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University of Malaya, Kuala Lumpur

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1	**"Criminalisation" of Marital Rape in Colonial India: Clash of Tradition and Modernisation in Nineteenth Century** Dr Subhasree Ghosh Independent Scholar	**Institutional Building for Maritime Security in Southeast Asia: The Role of ASEAN** Dr Hao Duy Phan Cetre for International Law, National University of Singapore	**Reconstruction of Tradition in the Indonesian and Malaysian Constitution: A Comparison** Dr Adul Fitriciada Azhari Universitas Muhammadiyah Surakarta	**Between Tradition and "Modernity": Law on Indigenous Peoples in the Philippines** Mr Christian Pangilinan Peking University School of Transnational Law	**Regulation of Partnership and Community Development Program (PKBL) As A Form Of Corporate Social Responsibility (CSR) For The State-owned Enterprises in Indonesia** Asst Prof Sri Bakti Yunari Faculty of Law Trisakti University	**E judiciary a step towards modernization in Indian legal system:** Dr Setlur B.N.Prakash National Law School of India University Bangalore	**The City as an Object of Asian Legal Studies: Towards a Positive Research Agenda** Dr Jason R Bonin Centre for Asian Legal Studies, National University of Singapore
2	**Recent Legislative Initiatives for Protection of Women in India-An Appraisal of Effectiveness** Assoc Prof G.B.Reddy University College of Law,Osmania University	**Inconsistencies Of Regulations Upon Trawl Usage: A Harmonization Study of International And National Regulations** Mr Ayub Torry Satriyo Kusumo & Mrs Rosita Candrakirana Faculty of Law Sebelas Maret University	**The Politics of National Security: A Historico-Legal Analysis of the Malaysian Government's Response to the Communist Party of Malaya** Mr Mohd Nazim Bin Ganti Shaan Universiti Teknologi Mara	Encountering Religious and Ethnic Conflict in Indonesia: Recalling the Needs for Education and Inter-Cultural Dialog to Initiate Peace Building Dr Marcella Elwina Simandjuntak & Mr Fandy Kevin M. Pandiangan Faculty of Law of Soegijapranata Catholic University	**Directors' Duty of Care: Myth or Reality? A Critique of Sri Lankan Law** Mrs Shanthakumari Segarajasingham Faculty of Law, University of Colombo	**Technology and the evolving concept of privacy** Prof Antonio Formacion Kyushu University, Graduate School of Law	**Law and the Organization of Shopping Streets: Japan s Shoutengai** Prof Sean McGinty Nagoya University
3	**Domestic Violence: Justice for the Victim** Dr Muzaffar Syah Mallow Universiti Sains Islam Malaysia (USIM)	**Fortifying Horn of Africa with the Djibouti Code of Conduct in Combating Piracy and Armed Robbery Against Ships: Myth or Reality** Dr Kyaw Hla Win (alias) MD. Hassan Ahmed, Prof Dr Abdul Ghafur Hamid (alias) Khin Maung Sein & Prof Dr Abdul Haseeb Ansari Ahmad Ibrahim Kulliyyah of Laws, IIUM (NOT PRESENT)	**The Exercise of Emergency Powers in India, Pakistan and Bangladesh: Problems and Prospects** Mr M. Ehteshamul Bari Macquarie University	**Personality in a timeline: Traditional and "modern" concepts of the rights of personality** Assoc Prof Yuriko Haga Faculty of Law, Institute of Human and Social Sciences, Kanazawa University	**Direct to Consumer Advertising of Prescription Drugs: The Malaysian Approach** Dr Siva Barathi Manimuthu (Sharllene) University of New England	**Terms of Use: Reflections on a Theme** Dr Eliza Mik Singapore Management University	**Spatial Management, Land Tenure, and Public Participation in Bandung** Dr Tristam Pascal Moeliono & Dr Gustaaf Reerink Parahyangan University
4	**Islamic Criminal Law (Jinayat) as a Bridge of Contention Between Public and Individual Interest within Restorative Justice (A response to potential challenge on implementing Indonesian Juvenile Criminal Jusrice System Act** Mr Ferry Fathurokhman Faculty of Law Sultan Ageng Tirtayasa University	**The tradition of private law unification in the context of modern Asia: comparisons with the regional unification in Europe and Africa** Prof Souichirou Kozuka Gakushuin University	**Compensation for Private Wrongs between Tradition and Modernity in South- and Southeast Asia** Dr Lukas Heckendorn Urscheler Swiss Institute of Comparative Law			**Bioprospecting and the Protection of Traditional Knowledge in the New World: Implications for Asia** Ms Naazima Kamardeen University of Colombo	**Commandments and Conversations: Regulating Singapore's Historic Built Environment** Dr Jack Tsen-Ta Lee Singapore Management University

Q & A Session

3:30pm – 4:30pm: Coffee Break @ Staff Carpark

34	Asst Prof	Yogesh Pai	National Law University, Delhi	India	yogesh.pai@tradelawdevelopment.com
35	Prof	Gur Iqbal Singh Sandhu	Rajiv Gandhi National University of Law, Punjab	India	gissandhu@yahoo.com
36	Prof	Paramjit S Jaswal	Rajiv Gandhi National University of Law, Punjab	India	paramjitsjaswal@gmail.com
37	Prof	R Venkata Rao	National Law School of India University	India	profrao@yahoo.com
38	Dr	Prabhash Ranjan	South Asian University	India	pranjan1278@gmail.com
39	Dr	Aldul Fitriciada Azhariu	Universitas Muhammadiyah Surakarta	Indonesia	af_ciada@yahoo.com
40	Dr	Widodo Dwi Putro	Faculty of Law, University of Mataram	Indonesia	widodo.fhunram@gmail.com
41	Mr	Muhammad Rustamaji	Faculty of Law, Sebelas Maret University (UNS) Surakarta	Indonesia	hatchi_ajie@yahoo.com
42	Ms	Sasmini	Faculty of Law, Sebelas Maret University	Indonesia	sasmini.uns@gmail.com
43	Ms	Erna Dyah K	Faculty of Law, Sebelas Maret University	Indonesia	ernakusumawati77@gmail.com
44	Ms	Diana Tantri C	Faculty of Law, Sebelas Maret University	Indonesia	dianatantri@yahoo.com
45	Asst Prof	Sri Bakti Yunari	Faculty of Law Trisakti University	Indonesia	sbyunari.trisakti@gmail.com
46	Mr	Ignatius Hartyo Purwanto	Law Faculty of Soegijapranata Catholic University	Indonesia	ignh.purwantyo@gmail.com
47	Dr	Anna Maria Tri Anggraini	Faculty of Law, Trisakti University, Jakarta	Indonesia	trianggraini@yahoo.com
48	Dr	Deni Bram	Faculty of Law, Tarumanagara University	Indonesia	deni_up@yahoo.co.id
49	Dr	Antonius PS Wibowo, SH, MH	Faculty of Law, Catholic University of ATMA JAYA, Jakarta	Indonesia	antonius.psw@atmajaya.ac.id
50	Dr	Siti Nurbaiti	Faculty of Law University Of Trisakti	Indonesia	nurbaiti_05092000@yahoo.com
51	Dr	Marcella Elwina Simanduntak	Faculty of Law of Soegijapranata Catholic University	Indonesia	simandjuntak_marcella@rocketmail.com
52	Mr	Fandy Kevin M. Pandiangan	Faculty of Law of Soegijapranata Catholic University	Indonesia	kevin.fandy@yahoo.com
53	Dr	Hieronymus Soeriatisnanta	Department of Administrative Law, Faculty of Law, University of	Indonesia	s.nymus@yahoo.co.id
54	Prof	Dr. Hj. Rahayu Hartini, S.h., M.Si., M.Hum.	Universitas Muhammadiyah Malang	Indonesia	rahayuhartini@yahoo.co.id
55	Mr	Ferry Fathurokhman	Faculty of Law Sultan Ageng Tiirtayasa University	Indonesia	feryfaturohman@gmail.com
56	Dr	Linda Yanti Sulistiawati	Universitas Gadjah Mada	Indonesia	lindayanti@ugm.ac.id
57	Mrs	Bernadeta Resti Nurhayati, SH, Mhum	Faculty of Law and Communication of	Indonesia	bernadeta_resti@yahoo.com
58	Ms	Wahyu Tri Yuliana	Faculty of Law and Communication of	Indonesia	wahyutyuliana@yahoo.com
59	Mrs	Mailinda Eka Yuniza	Faculty of Law, Universitas Gadjah Mada	Indonesia	mailindahk@yahoo.com
60	Mr	Ayub Torry Satriyo Kusumo	Faculty of Law Sebelas Maret University	Indonesia	ayub.kusumo@gmail.com
61	Mrs	Rosita Candrakirana	Faculty of Law Sebelas Maret University	Indonesia	rositakirana@yahoo.com
62	Mr	Tristam Pascal Moelion	Fakultas Hukum UNPAR-Bandung	Indonesia	tristam_m@yahoo.com
63	Dr	Gustaaf Reerink	Independent	Indonesia	goreerink@yahoo.com
64	Mr	Muhammad Anggoro Wicaksono	Gadjah Mada University, International Program Faculty of	Indonesia	manggorow@gmail.com
65	Mr	Ronald Hasudungan Sianturi	Prima Indonesia Univeristy	Indonesia	hasudungan_r@yahoo.com
66	Dr	Tommy Leonard	Prima Indonesia Univeristy	Indonesia	tommy@unprimdn.ac.id
67	Prof	Topo Santoso	Universitas Indonesia, Faculty of Law	Indonesia	lawschool@ui.ac.id
68	Prof	Roberto Toniatti	University of Trento	Italy	roberto.toniatti@unitn.it
69	Assoc Prof	Yuzuru Shimada	Nagoya University	Japan	shimadayuzuru@gsid.nagoya-u.ac.jp

Law in Asia:
Balancing Tradition & Modernization

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Islamic Criminal Law (*Jinayat*) as a Bridge of Contention Between Public and Individual Interest within Restorative Justice (A Response to Potential Challenge on Implementing Indonesian Juvenile Criminal Justice System Act)

Ferry Fathurokhman

Faculty of Law, Sultan Ageng Tirtayasa University, Jl Raya Jakarta KM 4, Serang Banten, 41221, Indonesia

feryfaturohman@gmail.com; ferry1@stu.kanazawa-u.ac.jp

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Date of Presentation *(delete where applicable)*:	Thursday, 29 May 2014 Friday, 30 June 2014
Panel Assigned:	

Abstract

Restorative justice has been developing broadly in many countries as a new paradigm in criminal law field. Following the necessity and global trend, Indonesia has made an effort to replace the current Juvenile Court Act (JCA) with the new one, called Juvenile Criminal Justice System Act (JCJSA), which utilizes diversion as restorative justice program for juvenile delinquent which will take into effect on July 2014.

As a new paradigm, restorative justice has been criticized sporadically. One of the critics is how to balance public interest and individual interest when they are in conflict regarding restorative justice settlement that reached by victim and offender. The contention between proponent and opponent of restorative justice movement on this issue is remains unsolved up to present. This issue is also possible may be arise when Indonesian government enforces JCJSA. As a Muslim-majority country, Indonesia has an opportunity to resolve the contention by offering Islamic criminal law (*jinayat*) as an approach method since restorative justice values exist also in Islamic criminal law (*jinayat*).

There are at least two notions why Islamic criminal law (*jinayat*) could relax the contention. Firstly, historically Islamic law ever existed in Indonesia. Secondly, restorative justice values exist in Islamic criminal law. This paper will try to portray restorative justice in Islamic criminal law (*jinayat*) point of view in order to mollify the contention.

Keywords: Restorative Justice, Islamic Criminal Law (*Jinayat*), Indonesia.

I. Definition of Restorative Justice

In much of the literature, proponents of restorative justice have unanimously affirmed that the term "restorative justice" was first coined by Albert Eglash. Most of them also agree that it first appeared in his 1977 paper,[1] entitled *Beyond Restitution – Creative Restitution* which was presented at a conference on restitution in 1975.[2]

In his paper, Eglash described three faces of justice: (1) retributive justice; (2) distributive justice[3] and; (3) restorative justice. The first aspect relied heavily on punishment as its prominent technique for handling crimes, while the second advocated therapeutic treatment of offenders.[4] The third aspect, that is restorative justice, proposed restitution as its characteristic feature in handling crime. Eglash referred to this as creative restitution. He noted that, in many respects, retributive and distributive justice shared similarities but differed from creative restitution. For instance, both punishment and therapeutic treatment were primarily concerned with the offender's behavior, whereas restorative justice focused on the destructive or harmful consequences of that behavior, and its effect on the victim of a criminal act.

Interestingly, as Eglash admitted, creative restitution was designed primarily for offenders, noting that: "For me, restorative justice and restitution, like its two alternatives, punishment and treatment, is concerned primarily with offenders. Any benefit to victims is a bonus, gravy, but not the meat and potatoes of the process."[5] As we shall see later, various definitions have emerged with the growth of the restorative justice movement that are wider than the above-mentioned definition by Eglash, especially in term of its central concern.

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[1] The exceptions are Daniel W. Van Ness and Karen Heetderks Strong who, while initially concurring with this view, inserted a "clarification" footnote in the fourth edition of their book. They noted that Eglash developed his concept of creative restitution (discussed in his 1975 article) as a feature of restorative justice within his series of articles published in 1958 and 1959. Ann Skelton (2005), who has traced Eglash's sources, found that the term restorative justice emerged in 1956 in a book by Heinz-Horst Schrey, Hanz Hermann Walz, and W.A. Whitehouse. The book was, written in German and subsequently translated and adapted into English as *The Biblical Doctrine of Justice and Law.* For more details, see Daniel W Van Ness and Karen Heetderks Strong, *Restoring Justice, An Introduction to Restorative Justice* (4th ed., Anderson Publishing 2010) 22.

[2] In 1977, the paper was published in an anthology entitled *Restitution in Criminal Justice: A Critical Assessment of Sanctions.*

[3] The concept of distributive justice discussed here should be regarded differently from the concept of distributive justice that is opposed to commutative justice within penal law *vis-à-vis* civil law. Eglash appears to have been referring to the neoclassical meaning of distributive justice which, in contrast to the classical meaning, focuses on the offender rather than on the offence. Most scholars of criminal law and criminologists refer to this as the rehabilitation model of criminal justice (or simply rehabilitative justice) instead of distributive justice. See, for example, Steve Mulligan who wrote that "[restorative justice] is better understood through its goal and principles and in comparison to the paradigms that precede it, namely the retributive and rehabilitative philosophies of punishment." Steve Mulligan, 'From Retribution to Repair: Juvenile Justice and the History of Restorative Justice' (2009) 31. U.La Verve L. Rev. 139.

[4] In the view of most scholars of criminal law, the most effective penal reform in modern society was accomplished by shifting the focus of sentencing from punishment for reasons of deserving to punishment as a means of rehabilitation and reform. The reform entailed a shift in the purpose of punishment from distributive to rehabilitative justice. See Wesley Cragg, *The Practice of Punishment: Towards a Theory of Restorative Justice* (Routledge 1992) 80.

[5] For more details, see Albert Eglash, 'Beyond Restitution–Creative Restitution' in Joe Hudson and Burt Galaway (eds.), *Restitution in Criminal Justice: A Critical Assessment of Sanctions* (Lexington Books, 1977) 91-99. <www.lorennwalker.com/blog/?p=117> accessed March 7, 2014.

Howard Zehr, the "grandfather" of restorative justice, originally conceptualized restorative justice as a process that involved, to the greatest extent possible, those who had a stake in a specific offence in collectively identifying harms, needs, and obligations, as well as their redress, to heal and make things as right as possible.[6] Another definition argued by Tony Marshal who wrote that "restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future."[7]

Marshal's definition, however, raises the same question as Zehr's definition, namely, who is "the parties with a stake in a particular offense?" Additionally, according to Marshal's definition, what should be restored? The latter question was reasonably resolved within Zehr's definition, that is, harm and needs resulting from a specific offense.

To respond to the above question, we may refer to the Economic and Social Council (ECOSOC) Resolution of 2002/12 regarding the Basic Principle on the Use of Restorative Justice Programmes in Criminal Matters. In its annex, specifically subsection 4 of section I on the use of terms, it states that "Parties" means the victim, the offender, and any other individuals or community members affected by a crime who may be involved in a restorative process.[8] This is in line with John Braithwaite's response in his book regarding Marshal's definition that a "stake in a particular offense" primarily refers to the victim(s), offender(s), and affected communities (including the families of victims and offenders). Braithwaite also answered the question of what should be restored as follows: "whatever dimensions of restoration matter to the victims, offenders and communities affected by the crime. Stakeholder deliberation determines what restoration means in a specific context."[9]

In his audiovisual lecture, John Braithwaite explained restorative justice by describing its history and process in the following way:

> *Restorative Justice evolved from searching for a more productive way of dealing with crimes rather than putting more and more people away in prison. The main idea is about restoring the victim, restoring the offender and restoring the community. Because crime hurts, justice should heal. In a typical process the victim will be asked to say who would they like to come to support them through the audience, then the offender will be asked in the same way, and the supporter of the offender with the offender come together with the victim and the victim supporter are facilitated, they sit together in a circle [sic]. First, they talk about what happened, who was hurt by what happened and what might be done to right the wrong and come up with plan of action and then there will be follow up to check whether the plan of action is actually implemented to the satisfaction of all stakeholder.*[10]

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[6] Mark Umbreit and Marilyn Peterson Armour entitled, *Restorative Justice Dialogue, an Essential Guide for Research and Practice* (Springer Publishing Company 2011) 7.

[7] John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002) 11.

[8] <www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf> last accessed March 7, 2014.

[9] Braithwaite (n 7) 11.

[10] <www.anu.edu.au/fellows/jbraithwaite/lectures/index.php> last accessed March 7, 2014.

It is clear from the three definitions provided by Zehr, Marshal, and Braithwaite that the central focus has gradually changed from Eglash's proposal of creative restitution which was designed primarily for the offender. Borrowing Eglash words, now the victim has become "the meat and potatoes" in most restorative justice programs.

For most criminal law scholars, incorporating victims—and the affected community when appropriate—in the criminal justice process is a relatively new idea given that the role of victim in this process has been represented and taken over by the investigator (police) and prosecutor. Restorative justice evidently has a different core concept from that of criminal justice.

To clarify these differences, Zehr then differentiated between criminal justice and restorative justice as shown in the table below:[11]

Table 1: Two Different Views of Justice

Criminal Justice	Restorative Justice
• Crime is a violationof the law and the state • Violations create guilt • Justicerequires the state to determine blame (guilt) and impose pain (punishment)	•Crime is a violation of people and relationships •Violations create obligation •Justice involves victims, offenders, and community members in an effort to put things right
• Central focus: Offenders getting what they deserve	•Central focus: Victims' needs and offenders' responsibility for repairing harm

II. Historical Background of the Restorative Justice Movement

To many, the VORP (Victim Offender Reconciliation Program) was believed as the first "baby" of the restorative justice program in its modern form. VORP was born from the "Kitchener experiment" in 1974. At that time, two young individuals, aged 18 and 19 years, from Elmira in Ontario, Canada, pleaded guilty to vandalizing 22 properties (houses and cars).

The case was published and widely discussed. Mark Yantzi, a probation officer, who was charged with preparing the presentence report for this case, attended a Christian group meeting several days before the guilty plea was filed. At the meeting, the Christian response to shoplifting was discussed. Yantzi then conceived of the idea

[11] Umbreit (n 6) 8.

of the offenders meeting the victims to repair the damage. In criminal procedural law, this idea was impossible to implement, because, as I mentioned earlier, the victims' interests are taken over by the prosecutor.

Yantzi buried the idea because of the lack of a legal basis to support it. However, Dave Worth, a coordinator of voluntary service workers for the Mennonite Central Committee (MCC), encouraged Yantzi to pursue the idea. He, therefore, took a chance and proposed to the judge that the offenders meet with the victims and pay them back. Predictably, the judge refused to entertain the idea.

Nevertheless, Yantzi's proposal seemed to have influenced the judge, because when the time for sentencing arrived, the judge ordered the offenders to have a face-to-face meeting with the victims to work out suitable restitution as a condition of probation. Accompanied by their probation officer, the offenders then visited all of their victims,[12] negotiated restitution, and within three months had repaid their victims.

The above case was considered the inception of VORP in Canada, and is also believed to be the first restorative justice program. Judges have subsequently continued to order this process to be carried out. Van Ness notes that in 1976, the probation officer formed a nonprofit organization to promote and facilitate these meetings.[13] Coincidentally, the initial practice of VORP in Canada fulfilled what Eglash had suggested in terms of implementing creative restitution, namely the probation requirement.[14]

Zehr describes VORP as "contagious," with Indiana being the first state in the United States to establish a similar program in 1977–1978.[15] More recently, restorative justice has been discussed and implemented in several countries. Barda Nawawi Arief notes that within Europe, Austria, Belgium, Germany, France, and Poland have been applying restorative justice in many forms within their criminal code procedures.[16] From its first emergence in Canada, the practice of restorative justice has been spreading to other continents such as Europe, Africa, and Asia.[17] The restorative justice movement is unstoppable and has mutated into many forms to fit each country's needs particularly for handling juvenile offender.

III. Restorative Justice for Juvenile in Indonesia

In 2011, child population with the ranging age of 0-17 in Indonesia reached 82.6 million. This means 33.9% or more than one third of Indonesian population is

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[12] There are two versions of this part of the post-case proceedings. According to Mark Umbreit and Marilyn Peterson Armor, the offenders met all of the victims, whereas Howard Zehr contends that the offenders could not meet two of the victims because they had moved from Elmira.

[13] cf. Van Ness (n 1); Umbreit (n 6); Howard Zehr, *Changing Lens: A New Focus for Crime and Justice* (Herald Press 2005).

[14] Eglash proposed two points relating to the implementation of creative restitution within the criminal justice process. The first was the probation requirement that could be done at the hearing stage before the sentence was handed down. The second involved preoffenders turning themselves in to the police or a mental health agency before committing any offence. See Eglash (n 5) 96 for further details.

[15] Zehr (n 32) 159.

[16] See Barda Nawawi Arief, *Mediasi Penal Penyelesaian Perkara di Luar Pengadilan(Penal Mediation, Extrajudicial Settlement)* (Pustaka Magister Publishing 2008).

[17] Paul McCold, 'The Recent History of Restorative Justice: Mediation, Circle, and Conferencing' in Dennis Sullivan and Larry Tifft (eds.), *Handbook of Restorative Justice* (Routledge 2008) 35–40; Van Ness (n 1) 33–38.

children.[18] The categorization age and the term of "child" or "children" here obviously refer to Convention on the Right of the Child.[19] Children are a nation asset. The future of a nation relies on their shoulder. However things may goes wrong within their life. One of which is when they in conflict with law. Therefore special treatment and measurement should be made for handling child whom in conflict with law.

In regard to criminal law field, child is divided into two categories: child that is considered as to young to bear criminal responsibility and child that perceived as able to bear criminal responsibility. The earlier often called as child whilst the last varies to each country. For the purpose of this paper, I employ "juvenile" referring to the second category and "child" for the first category.[20] Therefore stipulating age of criminal responsibility is one of critical matters in criminal law field to distinguish child and juvenile. In respect to Indonesia, some changes have been made for categorizing child and juvenile as I will describe below.

III.1 Criminal Responsibility Age for Juvenile in Indonesia

In its consideration part, United Nations (UN) Resolution Number 40/33 of 1985 on UN Standard Minimum Rules for the Administration of Juvenile Justice (often called as The Beijing Rules) recognizes that juveniles as young need special treatment by virtue of their early stage of human development. This special treatment includes particular care and assistance with regards to physical, mental and social development. Beside that legal protection in conditions of peace, freedom, dignity and security is also required. Therefore formulating age of criminal responsibility for juvenile is one of measurements to create a safeguard in order to assure special treatment for juvenile.

The Beijing Rules does not stipulate a fix age of criminal responsibility for juvenile. In its annex, The Beijing Rules merely sets the beginning of age of criminal responsibility shall not be fixed at too low an age level.[21] This is because the formulation of law will depend on history or culture of a nation. In Japan for instance, the range of criminal responsibility age is set at the age of 14 up to 19[22] whilst in New

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[18] Kementerian Pemberdayaan Perempuan dan Perlindungan Anak dan Badan Pusat Statistik. *Profil Anak Indonesia 2012 (Indonesian Child Profile 2012)*. Jakarta. 2012, p 5.

[19] Child in article 1 of the convention said that "....a child means every human being below the age of eighteen years...." See UN Resolution 44/25 of 1989 on Convention on the Rights of the Child.

[20] Juvenile Court Act Number 3/1997 and Juvenile Justice System Act Number 11/2012 utilize merely "*anak*", which literary means "child", for both terms. The using term of "child" and "juvenile" for this thesis is a combination that derived from Convention on the Right of the Child and The Beijing Rules.

[21] The phrase "too low" is actually difficult to be measured since each country has their own law which reflected from their values and cultures. Even within same continent the minimum age of criminal responsibility varies from country to country. Take for instance in European countries such Scotland, Ireland, France, Sweden, Spain, Luxemburg, within these countries, criminal responsibility begins at 8, 10, 13, 15, 16 and 18 respectively. See G. Van Bueren. *International Rights of the Child (Section C: Children and the justice system)*. London. University of London Press. 2006 in http://www.londoninternational.ac.uk/sites/default/files/international_rights_child.pdf. Accessed 15/02/2014

[22] See Penal Code of Japan Act No 45/1907 art 41 and Juvenile Act of Japan No 168/1948 art. 2 (1) and 3 (1).

Zealand is set from 14 up to under 17.[23] This age limit formulation differs among countries depending on each economic, social, political and legal system.[24]

In term of Indonesia, the provision for juvenile who commits crime in Indonesia prior to Juvenile Criminal Justice System Act, hereinafter JCJSA, (Act Number 11/2012) and Juvenile Court Act, hereinafter called JCA, (Act Number 3/1997) was stipulated in Indonesian Penal Code (Act number 1/1946) article 45[25] of Chapter III about exclusion, mitigation and enhancement of punishment.

Indonesian penal code sets maximum age of criminal responsibility at under 16 which means for those who commit crime whose age is 16 or more would be regarded as adult. Indonesian penal code does not set the minimum age of criminal responsibility for juvenile.

In 1997, an act for the juvenile court was established. With this act (Act No. 3/1997), the general provision for juvenile, which was regulated under the KUHP, was abolished and replaced by the act. In this act, juvenile between the ages of eight to under 18-year-old and unmarried fall within the jurisdiction of the juvenile court.

For child whom below the age of eight and commits a delinquency, the investigator will examine whether the juvenile still can be educated by their parents or should be sent to social department to be educated after hearing the consideration of the probation officer.[26]

However the age of eight, later, was considered as too low for juvenile to hold criminal responsibility. Subsequently Constitutional court in its decision number 1/PUU-VII/2010 has made a judicial review, that filed by the parties above, by giving its verdict which stating the phrase "8 years old" in article 1 verse 1, article 4 verse 1 and article 5 verse 1 of JCA including its explanation part are in conflict with constitution of Republic of Indonesia and has no binding power therefore it is conditionally unconstitutional unless interpreted as 12 years old. This minimum age then re-justified by JCJSA No 11 of 2012 which is going to replace JCA in 31 July 2014 (two years after its enactment)

To ease, the long history in formulating age of criminal responsibility for juvenile in Indonesia will be portrayed in table below:

Table 2: Table of Age of Criminal Responsibility for Juvenile

Regulation	**Age of Criminal Responsibility for Juvenile**	
	Minimum Age	**Maximum Age**
Penal Code	-	under 16
JCA	8	under 18
Constitutional Court Decision	Amending minimum age in JCA from 8 to become 12	

[23] See Child, Young Person and Their Family Act of New Zealand No 24 of 1989 section 2 subsection 1

[24] See commentary part on The Beijing Rules Annex of Number 2.2.

[25] Abrogated by article 67 of JCA

[26] Article 5 of JCA.

JCJSA	12	under 18

III. 2 The Necessity of Restorative Justice for Juvenile Delinquency in Indonesia

Currently, juvenile cases fall within jurisdiction of JCA. JCA does have several features of measurement for juvenile offender to protect their mental development. For instance, the trial should be held in camera,[27] or law enforcement agencies are forbidden to wear formal uniform when investigates, prosecutes and tries the juvenile offender and so forth.[28] However the JCA has a main weakness i.e. it has no means for diverting the case in lieu of criminal trial.[29]

In relation with this, the Beijing Rules in point 6 of the general part of the resolution states that "in view of the varying special needs of juveniles, as well as the variety of measures available, an appropriate discretionary scope shall be allowed at all stages of proceedings and levels of juvenile justice administration, including investigation, prosecution, adjudication, and the follow up of disposition."[30]

According to the Beijing Rules, discretion is permitted in juvenile cases in order to divert out of the criminal justice system at all stages and levels. Such diversion can be understood since juveniles play a very important role as the next generation in light of a state's sustainability. This notion corresponds to the Declaration of The Right of The Child (UN General Assembly Resolution 1386), which states that children shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable them to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner and under conditions of freedom and dignity. In the enactment of laws for this purpose, the best interest of the child shall be the paramount consideration.[31]

Based on this idea, we should determine the best settlement for juveniles in conflict with the law in order to create a safeguard that protects the child and juvenile future. One such method is what we know as restorative justice.

III.3. JCJSA: New Chapter in Handling Juvenile Cases

The obsolete of JCA has triggered the birth of new act the so-called JCJSA which has been passed by Indonesian Parliament and enacted on 30 July 2012 by Indonesian Government. JCJSA has been formulated based on the basic idea that juvenile whom in conflict with the law should have right to get special protection including to stay away from incarceration.

JCJSA categorizes child into three categories: juvenile (as delinquent), victim child (as victim); witness child (as witness). Unlike JCA which does not provide a diversionary system in lieu of criminal court, JCJSA does provide.

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[27] Article 8 (1) of JCA
[28] Article 6 of JCA
[29] As I wrote in chapter 2, diversionary is one work system of restorative justice based on its time-line operation that allows law enforcement agencies to divert the case in lieu of formal criminal justice.
[30] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted by General Assembly Resolution 40/33, 29 November 1985
[31] Principle 2 of Declaration of the Right of the Child (General Assembly Resolution 1386 (XIV) of 20 November 1959 in Paulus Hadisuprapto. *Delinkuensi Anak: Pemahaman dan Penanggulangannya (Juvenile Delinquency and its Alleviation)*. Malang: Bayumedia; 2008.p. 236.

JCJSA has 15 chapters consisting 108 articles. The provision regarding diversion, a restorative program, is regulated in chapter two. The objectives of diversion are stated in article 6 which declares:

a. To achieve reconciliation between victim and juvenile;[32]
b. To settle juvenile case outside of the court process;
c. To divert juvenile from freedom deprivation;
d. Encouraging community to participate; and
e. To instill in a sense of responsibility to the juvenile.

The diversion is obligatory to be applied on criminal offenses that subject to be sentenced not more than 7 years imprisonment and is not recidivism.[33] Outcomes of the diversion consensus that provided by JCJSA may be:[34]

a. Reconciliation with or without redress;
b. Returned to parents/guardian;
c. Participation in education or training at an educational institution or at Institution of Social Welfare Exertion (*LPKS/Lembaga Penyelenggaraan Kesejahteraan Sosial*) not longer than 3 (three) months or;
d. Community service.

Musyawarah, a method for settling a dispute peacefully that involves all stakeholders, is going to be used in JCJSA as a mechanism for implementing diversion as stated in article 8 subsection 1:

> "Diversion process is conducted through *musyawarah* involving juvenile and parents/its guardian, victim and/or parents/its guardian, probation officer, and professional social worker based on restorative justice approach"[35]

What makes JCJSA unique is that there are three efforts and chances for juvenile getting restorative settlement through diversion: at investigation stage, prosecution stage and adjudication stage.[36] This is another words to say that conventional criminal trial is the *ultimum remedium*[37] or the last resort for settling the case if diversion fails to be conducted.

One thing should be noted that those efforts, diversion process, are obligatory to be exercised by law enforcement agencies otherwise they are subject to be sentenced for not more than two years imprisonment or fine maximum two hundred million *rupias* if they pass the diversion process.[38] The result of diversion agreement is guaranteed by the head of district court determination. This is to ensure that the agreement acknowledged by the law.

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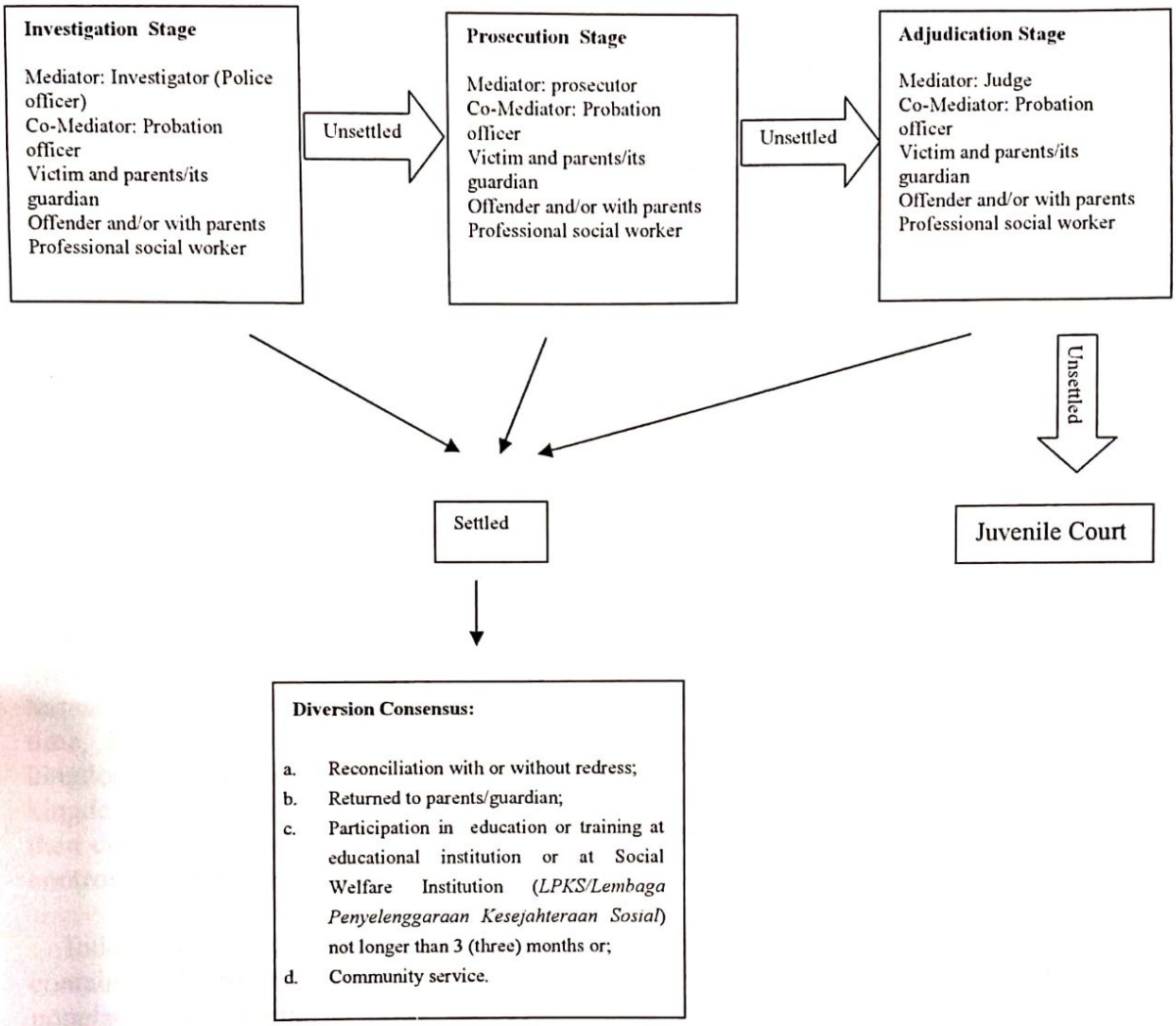
[32] Juvenile here refers to child in conflict with law (child as delinquent) according article 1 of JCJSA
[33] Article 7 subsection 1 JCJSA
[34] Article 11 of JCJSA
[35] Translated from art.8 (1) *proses diversi dilakukan melalui musyawarah dengan melibatkan anak dan orang tua/walinya, korban dan/atau orang tua/walinya, pembimbing kemasyarakatan, dan pekerja sosial professional berdasarkan pendekatan keadilan restorative.*
[36] Art. 7 (1), 29, 42, and 52 of JCJSA
[37] *Ultimum remedium* is a basic principle in criminal law field which means that the utilization of criminal law should be put in the last option after all means fail to settle the case.
[38] Art. 96 JCJSA

The three stages of diversion processes as mention above in JCJSA are shown below:

Figure 1: JCJSA Diversion Flow Chart[39]



From the diversion consensus above it can be seen that the last three consensuses address the offender whilst the first one is formulated to meet victim interest. Therefore it reflects the same idea with Eglash notion, that the victim here is not the meat and potato of the diversion process. Therefore JCJSA is more offender-oriented rather than victim-oriented. This does not mean that JCJSA ignores victim interest. In many articles it is clear stated that the victim plays a key role whether diversion should occur or not since it needs a voluntarily consent of the victim party.

[39] Based on article 7, 8, 9 and 13 of JCJSA

In sum JCJSA is just like 'a dream come true', an act that predicted will protect child and juvenile future. Based on Indonesian legal history, Indonesian people would likely not find difficulty to exercise diversion as stated in JCJSA since they have been conducting *musyawarah* in their daily life coping dispute. However, several things should be in consideration that up to now there were no statistic numbers of how extent *musyawarah* have succeeded to resolve conflict in Indonesia.

IV. Restorative Justice Values from an Islamic Criminal Law (*Jinayat*) Perspective

Islamic law is mostly portrayed as a cruel law, typically by pointing to the amputation of hands as a punishment for theft, or to stoning for adultery. Moreover, after the 9/11 incident, Islam-phobia has become widely apparent in many countries. However, the incident appears to have also aroused curiosity to learn more about Islam itself. According to Nawal H. Ammar, Islam is currently an expanding religion in North America.[40] Leaving aside this image and the growth of Muslim populations around the world,[41] the aim of this section is essentially to assess whether restorative justice values exist within Islamic criminal law.

Islam came to Indonesia through Muslim traders who traveled to the Southeast Asian region during an early period of Islam (the eighth century CE).[42] *Samudera Pasai* is recognized as the first Islamic Kingdom that was located in Northern Sumatera (Aceh) and founded during the early thirteenth century CE.[43] Since that time, Islam spread across the archipelago with the emergence of other Islamic kingdoms. There is some evidence that Islamic law prevailed during the era of Islamic kingdoms that continued to coexist in Netherland Indie (now Indonesia).[44] Its power then declined with the advent of Dutch imperialism that included the assumption of control over government and replacement of the law.

Indonesia is often categorized as a Muslim-majority country and simultaneously as containing the world's largest Muslim population.[45] A total of 87.2% of Indonesia's population is Muslim.[46] Therefore, a discussion of restorative justice from the

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[40] Nawal H Ammar, 'Restorative Justice in Islam: Theory and Practice'in Michael L Hadley, *The Spiritual Roots of Restorative Justice* (State University of New York Press 2001) 162.

[41] The world's Muslim population is predicted to reach the same number as the Christian population by 2030, that is, 2.2 billon. See http://newsfeed.time.com/2011/01/27/2-2-billion-worlds-muslim-population-doubles/.

[42] There are two competing versions regarding the issue of when Islam arrived in Indonesia. The first version claims that Islam came to the Indonesian archipelago during the early eighth century CE. The second version claims that this occurred early in the thirteenth century CE. See *Mark E. Cammack and R. Michael Feener,* 'The Islamic Legal System in Indonesia' (2012) Pacific Rim Law & Policy Journal. 21 Pac. Rim L. & Pol'y J. 13; and Asma T. Uddin, 'Religious Freedom Implications of Sharia Implementation in Aceh, Indonesia' (2010) 7. St. Thomas L.J 603.

[43] Cammack (n 42).

[44] See, for instance, Dinar Boontharm, 'The Sultanate of Banten AD 1750–1808: A Social and Cultural History' (DPhil thesis, University of Hull 2003).

[45] <www.bbc.co.uk/news/world-asia-pacific-14921238> accessed January 30, 2014.

[46] The population of Muslims is followed by Christians (Protestants) 6.2%, Catholics (2.9%), Hindus (1.7%), Buddhists (0.7%), and followers of Confucius (0.05%) with total population of 237.641.326 inhabitants in 2010. See <http://sp2010.bps.go.id/index.php/site/tabel?tid=321>; <www.indonesia-investments.com/id/budaya/agama/item69> accessed January 30, 2014.

perspective of Islamic law might offer a significant approach for implementing restorative justice in Indonesia.

Islamic law currently prevails only in civil matters in Indonesia.[47] However, an exemption has been made for Aceh province. In 1999, with an Act as its legal basis, Aceh gained special autonomy in certain areas, one of which was to implement *shariah*[48] (Islamic law), which includes Islamic criminal law.[49] A decade has passed since 2004 when Islamic criminal law first prevailed in Aceh regarding certain criminal offences such as adultery, gambling, *khalwat* (intimate relations outside of marriage), and selling and drinking alcohol.[50]

The question that grounds this section is whether any restorative justice values exist within Islamic criminal law? If there are such values, how can they contribute to the implementation of the Juvenile Criminal Justice System Act (Act Number 11/2012)? Like *adat* criminal law, Islamic criminal law (*jinayat*) is one branch of *shariah* law that was marginalized by colonial law. *Shariah* means Islamic law that applies to all aspects of a Muslim's life. Its branches include: *ibadah* (worship), *jinayah* (criminal law), *muamalah* (*civil law*), *siyasah* (politics), *Al Mashrafiyah-Al Islamiyah* (Islamic banking), and Islamic humanitarian law. In this section, I focus only on *jinayah* to assess whether it includes restorative justice values.

Criminal offenses (*Al-jarimah,*) in Islamic criminal law (*jinayah*) are divided into three categories. These are: *Hudud*, *Qisas and Diyyat*, and *Ta'zir* as I will discuss below.

IV.1 *Hudud*

Hudud denotes criminal offenses for which the *had* penalty is imposed. According to Abdul Qadir Audah, *had* (the singular form of *hudud*) means a penalty that has already been determined by *syara* (Al Quran and Al Hadist)[51] and constitutes God's right (*haq* Allah). From the above definitions, Ahmad Wardi Muslich has characterized *hudud* as follows:[52]

1. The penalty is specific and definite, implying that the penalty has already been prescribed and has no minimum and maximum limitations.

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[47] Marriage, inheritance, *waqaf* (donating property for societal interests), and *syariah* (economic disputes) relating to Muslims all fall within the jurisdiction of the religious court (*pengadilan agama*) located in each city, with a religious high court (*pengadilan tinggi agama*) in each province. See Act Number 7/1989 on religious courts as amended by Act Number 3/2006.

[48] شريعة is mostly transliterated in English as *sharia* or *shari'a*. I use the term *shariah*, which is also recognized by the Cambridge Advanced Learner's Dictionary 3rd Edition and the Oxford Advanced Learner's Dictionary 8th Edition. This is because the last letter "h" (or "ta" in Arabic) of *shariah* is an important component of the word, and also of its meaning.

[49] See Articles 1 and 3 of Act Number 44/1999 on Preferential Implementation of Aceh Preferential Region Province.

[50] Fachri Bey, 'Three Most Important Features of Indonesian Legal System That Others Should Understand.' In IALS Conference *Learning From Each Other: Enriching the Law School Curriculum in an Interrelated World,* downloaded from <www.ialsnet.org/meetings/enriching/bey.pdf> accessed June 5, 2012..

[51] Al Hadist is the second legal source in Islamic law after the Qur'an.

[52] Ahmad Wardi Muslich. *Hukum Pidana Islam* (*Islamic Criminal Law*) (Sinar Grafika 2005).

2. The penalty constitutes God's right (a public right), implying that there is no place for individual rights, and if there is, then God's right would take precedence for this offense.

As mentioned by Muslich, individual rights should be understood as the rights of the victim of crime. In the framework of traditional criminal law, *hudud* can be understood to refer to criminal offenses that violate public rights, thereby leaving no place for the intervention of the individuals' (victims') rights in the criminal justice system process. According to Nawal H. Ammar, *hudud* are the most serious crimes, because the offenders have violated God's right by injuring harmony within the community that is his creation and a public right.

Most Islamic scholars agree that there are seven criminal offenses that are categorized as *hudud.* These are: (1) *Zina* (adultery, including fornication), (2) *Qadzaf* (slander),[53] (3) *Syurb Al-khamr* (drinking alcohol), (4) *Sirqah* (theft), (5) *Hirabah* (highway robbery), (6) *Al-baghyu* (rebellion), and (7) *Riddah* (apostasy)

Islamic criminal law (*jinayah*) is a system that employs not just retributive justice, but also restorative justice.[54] In my view, a perusal of the seven *hudud* crimes reveals the existence of values of restorative justice within theft and highway robbery. Both crimes provide *dhaman* (redress) as their penalty. Moreover, redress applies to the victim and not to the state as in fines. The victim's interest in this type of crime is represented by the state, which simultaneously represents public interest.

V.2. Theft

The legal basis for *hudud* relating to theft is prescribed in Quran *surah* Al Maidah: 38.[55] Even though the penalty of hand amputation for a theft is stipulated in the above verse, its implementation is more complicated than is commonly thought. As with other common forms of criminal law, *actus reus* and *mens rea* are also required. Muslich described the following four criminal elements of theft:[56] (1) Taking (other's) property furtively, (2) the object that is stolen is property,[57] (3) the property belongs to another person, and (4) the act is committed with an unlawful intention. The first three elements belong to the domain of *actus reus,* whereas the last belongs to *mens rea.* In crimes of theft, there are three kinds of evidence that are presented to prove whether the offender is guilty or innocent. These are evidence provided through: (1) witnesses; (2) a confession; and (3) an oath.[58]

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[53] Ibid 60. There are two types of slander within *jinayah*: (1) slander that exacts a *had* penalty, that is, slandering someone as having committed adultery or fornication; and (2) slander that exacts a *ta'zir* penalty, that is, slandering someone for reasons other than adultery and fornication.

[54] See Mutaz M. Qafisheh, 'Restorative Justice in the Islamic Penal Law: A Contribution to The Global System' (2012)Vol. 7 Issue 1 January – June, International Journal of Criminal Justice Sciences, 487.

[55] This states: "[as for] the thief, the male or the female, amputate their hands in recompense for what they committed as a deterrent [punishment] from Allah. And Allah is exalted in Might and Wise [*sic*]" (*Sahih* International translation).

[56] Muslich (n 52) 83.

[57] This element requires that several conditions be met for the application of the punishment of hand amputation. According to Hadist, narrated by Imam Bukhari (Hadist Number 6291), one of the conditions is that the value of the property stolen should reach a quarter dinar (one dinar is equivalent to 4.25 grams of 22k gold). If the value of the stolen property is less than this prescribed value, the crime will be diverted and categorized as *ta'zir* instead of *hudud.*

[58] Muslich (n 52) 87–8. The witnesses should consist of two men or a combination of one man and two women to prove guilt. If there are no witnesses, the case should be dropped. The number of confessions is subject to debate. According to the Maliki, Hanafi, and Syafi'i schools, one confession is enough to

The punishments for theft are redress (*dhaman*) and hand amputation. Both punishments vary in the way they are executed, depending on each school. Hanafi's school argues that redress can only be imposed when hand amputation is not imposed and vice versa.[59] According to Syafi'i and Hambali's school, both sentences can be simultaneously applied since hand amputation constitutes God's right, whereas redress constitutes the victim's right.

IV.3. 'Highway' robbery (*hirabah*)

Capital punishment is applicable to highway robbery when it involves the killing of the victim. The legal basis is the Qur'an *surah* Al Maidah: 33

> "The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter." (Yusuf Ali translation)

However, if the offender/s regret/s and repent/s (*tawba*) before they are apprehended, the above-mentioned *had* punishment should be dropped. This is stated in the next verse of the same chapter (*surah*):

> "Except for those who return [repenting] before you apprehended them. And know that Allah is Forgiving and Merciful." (Al Maidah:34)

However, even though the *had* punishment (in term of God's right/public right) can be forgiven and, therefore, nullified based on the above verse, the victim's right is not automatically nullified. Therefore, in this case, the offender is still liable to provide redress for the victim. In case the crime leads to the death of the victim, if the offender repents, the crime will be mitigated and categorized as *Qisas* and *diyat*.[60]

IV.4. *Qisas and Diyyat*

According to Ibrahim Unais, *Qisas* means handing down a punishment to the offender that is similar to what s/he has done (to the victim).[61] Like *hudud,Qisas* and *Diyyat* are criminal offenses that include punishments that are already determined by *syara* (*shariah*). However, unlike *hudud,* the individual rights of victims are the predominant rights in *Qisas* and *diyyat*. Therefore, the victims within the *Qisas* and *Diyyat* offense categories may intervene in the criminal justice process. In fact, the victim is the paramount party in *Qisas* and *Diyyat*.

The criminal offenses in *Qisas* and *diyyat* consist of just two criminal offences: homicide and maltreatment. However, these are subdivided into several types:[62]

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punish the offender. However, according to Hambali's school and Syiah Zaidiyah, the confession should be proclaimed twice. The last, oath, is a development of the Syafi'i school to resolve a situation in which there is none of the above evidence. The offender's refusal to proclaim the oath and the proclamation of an oath by the victim can be considered as sufficient to hand down a punishment. However, the last kind of evidence is subject to debate even within the Syafi'i school.

[59] The reason is that Al Quran only stipulates hand amputation without stipulating redress.

[60] Muslich (n 52) 104-05.

[61] Ibid 149.

[62] Ibid xi.

1. Murder (*Alqatlul amdu*).
2. Manslaughter that resembles murder (*Alqatlu syibhul amdu*).
3. Manslaughter by mistake (*Alqatlul khoto*).
4. Deliberate maltreatment (*Aljinaayatu ala maaduunannafsi amda*).
5. Non-deliberate maltreatment (*Aljinaayatu ala maaduunannafsi khoto*).

The legal basis for *Qisas* is prescribed in the following Al-Quran *surahs*:

a. Al-Baqarah:178[63]

"O you who believe, *Al Qisas* (the law of equality in punishment) is prescribed for you in case of murder: the free for the free, the slave for the slave, and the female for the female. But if the killer is forgiven by the brother (or the relatives, etc.) of the killed against blood-money, then adhering to it with fairness and payment of the blood-money to the heir should be made in fairness. This is an alleviation and a mercy from your Lord. So after this whoever transgresses the limits (i.e. kills the killer after taking the blood money), he shall have a painful torment."

b. Al-Maidah: 45.

"And we ordained therein (Torah) for them: "life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal." But if anyone remits the retaliation by way of charity, it shall be for him an expiation. And whosoever does not judge by that which Allah has revealed, such are the *zalimun* (polytheists and wrong-doers—of a lesser degree)."

c. Al Baqarah:179

"And there is (a saving) of life for you in *Al Qisas* (the law of equality in punishment), O men of understanding, that you may become *Al-Muttaqun* [the pious believers of Islamic Monotheism who fear Allah much (abstain from of all kind of sins and evil deeds which He has forbidden) and love Allah much (perform all kinds of good deeds which He has ordained)]."

From the verses above, *Qisas* at first glance appears to share the same sense of retaliation as in *Lex Talionis*.[64] However, this is not actually the case, because *Qisas* provides diversion as a means to mitigate the penalty to *Diyyat* (blood-money). If the victim or his or her relatives (in the case of murder) forgives the offender, then the penalty will be mitigated as mentioned in the Qur'an.

IV.5 Punishments for Qisas and Diyyat Offences

1. Murder

The Prophet Muhammad named murder as one of the four greatest sins in Islam:[65]

Narrated by Anas bin Malik:

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[63] The Noble Qur'an, *English Translation and the Meaning* (Translated by Dr. Muhammad Taqi-ud-Din al-Hilali and Muhammad Musin Khan) (King Fahd Complex for the Printing of Holy Qur'an 1404 H) 35.

[64] The Presidency of Islamic Research (IFTA) wrote in its commentary that translating *Qisas* as retaliation is not correct. It was noted that the Latin legal term *Lex Talionis*, may come close, but even that needed to be modified here (Al-Baqarah:178). Retaliation in English has a wider meaning that is almost equivalent to returning evil for evil. For more details, see The Holy Qur'an *English Translation of the Meanings and Commentary* (Revised and edited by The Presidency of Islamic Researches, IFTA, Call and Guidance. King Fahd Holy Qur'an Printing Complex. Madinah. K.S.A.

[65] Sahih Al-Bukhari Volume 9, Book 83, Number 10.

The Prophet said, "The biggest of *Al-Kaba'ir* (the great sins) are (1) to join others as partners in worship with Allah, (2) *to murder a human being,* (3) to be undutiful to one's parents, and (4) to make a false statement, or to give a false witness." (Emphasis added)

The punishment types applied to the murderer are:

1. *Qisas*.
   For murder, the *qisas* is capital punishment.
2. *Kaffarat*
   Freeing a slave or fasting for two months. This punishment is subject to debate. The Syafi'i school argues that this is mandatory for the offender as one of the main forms of punishment. However, according to the *Hanafiyah*, *Malikiyah*, and *Hanabilah* schools, this is not a mandatory punishment in the case of murder.
3. *Diyyat.* The above *qisas* can be mitigated through conversion into *diyyat* if the victim forgives the offender. In this case, the offender should pay *diyyah* amounting to 100 camels or 1000 dinar.[66]
4. *Ta'zir.* This is an alternative punishment and its implementation is subject to the policies of each state. According to the *Malikiyah* School, if the *qisas* is diverted due to forgiveness, then the offender is obliged to comply with *Ta'zir*. The *ta'zir* punishment prescribed by the *Malikiyah* School for murder is 100 lashes and exile for one year. Nevertheless, many Islamic scholars do not consider *ta'zir* to be mandatory for murder. The judge decides whether to impose *ta'zir*.

2. Manslaughter that resembles murder (*Alqatlu syibhul amdu*)

Manslaughter that resembles murder refers to a crime in which the offender intentionally commits an unlawful act, but does not intend to kill the victim. However, the crime culminates in the death of the victim.

The punishment for this criminal offence is:

1. *Diyyat* of 100 camels
2. *Kaffarat* (freeing a slave or fasting for two months).
3. *Ta'zir*
   If the victim forgives the offender and the offender sincerely pays the *diyyat,* then the state (represented by the judge) may mitigate the punishment through its conversion into *Ta'zir* (depending on the school and policy)
4. Cancellation of the offender's inheritance right.
   According to *AlHadith,* a person who commits homicide may not receive an inheritance.

3. Manslaughter by mistake (*Alqatlul khoto*)

The punishment for this criminal offence is:

1. *Diyyat* of 100 camels
2. *Kaffarat*
3. Cancellation of the offender's inheritance right

4. Deliberate and nondeliberate maltreatment

Classification of the above criminal offenses is determined by whether or not the crime is intentionally committed and by considering its severity. In general, the main punishments for these crimes are *qisas.* However, these can be mitigated through their conversion into *diyyat* and *ta'zir* punishments if the victim forgives the offender.

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[66] One dinar is equivalent to 4.25 grams of 22k gold, see <www.islamicmint.com/dinar_dirham/> last visited on March 10, 2014.

In conclusion, *qisas* may be dropped if the victim grants forgiveness or if *sulh* (reconciliation) occurs.

IV.6. Ta'zir

Ta'zir is the third category of criminal offenses and their punishment in Islamic criminal law. Etymologically, the root of the word *ta'zir* is *azzar*, which has four synonyms, one of which is *addaba* meaning to educate. According to Al Mawardi, cited by Muslich, terminologically *ta'zir* means a punishment that has an intrinsically educational characteristic not been prescribed by *syara*.[67] Therefore, *Ta'zir* crimes include all crimes that are not classified as *hudud, qisas* and *diyyat*. However, several of the latter crime categories can also be categorized as *ta'zir* crimes if there is doubt concerning the evidence, or if the requirements concerning elements of the crime are not fulfilled. These include, for instance, cases where the value of the stolen object is less than a quarter dinar.

Ammar propounds that all forms of restorative justice programs such as mediation, conferences, and victim's compensation may be implemented with little resistance in the *ta'zir* category.[68] I suggest that *ta'zir* is both a category of crime and punishment in Islamic criminal law that has the ability to adapt with a society's development. Therefore, I argue that it is possible to implement restorative justice within the framework of Islamic criminal law. Moreover, forgiveness in Islam is encouraged and highly rewarded by God. To illustrate this, I cite several *Hadiths* related to forgiveness, anger control, and generosity below:[69]

> "God shows his mercy to those who are merciful, have compassion to creatures on earth so that those in heaven may have mercy upon you" (narrated by Tirmidzi Kitab Al-Birr Hadith No. 48).
>
> "Every kindness will be rewarded tenfold" (narrated by Bukhori, Kitab Al-Sawm, Hadith No. 56).
>
> "I guarantee that anyone who does not fight even when provoked, shall be given a mansion in paradise" (narrated by Tirmidzi, Kitab Al-Birr Hadith No. 58).
>
> A strong person is not the one who beats his rivals in wrestling, but a strong person is the one who controls his anger (narrated by Bukhari, Kitab Al-Adab Hadith No. 76).
>
> A generous person is close to God, close to human being[s], close to Paradise, and far from Hell (narrated by Tirmidzi, Kitab AlBirr, Hadith. No. 40).

IV.7. Age of Criminal Responsibility for Minors in Islamic Law

Al Quran and Al Hadith do not specify the age of criminal liability for minors.[70] The Quran merely states a general condition, *baligh*.[71] Therefore, *ulama* (Islamic

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[67] Muslich (n 52) 248–9.
[68] Ammar, (n 40) 173.
[69] M Yasar Kandemir, *40 Hadiths for Children with Stories* (Erkam Publishing 2009).
[70] Ali Imron, '*Kontribusi Hukum Islam Terhadap Pembangunan Hukum Nasional (Studi Tentang*

scholars) have conducted *ijtihad*[72] to determine the *baligh* criteria, as delineated by Ali Imron in Table 2 below.[73]

Table 3: *Baligh* Criteria

No	Legal School	*Baligh* Criteria
1	Syafi'i School	Males or Females: 1. Has reached the age of 15 years (lunar year), and/or 2. Discharges semen (minimum age of 9 years old) 3. Pubic hair growth Females : 1. Menstruation, and/or 2. Pregnancy The average age for males and females is 15 years old.
2	Maliki School	Males or Females: 1. Discharge of semen regardless of being asleep or awake 2. Coarse pubic hair growth 3. Hair growth in armpits 4. The sense of smell becomes sensitive 5. The change in vocal cords 6. Age is in the range of approaching or reaching 18 years old. Females: 1. Menstruation 2. Pregnancy The average age for males and females is 18 years old.
3	Hanafi School	Males: 1. Minimum age of 12 years and/or 2. *Ihtilam* (discharge of semen) regardless of whether or not it occurs through sexual intercourse 3. Impregnation of a female Females: 1. Menstruation, and/or 2. Pregnancy 3. Minimum age of 9 years The average age for males is 18 years old. The average age for females is 17 years old.
4	Hambali School	Same criteria as *Syafi'iyah*

Konsepsi Taklif dan Mas'uliyyat dalam Legislasi Hukum)' The Contribution of Islamic Law to National Law Development (Study on The Conception of Taklif and Mas'uliyyat within legal legislation)' (DPhil thesis. Diponegoro University 2008).

[71] See Al Quran *SurahAnNur*: 59.

[72] *Ijtihad* is the third Islamic legal source after Al Quran and Al Hadith. It refers to the method for establishing a law that has not been stated in Al Quran and Al Hadith.

[73] Imron (n 70).

Stipulating the age of criminal responsibility for juveniles is a critical matter in Islamic criminal law, because a person to whom the *baligh* criteria do not apply should not incur the punishment of a *hudud* crime. Therefore, if a juvenile commits a *hudud* crime, the punishment should be mitigated to *ta'zir*.

In conclusion, redress or compensation, remorse, repentance, forgiveness, and reconciliation are values of restorative justice that exist within *adat* criminal law, community policing, and Islamic criminal law. I suggest that these would provide a valuable base for implementing formal, state-recognized programs of restorative justice. Restorative justice is not an alien concept for most Indonesians, and would probably be accepted without any significant resistance. Moreover, the values that I have described are broad-based values regardless of religion or ethnicity.

V. Bridging and Balancing Public and Private Interests within Restorative Justice

The Beijing Rules suggest that efforts shall be made to establish a set of laws, rules, and provisions that are designed to:

a. Meet the varying needs of juvenile offenders, while protecting their basic rights;
b. Meet the needs of society; and
c. Implement the rules thoroughly and fairly.

In many respects, the above criteria, particularly clauses *a* and *b*, are not easy to implement. Moreover, the victim can be considered as an additional variable. In civil matters, this problem would probably not occur since the conflict only involves each party and society or the public have no part in it. However, in criminal matters, society also has its needs in the words of the Beijing Rules, or its legal interest, to cite Gerry Johnstone. Restorative justice takes back the victim's rights from the state and returns them to the victim. It seems that restorative justice is leading to the collapse of the wall between civil and criminal matters. This does not, however, mean that society's interest can be totally abandoned as Johnstone points out, citing Zehr:[74]

Since one cannot ignore the public dimension of crime, the justice process in many cases cannot be fully private. The community, too, wants reassurance that what happened was wrong, that something is being done about it, and that steps are being taken to discourage recurrence

According to Zehr, many proponents of restorative justice insist that the public dimensions of crime should not be considered more important than the private dimensions. Johnstone notes that finding a way of balancing these interests, in theory and in practice, is an important challenge facing those who campaign for restorative justice.[75]

A conflict of interest between the victim and society may occur in many cases. Johnstone provides an example of a person who commits indecent assault against a

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[74] Gerry Johnstone, *Restorative Justice. Ideas, Values, Debates* (Routledge 2011) 69.
[75] Ibid 70.

relative and then offers generous restitution, a genuine apology, and agrees to undergo therapy that leads to the satisfaction of the victim, who then refuses to testify in a criminal trial. A question then arises: if the prosecutor thinks that the conviction and punishment of the perpetrator is in the public's interest, would it be right to compel the victim to testify in the trial?[76] Such a case mentioned by Johnstone, would be a touchstone for restorative justice.

Theoretically, I suggest that the answer to the above question hinges on the approach of Islamic criminal law, particularly *qisas* and *ta'zir*. In terms of *qisas*, society should understand that it is the victim rather than society who has the predominant right. Therefore, the victim's decision should be respected.

Interestingly, in Islamic criminal law, society's aspirations can also be considered in the context of *ta'zir*. Its flexibility in adapting to society's development makes balancing and bridging the interests of victims and society possible. In the Islamic criminal law concept, relationships between humans (*habluminannas*) should be resolved among themselves when they are engaged in a conflict. This can be applied to the relationship between the victim and offender, which can encompass both families. The offender may sincerely repent to God who is most merciful, but the issue remains of crimes that belong to victims whose privilege and right it is to forgive. On the other hand, humans also have a relationship with God (*habluminallah*).[77] In term of the law, and with some points of note, this can be regarded as a public or state right. Repentance can be shown by serving a punishment issued by the state. In short, the type of relationship determines to whom the perpetrator should be liable. According to Islamic criminal law, all human deeds should be accountable, whether in this world or in the hereafter. In terms of punishment, these two worlds are connected. Therefore, a perpetrator who is punished in this world will be spared in the hereafter.

As I described in chapter three, *ta'zir* means a punishment that has an intrinsically educational character not prescribed by *syara*. This means that the government decides on the type of punishment. Therefore, in cases where a crime is viewed as infringing both God's right and an individual's right, the fulfillment of both interests is possible through the application of restorative justice as well as a stipulated punishment (for instance, incarceration). However, in the context of Islamic criminal law, the stipulated punishment should not conflict with the Qur'an and Hadist.

To return to Johnstone's example, indecent assault in Islamic criminal law is categorized as a *ta'zir* crime that is related to dignity and morals (*kehormatan dan kerusakan akhlak*).[78] In accordance with the nature of *ta'zir*, the punishment of this crime is left to the state. Therefore, if on one hand this case is perceived as a breach of an individual's right, and on the other hand, is also deemed an infringement of God's right (public right), then the offender could be punished by the state as well as be obliged to restore the victim. This does not mean that the offender receives double jeopardy (*ne bis in idem*) since these components, entailing separate responsibilities to the state (public) and to the victim, can be "packaged" as one punishment. Moreover,

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[76] Ibid.

[77] There is in fact a third category of relationship, which is the relationship between humans and nature. This is evident from several *hadists*, for instance the *hadist* narrated by Ibn Majjah exhorting followers to conserve and not to waste water, even in a running stream, and even for ablution. See Ibn Majjah Hadith No. 419.

[78] Muslich (N 52) 256.

as I discussed in chapter two, recently, the approach of integrating the victim's rights, for example, through a victim impact statement, restitution, and state compensation within a criminal trial has been proved to be possible.

In short, the contention between public and individual interests may be alleviated by adopting the Islamic criminal law approach, particularly the concepts of *qisas* and *ta'zir*, depending on the case.

JCJSA provides clear-cut provisions. The use of diversion is obligatory in all criminal offenses requiring that the offender be sentenced to not more than seven years of imprisonment, providing that they do not involve recidivism, as I noted in chapter four.[79] This implies that diversion can be employed for a wide range of crimes. As Johnstone has shown, indecent assault is generally one such crime that can be diverted. Chapter XIV of the Penal Code of Indonesia stipulates that indecent assault entails crimes against decency. The imprisonment period described within this Chapter is below seven years for all crimes committed by a juvenile in this context. An exception, however, is if the indecent assault or an obscene act results in the victim's death.[80]

Clearly, introducing something new into a well-established system is not as simple as flipping a coin and resistance may occur. It is in this context that the contention between the victim's interest and public interest is likely to emerge. Prior to JCJSA, all the victim's interests were taken over by the police and prosecutor, which reflected public interest. In the near future, the victim's interest will be returned to the victim and public interest will be correspondingly reduced. I deliberately use the term "reduced," because the community still has a place in diversion. According to JCJSA chapter VIII, Article 92 (c) regarding community participation, a community may participate in a diversion. However, the victim's interest is paramount in JCJSA, particularly in the diversion process.

However, responses of outrage that can happen within society may be viewed from a different angle. The lesson is that society is watching and has the power to show disagreement. Again, as I proposed earlier, the solution lies in the Islamic criminal law approach. As a Muslim-majority country, Indonesia still has a place for Islamic values within society. Apology, forgiveness, remorse, repentance, and compensation are some general Islamic values that, like common sense, can be easily accepted as broad-based values, regardless of religion.

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[79] This means that diversion may not be applicable for several crimes, for example, in the case of homicide. According to Article 338 of the Indonesian Penal Code, manslaughter may be punished by a maximum imprisonment of fifteen years. As *lex specialis*, JCJSA stipulates that the maximum imprisonment for juveniles is half of the maximum imprisonment for adults. Therefore, the imprisonment sentence for a juvenile in a manslaughter case may not be more than seven and a half years, which implies that diversion may not be used in a manslaughter case. See Article 79 (2) of JCJSA.

[80] Article 291 (2) of the Indonesian Penal Code: If one of the crimes described in Articles 285, 286, 287, 289, and 290 (*obscene acts*) results in death, a maximum imprisonment of fifteen years shall be imposed (emphasis added).