

RESTORATIVE JUSTICE IN SETTLING MINOR CRIMINAL DISPUTES IN PONOROGO, EAST JAVA: An Islamic Law Perspective

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Abstract

This article aims at examining the viability of a village court as an alternative settlement of minor criminal disputes in the district of Mlarak, Ponorogo, East Java. Among the cases resolved through restorative justice are petty theft, juvenile delinquencies, crimes against women and children, and public order disruption. The village court has used mediation among the disputants in the search of a consensus without harming each party. The consensus achieved signifies the return of balance in the community which has been damaged by the offenses. This makes dispute resolution through mediation and customary justice in line with the concept of Restorative Justice. However, there are obstacles in the resolution of cases through mediation. This includes: first, there are no regulations governing village justice procedures so that the mediation and village justice procedures differ from one village to another. Second, the determination of sanctions for minor criminal offenses is perceived to have not deterred some of the perpetrators. This is evidenced by the repetition of criminal acts committed by the perpetrators which, thus, has created public unrest. Third, the level of understanding of community leaders towards the law is still lacking. This has resulted in

discrepancies in settling the disputes. From the Islamic law perspective, the settlement of a dispute by means of the village justice is in accordance with the Sharia. It constitutes the implementation of al-shulh system and ta'zīr concept in the provision of punishment for the perpetrators.

Keyword: Restorative Justice, Sulh, Alternative Dispute Resolution (ADR)

Abstrak

Makalah ini bertujuan untuk melihat bahwa pengadilan desa sebagai alternatif penyelesaian sengketa pidana ringan di kabupaten Mlarak, Ponorogo. Dari hasil penelitian ditemukan bahwa di Ponorogo, Alternatif Penyelesaian Sengketa (APS) dikenal sebagai problem solving, yaitu penyelesaian sengketa melalui pengadilan desa menggunakan pendekatan mediasi, konsiliasi, dan semi arbitrase antara pihak-pihak yang bersengketa guna mencari kata mufakat tanpa merugikan kedua belah pihak. Hasil akhir yang dicapai menekankan pada kembalinya keseimbangan masyarakat yang dirusak oleh perselisihan, menjadikan penyelesaian sengketa melalui problem solving ini sejalan dengan konsep keadilan restoratif. Di antara kasus-kasus yang diselesaikan melalui keadilan restoratif adalah pencurian kecil, penganiayaan ringan, kasus-kasus yang melibatkan anak-anak, dan kasus-kasus yang mengganggu ketertiban umum. Meskipun demikian, ada kendala dalam penyelesaian kasus melalui problem solving ini, diantaranya: pertama, tidak ada peraturan yang mengatur prosedur kearifan lokal, sehingga prosedur problem solving dan kearifan lokal berbeda dari satu desa dengan desa lainnya; kedua, penetapan sanksi bagi pelaku tindak pidana ringan dirasa belum membuat jera sebagian pelaku,, hal ini terbukti dengan adanya pengulangan tindakan pidana yang dilakukan oleh pelaku, sehingga meresahkan masyarakat; ketiga, tingkat pemahaman para tokoh masyarakat terhadap

hukum masih kurang, menghasilkan perbedaan dalam menyelesaikan perselisihan. Dari perspektif hukum Islam, penyelesaian perselisihan dalam kearifan lokal sesuai dengan Shariat Islam, dengan penerapan sistem al-shulh dan paradigma ta'zir dalam pemberian hukuman bagi para pihak yang bersengketa.

Kata kunci: *Restorative justice di Indonesia, Sulh, alternative penyelesaian sengketa.*

A. Introduction

This research investigates the alternative settlement of minor criminal offenses that occurred in Mlarak District, Ponorogo Regency, and analyzes them according to Islamic Criminal Law, especially in cases of minor theft, because criminal law enforcement is implemented in a Criminal Justice System (CJS) whose results are still not satisfying the many parties.¹ The intention of the word “minor” theft here is in accordance with the Criminal Code Article 364 About the crime of minor theft. the nominal is not more than Rp. 2,500,000. Meanwhile, in Islam, *nishab* of theft that the offender can be given a cut off hand is a quarter of a dinar (calculated in gold prices). This is much lower than the theft limit according to the Criminal Code. Problems surrounding the development of the existing criminal justice system indicate that this system is no longer considered to be able to provide protection for human rights and transparency of the guarded public interest is increasingly not felt. Likewise, the concept of positive criminal law, in the settlement of criminal cases is generally resolved through formal channels, namely the judiciary, known as the “in the court system”. The results that will be created from the settlement process are known as win-loss solutions, where there are winners and losers.²

1 Achmad Romsan, *Alternative Dispute Resolution: Teknik Penyelesaian Sengketa di luar Pengadilan: Negoisasi and Mediasi*, (Malang, Setara Press, 2016), p 3

2 Ahmad Ramzy, *Perdamaian dalam hukum Pidana Islam and Penerapan restorative Justice dikaitkan dengan pembaruan hukum*

The out-of-court process produces an agreement that is a “win-win solution”, guarantees the confidentiality of the disputes of the parties, avoids delays caused by procedural and administrative matters, resolves issues comprehensively in togetherness and still maintains good relations.³ It’s also very easy to understand, simple and fact resolving disputes.⁴

One of the phenomena that need to be examined in solving criminal cases is the rise of peaceful efforts carried out when an alleged crime arises.⁵ Recent developments indicate that there is a new paradigm in the criminal law enforcement process called the “Restorative Justice” approach.⁶ The restorative justice approach is a paradigm that can be used as a frame of the strategy of handling criminal cases which aims to address dissatisfaction with the operation of the existing criminal justice system.

Local wisdom as an important forum for the development of the philosophy of restorative justice criminalization, was born from the belief that the concept of Restorative Justice

pidana di Indonesia, Thesis, Fakultas Hukum Program Pascasarjana Universitas Indonesia, Juni, 2012, p 2

3 Rachmadi Utsman: *Pilihan Penyelesaian Sengketa di Luar Pengadilan* (Bandung: PT Citra Aditya Bakti, 2013), p 5-6

4 Syaikhu, The Dispute Settlements of Inheritance in Palangka Raya: A legal Antropology Approach, Mazahib, *Jurnal pemikiran Hukum Islam*, IAIN Samarinda, Vol 18, No. 1, Juni, (2019), 131

5 Herry Kandaty, Penerapan Mediasi oleh Lembaga Kepolisian Republik Indonesia dalam Penanganan Tindak Pidana Sebagai Perwujudan Restorasi Justitia, *jurnal hukum* Vol.1/No.V/Okttober-Desember (2013), 104

6 Restorative Justice is a court that emphasizes reparation for damages caused or related to criminal acts carried out through a cooperative process involving all parties. This approach considers that crime or criminal action does not only lead to punishment for the perpetrators, but also pay attention to the interests of the victim, the solution can be done by involving both parties and does not have to lead to conviction. (See: Kuat Puji Prayitno, Restorative Justice Untuk Peradilan di Indonesia, (Perspektif yuridis filosofis dalam Penegakan Hukum In Concerto), *Jurnal Dinamika Hukum*, Vol.12, No. 3 september (2012,) 409. Also see H. M. Hatta Ali, *Implementasi Paradigma Restorative Justice Dalam Sistem Pemidanaan di Indonesia*, Mahkamah Agung-Republik Indonesia, dipostkan 29 Desember 2013, <https://www.mahkamahagung.go.id/rnews.asp?bid=3842>, (accessed on 15 Februari 2018, pukul 20.37)

already exists in the customary legal system which is a local policy, where the application of criminal law requires provisions and regulations before any action can be categorized as a criminal act and must be existed a strong basis in its application to meet the sense of fairness and effectiveness of law enforcement that benefits are felt. ⁷

Quoting the results of World Bank research, the national strategy shows that the biggest dispute resolution actors in poor communities are the village government.⁸ This shows that the poor prefer to settle their cases in the customary courts rather than follow the country's legal channels. However, alternative settlement of cases in daily life has been carried out for a long time through custom law methods or community justice. However, the recognition of the existence of custom law and community justice has not been much explored to resolve legal cases that occur in society.⁹

Based on various data from the Central Statistics Agency (BPS) in Ponorogo Regency in 2018 there were only 12 cases recorded in Mlarak Police in 2017, including theft (4 cases), mistreatment (0), fraud (1 case) embezzlement (1 case), extortion (0), robbery (0), and others (6 cases). In the context of security and its relationship with law and its enforcement, if observed with the number of criminal cases from 15 villages in one year, there were 12 cases. This indicates the high level of security of 25 Mlarak Police officers who protect 267 RT (1:10 RT) and 37,004 people (1: 1480). But is that the fact? Considering, as the researchers know from someone's confession, there was a theft committed by a

7 H. M. Hatta Ali, *Implementasi Paradigma Restorative Justice Dalam Sistem Pemidanaan di Indonesia, Mahkamah Agung-Republik Indonesia*, dipostkan 29 Desember 2013, <https://www.mahkamahagung.go.id/rnews.asp?bid=3842>, (accessed on 15 Februari 2018, pukul 20.37)

8 Historically, customary courts have been an alternative dispute resolution in several regions in Indonesia, in Aceh known as the Gampong traditional justice, in Papua known as Para-Para Adat, ect

9 Yance Arizona, *Kedudukan Peradilan Adat dalam Hukum Nasional*, p2. See also Ratno Lukito, *Shariah And The Politics Of Pluralism In Indonesia: Understanding State's Rational Approach To Adat And Islamic Law*, *PETITA*, Volume 4, Issues 1, (2019), 14-30

minor that was then settled in a family manner, and the case ended peacefully without due process in the police.

Thus, in the case of dispute resolution, that the process of deliberation and peace, justice and mutual benefit is the purpose of implementing a punishment. So the author wants to discuss what disputes can be resolved by Ponorogo village court through restorative justice, and what sanctions are imposed on perpetrators of crime, and how their implementation is reviewed according to Islamic law.

This type of research is included in socio-legal research using an empirical-normative approach (socio legal) with qualitative methods. An empirical-normative approach (socio legal) and qualitative methods are used to view and analyze data derived from various social facts, paradigms and social behaviour in society from a legal and scientific perspective. Specifically, by referring to legal norms contained in statutory regulations, norm theories and practices that exist in society. The two approaches are used to see the social reality in this study related to the reality and social behaviour that occurs in Mlarak District. Particularly in the use of ADR to resolve criminal cases that actually occur between them amid the prevailing legal system.

As a socio legal-qualitative research, research resources data derived from data sources and legal material sources. Data sources consist of primary and secondary data sources. Primary sources come from interviews and related documents. And secondary data sources come from various legal materials. The various legal materials, among others, consist of primary legal materials that are binding and authoritative, such as the Criminal Code, Jurisprudence Book (Islamic Criminal Law), etc .; secondary legal materials which are explanations of primary legal materials, which come from various literature and literature relating to primary legal materials and research objects; and tertiary legal material in the form of explanations and instructions that can come from dictionaries, etc.

In primary data collection techniques in the form of interviews in the field. Researchers use genealogical techniques, namely the method of interviewing without a

plan but structured to collect individual experiences (life history method) from the informant, which can be used to build relationships between researchers and informants, and collect data in a short time.¹⁰

The parties interviewed in this study are:

- a. The District Government of Mlarak, in this case, the Village leader
- b. Mlarak District community figure
- c. Mlarak District Police Station
- d. Those who have been involved in the process of resolving minor criminal offences in Mlarak District, ten people (perpetrators, victims and victims' neighbours)
- e. Other parties who have knowledge about the settlement of criminal cases in Mlarak District

Interviews are conducted formally to parties who have official positions, while informal interviews are conducted with parties who have been involved in resolving minor criminal disputes in Mlarak District through mediation mechanisms so that they look relaxed, so they want to tell the chronology of the problem and its resolution. Questions raised by researchers with one informant were asked back to other informants to find out the validity and accuracy of the data and were expected to produce a more comprehensive understanding. The interviews were conducted in the villages of Mlarak sub-district.

After primary data and secondary data are completely obtained, researchers then analyze such collected data with regulations relating to the problem under study. The custom law case analyzed is the case that was obtained and heard by researchers in the field during the interview. The analysis is carried out inductively, that is finding the truth departing from things that are specific to things that are general in order to obtain conclusions. Researchers try to describe and

10 This method is also used to inquire about the object of research, between an informant and his relatives, between informants and other informants also met by researchers, and between them and their respective relatives. The genealogy method is also used to ask abstract conceptions by referring to concrete relationships and events experienced by a person. Koentjaraningrat, *Sejarah Antropologi II* (Jakarta: UI Press, 1990), p 144-145

analyze data from the stage of collection, data compilation then analyzed and interpreted against the data.

B. The Dynamics of Enforcing Law with Restorative Justice

The term “restorative justice” was coined by a psychologist, Albert Eglash in 1977, in his writings on compensation or reparation. Restorative justice is very concerned with the effort to rebuild relationships after a crime has occurred, not merely improving the relationship between the perpetrator and the community. but also as a sign of the modern criminal justice system.¹¹

Jeff Christian, an expert in international penitentiary from Canada, stated that the concept of restorative justice is a handling of criminal acts which is not only seen from the perspective of law alone but is also related to moral, social, economic, religious and local customs aspects and various other considerations. Therefore Eva Achjani Zulfa states that the values carried by restorative justice are rooted in traditional values in traditional societies such as balance, harmony, and peace in society.

In restorative justice, the improvement of justice is reaffirmed by the value of togetherness in the bilateral process, in contrast to retributive justice which refers to the improvement of justice through unilateral coercion. The concept of restorative justice in which all parties, whether victims or perpetrators have a voice in open dialogue to reaffirm the best sentence.¹²

Tony F. Marshall interprets restorative justice as “the process by which the parties concerned, solve together to reach an agreement after a crime has been committed,

11 Muladi, “Restorative Justice Approach in the Criminal Justice System and Its Implementation in the Criminal Justice System for Children” (Semarang, 1-2 November 2013)

12 Michael Wenzel, Tyler G. Okimoto, Norman T. Feather, Michael J. Platow, “Retributive and Restorative Justice”, *Law and Human Behaviour* issue 5 vol 32, Published online: October 24, (2007), p 385,

including its implications in the future.”¹³ Howard Zehr, the pioneer of the “Restorative Lens”, states that crime is seen as a violation of individuals and relationships between individuals, whereas justice is interpreted as a joint search for solutions through healing, reconciliation, improvement, and certainty.¹⁴ Marian Liebman added that restorative justice aims to restore the welfare of victims, perpetrators and the community that has been damaged by crime, as well as to prevent further violations and acts of crime.¹⁵

There was a public debate among legal experts about restorative and retributive justice, the first group being those who supported a restorative approach (Md. Zahidul Islam, Mu'taz M Qafishes, Norman Tutt, Frida Errikson). Qafishes said. that: In essence, Islam recognizes the peace and reconciliation process in the settlement of criminal disputes.¹⁶ Zahidul Islam added that in Islam, civil and small criminal disputes are highly recommended to be resolved through negotiation, mediation, conciliation, and compromise because this is closer to the norms set out in the Koran and Hadits.¹⁷ As for Tutt, said that there are a hierarchy and form

13 Eriyantouw Wahid, *Keadilan Restoratif and Peradilan Konvensional dalam Hukum Pidana*, (Jakarta: Universitas Trisakti), 2009, p 3. Also see: Intan Indriana Rininta, *Analisa Yuridis Penerapan Pemidanaan Edukatif Terhadap Anak Sebagai Pelaku Tindak Pidana*. Fakultas Hukum Pascasarjana, Konsentrasi Peradilan Pidana, Thesis, 2012, p 24

14 Muladi, *Pendekatan Restorative Justice dalam Sistem Peradilan Pidana and implementasinya dalam sistem Pradilan Pidana Anak*, Lecture Material for Diponegoro University's Masters of Law program and Semarang University's Masters of Law program, date 1 and 2 November 2013. P 2

15 Badan Pembinaan Hukum nasional Kementerian Hukum and Hak Asasi Manusia, *Laporan Tim Pengkajian Hukum tentang Sistem Pembinaan Narapidana Berdasarkan Prinsip Restorative justice*, 2012, p 4

16 Also see: Mu'taz M. Qafishes, Restorative Justice in the Islamic Penal Law: a Contribution to the Global System, *International Journal of Criminal Justice Sciences*, Vol. 7, Issue 1 January-June, (2012), ISSN: 0973-5089, Hebrone University, Palestine.

17 See Md. Zahidul Islam, Provision on Alternative Dispute Resolution Process in Islam, *IOSR Journal of Business and Management (IOSR-JBM)*, ISSN: 2278-487X. Volume 6, Issue 3 (Nov. - Dec. 2012), PP 31-36, www.iosrjournals.org. (accessed on 15 Maret 2018 pukul 20:15)

of Restorative Justice. Namely: Victims' awareness, Indirect Reparations, Direct Reparations, Mediation, Compensation, and Humiliation of the perpetrators.¹⁸

Their second group supports the retributive approach, including: (Kathleen Daly¹⁹, Antony Duff²⁰, and Paul H Robinson²¹), arguing that to achieve a legal justice, in addition to a restorative approach, a retributive approach must be taken. Duff argues that restorative justice procedures do not adequately deal with losses caused by crimes that punishment is an exercise in moral education, where perpetrators are held accountable for their mistakes.²² He also believes that the RJ process and sanctions are understood as "punishment alternative" than "alternative punishment".²³

Dally also views restorative justice as an alternative punishment rather than an alternative punishment. According to him, punishment is needed to defend the victim, in order to show the offender is determined to make amends by dropping the sentence. He offers the definition of punishment as something unpleasant, a burden, or a kind of imposition and suffering to the offender.²⁴ Robinson is

18 Norman Tutt, Restorative justice in Practice in Great Britain and Ireland, *European Journal on Criminal Policy and Research* Vol5-4 (accessed on 21/03/2018, 23:31)

19 She is Associate Professor, School of Criminology and Criminal Justice, Griffith University, Brisbane.

20 He was Director General (DG) of MI5, the United Kingdom's internal security service, from 1985 to 1988.

21 Professor of Law, University of Pennsylvania Law School.

22 Antony Duff, (2002). *Restorative Punishment and Punitive Restoration* In, Lode Walgrave, ed., *Restorative Justice and the Law*. Devon, UK: Willan Publishing, <http://www.restorativejustice.org/articlesdb/articles/2687>, (akses 21/03/2018, 20:21)

23 He further argues that the purpose of punishment is to encourage and facilitate repentance, sincere remorse, and therefore "moral improvement" can only be through the acceptance of punishment in accordance with crime. See: Collen Pawlichka, Punishment or Logical Consequences: a Response to the Punishment Debate Within Restorative Justice, *Alaska Journal of Dispute Resolution*, Vol 1 (2012), <http://crjc.ca/wp-content/uploads/Consequence-v-Punishment-Alaska-Journal-of-Dispute-Resolution-2012.pdf>, (accessed 21/03/2018, 22:21), 97.

24 Kathleen Dally, *Restorative Justice: The Real Story*, School of Criminology and Criminal Justice, Griffith University, Brisbane,

similar to this stance with the argument that reconciliation for crimes cannot only be achieved by restoration, but must be accompanied by additional suffering for the perpetrators to show that the perpetrators understand the mistakes that have been made, and achieve justice for the victims.²⁵

Jonathan Masur, Jhon Bronsteen, and Christopher Buccafusco said that any attempt by a state to uphold justice in criminal law, either by retributive or utilitarian means, depends on the severity of the crime committed by the perpetrators of crime.²⁶ They mediate the arguments of David C. Gray²⁷, Dan Markel and Chad Flanders²⁸, legal experts who support the retributivist theory.

Queensland, Australia, Version Revised, 12 July 2001, http://www.griffith.edu.au/_data/assets/pdf_file/0011/50321/kdpaper12.pdf, (accessed 21/03/2018, 23:47), 39-41 Also see: Collen Pawlichka, Punishment or Logical Consequences: a Response to the Punishment Debate Within Restorative Justice, ..., p 12

25 Paul H Robinson, The Virtues of restorative Procces and The Vices of Restorative Justice, *Penn Law, legal Scholarship Repository*, http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1032&context=faculty_scholarship, (accessed at 22/3/2018 19:14), p 377-378

26 Jonathan Masur, Jhon Bronsteen, and Christopher Buccafusco, Retribution, and The Experience of Punishment, *Calivornia Law Review*, Vol. 98, October, 2010, No. 5, University Of Chicago Law School, http://chicagounbound.uchicago.edu/journal_articles, (accessed on 24/03/2018, 10:37)

27 Gray states that the degree of suffering experienced by the offender subjectively can be seen in the amount of punishment he receives. The punishment is determined for the logical consequences of the crime committed. (See: David Gray, Punishment as Suffering, *Vanderbilt Law review*, Vol. 63, No. 6, 2010. <http://www.vanderbiltlawreview.org/content/articles/2010/11/Gray-Punishment-as-Suffering-63-Vand.-L.-Rev-1619-2010.pdf> (accessed on: 23/03/2017, 10:56)

28 Markel and Chad state that experience (looking at the severity of a criminal offense) does not have much effect, that a layman will see the message of punishment itself, and therefore experience is not relevant to the theory of punishment. (See: Dan Markel and Chad Flandres, Bentham On Stilts: *The Bare Relevance of Subjectivity to Retributive Justice*, *Calivornia Law Review*, Volume 98, Issue 3, Article 9, June, 2010, <http://scholarship.law.berkeley.edu/californialawreview/vol98/iss3/9> (accessed on 24/03/2018, 09:47)

This restorative justice approach is very important and strategic because with the process of restorative justice, what changes and shifts not only institutional issues and aspects of policy and regulatory norms, but also relates to issues of cultural change related to the value of perceptions, attitudes and philosophies. The retributive concept that is only actor-oriented must be changed to a restorative concept that is oriented towards the perpetrators, victims and the community to produce a balanced approach.²⁹

C. Restorative Justice in Islam

Islam comes with the banner of justice which is gradually being accepted by the wider community, including justice in the criminal justice system in order to create the rule of law. In applying sanctions, Islam strongly considers a sense of justice, both social justice and individual justice.³⁰

Under Shariah, punishment can be classified into three categories, *hudūd* (fix punishment), *qishās* (restitutory), and *ta'zīr* (discretionary), which are mentioned in the primary source of Islam. In relation with the concept of punishment, the people who are involved in the problem of law can restore the justice through *sulh*.³¹ The victim and the offender may resolve offences through *shulh* if the cases are not brought to the court.³² Forgiveness plays an integral part in *sulh*. Certain *hudūd* cases which particularly involve the rights of individuals can be withdrawn with forgiveness provided that

29 Muladi, "Pendekatan *Restorative Justice* Dalam Sistem Peradilan Pidana and Implementasinya Dalam Sistem Peradilan Pidana Anak", p 44.

30 Abnan pancasilawati, Penegakkan Hukum dalam Syari'at Islam, *Mazahib, Jurnal Pemikiran Hukum Islam*, Vol 11, No. 1, Juni (2013), p. 42

31 Abd al-Qadir, 'Awdah, *Al-Tashri' Al-Jina'i Al-Islami, Muqaranan bi al-Qanun al-Wadh'*, juz 1 (Beirut: Dar al katib al 'azli, tt), p: 305 also see: Sayyid Sabiq, *Fiqh Al-Sunnah* Juz III , (Beirut:Dar Al Fikr, 1977), p: 773

32 T. Mahmood, , et al., *Criminal Law in Islam and the Muslim World: A Comparative Perspective* (New Delhi: Institute of Objective Studies, 1996), p: 4

the matter has not been brought to the authority. In *qishās* cases, forgiveness from the victim is highly recommended.³³

Many hadiths explain about restorative justice in Islamic law, such as: hadiths where Safwan ibn Umayya's cloak was stolen from at the time he slept at a mosque. This hadith indicates that theft is allowed to be resolved through *sulh* before the matter is brought to the judge.

God's purpose in establishing His law is to realize the power of human life, both here and hereafter. Thus, the law must direct and realize the existence of an entitlement.³⁴ The doctrine of the maqasid Shariah is the *mashlahah* or goodness and the well-being of mankind both in the world and in the hereafter. therefore, al-Syatibi positioned the maslahat as an 'illat law or a reason for Islamic law.

Justice is the ultimate goal of Islamic religious teachings. It can be argued that pursuing justice and peace through non-violent strategies is a more viable and effective method for achieving it.³⁵ The paradigm of *ta'zīr* becomes the best alternative of punishment settled by deliberation and peace.³⁶ Forgiveness can withdraw *ta'zīr* punishment. If a *ta'zīr* offence involves the rights of Allah and public interests, the ruler has the power to pardon the offender and the *ta'zīr* punishment can be withdrawn.³⁷

By previous explanations, restorative Justice is not something new in the Islamic criminal justice system. In this case, it has been used some restorative mechanisms, such as

33 Ab Aziz, Norjihana, and Nasimah Hussin, The Application of Mediation (Sulh) in Islamic Criminal Law, *Shariah Journal*, Vol. 24, No. 1 (2016), p. 115-136,

34 Muhammad Helmi, konsep Keadilan dalam Filsafat Hukum dan Filsafat Hukum Islam, Mazahib, *Jurnal Pemikiran Hukum Islam*, Vol. XIV, No. 2, Desember, (2015), p. 142

35 Mohammed Abu An Nimer, *A Framework for Nonviolence and Peacebuilding in Islam*, *Muis Occasional Papers Series*, Paper No. 6, 2008, p. 2

36 Wahbah Zuhayli, *Fiqh Al Islami Wa Adillatuh*, Jilid 7, (Dimashqa: Dar Al Fikr Al 'Ilmiyah, 1997), p. 831

37 Ab Aziz, Norjihana, and Nasimah Hussin, *The Application of Mediation* p. 115,

compensation, conciliation and forgiveness. This proves that severe punishment is regarded as a preventive rather than a true punishment for its implementation.³⁸ The forgiveness and the relief of the punishment of the offenders of the crime from the victim and the regret of the offenders eliminates severe punishment for him. Forgiveness and peace is the concept of restorative justice in Islam that is best suited for transforming justice in the criminal justice system from retributive to restorative.³⁹ The philosophical principles and foundations on which punishment based in Islam show that restorative justice exists as a rule in Islamic law. The Islamic justice system can be part of an effort to develop restorative justice standards because Islamic legal provisions are almost all of the alternative forms known in the restorative justice system.⁴⁰ Abu Hamid al Ghazali (1111) says that “the idea and vision of Islamic rules (law / sharia Islam) is the realization of personal and public and security welfare (*mashlahat*).

In Islamic law restorative forms of justice can take the form of compensation, conciliation and forgiveness. It is intended that the perpetrators can be held responsible for the damages caused to the victims and the community.⁴¹

38 Mu'taz M. Qafisheh, “Restorative Justice in the Islamic Penal Law: A Contribution to the Global System”, *International Journal of Criminal Justice Sciences* Vol 7 Issues 1 January-June 2012.<http://www.sascv.org/ijcjs/pdfs/mutazaicjs2012istissue.pdf> (Accessed February 25, 2013), p. 487

39 Nawwal H. Ammar, “Restorative Justice in Islam: Theory and Practice”, *The spiritual Roots of Restorative Justice*, edited by Michael L. Hadley (Albany: State University of New York Press, 2001), p. 162

40 Mutaz M. Qafishes, “Restorative Justice in the Islamic Penal Law: A Contribution to the Global System”, p. 488

41 Muhammad Siddiq Armia, ‘Implementing Islamic Constitutionalism: How Islamic Is Indonesia Constitution?’ *Al ‘Adalah Journal*, Vol.15 Issues 2. (2018), pp. 437-450.

1. Compensation (*Diyat*)

Compensation or *diyat*⁴² is an alternative to the death penalty or other punishment for a crime committed by the perpetrator against the victim. If the perpetrator is rich, then he must compensate from his own money. But if he is proven to be financially inadequate or what he does is due to an element of inadvertence (negligence/error) then compensation is also charged to *'aqila*.⁴³ Compensation can be paid within 3 years, this time period is given so that the payee can plan and manage instalments. The victim or the victim's family can receive a smaller amount than *diyat* if the victim agrees in accordance with the agreement between the two parties.

2. Conciliation (*Shulh*)

A modern example of restorative justice practices operating in the context of a Muslim majority is the *shulh* process. This process can be found in various parts of the Middle East. This process is in line with the principles of restorative justice. Three principles in *shulh* which form a form of restorative justice, namely: forgiveness, peace and improving relations.⁴⁴ The purpose of conciliation is to end conflict and friction. According to a number of legal experts, conciliation is not permitted in serious cases involving crimes such as terrorism, grave killings and rape, because they violate God, the state, society and violate human rights.

42 *Diyat* is compensation in the form of large amounts of money given by the perpetrator to victims to do peace in a judicial matter. Criteria in determining compensation money for consistency and equality. In this case compensation is usually measured by grams of gold or the specific number of livestock for each part of the body affected by the attack / which gets a loss. 'Abdul Qadir 'Audah, *at-Tashri' al-Jina'i Al-Islami Muqararanan bi al-Qanun al-Wad'i*, p 176-177.

43 "Aqila is a family that helps in compensating victims and preventing conflicts. This can be interpreted as a nuclear family such as: parents, children, daughters, brothers and sisters, uncles, cousins, entire tribes and in-laws.

44 Center for Restorative Justice and Peacemaking, "Restorative Justice and Islam".

3. Forgiveness (al-'Afwu)

The concept of forgiveness or *al-'Afwu* is similar to compensation and conciliation which is to avoid original punishment. If *diyat* means forgiveness with full compensation (pay compensation in accordance with *diyat* provisions) and conciliation equals forgiveness with partial compensation (compensation according to the agreement of both parties or as determined by the State), then *al-'afwu* refers to forgiveness without a reward or can be called "full forgiveness".

According to 'Abdul Qadir' Audah *al-'afwu* is the fall of penalty obligations (such as *qishās* without compensation while *shulh* is the fall of penalty obligations (such as *qishās*) with compensation. Imam Malik and Imam Abu Hanifah likened forgiveness with compensation called *shulh* and not *al-'Afwu*. This is because the mandatory killing sentence is *qishās* and *diyat* is not required unless the victim is willing not to carry out *qishās* then it is obligatory for the perpetrators to carry out *diyat*. According to Imam Shafi'i and Imam Ahmad forgiveness by *diyat* is called '*afwu* and not *sulh*.⁴⁵

D. Restorative Justice Practices in Ponorogo

The village is the smallest traditional territorial unit in Ponorogo consisting of several hamlets. As for the structure of a village in Ponorogo consists of three elements; the first element is the village leader, the village leader, as the customary holder and assisted by village officials as law enforcers; second, the element of Parents or also called *Kamituo*. The third element is the society.

Disputes resolved by the village court,⁴⁶ the implementers are village functionaries, *babinsa*, and *Kantibmas*, where the village leader sits as a judge, the decision is a peaceful decision. If the parties accept the decision, the case is finished, on the other hand, if one of the parties does not accept the decision, then the party concerned can file the case again with the Police. The village leader plays an active

45 'Abdul Qadir 'Audah, *at-Tashri' al Jina'i Al-Islami*, p 168.

46 Village Court is a village-level law enforcement body, where the form and implementation are made very simple according to the level of knowledge of rural communities. Law enforcers involved are the village head, village officials, community leaders, Police, and TNI

role in building communication with fellow village officials in addressing any problems faced by the community and giving space to other village officials to play a role in making decisions in accordance with their fields and authorities.

1. Case Settlement Process

a. Restorative Justice Process in Village Courts⁴⁷

First: the reporting stage and the settlement request. In this initial stage the victim or the victim's family or other residents who saw the criminal event, reported and asked for a resolution to the Village leader shortly or a few days after the dispute or crime occurred. The village leader then reported the case to the police station, then together with Kamtib and Babinsa who were on duty in the village where the incident determined the next steps to resolve the case peacefully. In this stage also spontaneously shortly after reporting as well as citizens' requests for resolution through mediation, village officials or village leaders must decide whether or not settlement at the village level can be carried out, this consideration is closely related to the degree of criminal acts that occur.

Second, the stage of fact-finding by the village leader, babinsa, and Kantibmas. At this stage, the three elements come to the two parties separately to look for facts about the problem that has been done. The time for this fact-finding was carried out the day after the report was carried out.

Third, the stage of determining the settlement time through mediation by the village leader. Shortly after the reports and requests for resolution through mediation were received by the village officials or the village leader himself, the village leader along with the *babinsa* (TNI AD Village level) and *kamtib* (Police in village level) determined the time to settle the case through the village court. At the same time, in determining the settlement time, the form of the meeting or mediation forum is also determined, including the determination of the mediator and who is involved in mediating the two parties to the dispute. When it has been

⁴⁷ Interviews with village leaders in the mlarak sub-district, Mr. Saipul, 22 June 2019

agreed on when and who will be involved in the settlement process the mediation process is carried out. The mediation process is generally carried out at the village leader's house or at the village hall. Village officials must create a peaceful and calm atmosphere so that mediation activities can proceed smoothly as expected.

If an amicable settlement agreement has been agreed, the village chief secretary will officially invite both parties to attend the hearing on the day and date specified.

During the trial, the parties can be represented by their guardian or other relatives as the spokesperson. The trials are formal and closed which are usually held at the village leader's house or at the village hall. The trial took place solemnly and the village leader invited the parties or their representatives to submit their problems which were then recorded by the Registrar. The village leader invites witnesses to give their testimonies and usually if deemed necessary, witnesses before giving their testimony will be sworn in first. The village leader gave *Kamituo*, ulama and other community leaders the opportunity to respond and present a solution to the case. The village leader and all members of the congregation deliberated on the peaceful decision to be given. If they have agreed on the type of peaceful decision to be handed down, the village leader asks the parties again if they are ready to accept the peace decision.

The village leader read the peace decision and asked the parties to sign the peace deed and to carry out the decision seriously. The decision and the copy given to the parties are kept as an archive in the village leader's office. After the decision is agreed and accepted by the parties, then at the next meeting the decision will be executed through a peace ceremony:

- To one or both parties will be subject to sanctions, the severity of which is very dependent on the type of violation or customary crime they have committed.
- Execution (execution) is carried out through a peace ceremony by imposing something on the parties or on one party depending on the decision (there is a relationship with the degree of error).

b. Settlement of Disputes through Village Courts

Among the cases that are under the authority of the village court as found in the field are disputes in the household, disputes between families related to inheritance, disputes between citizens, disputes over property rights, petty theft, minor abuses. In practice, cases of minor criminal offences, such as traffic accident and even minor cases are often resolved by the village court.

According to data and information collected by researchers from various informants, the peace carried out by the perpetrators and victims of various types of criminal acts resolved by village officials in the past one (1) year, namely in 2018 amounted to 20 cases resolved by officials village. The types of cases completed by village officials consist of several types of cases, namely:

- a) Cases of theft by minors
- b) Light Theft Case
- c) Cases of persecution
- d) Case then
- e) Cases Interfering with public order

For more details on the type and number of criminal acts completed at the village level by the village government in this case the village leader, the authors describe in the form of a table:

<i>No</i>	<i>Case Type</i>	<i>Total</i>	<i>Explanation</i>
1	<i>Mild theft case⁴⁸</i>	5	Peace
2	<i>Cases of persecution</i>	6	Peace

48 It is Crime of minor theft Article 364 of the Criminal Code. If the object or goods resulting from a criminal offense in cases of theft (minor), embezzlement (minor), fraud (minor), detention (minor) and the like do not exceed Rp 2,500,000 (two million and five hundred thousand rupiah). Therefore, criminal offenses are classified as minor offenses, detention is not established or extended, and cases are examined by a single judge in a quick examination, as agreed in Article 3 and Article 5. In addition, based on Article 1 paragraph (2) and Article 4 Nokesber, law enforcement of tipping can be carried out by using law enforcement which is oriented towards restorative justice, in which the relevant PERMA has not yet been regulated on this matter.

3	Traffic accident case	6	Peace
4	Cases disturbing public order	3	Peace
Jumlah		20	

Table 1. Criminal Acts data mediated by the Village Officers in the Subdistrict of MLarak in 2018⁴⁹

Related to various types of criminal acts that were successfully resolved by the village officials, the following authors describe in the form of a table, following a detailed table with the initials of the parties:

No	Dispute party	Jenis Kasus	Village Court results	Parties involved
1	A and R	Mild theft case	1. The shop owner forgives the perpetrator (ABH) and asks him not to repeat it again 2. Warning to the offender's parents to look after and guide their child	1. Village leader 2. Village Officials 3. Victim and offenders 4. shop owner 5. Babinsa
2	A and B disagree with each other	Cases of persecution	Emphasize to A and B to keep each other safe and never repeat their actions	1. Village leader 2. Village Officials 3. Victim and offenders 4. witnesses 5. Babinsa
3	I and A	Traffic accident case	Both parties agreed to peace, forgive each other and agreed to bear the costs of each other's losses	1. Village leader 2. Village Officials 3. Kamituo 4. Victim and offenders
4	AS and IR do Asusila	Cases disturbing public order	Give a stern warning to the offender not to repeat his actions	1. Village leader 2. Village Officials 3. Offenders 4. Chief of RT

Table 2. Data on the type of case along with the results of agreement one out of each case mediated

c. Analysis of Settlement of theft cases according to Islamic law

Settlement of theft cases through the village court, even though the culprit is someone who is not yet capable of

49 Interviews with village leaders in the mlarak sub-district, Mr. Saipul, 21 June 2019

law, the case can be resolved by a process of deliberation and peace, so as to produce a joint decision that does not harm either party. The decision of the village leader as chair of the session can be accepted by both parties with sincerity, the perpetrators accept the sanctions given by the village leader as a manifestation that the perpetrators are aware of their mistakes and are responsible for their actions. As for victims with great souls, forgive the perpetrators, in order to maintain their harmony and brotherhood, this is proven by not bringing the case in the case of law, given that the case is under the authority of the state court. In cases where the perpetrators are minors, not only decides that the offender is guilty, but in this case the perpetrator is also a victim, because he is not given a foundation and more intensive religious education by his parents, the lack of family economic conditions is also a factor of the perpetrator doing that matter. Customary wisdom provides policies for the perpetrators and also their parents to better guard and educate their children, not only with formal education, but also with spiritual or religious education that will be the basis of strength and shields from immoral acts, because children are a mandate from God that must be guarded and protected his future.

In Islamic law, theft enters the *jarimah hudūd*. Everything that leads to the elimination or destruction of property is a bad act that is prohibited, in this case, God forbids theft to guard property or “*Hifz al-Māl*”⁵⁰, because

50 The scholars of the jurists agreed on the illegality of the property of a Muslim and the infidel. Their property should not be taken, taken, stolen, eaten in an unlawful manner, no matter how small. Because of the damage caused by theft, it is by His wisdom that Allāh promotes the law of amputation for the perpetrator. However, the law of extortion for thieves is not intended to harm members but for the protection of others' property. So the purpose of the Shariah in determining the shari “at is to be carried out in accordance with His requirements. It is not intended to create *masyaqqat* for the culprit (*mukallaf*) but instead there is a distinct benefit to the culprit. If in the *taklif* there is *masyaqqat*, then it is not *masyaqqat* but *kulfah*, something that cannot be separated from human activity as in customary glasses, people carrying goods or working night in search of life not viewed as *masyaqqat*, but as one of necessity and the habit of making a living. Imam Syathibi, *al-Muwāfaqāt fī Usul al-Syariah*, Juz I, (Beirut: Dar al-Kutūb al- ‘Ilmiyyah, p.th.), p. 93-94.

property is included in one of the five needs in *dharūri* (primary) humans according to Islamic sharia, thus, the act of eliminating or reducing one of the five *dharuriyat* is forbidden, because the purpose of establishing the sharia is to achieve benefit and reject *madhārat*.

Al-Zuhayli defines theft as taking someone else's property out of his or her secret storage and in secret. As for 'Awdah defines theft by: "أخذ مال الغير خفية" means to steal one's goods in secret. According to this definition, then the principle of stealing is four things; first take it in secret; both property owned by others; third, a property; and there is an element of intent. Al-Zuhayli adding the pillar of stolen goods is in storage.⁵¹ When all these elements are met, then it is prescribed for the punishment of *hadd*, this is included in the word of Allah Qs. Al Maidah verse 38.⁵² Among the reasons why Islam decrees such punishment is the protection of the moral order, and the good and the eradication of evil and despicable things, while theft is one of the most despicable acts of harm to others.

Enforcement of theft penalty has several requirements and conditions to be met. Among these conditions are:

The conditions of the perpetrators of the theft, namely the requirements of al-expert (eligibility and appropriateness) to be sentenced to the law of cutting off hands, which is sensible, baligh, committing theft of their own will and awareness (not forced), and knowing that the law of stealing is haram. Maliki scholars add another condition, namely, the perpetrators of theft are not the parents of the victims of theft, the thief does the theft because he is forced to do it because he is hungry. Hanabilah scholars added another requirement that the thief knows the item he stole and knows that he is forbidden to take it, by paying attention to and considering what is in the alleged mukallaf (intelligent mind).

51 Wahbah Zuhayli, *Fiqh Al-Islami Wa Adillatuh*, Jilid 7, (Dimashqa: Dar Al Fikr al-'Ilmiyah, 1997), 5422, Also see: 'Abd al Qadir 'Awdah, *al-Tashri' al-Jinai Al-Islami muqaranan bi al-Qanun al wad'i juz 2* (Beirut, Libanon: Muassasah al Risalah, 1997), p 518

52 38. *Men who steal and women who steal, cut off both hands (as) retribution for what they do and as punishment from God. and Allah is Mighty, Wise.*

The terms of the stolen item, namely:

1. Something that is stolen must be a treasure that has value (*mutaqawwim*).

Hanafiah scholars require assets that have value is that the stolen property must be assets that are considered valuable to society in general in a community. As for the Shafi'iyah, Malikiyah and Hanabilah, they argue that valuable assets are valuable and respected assets (*muhtaram*).

2. The stolen property must reach the limit (*nisab*) theft.⁵³
3. Stolen items can be moved. Movable assets are assets that can be removed from his property, and transferred from the victim's hand to the thief's hands.
4. Something that is stolen must be something that is indeed stored and maintained (element of *al-hirz*).

53 Fuqaha differs in his views on the level of theft. The Hanafi scholars are of the opinion that the rate of theft is one dinar or ten dirhams. This is based on the hadith: لا قطع فيما دون عشرة دراهم Meaning: There was no handcuff in the case of theft still under ten dirhams (HR. Ahmad) In the case of a narrator named Nas r Ibn Bab, he was a narrator who was included the category of narrator is aif by jumhur, while imam Ahmad assesses that he is a narrator. The second proposition is the hadith: The hand of a thief is not cut off except in the theft of a shield, at which point a shield is valued at ten shillings. (HR. Ibn Abi Syaibah from Abdullah Ibn Amr ra.

While the Jumhur of the Scholars of Malikiyah, the Shaykh 'yah, and Hanabilah argue that the theft is a quarter of a dinar or three dirhams of pure syar'i, or worth it. Their claim is a hadith narrated by Ahmad, Malik, Bukhari, Muslim, Al Tirmidzi, al nabi i, Abu Daud, and Ibn Majah: تقطع اليد في ربع دينار فصاعدا Meaning: A thief's hand is cut in the case of theft of a quarter dinar upwards. The second hadith is: أن رسول الله صلى الله عليه وسلم قطع في مجن ثمنه ثلاثة دراهم Meaning: The Prophet cut off his hands in the crime of theft in the form of a three-piece shield. (HR. Bukhari, Muslim Abu Dawud, al Nasa'i, dari Ibnu Umar ra.)

The source of disagreement between the Hanafi clerics with Jumhur is the estimation of the value of the shield which the thief cut off his hand by the Messenger of Allah. However, seeing that the hadiths exist, the opinion of jumhur is stronger because it is supported by hadith sahih. (matan hadith seen on hadith no 1684, 1685, 1866, and 1687, Imam Abi al-Husain Muslim Bin al Hajjaj al-Qushairi al-Naisaburi (261), Shahih Muslim (Beirut: Dar al-Kutub al-'Ilmiyah, 2003), p 667

The proposition agreed upon by the scholars of the four schools is the hadits:

وروي عنه عليه الصلاة والسلام أنه قال: "لا قطع في ثمر ، ولا كثر حتى يؤويه الجرين ، فإذا آواه (الجين فيرية فيرية فيرية فيرية في روية فيرية).

“There is no penalty for cutting off hands (for stealing) dates and katsar until the fruit is placed in al jarin (drying basket). If the fruit has been placed in al jarin, then someone stole it, then he was sentenced to cut off his hand. “In history, it is stated: if it has been placed in al-murah (cage) or al-jarin” (HR. Al Daruqutni)

Scholars agree that the storage of assets (*hirz*) are of two kinds:

First, *al hirz bi al nafsi* or *al hiirz bi al ghoir* which is every place provided to maintain, store and protect property, and are prohibited from entering it unless they have to permit it, such as a house, shop, warehouse, etc. Munurut Imam Shafi’i and Imam Ahmad, which is meant by *al hiirz bi l ghair* are all closed places provided for storing assets in one’s power. As according to Abu Hanifah, *hirz bi al nafsi* is any place prepared to store assets that are prohibited from entering it, even if the door is open or closed.⁵⁴

Second, *al hirz bi al-hafid* or *al hirz bi al-ghair*, any place that is not provided to protect, store and protect property, anyone entering into it without permission. Like the mosque, the field, etc., this is the opinion of Abu Hanifah. As for the three Ulama who have the same opinion, but these places can be *al hirzbi al* then n and can be *al hirzbi al-Hafiz*⁵⁵

54 ‘Abd al Qadir ‘Awdah, *al-Tashri’ al-Jinai Al-Islami muqaranan bi al-Qanun al-wad’i juz 2* (Beirut, Libanon: Muassasah al-Risalah, 1997), 554.

55 Abu Bakar Mas’ud Bin Ahmad Al-Kasani, *Badai’ al-Sanai’ fi al-Tartibi al-Sharai’*, Juz 7, (Dar al Kutub al ‘Ilmiyah, 1986), http://library.islamweb.net/newlibrary/display_book.php?flag=1&bk_no=12&ID=3188, accessed on 3 Juli 2018. Also see: Fida Fathi Shathani, *al-Tatbiqat al-Mu’asirah li Sharti al-Hirzi fi al-Sariqah*, 8, <http://faculty.yu.edu.jo>, accessed on 4 Juli 2018.

5. Something that is stolen is an object that can be stored for a long time and is not easily damaged or rotten.⁵⁶
6. The stolen property does not include something that originates from a *mubah* property (something that anyone can take part in).⁵⁷
7. The stolen property is protected property, the thief has no right to take it, does not have a reason or apologetic interpretation (*ta'wil*) that can explain why he took it and also has no doubt in taking it.
8. The perpetrators of theft do not have ownership rights to something that was stolen and also do not have an apologetic interpretation of ownership of it, or the existence of an element of liability regarding ownership of the stolen property.
9. The perpetrators of the theft are not people who are given permission to enter into *al hirz*, or in which there is an element of safety that permits.
10. The stolen item is indeed what is intended and intended to be stolen by the offender, not something whose status follows the item intended to be stolen.
11. The stolen property does not belong to the offender.

Conditions for theft victims: first the possession hand, the mandate hand, such as the hand of the entrusted person, the person borrowing something, and the partner's hand as *mud a rib*. Third, the hands that bear, such as the hands of those who call *ab*, and the hands of those who hold the goods based on the purchase offer, and the recipient of the mortgage.

56 he point is fruits, vegetables, and so on. However, scholars Malikiyah, Shafi'iyah, and Hanabilah said that the law of cutting off hands is enforced in every case of theft of property that may be traded and exchanged, whether in the form of food, clothing, animals, and so forth. This is because looking at current conditions, these items are included in items that are very valuable to their owners.

57 This is different if the item is a *muhraz* (guarded, stored and protected by the owner). If someone stole it, then the punishment for cutting off a hand is given to him.

Terms of crime scene (crime scene, area, or place where the theft took place: in this case, it is required that the theft be carried out must occur in the area of *al-'adl* (the area of the Islamic state which is controlled by a legitimate government, not an enemy area and not the area controlled by rebel or separatist groups).⁵⁸

The proof of theft crime according to Islamic law can be known through two things, namely *Bayyinah* (witness), confession of the perpetrators, and oaths. A *bayyinah* can be accepted if it fulfils several conditions, which are related to the punishment of hadd and qishās , namely: behaviour, fairness, *al-asalah* (original) and there is no element of *shubhat*, cases and events have not expired, and the submission of indictment and litigation by the rightful owner of the hand. *Shafi'iyah, Hanafiyah, and Hanabilah*, they argue that in the case of having a hand-cut it requires the existence of a lawsuit and indictment of the victims of theft because the element of *Adami* rights in the hand-cut *hadd* is dominant. As according to Imam Malik said that *hadd* to cut hands do not need the demands of victims of theft, in order to protect the rights of the community and protect their property.⁵⁹

Regarding proof by oath, the Shafi'i Ulama believes that the crime of theft is determined by oath if the culprit has proven the truth that he stole and it is not enough just to confess and there are strong witnesses or qualified. Imam Malik and Abu Hanifah argued that the hadd punishment for a thief can be given sufficiently by the witness's testimony and testimony without having to be sworn in, and sufficiently proven by the stolen property in the thief.

If all of these conditions are met, then the offender may be subject to a sentence of cutting off the hand, but if there is only one condition that is not met, then the sentence cannot be enforced. The penalty given is *ta'zir*. The penalty *ta'zīr* is

58 these conditions are abstracted from: Wahbah Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuh*, Jilid 7, (Dimashqa: Dar al-Fikr Al 'Ilmiyah, 1997), 5424-5435

59 'Abd al Qadir 'Awdah, *al-Tashri' al-Jinai Al-Islami Muqaranan bi al-Qanun al-Wad'i juz 2* (Beirut, Libanon: Muassasah al-Risalah, 1997), 614

a discipline (*ta' dib*) whose existence follows the *mafsadah* (damage, negative impacts) caused.⁶⁰ Among the crimes that are punished by *ta'zīr* are crimes that are not included in the crime of *hudūd* and *qishās*, as well as crimes that do not meet the requirements of the punishment of *hadd* and *qishās*.

If the accusation of theft has been proven, then for the thief to get two sanctions, the first is *dhiman* (guarantee or *diyāt*) and the second is cutting off the hand. Abu Hanifah argues that if a person is determined to be a thief, then he must replace the stolen item with a price that is of value and he must be subject to the punishment of having a hand-cut if it is proven that he is the culprit, but *diyāt* and the punishment of a hand cannot be carried out together. If the thief is chopped off his hand there is no imitation for him, even if the stolen item is damaged. The reason is that the Qur'an explains *hadd* only cut hands, there is no *dhiman*.

Imam Shafi'i and Imam Ahmad are argued that the penalty of cutting off hands and *dhiman* can be carried out together, because a thief is required to have his hand cut off and is obliged to pay *diyāt* worth the assets taken, because a thief violates two *Haq*, first the *haq* of Allah forbidding stealing and secondly is the *haq* of a servant whose property is damaged or taken without necessity, so if a crime is a violation of two *haq*, then he is obliged to replace the two *haq*.

Imam Malik believes that a thief must replace the stolen item in accordance with the price and value of the item if it has not yet fallen upon the punishment of cutting hands for several reasons, whether it has not reached *nishab*, theft not from *hirz*, or others, but if the goods what is stolen is still remaining and is still present, then it must be returned to its owner. If a thief has had his hands cut off, he is obliged to return the stolen property if it still exists, and if it does not exist, then he must return it according to the value and loss of the victim on the condition that he get the convenience in carrying out his crime.⁶¹

60 Wahbah Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuh*, Jilid 7, (Dimashqa: Dar al-Fikr al-'Ilmiyah, 1997), 5429

61 summarized from: 'Abd al-Qadir 'Awdah, *al Tashri' al-Jinai al-Islami Muqaranan bi al-Qanun al-Wad'i*, juz 2 (Beirut, Libanon: Muassasah

The theft case committed by brother A, when seen from the conditions of *al-Ahliyah*, the perpetrator has fulfilled all the requirements, except for *baligh*.⁶² When viewed from the terms of the stolen object, the conditions of achievement to *nisab* have not yet been fulfilled,⁶³ however, in this case, A remains as a perpetrator of theft because he took the goods secretly and with a malicious intention to want to own the item. The element of evil intentions is fulfilled because the perpetrators know that what they do is forbidden. He also took the item from the owner directly (fulfilling the ownership hand element).

The decision of the village leader and *babinkamtibmas* to give *ta'zīr* punishment in the form of advice, reprimand, apology, and *diyat* is appropriate. This is because the

al-Risalah, 1997), p 618-621

- 62 The sign of a child is said to be puberty first, for women to have menstruation and for men to dream, and the age limit is five to fifteen years. Regarding age restrictions, the Messenger of Allah (may peace be upon him) said:

عرضني رسول الله صلى الله عليه وسلم يوم أحد في القتال وأنا ابن أربع عشرة سنة، فلم يجزني، وعرضني يوم الخندق وأنا ابن خمس عشرة سنة، فأجازني. متفق عليه (وهذا لفظ مسلم).

Meaning: "The Messenger of Allah (may peace be upon him) appointed me to participate in the battle of Uhud, at the time I was fourteen years old. But he didn't allow me. And then he led me back to the battle of Khandaq, at which time I was fifteen years old. He even allows me. " Nafi (the narrator of this hadith) said: "I was facing' Umar bin 'Abd al' Aziz, at that time he was acting as caliph, and I narrated this hadith, and he ('Umar bin' Abd al 'Aziz) said: In fact, this is the boundary between young and old". (Shohih Bukhori, no.2664 and Shohih Muslim, no.1868) (Lihat: Siroj Munir, Batasan Umur Balig laki-laki and Perempuan, Dalil, and hikmahnya, *Fiqih Kontemporer, Article*, Senin, 14 Januari 2013, <http://www.fikihkontemporer.com/2013/01/batasan-umur-baligh-bagi-laki-laki-dan.html>, accessed on 4 Juli 2018, Also see: Ulil Hadrawi, Tiga Tanda Balig, *Article Shariah*, <http://www.nu.or.id/a,public-m,dinamic-s,-detail-ids,11-id,40361-lang,id-c,syariah-t,Tiga+Tanda+Baligh-.phpx>, accessed on 4 Juli 2018.)

- 63 As previously explained, that the value of theft is a quarter of a dinar or three dirhams. considering 1 dinar = 4.25 gr. 22 carat gold. 1 gr. While 22 carat gold = 461,225. When viewed from these provisions, then a quarter of the dinar is worth Rp. 490,051. (Lihat:<http://www.dinar-online.com/>, accessed on 05 Juli 2018)

perpetrator is a minor (not yet mature). In addition, the offender is also a victim of family poverty and his lack of religious education causes the offender to commit acts that are forbidden by God because it is an obligation of parents to instil in their children religious and spiritual education in order to protect them from immoral acts.

2. The Obstacles in Resolving Disputes Through Mediation

In terms of regulation, Ponorogo does not yet have sufficient requirements to apply the judicial court because there are no regional regulations governing problem-solving, this triggers several obstacles and obstacles in its implementation,⁶⁴ including:

Local wisdom is carried out not by professionals who depend their lives on work as judges but is carried out by certain people who are seen to understand cases in society that also have their own profession/occupation. A judge or executor of a village court is not a person who depends his life on the operation of the village court, but because of his responsibilities within the community. This can avoid bribery in resolving cases in traditional justice.

The next obstacle is that the community leaders' level of understanding of the law is still lacking, this is due to various factors, including the change of head causing the appointment of a new village leader and not yet understanding in detail about local wisdom, specifically the authority of the village court in resolving disputes.

The next obstacle is the lack of deterrent effect on some sanctions imposed on the perpetrators, this is proven by the repetition of crimes committed by the perpetrators. Thus, it is very important to make local regulations that regulate this problem solving as a whole, so that it has legal power.

E. Conclusion

In Indonesia, local wisdom is an alternative dispute resolution used in several regions, such as Banjar, Bali, Aceh, Maluku, Palangka Raya, Ponorogo, ect. Local wisdom has a

64 These obstacles and constraints are the essence of the interview with the village government

positive impact on the people of Indonesia, including simple, fast, cheap, and appropriate dispute resolution, and the nature of volunteerism in the process and the involvement of victims and perpetrators to resolve disputes. The final result achieved is to prioritize the return of the community's balance and peace and peaceful atmosphere between the parties and indigenous peoples in general. Dispute resolution through mediation and traditional justice is in line with the concept of Restorative Justice.

In Ponorogo, alternative dispute resolution (ADR) is known as problem-solving. The restorative justice approach is carried out in the process of resolving disputes in order to seek consensus and not to harm both parties to the dispute. The Village Court is deemed suitable for use in settling a number of minor cases in Ponorogo. Nevertheless, there are obstacles in the resolution of cases through local wisdom, including the absence of regulations governing the mediation procedures, and the determination of sanctions for minor criminal offences felt not to make a partial deterrent, this is evidenced by the repetition of criminal acts committed by the perpetrators, thus disturbing the community.

From the perspective of Islamic law, it can be seen that the resolution by local wisdom in Ponorogo is in accordance with Islamic sharia, this is evidenced by the implementation of the *al shulh* (peace) system in resolving disputes and the *ta'zir* paradigm in providing penalties for violators custom. With the existence of 'Afw, and repentance, very important role in determining decisions and sanctions for perpetrators. 'Afw or apologize from the victim is a symbol of recognition of mistakes and as a form of peace there has been a peace between the parties, and repentance as a form of awareness of the perpetrators not to repeat their mistakes.

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