also criminal acts of sexual violence. Forced marriage, sexual torture, sexual exploitation, and sexual slavery, which force victims to work under the threat of violence, are also included in the category (Khoeriyah *et al.*, 2024) [16]. Electronic-based sexual violence, which involves the distribution of sexual material without the victim's permission, is increasingly prevalent with the development of digital technology. All of these forms of sexual violence require serious handling by the legal system to protect victims, prevent further violence, and ensure justice for those who are victims of criminal acts. Based on this, Islamic Law has accommodated criminal sanctions for perpetrators of sexual violence crimes of adultery and rape. The evidence related to adultery in Islamic law is explained in Qs. al-Isra': 32 which says (Wiranto & Akib, 2022) [33].

وَلَا تَقْرُبُوا الزَّوْجَىٰ إِنَّهُ كَانَ فَاحِشَةً وَسَاءَ سَبِيلًا

**Meaning:** And do not come near to adultery. It is indeed an abomination and an evil way.

The punishment for adultery, both men and women, in Islamic criminal law is divided into two categories. The two categories are muhsan adultery and ghairu muhsan adultery. For perpetrators of ghairu muhsan adultery (unmarried), a hundred lashes (lashings) are given with blows of the hand, stick and so on. The punishment of a hundred lashes should not be fatal, because the blows are not only on one part of the body, but on other parts of the body. In the book Fathul Qarib, it is explained that another punishment that can be carried out is exile for one year to a place as far as Qashar is permitted (Magfiroh & Zafi, 2020) [19].

muhsan zina is zina committed by a man or woman who has been married (husband or wife). There are two types of punishments for perpetrators of muhsan zina, namely being flogged 100 times and being stoned. The punishment of stoning is the death penalty by being pelted with stones or something similar until death. The punishment of stoning is a punishment that has been agreed upon by almost all fuqaha, except for the Azariqah group from the Khawarij Group which states that the punishment for both mukhsan zina and ghairu muhsan zina is flogged 100 times (Rokhmadi, 2015) [28]. As for the punishment for rapists in Islamic law who do not use weapons, there are several differences among scholars (Wahyuni, 2016) [31]. Imam Malik has the same opinion as Imam Syafi'I and Imam Hambali. Yahya (Imam Malik's student) heard Malik say that, what is done in society regarding someone raping a woman, whether a virgin or not, if she is a free woman, then the rapist must pay a dowry of the same value as someone like her. If the woman is a slave, then the rapist must pay the value that was lost. Had is the punishment applied to the

rapist, and there is no punishment applied to the raped. If the rapist is a slave, then it is the responsibility of his master unless he surrenders him. Abu Hanifah and Ats Tsauri are of the opinion that the rapist is entitled to the had punishment, but is not obliged to pay a dowry. Meanwhile, according to Imam Syafi'I and Imam Hambali, whoever rapes a woman, then he must pay a missile dowry.

Rapists who use weapons in their actions are punished as robbers, according to the provisions of QS. Al-Maidah: 33. The punishment for robbery in this verse includes several forms of severe sanctions, including: being killed, crucified, having the legs and hands cut off in a crossed manner (for example the left hand and right foot), or being exiled (banished). This punishment reflects the seriousness and cruelty of the crime committed, and aims to provide a deterrent effect and protect society from crimes that harm victims and damage the social order. Regarding the construction of the crime of sexual violence in Criminal Law in Indonesia, in principle it has been regulated in the Criminal Code, Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection, and Law No. 12 of 2022 concerning the Crime of Sexual Violence. In relation to the construction of *Islah*, *Islah* is basically the opposite of the word ifsad which means damage (Hidayat, 2021) [11]. The term *Islah* in the Koran with its various derivations is found 249 times, of which it is found in the Makiyyah surah 190 times, while in the Madaniyah surah 59 times (Fikri, 2018) [9].

Al-Thabarsyi and al-Zamakhsari stated that *Islah* is interpreted as conditioning something to a straight state and returning its function to be utilized. Meanwhile, according to Fiqh experts, *Islah* is interpreted as an agreement that is established to eliminate disputes between conflicting humans, both individuals and groups (Hamzah, 2008) [10]. In this context, the legal basis related to *Islah* is in QS. al-Hasyr: 25 which states:

هُوَ اللَّهُ الَّذِي لَا إِلَهَ إِلَّا هُوَ ۚ الْمَلِكُ الْقَدُّوسُ السَّلَامُ الْمُؤْمِنُ الْمُهَيْمِنُ الْعَزِيزُ الْجَبَّارُ الْمُتَكَبِّرُ سُبْحَانَ اللَّهِ عَمَّا يُشْرِكُونَ

**Meaning:** He is Allah, the Preserver of Safety, the Almighty, the Almighty, the One Who has All Glory. Glory be to Allah from what they associate with each other.

According to Ali Syu'aibi and Gils Kibil, the essence of *Islah* is to realize peace that leads to the fulfillment of justice for the community. In the context of *Islah* contained in Criminal Law in Indonesia, there is restorative justice which is used to resolve criminal acts. The resolution of criminal acts through restorative is regulated in the Regulation of the Republic of Indonesia National Police No. 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice and the Regulation of the Prosecutor's Office No. 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice (Kristanto, 2022) [18]. Efforts to resolve criminal acts of sexual violence in principle have requirements that must be met. The requirements contained in Article 3 paragraph (1) of the Regulation of the Republic of Indonesia National Police No. 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice include general requirements and/or special requirements.

In the context of general requirements, there are two types of requirements that must be met, namely material and formal requirements. The material requirements listed in

Article 5 include several important aspects, including not causing unrest or rejection from the community, and not having the potential to cause social conflict (Kang, 2021; Kawuwung *et al.*, 2023)<sup>[14, 15]</sup>. The criminal acts in question must also not divide the nation, be radical, or support separatism. Another requirement is that the perpetrator must not be involved in repeated criminal acts that have been decided by the court, and must not be included in the category of terrorism, crimes against state security, corruption, or crimes that threaten life. All of these requirements aim to maintain social stability and ensure that justice is upheld without harming the public interest. Meanwhile, the formal requirements as referred to in Article 6 include peace from both parties, except for drug crimes, as well as the fulfillment of the rights of victims and the responsibilities of perpetrators in drug crimes.

The context of the implementation of peace must be proven by a peace agreement signed by the parties and in terms of fulfilling the rights of the victim and the responsibilities of the perpetrator can be in the form of: returning goods, replacing losses, replacing costs incurred as a result of the crime and/or replacing damage caused by the crime. Based on these provisions, efforts to resolve the crime of sexual violence, if they have met the requirements above, can be made through restorative justice which in the context of Islamic law is almost the same as the concept of *Islah* (Aziz *et al.*, 2023)<sup>[14]</sup>.

According to Rahardjo (2005)<sup>[25]</sup>, legal protection is an effort to organize various interests in society so that there is no conflict of interest and can enjoy all the rights granted by law. This organization is carried out by limiting certain interests and giving power to others in a measured manner (Nola, 2017)<sup>[24]</sup>. Referring to Article 1 paragraph (3) of Law No. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims, it states that victims are people who experience physical, mental, and/or economic suffering caused by a crime. According to Susanto, the function of protection for victims is part of the sub-primary which is built into three (Yulia & Prakarsa, 2020; Nasirin & Lionardo, 2021)<sup>[22, 36]</sup>.

The function of the law Justice to obtain justice, because the law functions to protect and realize justice in society. Protection. The law functions to protect society from threats of danger and detrimental actions from fellow human beings and community groups, including those carried out by those in power (government and state) and those coming from outside, which are aimed at physical, mental, health, values, and human rights. Development. The law is used as a vehicle to determine the direction, goals, and implementation of development fairly. This means that the law is used as a tool for development, but also as a control tool so that development is carried out fairly (Syaufi & Zahra, 2021; Ananda *et al.*, 2023)<sup>[1, 30]</sup>.

In relation to legal protection for victims, Muladi stated three reasons for the importance of protection (Yulia, 2016; Yohana *et al.*, 2024)<sup>[34, 35]</sup>. Concretely, the criminalization process is related to the determination of criminal penalties through the penitentiary infrastructure (judges, correctional officers, and so on) (Atria, 2015)<sup>[2]</sup>. Therefore, in the implementation of the criminal justice system, legal protection for victims cannot be separated. Legal protection for victims of crime is an argument of social contract and social solidarity. The state has a monopoly on all social

reactions to crime and prohibits personal actions. Thus, when a crime occurs that results in victims, the state must be responsible for paying attention to the needs of these victims.

The problem of regulating crime victims is usually associated with one of the objectives of criminal punishment, which is currently widely emphasized, namely conflict resolution. Resolving conflicts caused by criminal acts restores balance and brings a sense of peace to society. In the context of providing legal protection for victims of sexual violence, referring to Article 16 of Law No. 12 of 2022 concerning Sexual Violence Crimes (Budiarta & Parwata, 2015)<sup>[5]</sup>. Imprisonment, fines, or other criminal penalties in accordance with statutory provisions, judges are required to determine the amount of restitution for victims of sexual violence crimes that are subject to imprisonment of 4 years or more. This restitution aims to provide compensation for the losses experienced by the victim due to the crime (Krahé *et al.*, 2014; Eddyono, 2021)<sup>[8, 17]</sup>. In addition, judges can also impose additional penalties, such as revocation of child custody or guardianship, which reflects the perpetrator's responsibility for the welfare of the child. Other additional penalties include confiscation of the perpetrator's identity or confiscation of profits and assets obtained from the crime of sexual violence, as a measure to prevent the perpetrator from profiting from the crime and to ensure justice for the victim (Carvalho & Nobre, 2013)<sup>[6]</sup>.

Based on these provisions, victims of sexual violence crimes are entitled to restitution, provided that the criminal threat is at least four years or more. In line with this, Article 1 paragraph (20) of Law No. 12 of 2022 concerning Sexual Violence Crimes states that restitution is the payment of compensation imposed on the perpetrator or a third party based on a court decision or ruling that has permanent legal force, for material and/or immaterial losses suffered by the victim or his/her heirs. On the other hand, victims of sexual violence crimes can also have an abortion if they become pregnant before 6 weeks from the first day of their last period. This is based on Articles 75 and 76 of Law No. 36 of 2009 concerning Health.

## Conclusion

The resolution of sexual violence crimes can be carried out through restorative justice efforts, which in the context of Islamic law is similar to the concept of *Islah*, namely a resolution that prioritizes peace between the parties involved. However, this resolution must meet certain requirements, such as not causing social unrest or conflict, and not involving serious crimes such as terrorism or corruption. On the other hand, in terms of protection for perpetrators of sexual violence crimes, they also have the right to receive restitution, especially if the crime committed is threatened with imprisonment of more than four years. Legal protection for victims is also a major concern, where victims of sexual violence crimes have the right to have an abortion, if they experience pregnancy due to sexual violence and the pregnancy is still within a time limit of six weeks after the first day of the last menstruation. This is regulated in Articles 75 and 76 of Law No. 36 of 2009 concerning Health, which provides victims with the right to obtain reproductive health recovery in accordance with applicable legal provisions.

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