

RELEVANCE OF THE POSITION OF THE VICTIMS IN INDONESIAN POSITIVE LAW AND ISLAMIC CRIMINAL LAW

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Abstract: The position of the victim in the criminal justice system is not considered as a subject or object. These problems are inseparable from the understanding that criminal law only regulates the relationship between the state and individuals. Positive laws governing the position of victims are contained in the Criminal Code and Criminal Procedure Code as well as regulations outside the criminal justice system. The regulation is very limited to the victim as a legal object, not a determinant. In the perspective of Islamic law, the position of the victim is regulated in the crime of qisas and takzir. Victims get the right to determine punishment for criminals by implementing qisas, forgiveness or diyat. In the takzir crime, the ruler or judge can determine to compensate the victim as a forgiving or reducing crime. This research is normative juridical research with a comparative approach. The results of the study indicate that there are similarities and differences in the regulation regarding the position of victims in positive law and Islamic law. Equality lies in the types of rights received by victims in the form of material compensation, compensation, restitution and rehabilitation except in takzir in the form of a

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decision to marry a rape victim. The difference lies in the position of the victim in positive law which does not include the victim as part of the criminal justice system, while in Islamic law as in qisas, the victim is an inseparable part of the criminal justice system.

Kedudukan korban dalam sistem peradilan pidana tidak dianggap sebagai subjek ataupun objek. Permasalahan tersebut tidak terlepas dari pemahaman bahwa hukum pidana hanya mengatur hubungan antara negara dan individu. Hukum positif yang mengatur tentang kedudukan korban terdapat dalam KUHP dan KUHPA serta regulasi di luar sistem peradilan pidana. Pengaturannya sangat terbatas kepada korban sebagai objek hukum bukan penentu. Dalam perspektif hukum Islam kedudukan korban diatur dalam tindak pidana qisas dan takzir. Korban mendapatkan hak sebagai penentu hukuman bagi pelaku tindak pidana dengan pelaksanaan qisas, pemaafan atau diyat. Pada tindak pidana takzir penguasa atau hakim dapat menentukan mengganti kerugian korban sebagai pemaaf atau pengurang tindak pidana. Penelitian merupakan penelitian yuridis normatif dengan pendekatan perbandingan. Hasil penelitian menunjukkan bahwa terdapat persamaan dan perbedaan pengaturan tentang kedudukan korban dalam hukum positif maupun hukum Islam. Persamaan terletak pada jenis hak yang diterima korban berupa pengganti kerugian materi, kompensasi, restitusi dan rehabilitasi kecuali dalam takzir berupa putusan untuk menikahi seorang korban perkosaan. Perbedaan terletak pada kedudukan korban dalam hukum positif yang tidak memasukan korban bagian dalam sistem peradilan pidana, sedangkan dalam hukum Islam sebagaimana qisas, korban merupakan bagian yang tidak terpisahkan dari sistem peradilan pidana.

Keywords: Positive Law, Islamic Law, Victim

INTRODUCTION

In the scientific discipline of criminal law, the position of the victim has never received attention. This is inseparable from the assumption that criminal justice only regulates perpetrators, not victims. According to Mudzakkir, the position of the victim in the criminal justice system is neither a direct subject nor a direct object, but only parties outside the system (Mudzakkir 2011:2). According to Ni Putu Rai Yuliantini in the Criminal Code and Criminal Procedure Code the position of the victim is not strong so the victim only acts as a witness (Yuliantini 2015:81).

According to Tyrone Kirchengast, recognition of the position of victims of crime by the state cannot be separated from the centralization of law, so that all authorities in enforcing the law are only between individuals and the state (Kirchengast 2006:1). When a crime is said to be a violation of public law, then the state is the representative of the violated individual's interests. This is different if the state recognizes the existence of laws that develop in society. As with customary law, the interests of victims are always accommodated in the criminal justice system.

According to Atu Karomah, the weak position of the victim in the provisions of positive law in Indonesia cannot be separated from Western influence (Karomah 2018:103). According to Alen Triana Masania, in the criminal justice system, the position of the victim has not yet received justice and the fulfillment of proper rights (Masania 2015:12).

The importance of the position of the victim in the criminal justice system cannot be separated from the rights and justice of the victim which is always neglected. With regulations that directly involve victims, it is hoped

that their rights and justice can be fulfilled. In Indonesia, initially there were no issues regarding the fulfillment of victims' rights. In the old criminal procedure law (HIR) even the Law on Judicial Power (UU No. 14 of 1970) does not contain compensation or rehabilitation. Along with the development of the discourse on human rights, KUHAP finally included Chapter XIII on the merger of lawsuits for compensation in Articles 98 to 101 (Mudzakkir 2011:2-3). In addition to the Criminal Procedure Code contained in Law no. 13 of 2006 concerning the protection of witnesses and victims and Government regulations (PP) No. 44 of 2008 concerning the provision of compensation, restitution and assistance to witnesses and victims.

Unlike in national law, in the perspective of Islamic law the problem of fulfilling the rights of victims is not only seen from the fulfillment of personal rights (victims and perpetrators), but includes the interests and public benefit. So that the purpose of law is not only the achievement of justice and certainty, but also aims to prosper the community. This example can be seen in *jarimah qisas*, where the victim has the right to determine punishment or compensation so that an agreement occurs.

Surah al Baqorah verse 179 states that in *qishos* there is survival. Most of the commentators provide an explanation of the survival of the verse in terms of the deterrent effect of the perpetrators. With the appropriate punishment, it is hoped that the community can take lessons so that they do not commit these crimes. However, if you look at other verses related to forgiveness as in the letter al Isra 'verse 33, then survival also means the cessation of grudges and bloodshed among the people.

METHODOLOGY

This study aims to compare the position of victims between positive national law, especially criminal law and Islamic law. The position of the victim in question is matters relating to justice and the rights of victims which are regulated in positive national law as well as in Islamic law. Comparing the two is expected to contribute ideas and solutions to problems for the position of victims in the national criminal law system which is still problematic. Based on the explanation above, the writer is interested in writing with the title Comparison of the Position of Victims in Positive Law and Islamic Law.

This type of research is normative law, which focuses on the analysis of regulations or applicable legal norms. It is a literature study where data collection techniques are collected by collecting secondary data from laws, books, journals and documents related to research (Marzuki 2014:55). The research approach method uses a comparative approach or comparison. According to Barda Nawawi Arief, the comparative approach does not only compare legal material, but also has philosophical values (Arief 2015: 3-4).

DISCUSSION

Position of the Victim in the Criminal Law System

Seeing the victim in the development of criminal law, at first there were no official boundaries or interference from the authorities. Rather it is only seen as a personal and family matter. Individuals who become victims of others will take revenge against the perpetrators. This concept of justice

can be found in old legislation such as the Code of Law of Hamurabi (1900 BC) and the legislation of Ancient Rome 4500 BC.

Furthermore, the concept of crime developed for acts aimed at the king such as treason and treason, while against individuals it was still a private matter. In the end, all matters concerning crime are regulated by the king (ruler) so that all crimes become public affairs (Arief 2015: 3-4). Because power is centralized in the ruler, in its enforcement it often occurs arbitrarily.

As a response to arbitrariness, the law exists to limit it. On this basis, the concept of the rule of law began to be known. According to Paul Scholten the term rule of law was born in the early nineteenth century in Europe, while ideas about the rule of law began to exist in the early seventeenth century (Nasution 2014:3).

The change of power from monarchy to democracy has placed the law above the interests of individuals and groups. This is positive for achieving justice, but in the enforcement of criminal law, law enforcers as representatives of the state often forget other rights that should be fulfilled and protection, namely victims. Concentration on perpetrators in the criminal justice system is an ongoing mistake. In fact, on the other hand there are victims whose rights must be fulfilled again.

Victims in this case are part of society as well as citizens, therefore the state is obliged to prosper by trying to restore what is their right. According to Barda Nawawi Arif, the main purpose of law is social welfare which is then derived by social policy. Furthermore, it is reduced to a criminal policy which has two instruments, namely penal and non-penal (Arief 2010:2-20).

Referring to all policies aimed at the welfare of the community, victims are an inseparable part. In this case, the specialization of the position between the state and the perpetrators in the criminal justice system needs to be reviewed. Given that there is another welfare that must be considered, namely the victim of the crime. In its development, the penal approach in criminal policy cannot stand alone, but must go hand in hand with non-penal and social policies (Arief 2010:2-20).

Based on the above, the role of victims in the criminal law system is important to study. Not only as part of the way to fulfill the rights of citizens, moreover to assist criminal law in tackling crime as part of the goal of social welfare. In addition to tackling crime, it is the role of the victim in formulating a policy with a victim perspective.

In the victimization approach, the victim is positioned as someone who is part of a criminal justice system. Victims can also be part of contributing solutions so that the law can be enforced and know the causes of crime. Therefore, victims have special rights such as protection and compensation. Another right is to participate in preventing various kinds of victimization, in order to uphold justice and improve the welfare of those who are seen directly or indirectly in the existence of a victimization.

Until now the classic view of the position of the victim is still dwelling on the system that distinguishes between criminal and civil justice. In fulfilling individual (private) rights, it can only be done through civil court proceedings. As for criminal justice, every loss is always assumed to be a loss to the state, so there is no place for individuals to fight for their rights.

In addition to the issue of rights, the concern of victims in the criminal justice system is the issue of justice. There are two forms of justice in the legal system, namely retributive and restorative. With the value approach through the justice model, justice is not only given to the perpetrator but the victim as a person whose rights have been violated must be restored. In its development, the fulfillment of the rights of victims can be carried out by the state or by the perpetrators as a form of accountability for what they have done.

The criminal justice system in Indonesia is not interested in seeing victims as part of the party that needs to be given a position. According to Mudzakir, the Police and Prosecutors as the initial gate and become the sub-judicial system do not make the victim an interested party. Victims of crime and the police are described as an indirect relationship that does not lead to legal consequences. On the other hand, the perpetrators and legal advisers are subject to legal consequences

The view that still applies in criminal law is that the perpetrator is a party managed by the state. Because crime is considered to violate the public interest, the reaction to crime is monopolized by the state. People who become victims are considered as people who are affected by natural disasters or disasters. The state is not responsible for what happened to the victim, especially related to immaterial losses (Reiff 1979:76).

Regulation of Victims' Rights in Positive Law

The lack of regulation of victims' rights in the current regulations, especially in the Criminal Code (KUHP) and the Criminal Procedure Code (KUHAP) cannot be separated from the influence of the Western system

brought about by the Dutch colonial era. Starting to erode the customary law that lives in the community where the victim is involved as a legal subject. In the national criminal law system, the state has taken over all criminal reactions that focus on the perpetrators of the crime. The state has a dominant role in the running of the judicial system and eliminates the role of the victim as the aggrieved party (Mudzakir 2011: 28 - 62).

According to Suryono Sutarto, in terms of compensation for the articles of the Criminal Code and the Criminal Procedure Code, they are actually only related to material as well as immaterial, so they are not included. In contrast to Indonesia, in the American criminal justice system, compensation is a reason not to prosecute a crime in court. So that the agreement between the perpetrator and the victim regarding compensation is the reason for the abolition of the crime for a criminal (Sutarto 2004: 25).

The protection of victims in the Criminal Procedure Code is contained in Articles 98-101 which contains the rights of victims to obtain compensation and the procedures for obtaining it, which is a combination of criminal and civil cases. According to R. Soeparmono, the merger is a form of the Criminal Procedure Code itself for the proceedings in Indonesia. In practice, a victim can claim civil damages at the same time as the criminal investigation takes place (Soeparmono 2003: 106-107).

During the criminal justice process, the victim gets a position based on Article 7 paragraph 1 Letter I Jo. Article 109 of the Criminal Procedure Code, which can file an objection to the termination of an investigation or investigation by the police. Termination of prosecution based on Article 13 letter h Jo. Article 140 paragraph 2 letter a of the Criminal Procedure Code.

When the decision of the police and the prosecutor's office is deemed detrimental to the victim, the mechanism that can be taken by the victim is to file a pre-trial (Article 80-81 of the Criminal Procedure Code). Victims are not explicitly specified, but victims can become third parties who are harmed or have their rights and justice taken away, so they can report to the police or the prosecutor's office.

Article 108 paragraph 1 of the Criminal Procedure Code explains that the victim can report a criminal violation to the investigator or investigator. Furthermore, Article 108 paragraph 2 of the Criminal Procedure Code deals with the obligations of someone who knows of a malicious conspiracy. Articles 224, 522 or 524 of the Criminal Code regulate how a person has obligations as a witness. Especially in the position of the victim, being a witness is an obligation, even being the first witness, whose testimony is heard in court based on Article 160 paragraph (1) letter b of the Criminal Procedure Code. The victim's testimony is the most qualified testimony as contained in Articles 1 to 27 of the Criminal Procedure Code.

When the victim dies, the rights of the victim pass to the family. The victim's family has the right to allow or not to allow post-mortem as stipulated in Article 134 of the Criminal Procedure Code. As for the exhumation of corpses, it is contained in Article 136 of the Criminal Procedure Code. However, the family's objection to this position is quite weak. Based on the formulation of Article 134 paragraph which states that in the case of an objection by the family, the investigator is obliged to explain as clearly as possible the intent and purpose of the need for surgery. It can

be concluded that there will be a conflict of interest between the victim's family and law enforcement.

The regulation regarding victims in the Criminal Code is not explicitly specified, but Article 14 c at least gives the right to compensation.

Article 14c reads:

"In addition to the general requirement that the convict will not commit other criminal acts, the judge may stipulate a special condition that the convict within a shorter period of his probation must compensate part or all of the losses incurred by his criminal act"

Furthermore, the rights of victims are more specifically regulated in Law no. 13 of 2006 concerning the protection of witnesses and victims. This regulation generally regulates the mechanism for the fulfillment of rights and protection for witnesses and victims of crimes, including gross human rights violations. The technicalities are translated in PP No. 44 of 2008 concerning the provision of compensation, restitution and assistance to witnesses and victims.

The regulation has also given birth to the Witness and Victim Protection Agency (LPSK) which functions as an intermediary in the criminal justice system. To get his rights, a victim must entrust his interests to the institution. As for the decision to grant an application, it is still a judge or a prosecutor. This mechanism is ultimately ineffective, because it makes the victim unable to speak or mediate directly with the perpetrators of the crime.

Law Number 21 of 2007 concerning the Eradication of the Crime of Trafficking in Persons (UU PTPPO) also regulates the protection of victims and the fulfillment of their rights. Article 48 paragraph (2) regulates the provision of restitution and rehabilitation. That is compensation for loss of

wealth or income, suffering, costs for medical and/psychological treatment and other losses as a result of the criminal act of trafficking in persons. Article 51 paragraph (1) of the law regulates health rehabilitation, social rehabilitation, repatriation and social reintegration from the government in case of physical or psychological suffering.

In 2004 the Law on the Elimination of Domestic Violence was enacted. A detailed discussion of the victim is contained in Article 1 point 3 which is defined as a person who experiences violence and/or threats of domestic violence. Article 10 regulates the rights of victims as follows: (a) Protection from the family, police, prosecutors, courts, advocates, social institutions, or other parties, either temporarily, or based on a protection order from the court; (b) Health services according to medical needs; (c) Special handling of the victim's confidentiality; (d) Assistance by social workers and legal assistance at every level of the examination process in accordance with the provisions of laws and regulations; (e) Spiritual guidance services.

Law Number 23 of 2002 concerning Child Protection and its amendments, namely Law Number 35 of 2014 regulates child protection in Article 1 number 2. The article explains that what is meant by child protection is all activities to guarantee and protect children and their rights. so that they can live, grow and develop, and participate optimally in accordance with human dignity and dignity, and receive protection from violence and discrimination.

Law Number 5 of 2018 concerning Amendments to Law Number 15 of 2003 concerning Stipulation of Government Regulations in Lieu of Law

Number 1 of 2002 concerning Eradication of Criminal Acts of Terrorism regulates victim protection in Articles 35a, 35b and 36. Article 35a explains that victims is the responsibility of the state. Victims consist of direct and indirect. The forms of state responsibility are: a. medical assistance; b. psychosocial and psychological rehabilitation; c. compensation for the family in the event the Victim dies; and D. compensation. Article 35b regulates the provision of medical assistance and Article 36 relates to compensation given to victims or their families.

Law Number 26 of 2000 concerning the Human Rights Court regulates the rights and protection of victims in Articles 34 and 35. Article 34 regulates the rights of victims and witnesses in cases of gross human rights violations with physical and mental protection from threats, harassment, terror, and violence. from any party. Article 35 paragraph (1) explains that every victim of serious human rights violations and or their heirs can obtain compensation, restitution, and rehabilitation.

Position of the Victim in Islamic Law

The concept of protection in Islamic law related to criminal acts includes all provisions of jinayah and maqashid sharia. In Islamic criminal law, the forms of crime and punishment are divided into hudud, qisas and diyat, and takzir. The definition of a hudud crime is a crime that is threatened with hudud punishment, which is a punishment that has been determined by the type and amount and becomes the right of Allah SWT (Audah 2007:126). The type of protection is public, because Allah's provisions relate to the benefit and value of the protected public or society.

As it is said in the Fathi Book that hudud is prescribed to be a deterrent before the incident, and a deterrent after the incident by knowing its provisions. Likewise, you can refuse to take revenge for your actions and repeat them. And had gives benefits that are returned to mankind to protect offspring, property, self-esteem and will from evil (Bahnasi 1989:25).

Jarimah hudud which is a rule regarding crimes and their punishments is related to the rights of the community. In the perspective of the victim, jarimah hudud does not give any position or rights. This means that the victim or the judge cannot abort the sentence or interfere with its enforcement. According to the opinion of the scholars, the crimes that include jarimah hudud are adultery (*al Zina*), accusing adultery (*al Qadzafu*), drinking liquor (*al Syurbu*), stealing (*al Syariqatu*), violent theft (*al Hirobatu*), treason (*al Bagyu*), apostate (*al Riddatu*) (Bahnasi 1989:24).

According to Mahmud al Khowali, the distribution of the had to seven crimes is still debated. Among them there are those who issue acts of treason (*al bagyu*) so that there are only six hudud fingers left. Others even went so far as to divide hudud into 17 crimes, including accusing other than adultery, witchcraft, liwat (homo), breaking the fast-during Ramadan for no reason and leaving prayer because of laziness (al Khowali 2003: 12-13).

By definition, according to Ahmad Fathi Bahnasi had been a certain and obligatory punishment determined by syara' and is the right of Allah. In terms of the provisions of Allah's rights, it is actually to distinguish it from qishos whose rights are given to humans. so that had is also a predetermined provision without any human right to give interpretation and qiyasan. This

is also a differentiator with qishoh where the right to determine the punishment is given to humans.

In a broader definition, actually had covers all crimes that have been determined by the texts (Quran and Sunnah). According to Sheikh al-Bazdawi, qisas is actually a had. Likewise, as conveyed by Ibn Taymiyya that in fact it is prescribed that had is a mercy for humans and for their good. Like parents who educate their children and doctors who heal their patients (Bahnasi 1989:25).

In general, the absence of victim rights in the provisions of jarimah hudud is based on the theory of the division of rights in Islamic law. The scholars divide the rights to the rights of Allah and the rights of servants. In more detail into four categories as follows (Khallaf 1977:210-216):

1. The pure right of Allah swt where the servant cannot reduce or change the provisions that already exist in syar'i law. This right is divided into three areas which include worship, Adhdhara'ibul-maliyah or taxation and jarimah hudud in addition to qadzaf and qisas.
2. The rights of Allah SWT are mixed with the rights of servants, but the rights of Allah SWT are won. An example is Jarimah accusing adultery (qodzaf). Even though a person who accuses adultery gets pardon from the accused, in fact, he cannot abort the sanctions that must be borne. In this case, the public interest takes precedence over individual rights.
3. Pure servant rights, namely rights related to the material of a servant. Especially with regard to agreements and muamalah between individuals. In this case, a person has the right to use his rights or not, it is up to each person's will.

4. The rights of the servant are mixed with the rights of Allah, but the rights of the servant are won. For example, in jarimah qisas, where a servant can give forgiveness, even though there is a public interest that is reflected in the giving of appropriate punishment.

Seeing the division above, the hudud provisions fall into points 1 and 2. As a result, if there are no syara' provisions governing the rights of victims, then there is no opportunity for victims to fight for their rights. This is certainly contradictory to the qishos jarimah, where syara 'provides opportunities for victims to fight for their rights with certainty. although it should be underlined that not all jarimah hudud have an object of action (victim).

According to Ahmad Mahmud al Khowali jarimah hudud in the Koran there are only 4 kinds, namely: theft, accusing adultery, theft with violence and adultery. Apart from these four actions, the law is not in the Koran (Khowali 2013:12). If you look at the classification of Mahmud al Khowali, all of these actions involve the victim.

As in the concept of general law, that the provisions of public law do not involve individuals, in Islamic law this is not always the case. The exception for victims in qisas illustrates that in Islamic law, in looking at the general benefit, it still looks at the benefit of the individual. The definition of a qisas or diyat crime is a crime that is threatened with qisas and diyat punishment. Both are individual rights whose amount has been determined, that is, there is no minimum or maximum limit (Audah 2007:100).

When someone violates the law by being punished with qisas, the victim can determine whether he should be rewarded according to his

actions or forgiven and replaced with diyat. The position of the judge is only as a determinant of the will of the victim or the victim's family. The direct involvement of procedural law in the criminal justice system is an extraordinary award. Victims are not only made objects or positions that are equivalent to witnesses.

According to Zubaida, judging from the position and rights of the victim, actually qishos in Islamic law has not yet had a holistic perspective. According to Sami Zubaida qishos is a crime against the soul which includes murder and persecution. As for in a broader context, in Islam there is the term takzir. According to Sami, as in Iran, takzir has determined a crime and its punishment which includes imprisonment and fines (Zubaida 2003:208).

According to Audah, takzir is a criminal act that is punishable by one or more takzir punishments. In Islam, there are no kinds of punishments for takzir crimes. Judges are given the freedom to determine the punishment according to the condition of the perpetrator. Actions regulated in the Qur'an or hadith are categorized as takzir if there is no provision for punishment. Actions that are not determined by the Qur'an or hadith can still be included in the takzir category based on considerations of benefit according to the authorities (Audah :245).

The judge's authority on takzir punishment is very broad. The judge can forgive the perpetrator as long as it is not related to the victim's personal rights. If it is related to the rights of the victim, it must be resolved on the basis of the victim's consent. For example, in a fraud case that causes a loss to the victim's property rights, compensation is a must and cannot be forgiven by a judge. Therefore, victims can give pardon for pure personal

rights. In contrast, when the crime committed intersects with the public interest, the victim's forgiveness cannot be abolished unless it is only mitigating.

The judge can determine the severity of the sentence depending on the actions and circumstances. The judge can determine the maximum or minimum sentence and can also ask to carry out the sentence or postpone it. Takzir can also be included with hudud punishment in addition or vice versa actions that are not punished by hudud can be replaced with takzir. For example, in a rape case, in addition to getting a had sentence, the judge can determine additional punishment in the form of compensation for the victim or marrying the victim.

Comparison of Victim Protection in Positive Law and Islamic Law

The provisions of positive law in Indonesia that regulate victims can be seen from the arrangements in the Criminal Code and the Criminal Procedure Code or laws outside of them. The Criminal Procedure Code is contained in Articles 98-101 which contains the victim's right to obtain compensation and the procedure for obtaining it, which is a combination of criminal and civil cases. Article 108 paragraph 1 of the Criminal Procedure Code explains that the victim can report a criminal violation to the investigator or investigator. As for Article 14 c at least provides the right to compensation.

Furthermore, the rights of victims are more specifically regulated in Law no. 13 of 2006 concerning the protection of witnesses and victims. The technicalities are translated in PP No. 44 of 2008 concerning the provision of compensation, restitution and assistance to witnesses and victims. The

Supreme Court has issued Regulation Number 1 of 2022 concerning Procedures for Completion of Applications and Provision of Restitution and Compensation to Victims of Crime. According to Article 4 of the Perma, the forms of restitution given to victims of criminal acts can be in the form of: first, compensation for loss of wealth and/or income; second, compensation, both material and immaterial, caused by suffering directly related as a result of a criminal act; third, reimbursement of medical and/or psychological treatment costs; and/or other losses suffered by the victim as a result of the crime, including basic transportation costs, attorney fees, or other costs related to legal proceedings.

Victims of criminal acts of gross human rights violations and criminal acts of terrorism are entitled to compensation in the form of: compensation for loss of wealth and/or income; compensation for losses caused by suffering directly related as a result of a criminal act, including injury or death; reimbursement of treatment and/or treatment costs; and other material and immaterial losses suffered by the victim as a result of the crime.

Law Number 21 of 2007 concerning the Eradication of the Crime of Trafficking in Persons (UU PTPPO) also regulates the protection of victims and the fulfillment of their rights. Article 48 paragraph (2) regulates the provision of restitution and rehabilitation.

Based on the explanation above, it can be concluded that the provisions on victim protection can be seen from the criminal justice system which is very minimal. The victim does not get an equal position or is directly involved in determining the fate of a perpetrator. In the Islamic criminal

system as contained in the qisas crime, a victim or the victim's family can participate in determining the punishment for a perpetrator.

The perpetrators of crimes in the provisions of national criminal offenses cannot be alleviated because of forgiveness or compensation from the victim or family. As a comparison with Islamic law, in the provisions of qisas, punishment is reduced on the basis of the agreement of the victim or the victim's family, namely by replacing qisas with diyat. The non-implementation of qisas is not based on a judge's decision but is determined by the victim or his family.

In contrast to the concept of forgiveness in qisas, the light and severe provisions of the punishment contained in takjir are determined by the judge. Even so, the judge still considers the victim's participation. For punishments related to the rights of the victim purely, the judge can forgive to be sentenced if the loss has been replaced. As for cases related to the public interest, the judge cannot forgive, what can be done is to give a reduced sentence.

Mechanisms outside the criminal justice system with the principle of restorative justice provide two mechanisms. Losses borne by the state as contained in the provisions of Law Number 5 of 2018 concerning Amendments to Law Number 15 of 2003 concerning Stipulation of Government Regulation in Lieu of Law Number 1 of 2002 concerning Eradication of Criminal Acts of Terrorism or Law Number 21 of 2007 on the Eradication of Trafficking in Persons (UU PTPPO). As for others as in Law no. 13 of 2006 concerning the protection of witnesses and victims, then the compensation is borne by the perpetrators not the state.

In Islamic law, it only recognizes compensation from the perpetrators, not by the state. In the qisas crime, it is the victim who determines whether it is still carried out or replaced with diyat, while diyat itself still has a predetermined size. In takzir, compensation is based on the judge's decision but is not based on state sources. In the author's opinion, the differences in these concepts cannot be separated from the state which is bound by the fulfillment and protection of citizens' human rights that must be fulfilled.

Comparison of forms of compensation in positive law and Islamic law is not too different. To compensate for losses regulated in positive law includes civil compensation, restitution, compensation and rehabilitation. Restitution includes compensation for material and immaterial losses, while compensation resembles restitution but is borne by the state. Like compensation, rehabilitation is left to the state as a consequence of law enforcement duties.

The form of compensation in Islam is seen from the qisas crime, it is determined by the victim or family in the form of paying diyat. The provisions for diyat include the distribution of heavy diyat and light diyat. The weight diya is determined for the intentional killer, namely replacing it with 100 camels which are divided into 3 categories. The light diyat is intended for involuntary manslaughter. The difference lies in the payment that can be repaid over three years and the age category of the camel. In addition to the diyat for the soul, there are other than the soul whose size is determined based on the provisions of the injured or non-functioning limb (Aksamawanti 2016:482-486).

Provisions for substitutes for victims are also contained in the takzir. As in the Criminal Procedure Code which regulates the provisions for civil compensation, in takzir the provisions for pure civil compensation can be the reason for the forgiveness of a crime by a judge. As for other than the payment of material compensation, for crimes related to violations of community values or the general benefit, judges cannot pardon them. As is the case in rape cases, judges can give additional punishments other than hadd, namely by marrying the victim, or compensating for immaterial losses or liability for the child conceived by the victim.

In Islamic law, the position and rights of victims can be seen in the provisions of qisas and takzir. In the case of qisas, the victim has an equal position, full rights and is a part of determining whether qisas can be carried out or otherwise replaced with a fine or unconditional forgiveness. In contrast to qisas in takzir, the position of the victim is still regulated based on the policy of the judge or ruler. Even so, it has a decisive role in crimes related to pure civil losses such as fraud, as for public crimes, it cannot abolish the crime but the mitigation depends on the judge.

The Contribution of Islamic Legal Thought to the Renewal of the Criminal Code

As a country that adheres to a civil law system, the codification of criminal law provisions is a necessity. As discussed above, the position of the victim does not get attention in the criminal law system based on the provisions contained in the Criminal Code or Criminal Procedure Code. Along with the development of awareness of the renewal of the Criminal Code which has been echoed since 1963 which began with the First National

Law Seminar in Semarang, the position of the victim began to receive attention.

As in the provisions of qisas, the position of the victim determines whether there will be punishment for the perpetrator or not. The main purpose of this provision is to protect the rights of the victim and at the same time to eliminate the grudge between the perpetrator and the victim. In the concept of Islamic law, forgiveness is better than continuing to carry out punishment so as to create justice in society. These provisions have been formulated in the RKUHP although they do not directly have a victim perspective, but provide space for sentencing.

Paragraph 1 concerning the purpose of sentencing Article 54 paragraph (1) letters c and d reads:

“The purpose of the punishment is: c. resolve conflicts caused by criminal acts, restore balance, and bring a sense of peace in society; and d. acquit the convict of guilt;”

The provisions of the article above are progress, namely by adding a guideline for judges, considering that the Criminal Code is not currently regulated. Even though the victim is not directly the subject or object of the policy, it is indirectly very related. A judge must carefully consider a sentence that can bring a sense of peace to the community, including by seeing how far the victim can accept the existence of peace efforts between them. In this case the victim can submit various conditions that are considered fair. With the existence of peace, of course, it is related to the provisions in letter c, namely freeing the guilt of the convict.

The provisions in paragraph 1 are further related to paragraph two, namely article 55 paragraph (1) which reads:

In sentencing, it is mandatory to consider: i. the effect of the crime on the victim or the victim's family; j. forgiveness from the victim and/or his family;

The provisions of the article above assist the judge in determining the severity of the sentence based on the fulfillment of the victim's rights. Although the victim is not a determinant of a sentence can be imposed or not, but the victim has become an inseparable part of the justice system. In the provision of letter j, forgiveness from the victim or family can be considered by the judge in lightening the victim's sentence. In accordance with the provisions of takzir where for crimes that violate public values, a judge cannot eliminate the crime because of forgiveness from the victim or family, but it can be a reason for mitigating.

The formulation in the RKUHAP which indicates progress is related to the definition of victims that did not previously exist. In general provisions it is explained that a victim is a person who experiences physical, mental suffering, loss of good name, and/or economic loss caused by a criminal act. With this provision, the articles related to victim protection become clear.

According to Paisol Burlian, the application of qisas law in Indonesia may be possible or have prospects for consideration in the RKUHP. In the Criminal Code, crimes against the soul are regulated in book II chapter XIX. According to him, although in the same setting, there are similarities and differences. The similarity related to the death penalty in the Criminal Code is the same as qisas. The difference lies in the criminal alternative. When the death penalty is not achieved, it is replaced by imprisonment, while in qisas

it is paying diyat. The RKUHP can include a replacement system as qisas which involves the victim in the criminal system (Burlian 2015:186).

CONCLUSION

Provisions on the position of victims in positive law are contained in the Criminal Code and Criminal Procedure Code, Law no. 13 of 2006 on the protection of witnesses and victims. The technicalities are translated in PP no. 44 of 2008 concerning the provision of compensation, restitution and assistance to witnesses and victims. Law Number 21 of 2007 concerning the Eradication of the Crime of Trafficking in Persons (UU PTPPO). Law on the Elimination of Domestic Violence. Law Number 23 of 2002 concerning Child Protection and its amendments, namely Law Number 35 of 2014. Law Number 5 of 2018 concerning Amendments to Law Number 15 of 2003 concerning Stipulation of Government Regulation in Lieu of Law Number 1 of 2002 concerning Eradication of Criminal Acts of Terrorism. Law Number 26 of 2000 concerning Human Rights Courts.

Islamic law regulates victim provisions in the criminal system for qisas and takzir crimes. Qisas places the victim as a determinant of whether a perpetrator of a crime gets the reward he deserves or is replaced with diyat. The rights of victims in qisas are the same as those of victims and judges. As for the crime of takzir, the rights of the victim are given by the judge with the provision that if the crime is related to pure civil law, the judge can forgive by not imposing a crime. As for criminal acts related to public crimes, forgiveness or compensation from the victim can only relieve.

Comparison of positive law and Islamic law relating to the position of the victim is in the position and rights of the victim. In the provisions of

the Criminal Code and the Criminal Code, the position of the victim is not specifically regulated, only partially on the provisions for civil compensation. In the crime of qisas, the victim has full authority over the replacement of his rights. In the provisions of regulations outside the Criminal Code, the position of the victim has a role in asking for his rights by providing restitution from the perpetrator and compensation and rehabilitation from the state. The rights of victims contained in Islamic law include provisions for forgiveness or replacement of diyat in qisas and asking for compensation for criminal acts of takzir. [W]

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