



 sciencedirect

BALTIC JOURNAL OF LAW & POLITICS

A Journal of Vytautas Magnus University

VOLUME 16, NUMBER 2 (2023)

ISSN 2029-0454

Cite: *Baltic Journal of Law & Politics* 16:2 (2023): 592-601

DOI: 10.2478/bjlp-2023-0000043

Protection of the Victim's Heirs in Cases of Intentional Homicide Under Islamic Law and its Relationship to Restorative Justice

Budi Sastra Panjaitan

Faculty of Sharia and Law, North Sumatra State Islamic University, Medan, Indonesia,

budisastrapanjaitan@uinsu.ac.id

Arifuddin Muda Harahap

Faculty of Sharia and Law, North Sumatra State Islamic University, Medan, Indonesia

Received: December 19, 2022; reviews: 2; accepted: January 04, 2023

Abstract

Islamic law has provided for the strictest possible sanctions against perpetrators of intentional homicide, namely qishas. The wisdom that can be taken from the practice of qishah is for humans to appreciate other human beings. The execution of qishah to perpetrators of intentional homicide is also intended to protect the heirs of victims of intentional homicide. This study aims to unravel the protection of the victim's heirs in cases of intentional homicide under Islamic law and its relationship with restorative justice. This research is a normative legal. Research result shows the application of the absolute qishah of property rights of the heirs of the victims of intentional homicide whose execution can be replaced by diyat through the mechanism of forgiving of the perpetrator. Forgiveness is a peaceful process as an alternative to solving criminal cases with a better specific purpose. Through peaceful institutions, it turns out that Islam has previously carried out restorative justice

Keywords

Intentional Homicide, Victim's Heirs, Restorative Justice

Introduction

Islam leads people to value other human beings. Love each other and avoid

various sinful deeds. The affection taught by Islam aims to prevent violence, let alone murder. Islam brings benefits to man, "benefit is not only for life in this world but also for eternal life in the hereafter" (Marsaid, 2020).

Murder is a deliberate act to take the life of another person. Murder occurs because of the intention to kill and its implementation jointly (Iriyanto and Halif, 2021). Murder is the deprivation or disappearance of one's life by another person that results in the malfunctioning of all vital functions of the limbs due to the separation of the spirit from the victim's body (Hasan and Saebani, 2013). Homicide can occur instantly or intentionally. The murder that occurred immediately arose because of a reaction to defend himself and in the perpetrator there was no intention to commit murder. Meanwhile, intentional homicide was committed by the perpetrator because there had been a previous intention to commit the act of murder. Both instantaneous and intentional homicides are forbidden.

With regard to perpetrators and victims in murder cases, Islam teaches to keep doing justice. A sense of understanding occurs in the midst of society. Many parties better understand the perpetrator should be punished than the victim should be protected. Even though the victim in the murder case is the most disadvantaged party. It should be that the understanding of the victim is balanced with the understanding of the perpetrator. "So far, victims of criminal acts can be said to lack protection from the state, both physically and economically, as well as other needs in fulfilling their obligations as witnesses in a judicial process. While criminals are always monitored, get special treatment for the sake of legal process, even to them are given regular food and drink" (Kenedi, 2020).

The victim must be given justice. Even the perpetrators must also be given justice. "Justice should not be abandoned just because of the impulse of lust and justice should not be abandoned just because of hatred towards someone" (Panjaitan, 2021). Islamic law never leaves the heirs of the victims unceremoniously in order to be displaced in prolonged suffering. The suffering of the victim's heirs can take the form of physical suffering, psychic suffering as well as suffering economically, socially and politically as a result of the victim's death by the perpetrator.

Restorative justice is an alternative to solving criminal cases through mediation in order to produce a joint decision to end criminal cases in a fair and balanced manner. The idea of restorative justice cannot be separated from the role of Albert Eglash who in 1977 divided three categories of criminal justice into: retributive justice, distributive justice and restorative justice. "Nevertheless long before Albert Eglash put forward his ideas, the civilizations and traditions of Ancient Arabia, Greece, Ancient Rome and Hindustan had actually known special restorative justice in the crime of loss of life" (Satria, 2018).

Islamic law is a progressive law that places restorative justice as a solution in solving murder cases. Through restorative justice the victim's heirs get legal protection. How the protection of the victim's heirs in murder cases under Islamic

law and its relationship with restorative justice is interesting to study, so this study then examines it so that there is an understanding that Islam provides space and movement for the protection of victims' heirs in cases of intentional homicide.

Method

This research uses the methodology of normative legal research. Normative legal research is also said to be library research or document studies because this research is mostly carried out on secondary data in libraries (Ishaq, 2017). The object of study of this research lies in the law which is conceptualized as a norm or rule. The norms in question include laws, other regulations.

Result and Discussion

Protection of Heirs of Victims of Intentional Homicide In Islamic Law

Islam wants people to live in peace, order and does not want evil to happen, let alone do unjustly. The desire for peace and justice is a basic need that cannot be bargained by any factor and by anyone, "Islamic law is not just a theory but is a rule to be applied in the joints of human life" (Iryani, 2017).

A believer with another believer is like one building that strengthens each other, does not tear down, let alone let the victim or his heirs remain victims without any protection and justice. If everyone ignores the principle of respect for man, or man makes religion a tool of righteousness against acts of cruelty to other human beings, it means that there has been a blasphemy of the values of religious teachings for the person concerned, an act that is not good.

Even if man is obliged to live in peace, in reality peace will never be separated from the various disturbances that may exist in the future. Peace is always tainted by the deeds of men who commit various forms of evil. This is because humans are created in a position between animals and angels and contain animal, satanic, angelic and divine qualities (Sumanta, 2022). In the state of human unbalance and various chaos, laws are presented to prevent evil and guard so that human life continues to run peacefully.

"The order itself is the most basic and first goal of all laws" (Kusumaatmadja, 2007). The enforcement of the law to prevent evil must be committed by man as Allah said in the Quran Surah Al-Imran verse 104, "And let there be among you a class of people who call upon virtue, command to the ma'ruf and prevent from the mungkar, they are the lucky ones".

The presence of Islamic law also aims to prevent humans from committing various crimes, both to nature and to other humans, even against themselves. "The application of Islamic criminal law in order to save human beings both individually and socially from corruption and eliminate things that give rise to evil" (Azizah, 2015).

The emergence of crimes that give birth to various victims occurs because

of weak principles of life and Islamic awareness. Moral decay in religious, social and economic life seems to indicate that human beings are in antiquity. Murder and various other criminal acts arise easily even if the problem at hand is mild.

Evil becomes a benchmark for man's role in carrying out noble morals both for himself and in social relations with others. The moral demand for a noble character requires that people respect each other as creatures of God. Respect for one's fellow human beings becomes the starting point in maintaining harmony and respect for human rights, "so that no one can interfere with the right to life of others" (Aji, 2015).

Islam not only forbids humans from making others victims, even making themselves victims is also prohibited and should be avoided. Such as committing acts that can be intoxicating, committing adultery, or even committing suicide. "Suicide is harsher and more poignant in the afterlife, that is, eternal in hell with no hope of getting out of it" (Syauman, 2010). The prohibition against hurting others or hurting oneself shows that Islam expressly does not want people to give birth to victims, both victims to others and victims to themselves.

The victim is the one who suffers from an evil deed. "This suffering is associated with the rights that a person has, namely the right to life, the right to material property, the right of security, the right of honor, the right of descent" (Hussain, 1996). In Islamic law, the rights of victims are not specifically regulated like the law of today. But that doesn't mean victims' rights aren't regulated. "The discussion of victim protection is carried out in general using arguments that tell humans to do good to others" (Ariyanti, 2019).

In the case of intentional homicide the victim can be ascertained to have died. The deceased victim will definitely be held at his funeral. But what about his heirs? In particular the protection of the heirs of the victim can be seen in the case of intentional homicide.

Interpreting the Quran Surah Al-Isra Verse 33, Islam teaches that people do not commit sedition, even murder is an act forbidden by Allah. Intentional homicide is not just about taking the life of a murdered person. Murder can cause various major losses, both to the perpetrator, the perpetrator's family and to the heirs of the murdered. That is why the act of killing is forbidden.

As a form of harsh prohibition for having committed murder, the perpetrator must get the same punishment as he did. The Quran Surat Al Baqarah verse 178 explains that the perpetrators of murder must be punished by means of qishash. "The Quran itself signals that what is meant by qishâsh is legal sanctions that are established as closely as possible (which are relatively the same) as previously committed crimes" (Batubara, 2010).

The meaning of qishash as illustrated in the Quran surah al-Baqarah verses 178 and 179 and the Quran surat al-Mâ'idah verse 45 shows that Islam does not want any murder that results in the loss of life of others. Man's life and death belong solely to God, not to man. Qishash is the main punishment justified in Islamic law. If in Indonesian criminal law, the perpetrator of murder suffers through

imprisonment for a period of 15 years, even with the various rights he has, it allows the perpetrator not to suffer for 15 years. Especially in Indonesia, there are legal provisions that regulate the reduction of criminal sentences due to remission. Meanwhile, the suffering of the victims' families is forever, more than 15 years. "The qishash law actually provides justice not only for the perpetrator but also for the victim and his family" (Sudarti, 2021).

In contrast to the Indonesian legal system, the position of the heirs of murder victims does not get the maximum place to represent the deceased victims, Articles 134 to 136 of the Criminal Procedure Code only open the opportunity for the families of deceased victims to allow or not allow police actions to carry out corpse surgery or grave excavation for autopsy purposes. This shows that the Criminal Procedure Code is not a complete set of laws and regulations discussing criminal and sentencing issues. "In essence, there is no legislation that is as complete or clear in regulating all human activities. In reality, the laws and regulations are static and rigid, while humans always develop from time to time" (Romadlon, et al, 2022). "The position of the victim in the Criminal Code seems to be not optimal compared to the position of the perpetrator" (Apriyani, 2021).

The existence of qishash does not mean that Islam is anti-human rights. Islam highly values and protects human rights. Through a strict prohibition against murder, Islam teaches that human beings still respect and recognize the right to life as part of human rights.

"Life is a gift of God that is the source of human dynamics. Therefore, Allah S.W.T very strictly forbids murder because it obliterates the most basic rights" (Nur, 2020). "This qishash law aims to restrain one from shedding the blood of another, so that the murderers will think twice about committing the crime of murder" (Anisah, 2018).

Because of respect for human rights, Islam teaches a strict prohibition against committing murder against human beings, and whoever commits a violation of the prohibition of murder is given punishment in accordance with applicable provisions. "Punishment according to Islamic criminal law is a punishment for the perpetrator of the crime (jarimah) as a consequence of his actions" (Umar and Zias, 2017).

Qishahs is a form of balance in the implementation of human rights from the concept of preserving the soul, so that human beings respect and respect the human rights of others by not killing. It is not always that qishash as a form of protection for the victim's heirs is applied in cases of intentional homicide, if the perpetrator is pardoned by the victim's heirs, the execution of qishas is legally void. "Qishash is not done when the murderer gets forgiveness from the heirs of the murdered, that is, by paying reasonable diat (compensation)" (Syauman, 2004).

The consequence of apologizing by the victim's heirs in the case of intentional homicide is the perpetrator's obligation to pay diyat. Thus qishash is not the only right in the context of protection of the victim's heirs in cases of

intentional homicide and the execution of qishash is dependent on the condition of the presence or absence of forgiving of the victim's heirs. "Only intentional (premeditated) and unapologetic homicide from the victim and his family can be subject to qishash punishment" (Sudarti, 2021).

Diyat is the property handed over by the perpetrator of the murder as a form of substitute protection to the victim which in this case is accepted by his heirs because of the non-implementation of qishash which is motivated by forgiving reasons. The gift of property is interpreted as a substitute for the loss of economic benefit to the victim if he is still alive which can be enjoyed by his heirs. With the loss of economic expediency, through diyat the heirs of the victim can still feel the protection of the victim, especially protection economically.

An additional punishment in the case of intentional homicide is the elimination of the murderer from the inheritance of the person he killed even though the murderer is the main heir of the murdered. "A person who kills another person, then he cannot inherit the property of the murdered person" (Sullivan, 2019). It would be unfair if the perpetrator could act as the heir of the person he killed. If the murderer is justified in accepting the inheritance of the person he killed, it will certainly give birth to a grudge for the victim's heirs to commit murder to the perpetrator, or at least it can cause injustice and chaos. Thus the perpetrator's obstruction from accepting inheritance from the person he killed actually also shows legal protection of the heirs of the murder victim.

Intentional Homicide and Its Relationship To Restorative Justice

Islamic law is not just about punishing people who violate it. Islamic law demands piety for everyone while building awareness to do justice to anyone. Islamic law is "A system that prioritizes adherence to nas (religion) and the principles of complete justice, including justice for perpetrators of criminal acts, justice for victims of criminal acts, and justice for society and the state" (Khasan, 2017).

The application of Islamic law is not rigid and merely punishes those found guilty. The implementation of Islamic law will never be separated from the consideration of maslahat, which is something that brings good to humans for the achievement of happiness in life in the world and the Hereafter. One of the benefits in the case of intentional homicide is the peace between the perpetrator and the victim's heirs which is carried out with good negotiation procedures. Negotiation as the simplest strategy for resolving disputes peacefully. Peace between the perpetrator and the victim's heirs in the case of intentional homicide became the starting point for the implementation of qishash.

The implementation of diyat can occur if there is forgiving and forgiving is carried out if the perpetrator and heirs of the victim of intentional homicide come to terms with the principle of justice. In relation to the present state of affairs, the granting of apologies and the existence of diyat is nothing but a form of exercise of restorative justice. "The concept of restorative justice was initiated by

perpetrators and victims to solve problems in a damage manner by prioritizing the principles of deliberation and consensus" (Rosdiana and Janah, 2020). Restorative justice is a solution to overcome the weaknesses of punishment.

"This restorative justice approach provides full involvement for victims in the settlement of their cases" (Hafrida and Helmi, 2020). Through peace and the execution of diyat, the heirs of victims of intentional homicide are sufficiently valued, restored their rights and re-humanized as if there had never been a victim.

Looking at the construction of Islamic law in the case of intentional homicide, it can be concluded that long before the theme of restorative justice as implemented at the present time, Islamic law has first regulated and applied it. Restorative justice in cases of intentional homicide according to Islamic law shows that revenge is not the best solution in the settlement of criminal cases.

Punishment through basic punishment in the form of qishah even though it is justified in Islamic law is retribution according to retributive theory. The implementation of the retributive theory in the case of intentional homicide in the form of qishah is the ultimate option if the perpetrator does not get forgiving from the victim's heirs.

This shows that Islamic law is a complete law and has a purpose in providing protection for the heirs of victims of intentional homicide and does not want revenge as a solution to the act of intentional homicide. The rules that have existed in Islamic teachings are then narrated in various languages, including restorative justice. "Actually, long before the influence of Western law emerged, Islamic law already had a criminal law system (Shari'a) that was responsive to the interests of victims of crime" (Karomah, 2018).

Restorative justice in Islamic law is carried out by allowing the basic law in the form of qishash in cases of intentional homicide to be replaced with diyat through the door of forgiving. This promulgation shows that Islamic law is a progressive law in establishing harmonious relations between the heirs of victims of intentional homicide and perpetrators and the tangible manifestation that Islam highly values and respects human rights. In addition, restorative justice in Islam by allowing qishash to be replaced with diyat shows that not always the settlement of criminal cases must be resolved through the judiciary.

Restorative justice that has been applied by Islamic law is not only oriented towards worldly affairs, but also ukhrawi as a form of maslahat inherent in the implementation of Islamic law. This is what may distinguish restorative justice in Islamic law from restorative justice outside Islamic law.

With the deliberations to forgive the perpetrator by ahli the victim's inheritance in the case of intentional homicide and the change of the type of punishment from qishash to diyat, showing that Islamic law has already had guidelines for punishment that are not only a handle for judges but also the public, the sentencing guidelines are actually very protective of victims.

In the context of Indonesianness, judges in passing judgments based on different views, this happens because the Criminal Code does not regulate in detail

the guidelines for punishment. "The Criminal Code does not explicitly mention the guidelines for punishment, so that sentences are imposed according to the different views of their respective judges" (Mudzakir, 2011), even "sentencing guidelines are strategic in the Indonesian criminal justice system" (Mulyadi, 2020).

Conclusion

In the case of intentional homicide, the imposition of punishment is not only limited to how to sanction the perpetrator, but also at the same time is a protection for the victim and his heirs. The imposition of similar punishments through qishash shows that intentional homicide is strictly prohibited, as it can have a broad impact on other life factors. If then intentional homicide actually occurs, the execution of the qishash is hung entirely on the victim's heirs. Whether the heirs of the victim take the choice in the form of qishash or diyat.

The justification of qishash being changed to diyat shows that Islamic law does not teach the practice of revenge. The choice of punishment that is entirely the right of the heirs of the victims of intentional homicide shows that Islamic law really gives attention and protection to the heirs of the victims. The choice of punishment shows that respect and respect for human beings is a theme that cannot be separated from Islamic law. In addition, the choice of punishment in the case of intentional homicide from qishash to diyat shows that Islamic law is a law that is very responsive to the victim and his heirs.

Long before the theme of restorative justice became an option in the settlement of criminal cases, Islamic law had already implemented restorative justice. Restorative justice in Islamic law in cases of intentional homicide is carried out by allowing qishash to be replaced with diyat. The giving of diyat is intended in exchange for the soul killed. The shift in the principal sentence from qishash to diyat shows that not always the settlement of criminal cases in Islamic law must end through the judiciary.

Restorative justice in cases of intentional homicide shows a balanced justice system between the perpetrator and the victim's heirs. In addition, restorative justice is the main option rather than revenge in cases of intentional homicide according to the provisions of Islamic law.

References

- Aji, AM. (2015), Human rights and obligations in Islamic perspective, *Jurnal Budaya Salam dan Syar'i*, 8 (6), DOI: <https://doi.org/10.15408/sjsbs.v2i2.2386>
- Anisah, S. (2018), Application of qishash law to uphold justice, *Jurnal Studi Hukum Islam (JILS)*, 2 (2), <https://scholarhub.ui.ac.id/jils/vol1/iss2/1>
- Apriyani, MN. (2021), Implementation of restitution for victims of sexual violence, *Risalah Hukum*, 17 (1), DOI: <https://doi.org/10.30872/risalah.v17i1>
- Ariyanti, V. (2019), The concept of victim protection in the national criminal justice system and the Islamic criminal law system, *Al-Manāhij*, 13 (1), DOI:

- <https://doi.org/10.24090/mnh.v0i1.2224>
- Azizah, N. (2015), Criminal law and islamic criminal law, Medan, Manhaji and Faculty of Sharia and Law UINSU
- Batubara, C. (2010), Qishâsh: death penalty in the perspective of the Alquran, *Miqot*, 34 (2), DOI: <http://dx.doi.org/10.30821/miqot.v34i2.204>
- Hafrida dan Helmi. (2020), Victim Protection Through Compensation in Juvenile Criminal Justice, *Jurnal Bina Mulia Hukum*, 5 (1), <https://doi.org/10.23920/jbmh.v5i1.16>
- Hasan, H. dan Saebani, BA. (2013), Fiqh jinayah islamic criminal law, Bandung, Pustaka Setia
- Husain, S. (1996), Human rights in islam, Jakarta, Gema Insani Press
- Iriyanto, E. dan Halif, (2021), Elements of the plan in the crime of premeditated murder review number: 201/Pid.B/2011/ Pn.Mrs., *Jurnal Peradilan*, 14 (1), DOI: 10.29123/jy.v14i1.402
- Iryani. E. (2017), Hukum Islam, Demokrasi dan HAM, *Jurnal Ilmiah Universitas Batanghari Jambi*, 17 (2), DOI: <http://dx.doi.org/10.33087/jiubj.v17i2>
- Ishaq. (2017), Legal research methods and thesis, thesis, and dissertation writing, Bandung, Alfabeta
- Karomah, A. (2018), Views of islamic law on victims of crime in the context of indonesian positive law, *al Qisthâs*, 9 (2), <https://doi.org/10.37035/alqisthas.v9i2.1574>
- Kenedi, J. (2020), Protection of witnesses and victims (study on legal protection of crime victims in the criminal justice system in indonesia), Yogyakarta, Perpustakaan Pelajar
- Khasan, M. (2017), The principle of legal justice in the legality principle of islamic criminal law, *Rechtsvinding*, 6 (1), DOI: <http://dx.doi.org/10.33331/rechtsvinding.v6i1.133>
- Kusumaatmadja, M. (2006), The concept of law in development, Bandung, Alumni
- Marsaid, (2020), Al-fiqh al-jinayah (islamic criminal law) understand criminal acts in islamic law, Palembang, Rafah Press
- Mulyadi, L. (2020), Initiating the Ideal Model of Criminal Guidelines in the Indonesian Criminal Law System, Jakarta, Kencana
- Mudzakir. (2011), Planning for the development of national law in the political sector of criminal law and the criminal system, Jakarta, National Legal Development Agency
- Nur, M. (2020), Introduction and principles of islamic criminal law, Aceh, Yayasan PENA
- Panjaitan, BS. (2021), Uphold justice, *Majalah Tabligh*, Edisi No. 1/XIX
- Romadlon, SG., Samekto, FXA., Saraswati, R. (2022), Harmonization of citizenship regulation in indonesia", *Baltic Journal Of Law & Politics*, A Journal of Vytautas Magnus University, 15 (7), DOI: 10.2478/bjlp-2022-007022
- Rosdiana dan Janah, U. (2020), The application of restorative justice in the crime of adultery in the kutai adat lawas community, *Jurnal Bina Mulia Hukum*, 5

(1), <https://doi.org/10.23920/jbmh.v5i1.14>

Satria. H. (2018), Restorative justice: a new paradigm of criminal justice, *Jurnal Media Hukum*, 25 (1), DOI: 10.18196/jmh.2018.0107.111-123

Sudarti, (2021), Qishash diyat law: alternative punishment for perpetrators of premeditated murder in indonesia, *Yudisia*, 12 (1), DOI: <http://dx.doi.org/10.21043/yudisia.v12i1.8991>

Sullivan, J. (2019), Legal study of the causes of obtaining and not obtaining inheritance according to islamic inheritance law, *Lex Privatum*, 7 (3)

Sumanta, (2022), The perfect man (al-insân al-kâmil) in al-ghazâlî's perspective, *Baltic Journal of Law & Politics*, 15 (7), DOI: 10.2478/bjlp-2022-007032

Syauman, A. (2004), *Abortion Law in Islam*, Jakarta, Cindekia

Umar, MN. dan Zias, Z. 2017, Study of Islamic Criminal Law and Positive Criminal Law Regarding Criminal Sanctions for Auxiliary Murderers, *Legitimasi*, 6 (1), DOI: <http://dx.doi.org/10.22373/legitimasi.v6i1.1847>