

Ferry Fathurokhmandan, Ahmad Fauzi

Fakultas Hukum Universitas Sultan AgengTirtayasa.

Jl. Raya Jakarta Km. 04 Pakupatan Serang Banten. E-mail: feryfaturhman@gmail.com

ISLAMIC CRIMINAL LAW AS A BRIDGE OF CONTENTION BETWEEN PUBLIC AND INDIVIDUAL INTEREST WITHIN RESTORATIVE JUSTICE

ABSTRACT

Restorative justice has been developing broadly in many countries as a new paradigm in the 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 a restorative justice program for juvenile delinquent which took into effect since 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 the restorative justice settlement that reached by the victim and offender. The contention between the proponent and opponent of the restorative justice movement on this issue is remains unsolved up to present. This issue is also possible may be arise when the 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. There are at least two notions why Islamic criminal law 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 point of view in order to mollify the contention.

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

ABSTRAK

Keadilan restoratif telah berkembang secara luas di banyak negara sebagai paradigma baru di bidang hukum

pidana. Mengikuti kebutuhan dan tren global, Indonesia telah melakukan upaya untuk mengganti Undang-Undang Pengadilan Anak dengan yang baru yang disebut Sistem Undang-Undang Peradilan Pidana Anak yang memanfaatkan penyalihan sebagai program keadilan restoratif kenakalan remaja yang mulai berlakunya sejak Juli 2014. Sebagai sebuah paradigma baru, keadilan restoratif telah dikritik secara sporadis. Salah satu kritik adalah bagaimana untuk menyeimbangkan kepentingan publik dan individu apa bila mereka berada dalam konflik tentang ketika mereka berada dalam konflik mengenai penyelesaian keadilan restoratif yang dicapai oleh korban dan pelaku. Pertentangan antara pendukung dan lawannya gerakan keadilan restoratif tentang masalah ini tetap belum terpecahkan sampai sekarang. Masalah ini juga mungkin muncul ketika pemerintah Indonesia memberlakukan Undang-Undang Peradilan Pidana Anak. Sebagai sebuah negara muslim, Indonesia memiliki kesempatan untuk menyelesaikan pertentangan dengan menawarkan Hukum Pidana Islam (jinayat) sebagai sebuah metode pendekatan karena nilai-nilai keadilan restoratif ada juga didalam Hukum Pidana Islam. Setidaknya ada dua pengertian mengapa Hukum Islam terkesan tenang dalam pertengkaran. Pertama, secara historis Hukum Islam pernah ada di Indonesia. Kedua, nilai-nilai keadilan restoratif ada di dalam Hukum Pidana Islam.

Kata kunci: Hukum Keadilan, Hukum Pidana Islam, Indonesia.

I. INTRODUCTION

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, entitled *Beyond Restitution—Creative Restitution* which was presented at a conference on restitution in 1975.

In his paper, Eglash described three faces of justice: (1) retributive justice; (2) distributive justice 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 (Routledge, 80: 1992). 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.” 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 terms of its central concern.

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. Mark Umbreit and Marilyn Peterson Armour entitled, *7: 2011*). Another definition argued by Tony Marshall 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.” (Braithwaite, 11: 2002).

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 process¹www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf last accessed March 7, 2014. 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.” (Braithwaite, 7: 2011)

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 (Braithwaite, 7: 11).

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: (Umbreit, 6: 2008).

TABLE 1: TWO DIFFERENT VIEWS OF JUSTICE

CRIMINAL JUSTICE	RESTORATIVE JUSTICE
<ul style="list-style-type: none"> • Crime is a violation of the law and the state • Violations create guilt • Justice requires the state to determine blame (guilt) and impose pain (punishment) • Central focus: Offenders getting what they deserve 	<ul style="list-style-type: none"> • 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: Victims' needs and offenders' responsibility for repairing harm

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 of the offenders meeting the victims to repair the damage. In criminal procedural law, this idea was impossible to implement, because, as we 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, 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 (Van Ness, 1); (Umbreit, 6); (Howard Zehr, 2005) Coinci-

dentally, the initial practice of VORP in Canada fulfilled what Eglash had suggested in terms of implementing creative restitution, namely the probation requirement.

Zehr describes VORP as “contagious,” with Indiana being the first state in the United States to establish a similar program in 1977–1978 (Zehr, 159) 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 See Barda (Nawawi Arief, 2008). From its first emergence in Canada, the practice of restorative justice has been spreading to other continents such as Europe, Africa, and Asia (Routledge, 35-40: 2008); (Van Ness, 33–38) The restorative justice movement is unstoppable and has mutated into many forms to fit each country’s needs particularly for handling juvenile offender.

II. ANALYSIS

A. 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 children (*Profil Anak Indonesia 2012,5: 2012*) The categorization age and the term of “child” or “children” here obviously refer to Convention on the Right of the Child (UN Resolution 44/25 of 1989 on Convention on the Rights of the Child) 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 (Juvenile Court Act Number 3/1997 and Juvenile Justice System Act Number 11/2012). 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 we will describe below.

B. 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. 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 (G. Van Bueren: 26). 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 (Penal Code of Japan Act No 45/1907 art 41 and Juvenile Act of Japan No 168/1948 art. 2 (1) and 3 (1)). whilst in New Zealand is set from 14 up to under 17 (Young Person and Their Family Act of New Zealand No 24 of 1989 section 2 subsection 1). This age limit formulation differs among countries depending on each economic, social, political and legal system (The Beijing Rules Annex of Number 2.2)

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 (article 67 of JCA) 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 (Article 5 of JCA)

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	
JCJSA	12	under 18

C. 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, (Article 8 (1) of JCA) or law enforcement agencies are forbidden to wear formal uniform when investigates, prosecutes and tries the juvenile offender and so forth (Article 6 of JCA) However the JCA has a main weakness i.e. it has no means for diverting the case in lieu of criminal trial.

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.” (United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) Adopted by General Assembly Resolution 40/33, 29 November 1985).

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 (Principle 2 of Declaration of the Right of the Child (General Assembly Resolution 1386 (XIV) of 20 November 1959 in Paulus Hadisuprpto ,236: 2008).

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.

D. 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.

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:

To achieve reconciliation between victim and juvenile; (Juvenile here refers to child in conflict with law (child as delinquent) according article 1 of JCJSA)

- a. To settle juvenile case outside of the court process;
- b. To divert juvenile from freedom deprivation;
- c. Encouraging community to participate; and
- d. 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 (Article 7 subsection 1 JCJSA) Outcomes of the diversion consensus that provided by JCJSA may be: (Article 11 of JCJSA).

- 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.

Musyawah, 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 *musyawah* involving juvenile and parents/its guardian, victim and/or parents/its guardian, probation officer, and professional social worker based on restorative justice approach” (Translated from art.8 (1) *proses diversi dilakukan melalui musyawah dengan melibatkan anak dan orang tua/walinya, korban dan/atau orang tua/walinya, pembimbing kemasyarakatan, dan pekerja sosial*

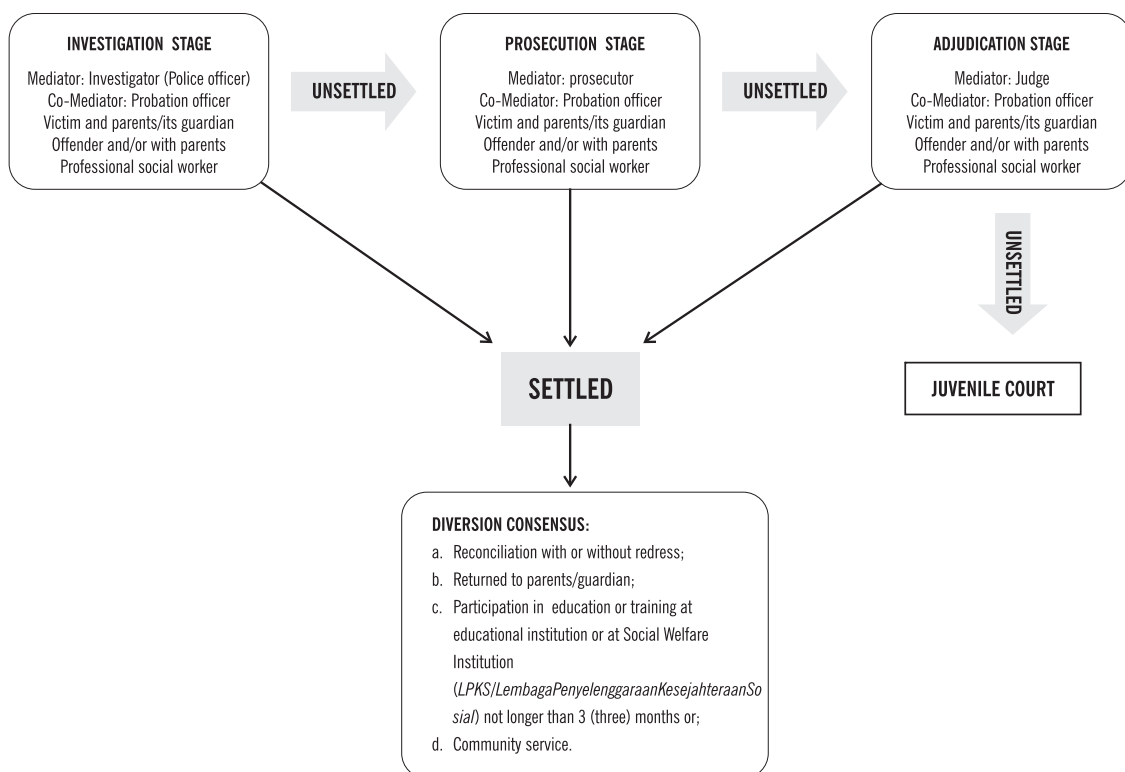
professional berdasarkan pendekatan keadilan restorative)

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 (Art. 7 (1), 29, 42, and 52 of JCJSA)his is another words to say that conventional criminal trial is the *ultimum remedium* 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 (Art. 96 JCJSA)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.

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

FIGURE 1: JCJSA DIVERSION FLOW CHART(ARTICLE 7, 8, 9 AND 13 OF JCJSA)



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.

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.

E. 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, Islamophobia 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 (Ammar, 162: 2001). Leaving aside this image and the growth of Muslim populations around the world (<http://newsfeed.time.com/2011/01/27/2-2-billion-worlds-muslim-population-doubles/>) 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)(Uddin, 2010). *Samudera Pasai* is recognized as the first Islamic Kingdom that was located in Northern Sumatera (Aceh) and founded during the early thirteenth century CE. 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) (Dinar Boontharm, 2003). 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 (<www.bbc.co.uk/news/world-asia-pacific-14921238> accessed January 30, 2014) A total of 87.2% of Indonesia's population is Muslim (<<http://sp2010.bps.go.id/index.php/site/tabel?tid=321>>; <www.indonesia-investments.com/id/budaya/agama/item69> accessed January 30, 2014) Therefore, a discussion of restorative justice from the 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 (Act Number 7/1989 on religious courts as amended by Act Number 3/2006) 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* (Islamic law), which includes Islamic criminal law (Articles 1 and 3 of Act Number 44/1999 on Preferential Implementation of Aceh Preferential Region Province) 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 (Fachri Bey, <www.ialsnet.org/meetings/enriching/bey.pdf> accessed June 5, 2012)

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 (*jinayah*) 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 Diyat*, and *Ta'zirah* we will discuss below.

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) and constitutes God's right (*haq Allah*). From the above definitions, Ahmad Wardi Muslich has characterized *hudud* as follows: (Muslich, 2005)

1. The penalty is specific and definite, implying that the penalty has already been prescribed and has no minimum and maximum limitations.
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), (3) *Syurb Alkhamr* (drinking alcohol), (4) *Sirqah* (theft), (5) *Hirabah* (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 (Qafisheh, 487). 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.

Theft

The legal basis for *hudud* relating to theft is prescribed in Quran *surah* Al Maidah: 38. 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: (Muslich, 83) (1) Taking (other's) property furtively, (2) the object that is stolen is property (Imam Bukhari, Hadist Number 6291)(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 (Muslich, 87-8).

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. 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.

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* (Muslich (n 52) 104-05)

Qisas and Diyat

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) (Muslich (n 52) 149-05). Like *hudud*, *Qisas* and *Diyat*

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 *diyat*. Therefore, the victims within the *Qisas* and *Diyat* offense categories may intervene in the criminal justice process. In fact, the victim is the paramount party in *Qisas* and *Diyat*.

The criminal offenses in *Qisas* and *diyat* consist of just two criminal offences: homicide and maltreatment. However, these are subdivided into several types: (Muslich (n 52) 104-05).

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

“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*. However, this is not actually the case, because *Qisas* provides diversion as a means to mitigate the penalty to *Diyat* (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.

Punishments for Qisas and Diyat Offences

1. Murder

The Prophet Muhammad named murder as one of the four greatest sins in Islam: (Sahih Al-Bukhari Volume 9, Book 83, Number 10)

Narrated by Anas bin Malik:

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.

Diyat. 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 (www.islamicmint.com/dinar_dirham/ last visited on March 10, 2014.)

3. *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. *Diyat* 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.

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

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* (Muslich (n 52) 248-9) Therefore, *Ta'zir* crimes include all crimes that are not classified as *hudud*, *qisas* and *diyat*. 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 (Ammar, (n 40) 173). 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: (M Yasar Kandemir, 2009).

"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).

Age of Criminal Responsibility for Minors in Islamic Law

Al Quran and Al Hadith do not specify the age of criminal liability for minors Ali Imron, 'Kontribusi Hukum Islam Terhadap Pembangunan Hukum Nasional (Studi Tentang Konsepsi Taklif dan Mas'uliyat dalam Legislasi Hukum)' (The Contribution of Islamic Law to National Law Development, 2008). The Quran merely states a general condition, *baligh* (Al Quran Surah AnNur: 59) Therefore, *ulama* (Islamic scholars) have conducted *ijtihad* to determine the *baligh* criteria, as delineated by Ali Imron in Table 2 below (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.

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

TABLE 3: *BALIGH* CRITERIA

NO	LEGAL SCHOOL	<i>BALIGH</i> CRITERIA
1	Syafi'i School	<p>Males or Females:</p> <ol style="list-style-type: none"> 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 <p>Females :</p> <ol style="list-style-type: none"> 1. Menstruation, and/or 2. Pregnancy <p>The average age for males and females is 15 years old.</p>
2	Maliki School	<p>Males or Females:</p> <ol style="list-style-type: none"> 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. <p>Females:</p> <ol style="list-style-type: none"> 1. Menstruation 2. Pregnancy <p>The average age for males and females is 18 years old.</p>
3	Hanafi School	<p>Males:</p> <ol style="list-style-type: none"> 1. Minimum age of 12 years and/or 2. <i>hthilam</i> (discharge of semen) regardless of whether or not it occurs through sexual intercourse 3. Impregnation of a female <p>Females:</p> <ol style="list-style-type: none"> 1. Menstruation, and/or 2. Pregnancy 3. Minimum age of 9 years <p>The average age for males is 18 years old. The average age for females is 17 years old.</p>
4	Hambali School	Same criteria as <i>Syafi'iyah</i>

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:(Routledge, 69: 2011).

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(Routledge, 69: 2011).

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 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?(Routledge, 69: 2011). 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 (*habluminnas*) 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 (*hablumillah*) (Ibn Majjah Hadith No. 419) 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 we 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*) (Muslich (N 52) 256) 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. More-

over, as we 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 we noted in chapter four (Article 79 (2) of JCJSA) 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 (Article 291 (2) of the Indonesian Penal Code: If one of the crimes described in Articles 285, 286, 287, 289, and 290 (*obscene acts*)).

III. CONCLUSION

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 we 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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