

## RECONSTRUCTION OF SENTENCE IN ISLAMIC CRIMINAL LAW (LEGAL PHILOSOPHY PERSPECTIVE) IN THE GOWA DISTRICT STATE COURT

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### Abstract

*Islamic Criminal Law is a law that lives in Indonesian society, and in order for Islamic Criminal Law to apply or color the arena of criminal law in Indonesia, there needs to be a reconstruction of Islamic Criminal Law, especially in terms of punishment. Reconstruction of punishment in Islamic Criminal Law from the perspective of legal philosophy can be carried out by desacralizing (re-interpreting textual legal sources) Islamic Criminal Law and bringing it in line with the flow of human history itself, rather than detaching it from the dimensions of space and time of the history of human civilization. , to realize the ideals of Islamic Law which are philosophically contained in maqasid al sharia, namely benefit or mercy for the universe (rahmatan lil 'alamin).*

**Keywords:** Project-Based Learning (PJBL), Entrepreneurial Character, High-Level Thinking Skills

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### INTRODUCTION

Indonesia is a country where the majority of the population is Muslim. And for followers of the Islamic religion, of course, they have the desire to be able to implement Islamic law in every aspect of their life, both in civil law, criminal law and state administrative law. However, Indonesia is not an Islamic country, but a legal country based on Pancasila. In the field of civil law, Islamic Law has been accommodated in the Compilation of Islamic Law which has become the material law in the Religious Courts. Meanwhile, in the field of criminal law, Islamic law is still not accommodated. Islamic Criminal Law seems very cruel, because there are punishments for cutting off hands for thieves, stoning for adultery, so Islamic Criminal Law tends to be abandoned. This is what the author thinks about, that in fact Islamic Criminal Law is a living law in Indonesian society.

And in order for Islamic Criminal Law to apply or color the criminal law arena in Indonesia, there needs to be a reconstruction of Islamic Criminal Law, especially in terms of punishment. The meaning of reconstruction can be understood as renewal or reactualization. And this has three meanings, namely:

- (1) Reconstructing or renewing things that have existed before (reviving);
- (2) Reconstructing or renewing something that has expired (patchwork);
- (3) Reconstruct or renew with a completely new form/  
creative-innovative.

The issue of reconstruction of Islamic law is influenced by two things, namely:  
(1) Stimulation from the modern development of the Western world which is so advanced in all respects, that it triggers and forces the Islamic world to adapt in such a way to these developments. This theory is often used by secular groups;

(2) There is substantive flexibility in Islamic teachings themselves. This means that to exist, Islamic teachings must be able to move dynamically so that they do not become outdated. This second theory is the main jargon of the modernist group.

These two theories support each other, and are in accordance with the rules of Ushul fiqh:

### والأزمان نكابتغير الأم مكاتغير الأح

"changes in law according to changes in space and time" This has been realized by Imam Syafi'i who is famous for his qaul qadim (previous/old opinion) and qaul jaded (new opinion). Because Imam Syafi'i's two opinions were issued at different places and times and in different social conditions of society. So it can be understood that reconstruction or renewal in Islamic law has been around for a long time. Islam is a way of life or problem solving for human life. And to make this happen in the implementation of Islamic Criminal Law, a comprehensive, holistic and proportional understanding of the philosophy of punishment in Islamic Criminal Law is needed. So that later Islamic Criminal Law can be accepted and not marginalized because it is considered ancient, cruel, sadistic and inhumane. From the problems above, a problem to be studied can be drawn: can punishments in Islamic Criminal Law be reconstructed if studied from the perspective of legal philosophy?

## DISCUSSION RESULTS

a. Punishment Theory in Islamic Criminal Law Punishment in Arabic terms is often called 'uqubah, which is a form of retribution for someone for their actions that violate the provisions of the Sharia' set by Allah and His Messenger for the benefit of humans.

The purpose of punishment in Islamic law is the realization of the purpose of Islamic Law itself, namely as retaliation for evil acts, prevention in general and specific prevention as well as protection of the rights of the victim.

Another definition states that punishment is a suffering imposed on someone as a result of their actions breaking the rules. Punishment with certain punishments is intended to bring about the benefit of the people and prevent injustice or misery.

When the purpose of punishment is to improve individuals, protect society, and preserve their lives, punishment must stand on a basic value that can realize these goals so that punishment can fulfill its proper duties. Basic Values of Sentencing Reconstruction in Islamic Criminal Law (Legal Philosophy Perspective) Ahmad Syafiq180Jurnal of Legal Reform Volume I No. 2 May - August 2014 which realized the objectives of the sentence were as follows:

- The sentence imposed can prevent everyone from committing a criminal act, before the criminal act occurs. If a criminal act has occurred, the punishment is to educate the perpetrator of the criminal act and preventing other people from imitating or following the actions of criminals. On this basis, some fuqaha (Islamic law experts) interpret punishment as a deterrent before a criminal act occurs and a deterrent for other members of society after the sentence is imposed, as well as knowledge of the promulgation of legal regulations containing criminal sanctions, will prevent the repetition of criminal acts by the perpetrator.

- The limits of punishment are for the needs and benefit of society. If the benefit of society demands that the punishment be made heavier, then the punishment will be made worse. Likewise, on the other hand, if the benefit of society demands that the punishment be reduced, then the sentence will be reduced. This shows that punishment is not permitted to exceed or be less than the benefit of the general public.<sup>7</sup>

- If to protect society from criminal acts, the perpetrator is required to be killed or the crime is prevented from society, the punishment that must be imposed is the death penalty, or imprisonment until the perpetrator of the crime dies, as long as he has not repented and his condition has not improved. All punishments that produce individual benefit and maintain the benefit of society are punishments that must be prescribed by law. Therefore it should not be limited to just apply certain punishments without other punishments.

- Educating the perpetrator of a crime does not mean taking revenge on him, but rather improving himself. All punishments in their various forms are education, correction and prevention which differ from each other according to the differences in criminal acts. Punishment is prescribed as love (grace) and kindness from Allah towards His servants.<sup>9</sup> So the basic principles for achieving the objectives of the punishment mentioned above can be made into several criteria as follows:

1. This punishment is universal, that is, it can stop people from committing a crime, it can raise awareness and educate the perpetrator.
2. The application of the punishment material is in line with the needs and benefits of society.
3. All forms of punishment must be able to guarantee and achieve personal and community benefit.
4. This punishment aims to make improvements to the perpetrators of criminal acts.

In the matter of criminal acts, there are two things that cannot be separated and are a chain that will never be broken, namely criminal acts and punishment. A form of command and prohibition alone is not enough to encourage someone to abandon an action or carry it out, which is why sanctions in the form of punishment

are needed for anyone who violates it. Punishment in the study of Islamic Criminal Law (fiqh jinayah) is grouped into several types, namely:

1. Punishment is seen from the relationship between one punishment and other punishments. In

There are four kinds of this:

a. The main crime, namely the punishment that is applied definitively, means that the judge only applies what has been determined by the text. In fiqh jinayah this punishment is referred to as jarimah hudud.

b. Substitute punishment, punishment that is applied as a substitute for the main sentence cannot be applied for valid/correct reasons. For example, qishash is replaced with diyat, and diyat is replaced with forgiveness.

c. Additional punishment, namely punishment that accompanies the main crime without a separate judge's decision. For example, for perpetrators of qaza (accusing of adultery), punishment is imposed in the form of loss of their witness rights, and loss of inheritance rights for perpetrators of murder.

d. Complementary punishment, namely additional criminal punishment through a separate judge's decision. Complementary punishment is in line with additional punishment because both are consequences/consequences of the main crime.

#### Difference

The difference between additional crimes and complementary crimes is that additional crimes do not require a separate judge's decision, while complementary crimes require a separate judge's decision.

2. Sentencing is seen from the judge's authority in deciding the case. In this case there are two types:

a. Limited punishment, namely criminal provisions that are definitely determined by the text, or in other words, there is no upper and lower limit. For example, the penalty is 100 lashes for the perpetrator of adultery and 80 lashes for the person accused of adultery.

b. Punishment that has alternatives to choose from.

3. Punishment is seen from its object. In this case there are three types:

a. Physical punishment, such as cutting off hands, stoning and others.

b. Psychological punishment, threats and reprimand.

c. Punishment of objects, compensation, diyat and confiscation of property.

From the description above, it is very natural that in all criminal law traditions, the most important attention is on the "form of punishment" that will be imposed on each perpetrator of a criminal act. Thus, the discussion is about criminal reconstruction

In fact, it is a very strategic step to understand a particular criminal law system, including Islamic Criminal Law. In reality, the application of any criminal system cannot possibly be justified without it being clear that the theory built in it can fulfill the objectives of the criminal system itself. As a first step to understanding the philosophical building system. Islamic Criminal Law, we will first explain the theory of punishment built into Islamic Criminal Law, apart from simply comparing it with the Western criminal law system as a tool to sharpen the analysis. In contrast to the Western criminal law system which bases and justifies its theory of punishment on the view of social utility, the theory of punishment in the Islamic criminal law system is based more on the source text of God's revelation written in the Al-Qur'an and the Sunnah of the Prophet Muhammad. . The problem is that at a practical level both the Qur'an and the Sunnah of the Prophet actually only contain a small portion of theory on this matter.

The rules given by these two sources are more general in nature and are very likely to be interpreted in various ways. Although it cannot be denied that the two sources of Islamic law specifically regulate several rules regarding the punishment of certain criminal acts, these rules are not numerous and generally relate to various topics.

b. Philosophy of Punishment in Islamic Criminal Law The Islamic religion is the most perfect way of life that brings rahmatan lil 'alamin (compassion for the entire universe). Islam continues to live and is always in accordance with the times and conditions faced by its people, it is elastic and not stagnant. Allah is the Most Wise (Al-Hakim), where He did not create in a playful way or full of falsehood. He will not make a law in vain, because Allah SWT has absolutely no need for His servants. All orders, prohibitions, halal, prohibitions, or permitted are solely for the benefit of humans so that they are far from error and damage. Ibn Qayyim explained that the basis and principles of sharia are to realize human benefit in this world and the hereafter. According to him, all laws contain justice, mercy, benefit and wisdom, if they depart from the four values they contain, then the law cannot be called shari'ah. And to realize this benefit, philosophically the aim of establishing laws in Islamic law is summarized in maqasid al syari'ah (which in linguistic terms is the aim of custom or sunnah). There are several opinions of scholars in defining maqasid al syari'ah, including:

- Abu Zahrah believes that maqasid al syari'ah is the ultimate goal to be achieved contained in every Islamic law, namely benefit. And this benefit is a benefit that is genuine, not a benefit that follows the desires of one's desires.
- Abdul Wahab Khallaf believes that maqasid al sharia is the desire of the law maker (shari') in enacting the law for the benefit (good) of humanity.
- Wahbah Al Zuhaili believes that maqasid al sharia are the values and targets of sharia which are implied in all or the largest part of its laws. These values and



goals are seen as goals and the secrets of sharia, which are determined by al Syari' (the Law Maker) in every legal provision.

- Imam Ghazali believes that maqasid al sharia is beneficial achieved by humans both in this world and in the afterlife, is good

Benefits are achieved by jalbu al manafi' (attracting benefits) or by means of daf al darar (resist danger/damage). 18

- Al Syatibi believes that maqasid al sharia is maslahah or goodness and welfare of mankind. From the definitions above, then The author can conclude that the purpose of enshrining Islamic Law is for the good (maslahah) of mankind. This human race is interpreted in general, not only Muslims, as explained in the Qur'an: And We did not send you, but for (to be) mercy.

for the universe." (QS. al Anbiya (21): 107) 20 To get to the maqasid al sharia, Hujjatul Islam Abul Hamid Al-Ghazali has made a special discussion which explains maslahah as having an unclear origin (ash mauhum) and divided it into three (3) levels which were later detailed by Imam Asy-Syathibi, as

1. Daruriyat (primary) means that it must exist for the benefit of the servant, which if it does not exist, will cause damage, for example the pillars of Islam. Daruriyat is explained in more detail and includes five objectives (al-kulliyat al-khamsah), namely:

1. maintaining religion (hifdz al din);
2. guarding the soul (hifdz al nafs);
3. maintaining reason (hifdz al 'aql);
4. looking after offspring (hifdz al nasl);
5. guarding assets (hifdz al mal).

So the goal of maqasid

al sharia will be achieved if the fifth safeguard is fulfilled the elements mentioned earlier.

2. Hajiyat (secondary) means something that is needed to eliminate narrowness, such as rukhsah (relief) of not fasting for sick people.

3. Tahsiniyat (supplementary) means something taken for good

life and avoid evil, such as noble morals, eliminating impurity, and covering the private parts. Several experts in criminology and social psychology are of the opinion that a criminal act that can be punished is an act that has been calculated rationally. This means that the criminal elements of the act have been fulfilled so that the perpetrator can be held criminally responsible. So, one of the elements is "intentional". This is in line with the Prophet's hadith which states that an action depends on the intention underlying the action.

In Islamic Criminal Law, punishment for criminal acts what falls into the category of hudud is drinking alcohol/drunkenness, stealing, robbery, adultery, accusing others of adultery, and apostasy, are forms of punishment that are

theoretically mentioned explicitly in the Qur'an and Sunnah of the Prophet Muhammad.

Apart from qishas (retaliation), which is a punishment for killing or injuring someone, all other criminal acts fall into the category of ta'zir. Even though the majority of ulama agree with this division, this does not mean that there are no minority ulama who have a different opinion. This difference seems to focus on what types of acts fall into the hudud category, whether more than six acts as mentioned above or less than six, as a result of their different understandings of the textual sources of the verses of the Qur'an and the hadith. There are not many studies that discuss the basic nature and purpose of these aspects of punishment in Islamic criminal law. Scholars of Islamic Law, especially classical and middle school ones, do not seem to be very interested in this kind of discussion. Especially in the case of hadd punishment, the ulama seem to be more influenced by an understanding that textual sources have provided a mature and clear formulation of the form of punishment that must be given so that they tend to no longer think about the legal reasoning behind the forms of punishment. the punishment.

However, in the midst of the lack of analytical products regarding the basic theory of punishment, several scholars since the early period have actually attempted to think critically about this institution of punishment. Ibn al-Qayyim, has tried to analyze this criminal institution in Islamic Criminal Law scholarship. <sup>23</sup> But unfortunately after the time of Ibn al-Qayyim, this subject was again largely forgotten by Muslim jurists. It was only in the modern period that Islamic Law experts returned to discussing this topic in detail in their works. Islamic law bases the formulation of punishment in criminal offenses on two basic aspects, namely: compensation/retribution (retribution) and deterrence (deterrence). <sup>24</sup> The following can explain the two basic aspects of the formulation of punishment in Islamic Criminal Law, namely:

1. Aspect of Compensation/Retribution. The retributive function of a punishment is the subject most discussed by Islamic Criminal Law experts, in addition to its deterrent function. This seems to be influenced by the existence of verses in the Al-Qur'an itself which discuss a lot about this aspect of retribution. For example, verses from the Koran the following :

"Indeed, the only retribution for those who fight against Allah and His Messenger and cause mischief on the face of the earth, is that they be killed or crucified, or have their hands and feet cut off in reciprocity, or be thrown out of the land (where they live). such things are (as) a humiliation for them in the world, and in the afterlife they will suffer a great torment" [Qs. al Maidah (5): 33] The man who steals and the woman who steals, have their hands cut off (as) retribution for what they did and as a punishment from Allah. And Allah is All-Mighty, All-Wise" [Qs. al Maidah (5): 38]

“And those who do evil (receive) the appropriate reward and they are covered with humiliation. they have no one to protect them from (the punishment of) Allah, like their faces covered with pieces of pitch black night. They are the inhabitants of hell; they will abide therein forever.” [Qs. 10: 27] 27

The verses in the Qur'an above mention a lot about the purpose of punishment as retribution/compensation for actions that violate certain laws. It is interesting to note here that the Arabic word for “reply”, namely *jaza'*, in the Qur'an is used for both meanings; punishment and reward. Thus, philosophically, both meanings of this word are used for the same purpose, namely providing compensation for good deeds or compensation for violations of the law that have been committed by someone. In terms of "retribution" as a legal reasoning behind punishment, there are two things that are inherently elements that must be present in it:

(a) the violence of a punishment, and (b) the necessity of the punishment being given to the perpetrator of a criminal act. 28 When compared with forms of punishment in other criminal law systems, the form of punishment prescribed in Islamic Criminal Law is seen as the harshest form of punishment.

According to Muhammad Qutb, the harshness of punishment in Islamic criminal law is due to psychological considerations that in order to combat the tendency of criminals to break the law, Islam prescribes harsh punishments as a response to criminal acts committed so that with these punishments people are deterred from repeating their actions again. 29 According to the author, the severity of punishment in Islamic criminal law is also due to the fact that the legal theory of evidence in Islamic criminal law is very strict. In Islamic Criminal Law there is no evidence of evidence or prejudice. 30 Because in Islam prejudice is a sin and is prohibited. 31 So the proof cannot be based on guidance (*dhan*), but must be certain.

This is where one of the differences between Islamic Criminal Law and Islamic Criminal Law lies Western Criminal Law. In this modern era, views on criminal violence in Islamic Criminal Law seem to be more influenced by the phenomenon of the dominant form of physical punishment in it. Almost all forms of punishment for criminal acts mentioned in Islamic text sources revolve around physical punishment, such as having their hands cut off, being whipped, throwing stones at them (stoning) and so on. This is actually what seems to mark the cruelty of forms of punishment in Islam. The problem now is whether these types of punishment are *tauqifi* in nature and must be carried out in exactly the same way as the verses of the Qur'an or the hadith of the Prophet direct, or whether it is actually possible to change the form of punishment which was previously only focused on physical torture to other forms of torture.

new ones that are more non-physical. Controversy and debate about the theory of criminal violence does not only occur among Muslims, Western legal philosophers also debate the same thing. Responding to the problem above, several experts are of the opinion that what perpetrators of criminal acts really need is "treatment" rather than severe punishment. This means that the punishment given to perpetrators of criminal acts should not be in the form of torture but simply to treat the "pain" they are suffering from. On the other hand, experts with different views view that severe punishment is necessary to prevent



the increase in crime rates which tend to be high. So, it is more of a functional purpose according to this second group. As seen in Qutb's analysis above, it appears that Islamic Criminal Law experts fall into this second group. According to them, severe punishment must be given as compensation for criminal acts that have been committed. More than that, especially in the case of hadd sentences, a more specific argument from Islamic Criminal Law experts is that heavy sentences must be carried out because they are in accordance with the commands of Allah SWT. Therefore, according to them, whatever form of punishment it must still be carried out as is.

The second aspect inherent in retributive punishment is "The necessity of punishment is given to people who commit criminal acts". This is understandable because a punishment will certainly lose its retributive nature if it is not imposed on everyone who commits a criminal act. Belief in the nature of retribution in the imposition of crime is actually something that is universal in nature. The Western criminal law system also recognizes this retribution formula. In England, for example, not only does the public want retributive punishment, but this doctrine itself has quite strong roots in English jurisprudence and legal philosophy. This is as stated by Goodhart that "retribution in a criminal offense is basically an expression of society's disapproval of a criminal act, and if this retribution is not considered, it means disapproval that society is lost."

## 2. Deterrence Aspect

Deterrence is the legal reason for imposing a sentence.

The main aim is to prevent the recurrence of criminal acts in the future. In contrast to retribution which tends to look backwards from the point in time of the crime, this deterrence has a forward projection, namely the need to take preventative action so that the violation does not happen again. The effect of this deterrence has two goals, namely internal and general goals. In the internal aspect, the deterrent is aimed at the perpetrator of the crime so that he is deterred from repeating his evil actions, while in general the deterrence is projected to society in general so that they are afraid to commit criminal acts. Thus, the main characteristic of this deterrent is to foster fear of punishment.

In general, the deterrent nature of criminal punishment is still accepted today as an effective form of justification in the criminal imposition process. Islamic Criminal Law is the legal system that has the strongest adoption of this deterrent aspect when compared with other criminal systems. Islam views the deterrent nature as The most important thing in administering a sentence. This kind of view can be seen from the opinions of Islamic scholars regarding the purpose of imposing a sentence. It is because of this view that al-Mawardi defines hudud as "a deterrent punishment created by God to prevent humans from committing violations of what He has forbidden and ignoring what He has commanded. society, is something that appears in the arguments of Islamic Law experts who generally support the view of this deterrent theory as the motivation behind God's decree regarding hadd punishment. Against this deterrent theory we

can also understand why some punishments are prescribed in Islamic Criminal Law, such as criminal punishment. For adultery, for example, it must be committed in front of a large number of people. The general purpose of deterring the public, namely to make them afraid of doing something similar, is of course the rational reason behind this decree.

c. Reconstruction of Punishment Theory in Islamic Criminal Law. The existence of various studies on criminal phenomena and criminal law in the last few decades has led to thinking about the importance of

The rational nature of punishment is other than the two aspects of retribution and deterrence as mentioned above. The attention of modern criminologists now also seems to be more focused on the reformation nature of punishment. For criminologists, reform itself is more synonymous with the meaning of "treatment" (cure). This tendency is more grounded

by the idea that people who commit criminal acts are no longer appropriately seen as "bad people" but "sick people". Like a sick person, the person who commits a criminal act really needs help. This epistemological framework has an impact on forms of punishment that do not take the form of physical punishment and the implementation of the punishment is more focused on the perpetrator of the criminal act, without involving other people who are not involved in the criminal act. Therefore, the form of punishment most often imposed is imprisonment/imprisonment. Physical punishment such as whipping or other bodily torture is no longer practiced, and such punishment no longer needs to be carried out in front of the person. Then the question arises as to what attitude Islamic criminal law experts have in responding to this kind of phenomenon, and it is certainly not easy to answer. Pros and cons then emerged among them, but until now the majority of Islamic Criminal Law experts still seem to be inclined to the view that in the forms of punishment that have been explicitly regulated in the Al-Qur'an and the Prophet's hadith, it is impossible to find justification for change it.

This means that in the case of hudud and jinayat punishments, the philosophy of penal reform cannot be used as a justification for changing their forms. Hands must still be cut off for people who steal, whipping or stoning for people who commit adultery, qisas for acts of murder and so on. Such an attitude certainly comes from the views of the majority of Islamic Criminal Law experts who still tend to understand the sources of religious texts textually. In matters that have been transparently regulated by the Al-Qur'an and the hadith of the Prophet, they still do not dare to question the possibility of going against these rules on the grounds that they are more concerned with the textual aspect. Therefore, even though they believe in the rules: *al-hukmu yadurru ma'a illagii wujudan wa 'adaman* (law based on legal reasons (legal reasoning) which are visible or not), and

taghayyiril ahkam bi tagayyiril amkan wal azman (changes in law are influenced by space and time) but at a practical level this rule only applies to things that are non-explicit in the two text sources.

In terms of criminal law, this epistemological reality is very clear where the ulama always put forward the argument of religious idealism (that all forms of punishment proposed by the Qur'an and the Prophet's hadith cannot be changed because they are solely rules from God) in every attempt to an attempt to reinterpret the building of the Islamic Criminal Law system.

However, the tendency towards the reconstruction of Islamic Criminal Law continues to emerge. This kind of tendency is felt to be very relevant, especially in the context of dealing with Islam and the current new world order. For this reason, the ideas of modern Islamic thinkers such as Abdullahi Ahmed an-Na'im really need to receive a positive intellectual response. What an-Na'im wants, for example, is actually to reformat the building of Islamic law to suit the environment of modern society which is plural and consists of various cultural values held. And this, according to an-Na'im, can only be achieved if Muslims are ready to rationalize (re-interpret textual legal sources) Islamic Criminal Law and bring it in line with the flow of human history itself, rather than releasing it from the dimensions of space and time. history of human civilization, to realize the ideals of Islamic Law which are philosophically contained in maqasid al sharia, namely benefit or mercy for the universe (rahmatan lil 'alamin)

## CONCLUSION

The reconstruction of punishment in Islamic Criminal Law can be carried out by desacralizing (re-interpreting textual legal sources) Islamic Criminal Law and bringing it in line with the flow of human history itself, rather than releasing it from the space and time dimensions of the history of human civilization, to realize the ideals of the Law. Islam is philosophically contained in maqasid al sharia, namely benefit or mercy for the universe (rahmatan lil'alamin).

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