博士論文

A STUDY OF RESTORATIVE JUSTICE IN INDONESIA: AN ECLECTICISM OF *ADAT* LAW, ISLAMIC CRIMINAL LAW, AND MODERN LAW

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ABSTRACT

In traditional criminal justice systems, victims do not have the right to express their needs. Instead, the state articulates the victim's rights. Therefore, the judge's verdict should be perceived as representing the victim's interest. Restorative justice takes cognizance of this gap in representation and offers a new paradigm for viewing crime. Importantly, victims are given a place in the restorative justice process. Their voices are heard. Restorative justice is viewed as a novel concept in criminal law that assumes various forms. Many countries, including Indonesia, have employed restorative justice for handling crime. However, for the Indonesian people, restorative justice is not a novel idea since its features can be found in *Adat* law, in local wisdom reflected in community policing programs, and in Islamic criminal law. The introduction and adoption of modern law in Indonesia, in the mid-nineteenth century, has led to the decline of *Adat* law and of Islamic criminal law. These systems were marginalized and gradually replaced by the transplanted Dutch law.

This study, grounded in the basic concept of restorative justice, aims, through textual analysis, to assess whether *Adat* law and some of the values embedded in Islamic criminal law fit with the characteristics of restorative justice. Field research was also conducted to seek answers to the research questions as textual law often differs from law in practice. The study found that despite the positive values ascribed to modern law, its transplanting to Indonesia, and replacement of traditional laws, has created several problems. These are rooted in the misfit of the legal culture, which is a critical factor in a legal system, with Indonesian culture. A new law, the Juvenile Criminal Justice System Act (JCJSA) has been passed by the Indonesian Parliament to replace the Juvenile Court Act (JCA). JCJSA diverges from the previous JCA Act through its inclusion of a restorative justice program that was not present in the earlier Act, and is considered to be aligned with Indonesian culture.

The study reveals that there are two potential obstacles and challenges regarding the implementation of JCJSA: synchronization of law enforcement agencies, and the role of mediators. Another finding of the study is that conflict between public and private interests within restorative justice may be alleviated through consideration of Islamic criminal law values. The ultimate conclusion of this thesis is that restorative justice in Indonesia is essentially an eclecticism of *Adat* law, Islamic criminal law, and modern law.

CONTENTS

List of Tables and Figures

List of Tables

List of Figures

Chapter I

INTRODUCTION

Restorative justice is a relatively new method for handling crimes. I emphasize "relatively" since there is contention among proponents of restorative justice as to whether this is a novel system or a revival of an older legal practice.

In its current form, restorative justice first appeared in the mid-1970s in the Canadian city of Kitchener, Ontario at a presentence hearing of the trial of two teenagers for vandalism. On the other hand, this practice, or what later came to be known as restorative justice, is actually part of indigenous practice in many traditions across the world. There is evidence of this from the discovery of John Braithwaite, an Australian criminologist, following the launch of his book, *Crime, Shame and Reintegration* in 1989, that restorative justice conferences also occur in Africa, Melanesia, Asia, and America.[1]

In the context of Indonesia, I hypothesize that the values of restorative justice are common to traditional legal systems, namely *adat* law and Islamic criminal law that predate the Dutch colonization of the archipelago and its subsequent renaming as Indonesia. This research is, therefore a variety of "flashback research" that analyzes old practices to predict the potential challenges facing the modern form of restorative justice, as enacted in the new Juvenile Criminal Justice System Act (JCJSA) that will prevail from mid-2014. I posit that JCJSA is an eclecticism of *adat* law, Islamic criminal law, and modern law. This study makes an important contribution through its assessment of whether restorative justice practices actually exist in Indonesia, and if they do exist, what these practices can contribute to the development and implementation of restorative justice in Indonesia.

1.1 Research Objectives

When I first learned about restorative justice in Indonesia in 2008, I realized that the basic concept shared similarities with some of the features of *adat* law as well as Islamic criminal law, both of which are familiar systems in Indonesian society, particularly prior to Dutch colonization. Therefore, when the Indonesian Parliament passed the Juvenile Criminal Justice System Act in mid-2012, I aimed to predict potential obstacles and challenges that could ensue when implementing restorative justice in Indonesia. I formulated this central concern within two research questions as follows:

[1] John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002) 24.

1. What are the possibilities, obstacles, and challenges entailed in the implementation of restorative justice for juveniles in Indonesia?
2. How can public and private interests be bridged and balanced within restorative justice programs?

The conflict between public and private interests, as articulated in my second research problem, is one of several issues that have been discussed within the field of restorative justice. I will subsequently return to this problem in an in-depth discussion in chapter five.

1.2. Methodology

This research is qualitative and relies on secondary data that are supported by primary data. Primary data for this research were obtained by conducting in-depth interviews using the purposive sampling method.

The research focuses on the notion of restorative justice by retracing its first appearance. My hypothesis is that the concept and practice of restorative justice had been in existence for a long time prior to the Dutch colonization. My attempt here is to retrace Indonesian legal history to situate the contemporary practice of restorative justice in postcolonial Indonesia and to analyze whether *adat law*, community policing, and Islamic criminal law theory share values in com`mon with restorative justice. Based on this study, I predict the possibility of implementing restorative justice in its modern form. I employ Lawrence M. Friedman's concept of legal culture as an analytic tool in this thesis. I discuss this concept further in chapter five.

1.3 Structure of Chapters

This thesis is divided into six chapters. Chapter one introduces the study and provides a brief framework of the thesis as a whole. In chapter two I discuss the basic notion of restorative justice and formulate categories of restorative justice. In chapter three, I present the three components of legal concepts and practice in Indonesia, namely *adat* law, Islamic criminal law, and community policing, and examine whether restorative justice values exist in their theory and practice. Chapter four entails a discussion of legal provisions on children and juveniles in Indonesia, including the new act for juveniles, which includes a diversionary model of a restorative justice program. In chapter five, in accordance with the research questions posed in this chapter, I discuss potential problems of restorative justice in Indonesia. Chapter six offers conclusions on the findings of this thesis.

Chapter Two

RESTORATIVE JUSTICE

2.1. Definition of Restorative Justice

The term "restorative justice" is becoming familiar in criminology and the field of criminal law. Moreover, restorative justice is emerging as a global trend in handling crime. To develop a deeper understanding of restorative justice, I would like to trace the origins of the term. 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,[2] entitled *Beyond Restitution—Creative Restitution* which was presented at a conference on restitution in 1975.[3]

In his paper, Eglash described three faces of justice: (1) retributive justice; (2) distributive justice[4] 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.[5] 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

[2] 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.

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

[4] 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 offense. 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.

[5] 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.

the destructive or harmful consequences of that behavior, and its effect on the victim of a criminal act. From the perspective of the victim, he or she was disregarded by both the punishment and therapeutic treatment approaches, except as a witness. On the other hand, creative restitution made victims and their needs an important consideration and gave them a significant role to play, both in achieving justice and in developing a rehabilitative or correctional program.[6] I suggest that besides the Kitchener experiment, creative restitution can also be regarded as an embryonic form of the restorative justice program. Interestingly, as Eglash admitted, creative restitution was designed primarily for offenders. He noted 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."[7] 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.

Restorative justice has been widely developed and applied in many countries as a new paradigm for handling crime. Recently, it has developed sporadically and in various ways, following from its first experimental inception in North America (Kitchener) and spreading to European and Asian countries. However, from the perspective of indigenous law, "restorative justice" has previously existed and been practiced in every continent.

Howard Zehr, who is regarded as the "father" of restorative justice, admits that he cannot identify and recognize all of the current restorative justice programs and the hundreds of restorative justice practitioners and academicians involved in developing restorative justice programs. This situation radically contrasts with the 1990s era when he was able to keep abreast of developments in restorative justice, including its practitioners and proponents.[8]

Since restorative justice has evidently evolved into many forms, it is helpful to briefly revisit its initial definition. Zehr originally conceptualized restorative justice as a process that involved, to the greatest extent possible, those who had a stake in a specific offense in collectively identifying harms, needs, and obligations, as well as their redress, to heal and make things as right as possible.[9] Certainly this definition raises some further questions, such as what does Zehr mean by those "who had a stake in a specific offense?" How are such

[6] 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.
[7] ibid 99.
[8] Howard Zehr in the foreword of a book by Mark Umbreit and Marilyn Peterson Armour entitled, *Restorative Justice Dialogue, an Essential Guide for Research and Practice* (Springer Publishing Company 2011) vii.
[9] ibid 7.

individuals to be defined?

To respond to such questions and enrich the discussion, I propose another definition that is acknowledged as the most acceptable definition of restorative justice since it has also been adopted by the United Nations.[10] This definition was proposed by Tony Marshal who argued 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."[11]

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 also 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.[12] 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."[13]

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's supporter are facilitated, they sit together in a circle [sic]. First, they talk about what happened, who was hurt by*

[10] 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) 23.
[11] Braithwaite (n 1) 11.
[12] <www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf> last accessed March 7, 2014.

[13] Braithwaite (n 1) 11.

> *what happened and what might be done to right the wrong and come up with a 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 stakeholders.*[14]

It is clear from the three definitions provided by Zehr, Marshal, and Braithwaite that the central focus has gradually shifted 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. I will subsequently elaborate on the background context of why the victim has become an important party in restorative justice.

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 the 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.

Zehr's framework provides a clear understanding of victim-incorporation. Adopting the analogy of a photographic lens, Zehr explained that the choice of lens affected the outcome, because different lenses created different pictures. The same went for understanding a crime. Zehr noted that if we viewed crimes through a retributive lens, the "criminal justice" process failed to meet many of the needs of either the victim or the offender. The process neglected victims while failing to meet its expressed goals of holding offenders accountable and deterring crime.[15]

To clarify these differences, Zehr then differentiated between criminal justice and restorative justice as shown in the table below:[16]

[14] <www.anu.edu.au/fellows/jbraithwaite/lectures/index.php> last accessed March 7, 2014.
[15] Howard Zehr, *Changing Lens: A New Focus for Crime and Justice* (Herald Press 2005) 178–179.
[16] Umbreit (n 8) 8.

Table 1: Two Different Views of Justice

Criminal Justice	Restorative Justice
• 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)	• 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

According to Zehr, as cited by Mark Umbreit and Marilyn Peter Armour, the two approaches shown in the above table entail different ways of seeking justice. These differences can be clarified by posing the following three questions relating to a criminal justice system. (1) What laws have been broken? (2) Who broke these laws? (3) What do they deserve in response? From a contrasting restorative justice perspective, these questions would be reframed as: (1) Who has been hurt? (2) What are their needs? (3) Who is obliged to meet these needs?[17]

For Allison Morris and Gabrielle Maxwell, restorative justice is a process that drastically reduces the roles of the court, judiciary, and other criminal justice professionals by returning this role to those most affected by it and by encouraging them to determine appropriate responses.[18]

Relying on the reparative and encounter concepts,[19] Daniel W. Van Ness and Karen Heetderks Strong defined restorative justice as a theory of justice that emphasizes reparation

[17] ibid.

[18] Allison Morris and Gabrielle Maxwell, 'The Practice of Family Group Conferences in New Zealand: Assessing the Place, Potential and Pitfalls of Restorative Justice' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice. International Debates* (Ashgate Publishing 2000) 207.

[19] The key point of the reparative concept is that crime causes harm and that justice must repair that harm while the encounter concept focusing on the importance of stakeholder meetings and on the many benefits that result from discussions of the crime among stakeholders, including what contributed to it and its aftermath. See Van Ness (n 2) 42; also Gerry Johnstone and Van Ness (eds) 'The Meaning of Restorative Justice' in *Handbook of Restorative Justice* (Routledge 2011) 9.

of the harm caused or revealed by criminal behavior. It is best accomplished through cooperative processes that include all stakeholders.[20] Citing Marian Liebmann, Steve Mulligan noted that restorative justice was a criminal justice paradigm that emphasized the restoration of the victim.[21] Similarly, Lyle Keanini, citing Tony Marshal, stated that restorative justice was "centrally concerned with restoration: restoration of the victim, restoration of the offender to a law-abiding life, [and] restoration of the damage caused by [the] crime to the community."[22]

There are many more definitions proposed by restorative justice proponents that have resulted from the ongoing development of restorative justice programs. Some of these are general and can incorporate all restorative justice programs, while others leave loopholes that do not apply to some restorative justice programs. In many respects, whereas some definitions complement and complete each other, others criticize and compete with each other, resulting in new formulations. This will be discussed further in a subsequent section of this chapter on categorizing restorative justice.

2.2 Historical Background of the Restorative Justice Movement

The traditional criminal justice system clearly focuses on the offender, and how to punish him or her to create a deterrent effect both for the particular offender and for potential offenders within a society. At the same time, the system excludes the crime victims who are only regarded as witnesses, helping the prosecutor to prove that the offender is guilty of a crime that actually involves them as the injured party. This situation was perceived as a gap in the prevailing criminal justice system. Therefore, research was conducted and a new paradigm of justice emerged and has been continually evolved. This new paradigm is known as restorative justice.

A discussion of restorative justice should begin by retracing the victim's position in the criminal justice system of the past when the state (in this case, court) did not yet exist, and which was subsequently followed by the emergence of the court that replaced the victim's interest.

There was a time when no distinction was made between penal law and private law; a time when penal law was still regarded as private law.[23] Crime victims directly sought justice

[20] ibid 43.
[21] Mulligan (n 4).
[22] Lyle Keanini 'ADR in Hawaii Courts: The Role of Restorative Justice Mediators'(2011) 12. Asian-Pac. L. & Pol'y J. 174.
[23] For further details, see Gustav Radbruch, *The Legal Philosophies of Lask, Radbruch, and Dabin. Harvard*

against offenders, often with the assistance of their kin. This system was based on the principle of commutative justice between coequals that is used in private law.[24] John Gilissen and Frits Gorle have argued that this system prevailed over a long period, creating vigilante (*eigenrichting*) as a form of criminal dispute settlement, until the state intervened and took over the settlement of criminal disputes.[25] Israel Drapkin has noted that the Twelve Tables (449 BCE) marked a transition from private retribution to state adjudication. Though during this period, there was still no clear boundary between public and private law, criminal matters were regulated in accordance with the eighth and ninth tables, which Drapkin, suggests was the embryonic form of the public law/criminal law divide.[26] In the early development phase of criminal law, victims were still considered as parties that should get restitution from offenders. Victimologists have described the justice approach during this period as a "victim justice system."[27]

Before the existence of the state, offenders were forced by victims (or the victim's kin) to take responsible for the crimes that they had committed. Codes of behavior were based on social norms. Society recognized crimes such as murder and other serious act as *mala in se* (crime by itself, viewed as totally unacceptable behavior).With rare exceptions, written law did not yet exist, and there was no clear distinction made between public and private law. Society also recognized a basic system of retribution and restitution. This system was based on the principle of *lex talionis*, (an eye for an eye, a tooth for a tooth) and was retaliation-based. Victims during this period could obtain restitution from offenders. With the emergence of the state, however, restitution gradually changed from being for victims to being for the state which replaced and represented the victim's interest. Barons played a significant role in changing restitution to the exacting of fines for the King (State). Thus, restitution was replaced by fines, and the process of excluding the victim's interest began. In addition, society was transformed from the simpler *gemeinschaft* society to the more complex *gesellschaft* society that encouraged individualism. Gradually, the victim justice system declined and was replaced by the criminal justice system.[28]

What followed entailed a progressive marginalization, ignoring, and abandonment of victims' needs. The role of law enforcement agencies was deemed as simultaneously

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(Kurt Wilk (trs) 1950) 186.

[24] ibid 74.

[25] John Gilissen and Frits Gorle, *Sejarah Hukum, Suatu Pengantar (Legal History, an Introduction),* (Refika Aditama 2007) 29.

[26] Israel Drapkin M D, *Crime and Punishment in the Ancient World* (Lexington Books 1989) 232.

[27] William G Doerner and Steven P. Lab, *Victimology* (3rd ed., Anderson Publishing 2002) 2

[28] Ibid.

representing the victim and public interest. The Victims' Rights Movement has tried to reincorporate victims within the criminal justice system. I suggest that the emergence of the victims' rights and restorative justice movements was triggered by dissatisfaction with the traditional criminal justice system, viewed as a nonintegrated system that only focuses on the offender and ignores the victim's interest; and on a critique of prison effectiveness.

From this point forward, a historical correlation between the restorative justice movement and the victims' rights movement is evident. This observation is in line with the point made by Daniel W Van Ness that restorative justice theory has its roots in a number of reform movements. One of these is the victims' rights movement.[29] The point made by Van Ness was affirmed by the victimologists William G Doerner and Steven P Lab who noted that the movement toward restorative justice was led by prominent proponents of victims' rights.[30] The gains of the victims' rights movement have been evident in many of its outcomes such as victim impact statements,[31] restitution from offenders, and state compensation.

In the view of Western scholars, the achievements of the victims' rights movement were gradually introduced from Western countries to Asian countries. In Japan, for instance, according to Tatsuya Ota, a professor at Keio University, victim impact statements were introduced into judicial proceedings when the criminal procedure code was amended in 2000.[32] In Indonesia, the concept of the victim impact statement is a new one that has emerged in the latest legislation, the Juvenile Criminal Justice System Act (Act Number 11/2012) that will replace the current Juvenile Court Act (Act Number 3/1997) by the end of July 2014.[33]

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[29] The two other reform movements are the informal justice movement and the restitution/diversion movement. For further details, see Daniel W Van Ness in Gordon Bazemore and Lode Walgrafe (eds.), *Restorative Justice, Repairing the Harm of Youth Crime* (Lynne Rienner Publisher 2010) 283.

[30] Doerner (n 27) 354.

[31] According to Gerry Johnstone, victim impact statements have been introduced in the UK, United States, New Zealand, Canada, Israel, and parts of Australia and Ireland. For more details, see Gerry Johnstone, *Restorative Justice. Ideas, Values, Debates* (Routledge 2011) 58.

[32] Matsuo cited by Tatsuya Ota 'The Development of Victim Support and Victim Rights in Asia' in Wing-Cheong Can (ed.), *Support for Victims of Crime in Asia.* (Routledge 2008) 128. Ota's article does not contain any further detailed information on this. However, I believe that Ota's (or Matsuo's) statement refers to Article 292-2 (1) Code of Criminal Procedure (of Japan) (Part II) (Act No 131 of 1948) which states that: "The court shall, when the victim or his/her legal representative requests to state an opinion such as their sentiments, have the victim and others state their opinions at the trial; or in its original version: 刑事訴訟法（第二編） 裁判所は、被害者等又は当該被害者の法定代理人から、被害に関する心情その他の被告事件に関する意見の陳述の申出があるときは、公判期日において、その意見を陳述させるものとする。

[33] Article 60, verse 2 states that: "In particular matters, the child victim is given an opportunity by justice to convey a statement regarding his or her related case (*Dalam hal tertentu Anak Korban diberi kesempatan oleh hakim untuk menyampaikan pendapat tentang perkara yang bersangkutan*)." This article, however, is unclear in several aspects. First, there is no further explanation as to the criteria of the "particular matter." Second, there is

Both concepts—restorative justice and the victims' rights movement—attempt to fill the gap in the current criminal justice system. However, restorative justice has a broader scope compared with the victims' rights movement. Restorative justice not only focuses on restoring victims, but also the offenders and the community that has been affected by the crime. It is an integrated and holistic way of dealing with crime. Till date, several countries have already implemented and enforced restorative justice as a new and alternative method for handling crimes and dispensing justice.

Many consider the VORP (Victim Offender Reconciliation Program) to be 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 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,[34] negotiated restitution, and within three months had repaid their victims. This 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

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no clear provision on whether the statement should be delivered orally or in writing. For comparison purposes, in Canada, the form of the statement is written and can be read aloud at the sentence hearing (http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/statem-declar/index.html). Third, there is no clear explanation provided on whether the child victim can delegate his or her role to other parties such as parents or a guardian in delivering the victim impact statement. This last point is critical as crime victims, especially child victims, usually have difficulty in expressing their feelings as a result of the trauma caused by the crime.

[34] 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.

be carried out. Van Ness notes that in 1976, the probation officer formed a nonprofit organization to promote and facilitate these meetings.[35] Coincidentally, the initial practice of VORP in Canada fulfilled what Eglash had suggested in terms of implementing creative restitution, namely the probation requirement.[36] Zehr describes VORP as "contagious," with Indiana being the first state in the United States to establish a similar program in 1977–1978.[37] 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.[38] From its first emergence in Canada, the practice of restorative justice has been spreading to other continents such as Europe, Africa, and Asia.[39] The restorative justice movement is unstoppable and has mutated into many forms to fit each country's needs.

Regarding Japan, restorative justice is described, mostly by Western scholars, as a new paradigm that will likely meet with no strong resistance when it is implemented. This perception usually involves reference to Japan's cultural foundation.[40] In addition, T. Kawashima and Y. Noda, as cited by Hiroshi Oda, have categorized Japanese society as a non-litigious society, which in my view will facilitate the implementation and acceptance of restorative justice.[41] Unfortunately, to date, Japan has not established a legal basis for implementing restorative justice, particularly as a diversionary system.[42] However, according to Kei Someda, Director of General Affairs and the Planning Division of the Chiba Probation Office, Ministry of Justice, the police and public prosecutor may discharge cases based on their discretionary power.[43]示談 *Jidan* (out-of-court settlement) is possible within this system.

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[35] cf. Van Ness (n 2); Umbreit (n 8); Zehr (n 15).

[36] 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 offense. See Eglash (n 6) 96 for further details.

[37] Zehr (n 15) 159.

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

[39] Sullivan (n 10) 35–40; Van Ness (n 2) 33–38.

[40] John O Haley stresses the cultural foundation to highlight apology and reciprocal pardon as dominant threads in the Japanese social fabric. This is reflected in standard practices in Japan whereby the offender seeks a formal letter of forgiveness from the victim that is addressed to the police, the prosecutor, or the judge. The victim, through the letter, may inform the law enforcement agencies that he or she has been compensated and has pardoned the offender. The letter may also include a request to the authorities not to report, prosecute, and punish the offender. This letter is then used by law enforcement officials when considering their decision. See John O Haley. *A Spiral of Success, Community Support is the Key to Restorative Justice in Japan.* 1994. Downloaded from www.context.org/iclib/ic38/haley/ accessed December 11, 2012.

[41] See Hiroshi Oda, *Japanese Law* (3rd ed., Oxford University Press 2009) 2.

[42] Diversionary system here means a system that provides an alternative dispute resolution in lieu of a criminal trial.

[43] According to Haley, despite the high conviction rate in Japan (about 99.5%), it is estimated that the police do

Nevertheless, Someda adds that further research is required as to whether or not *jidan* can be categorized as restorative justice.[44]

In my view, the perception of minimum resistance described above becomes shaky and vague when applied in practice. Some efforts have been made to implement restorative justice in Japan, especially as a therapeutic system that operates when the offender is serving his/her punishment in prison. The offenders are offered an opportunity to write an apology letter to their victims. However, according to Yoko Hosoi, a professor of sociology at Toyo University, this program can hardly be described as successful, since there are not many offenders who are willing to participate in it.[45] The same pessimistic outlook applies regarding the victims. Some victims have responded that if offenders want to apologize and repent for what they have done, then they should prove this by accepting a harsher penalty.[46] In my view this paradoxical fact can be understood to signify the decline of the Japanese legal culture. It seems that John O Haley's perspective on apology and reciprocal pardon being part of Japan's cultural foundation requires reevaluation.

2.3. Categorization of Restorative Justice

Restorative justice has been evolving and transforming widely and spontaneously. Some of the variations that have developed are not far from its original core, whereas others are considered to have developed well beyond the core of restorative justice. Debates about restorative justice occur not only between proponents and opponents of restorative justice, but also among its proponents. To better understand the concept and its variations, I will discuss four categories relating to restorative justice below:

2.3.1 Origins

There are two contrasting narratives of restorative justice: (1) as a novel and innovative system; and (2) as a modification of indigenous law. The first narrative views restorative justice as a subsequent development from its first experimental origins in Kitchener, as described earlier in this chapter. The second narrative views restorative justice as neither a novel nor an innovative system, but rather as an old practice that precedes any theory.

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not report up to 40% of all apprehended offenders and that prosecutors suspend prosecution of possible convicts in nearly a third of the reported cases. See Haley (n 40).

[44] Personal communication from Kei Someda at the Restorative Justice Regular Meeting at Waseda University, March 2, 2013.

[45] Personal communication from Yoko Hosoi, March 2, 2013.

[46] Personal communication from Professor Setsuo Miyazawa at Aoyama Gakuin University Law School during the 5th Annual Conference of the Asian Criminological Society held in Mumbai, India, from April 14–16, 2013.

According to this view, our realization that this old practice was actually restorative justice only came after its theorization.[47] According to Steve Mulligan, there is no dispute regarding the first narrative which is different from the second narrative.[48] Proponents of the first narrative argue that the second narrative provides a misleading view of restorative justice. Kathleen Dally has refuted what she regards as a misconception that conferencing is based on indigenous practices. According to Dally, efforts to write a history of restorative justice that romantically invoke a premodern past to justify current practices of justice are not only erroneous, but also unwittingly re-inscribe the ethnocentrism that they wish to avoid. Dally added that this misconception was ubiquitous among prominent advocates of restorative justice. In particular, she asserted that just because restorative justice was flexible and accommodating did not mean that conferencing (particularly in New Zealand) was an indigenous practice.[49] However, in my view, it is difficult to detach the practice of FGC (Family Group Conference) in New Zealand from the practices of the Maori people who have greatly contributed to FGC. Moreover, historically, as noted by Gerry Johnstone, in 1988, the New Zealand Department of Justice commissioned a report by Moana Jackson recommending that the Maori be allowed to deal with conflicts that affected them in a way that was culturally appropriate. This implied a return to the principles of restorative justice that were embedded in the precolonial method of dispute resolution. A year later in 1989, the practice of FGC, which was partly informed by Maori philosophy and practices of justice, was established for youth offenders.[50] Therefore, even though FGC cannot be said to be an indigenous practice, as Dally has pointed out, in the same way it also cannot be said to be an entirely new practice. Regarding this issue, I cite Zehr and Ali Gohar, who suggest that restorative justice in its modern form entails the "revival" of indigenous practices:[51]

> "….the movement owes a great debt to earlier movements and to a variety of cultural and religious traditions. It owes a special debt to the native people of North America and *New Zealand* (emphasis added). The precedents and roots of this movement are much wider and deeper than the Mennonite-led initiatives of the 1970s. Indeed, they are as old as human history"

[47] Sullivan (n 10) 24.
[48] Mulligan (n 4).
[49] Kathleen Dally, 'Conferencing in Australia and New Zealand: Variations, Research Findings, and Prospects' in Allison Morris and Gabrielle Maxwell (eds.), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart Publishing 2003) 65.
[50] Johnstone (n 31) 36.
[51] Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice* (2003) 10, downloaded from <www.unicef.org/tdad/littlebookrjpakaf.pdf> last accessed on March 10, 2014.

2.3.2 Initial Forms

In much of the literature, three forms of the initial practice of restorative justice are described, namely, Mediation, Conferencing, and the Circle. These practices are reflected in many programs. For instance, the Victim Offender Reconciliation Program (VORP), Victim Offender Mediation (VOM), and Community Mediation belong to the mediation category. Examples of the conferencing category are the Family Group Conference (FGC), the *Wagga Wagga* Conference, and Community Group Conferencing. Navajo Justice and the Sentencing Circle are examples of the last category. Paul McCold has differentiated these practices as discussed below.[52]

2.3.2.1 Mediation

VORP

As I have previously discussed in relation to the historical background of the restorative justice movement, the first emergence of VORP dates back to 1974 in Ontario, Canada. The primary purpose of VORP is reconciliation, involving the healing of injuries and restoring right relationships, which is conducted through direct mediation (face-to-face meetings between the victim and offender). This program can be viewed as complementary to the traditional criminal justice system rather than as a diversionary model designed to "avoid" the criminal justice system to obtain a better settlement compared with the criminal justice system. VORP is a faith-based program, that is, it adopts a religion-based approach, particularly Christian values, to reach reconciliation. Historically, VORP mediators were probation officers, but this does not have to be predetermined. Citing Zehr, Johnstone suggests it is preferable that the mediator is a community volunteer.[53] However, it is notable that the community affected by the crime is not involved in this program.

VOM

According to Mark Umbreit and Marilyn Peterson Armour, VOM is a further evolutionary step in VORP's journey. Historically, the VORP experiment in Ontario was adopted and implemented for the first time in Elkhart, Indiana, in the United States in 1978.

[52] Morris (n 49) 42–51. See also Daniel W Van Ness and Karen Heetderks Strong who consider three programs: Victim-Offender Mediation (Canada and US), Conferencing (New Zealand and Wagga Wagga, New South Wales) and Circles (Canada), to be key programs that have influenced the development of restorative justice, Van Ness (n 2) 26.
[53] Johnstone, (n 31) 2.

With the passage of time, the initial experiments have gone through numerous iterations in the structure of the encounter, its focus, and even in its name.[54] Paul McCold has noted that VOM does not stress reconciliation as VORP does, but places more emphasis, instead, on victims' healing, offenders' accountability, and the restoration of losses. Like its precursor, VOM entails direct mediation. Nevertheless, differing from the first VORP experience, VOM occasionally requires premediation sessions for each party and non-directive "dialogue driven" processes.[55] VOM can also be used at various stages of the criminal justice process.[56]

Community Mediation

Paul McCold states that community mediation was the first generation of mediation in the United States that emerged in the early 1970s. It was subsequently followed by VORP in 1978, which further evolved into VOM.[57] Community mediation programs are operated by community dispute resolution centers, often as adjuncts to law schools or court services that receive cases from the police, prosecutor, and probation officers, and offer a range of dispute resolution services.[58] Community mediation is "settlement-driven," implying that the mediator cannot impose a decision, but may help to identify multiple paths toward an agreement.[59] Unlike VORP, community mediation is a theoretically secular model, but has not been secular in practice.[60]

In terms of their ongoing development, the boundaries between these three initial programs are becoming increasingly blurred. For example, more recently, it has also become possible to conduct indirect mediation for a victim who does not want to meet the offender, but still wants to express their feelings emanating from the crime.[61] In Europe, most forms of mediation such as VOM do not mandatorily require direct meetings between the victim and offender.[62] It should be noted that VOM, VORP, and Community Mediation are initial forms of mediation. Certainly, there is scope for developing other programs beside these three within this category. Take for instance VOD (Victim-Offender Dialogue) which is an

[54] Umbreit (n 8) 113.
[55] A dialogue-driven process involves assisting parties to enter into dialogue with each other, experience each other as human beings, and understand the harm that has been done, Umbreit (n 8) 242.
[56] Keanini (n 22).
[57] Sullivan (n 10) 24.
[58] Morris (n 49) 42.
[59] Umbreit (n 8) 242.
[60] Morris (n 49) 42.
[61] Keanini (n 22).
[62] Norio Takahashi, "Restorative Justice and Treatment of Offenders" in *Sonderdruck Aus Menschengerechtes Strafrecht* (2005) Festschrift Fur Albin Eser Zum 70. Geburtstag. Verlag C.H. Beck Muncen, 1434–1439; see also Morris (n 50) 7.

outgrowth of VOM.[63] Unlike VOM, which is effective in handling juvenile offenders, VOD is designed as a non-diversionary program for handling severely violent crimes such as murder, vehicular homicide, or serious felony assaults.[64]

2.3.2.2. Conferencing

Family Group Conference (FGC) in New Zealand

Since 1989, New Zealand has incorporated FGC as a restorative justice program within its judicial process through the Children, Young Persons and Their Family Act. Compared with VORP and VOM, FGC has a larger number of participants. It is designed both as an alternative to court proceedings and as a means of providing guidance to sentencers. Youth justice family conferences are facilitated by a youth justice coordinator who is an employee of the Department of Child, Youth and Family Service.

Wagga Wagga Conference

Wagga Wagga is a small city in New South Wales, Australia. In 1991, influenced by FGC and John Braithwaite's theory of reintegrative shaming, Terry O'Connel, a police officer, emulated FGC in using the conference method in Wagga Wagga.[65] Unlike a sentencing circle, which uses judicial discretionary power, or FGC, which relies on an Act as its legal basis, O'Connel used the Wagga Wagga conference within the ambit of police discretionary power.

Community Group Conferencing

Community group conferencing is conducted by particular communities within a wide range of circumstances and places such as a school, workplace, community, youth organization, or college campus. Community group conferencing is an incident-focused conference which means that it is merely limited to repairing the damage caused by a specific offense.[66]

2.3.2.3. Circle

[63] According to Susan L Miller, as of October 2009, twenty-five states in the United States had VOD programs for victims/survivors of severe violence. For further details, see Susan L Miller, *After the Crime. The Power of Restorative Justice Dialogue between Victims and Violent Offenders* (New York University Press 2011) 17

[64] Umbreit (n 8) 212.

[65] Reintegrative shaming is a notion proposed by John Braithwaite that differs from the concept of "stigmatization shaming" within the traditional criminal justice system. For further details, see Braithwaite (n 1); see also Johnstone (n 31) 99.

[66] For further details, see Morris (n 49) 47.

Navajo Justice

Navajo justice refers to an old legal practice of the Navajo nation.[67] It is conducted if the *nalyeeh* (compensation) demanded by the victim from the offender is unsuccessful, and is facilitated by a *naat'aanii* (a respected peacemaker within the community). Its core practice is based on traditional spiritual beliefs. This practice has influenced modern forms of peacemaking circles such as the sentencing circle described below.

Sentencing circle

The sentencing circle first emerged in 1992, in Mayo Town, in Canada's Yukon Territory, and was based on the application of judicial discretionary power facilitated by a judge. At that time, a 26-year-old recidivist committed a "new" crime after his previous 46 criminal convictions. Realizing that the conventional criminal justice process had not been effective for this offender, the judge, probation officer, and Crown Counsel explored another way to engage other parties within the process of sentence determination. The judge then modified the courtroom setting. A circle of 30 chairs was arranged for the participants: the judge, lawyers, police, First Nation officials and members, probation officer, victim, and others. Using the circle process was advantageous for the judge compared with a traditional sentencing hearing.[68] In a sentencing circle, everyone is allowed to give their opinion regarding the crime and the offender. In the conventional criminal justice system, there is no opportunity for certain parties, for example, the police to appear at the trial. Therefore, a sentencing circle provides a comprehensive approach that helps a judge to reach a verdict. The sentencing circle was thus adapted from the traditional circle ritual and has been incorporated within the criminal justice system

2.3.3. Timeline Operation

A timeline operation refers to the operational time frame of restorative justice. Susan L. Miller divides restorative justice programs into two types: diversionary and therapeutic. The diversionary type refers to any restorative program that is designed to operate in lieu of the criminal justice system process and to provide an alternative outcome. In Miller's view, this type is more offender-centered. On the other hand, the therapeutic type is more victim-centered since it operates after the offender has been convicted. The goal of this type of

[67] The Navajo nation, with a population of approximately 200,000, is spread across the states of Arizona, New Mexico, and Utah, Johnstone (n 31) 50.
[68] Van Ness (n 2) 29.

program is to empower, recover, and heal the victim.[69]

In relation to this category, Moriss and Maxwell have identified three possible processes of restorative justice referring to its flexibility: pretrial as a diversion; presentence to inform sentencers; and prerelease.[70]

2.3.4. Enforcement

The last category is composed of two types of enforcement: voluntary and coercive. In much of the literature, these two subcategories are also referred to as "the purist" and "the maximalist" models, respectively. The purist model relies on the initial definition of restorative justice. Take for instance Toni Marshal, who, for many, is a purist. He defined restorative justice in this way: "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." From Marshal's definition, it is clear that the initial notion of restorative justice was to "resolve collectively" and not by just one party. This implies the necessity of obtaining the voluntary consent of each party.

On the other hand, maximalists take a different path, referring to Lode Walgrave and others who defined restorative justice as "all activities oriented to realize justice by restoring harm brought by a crime."[71] In the maximalist view, the words "all activities" can be extended to include all measures for realizing justice as long the purpose is to restore the harm caused by the crime. This also includes coercive enforcement of restorative justice. This can be done, for example, through the judge's verdict, regardless of whether the offender agrees or disagrees with the verdict.

2.4 Conclusion

In short, restorative justice should be understood from a wide set of angles to obtain a clear and comprehensive picture of what it entails. A nation can choose which of the categories that I have described in this chapter best fits its national characteristics so that it becomes feasible to implement restorative justice. Taking account of all of the above categories, there are twenty-four possible permutations of restorative justice programs. For instance, a nation can establish a new practice of restorative justice by using a conference

[69] Miller (n 63) 12.
[70] Crawford (n 18) 207; an example of a prerelease restorative justice program is VVH (Victim Voice Heard) which was formulated by Kim Book in Delaware in the United States, see Miller (n 63).
[71] Takahashi (n 62) 1434–35; Crawford (n 18) 273–77.

form as a diversion, which is based on the voluntary consent of the parties in lieu of a criminal trial.

This chapter has also revealed the inspirational role of religion and indigenous practices and their contribution to the emergence of the initial restorative justice program. Therefore, in the next chapter I will discuss whether restorative justice values also exist in Indonesia, particularly within *adat* law as an indigenous law in Indonesia, Islamic criminal law, and local wisdom that is reflected in community policing practices.

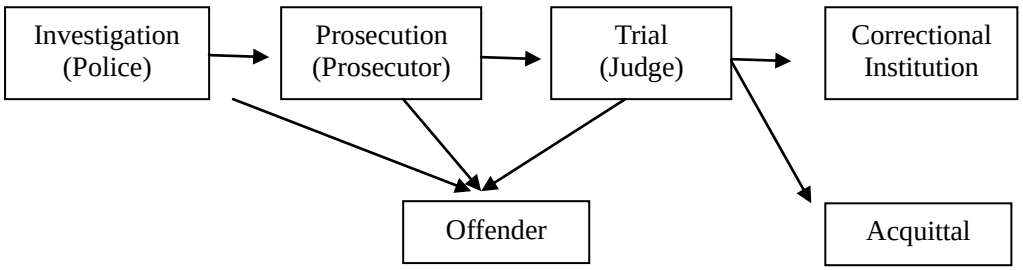
Chapter Three

RESTORATIVE JUSTICE IN INDONESIA

In chapter two, we examined how indigenous laws and religions have influenced and significantly contributed to the development of restorative justice practices. Some examples of the practices they have influenced include: VORP and sentencing circles in Canada and FGC in New Zealand. In my view these practices reflect improvements and efforts to address the loopholes and incompleteness of the prevailing criminal justice system, which does not have scope for alternative settlement processes like restorative justice. In the case of Indonesia, to date, no amendment has been made to recognize restorative justice within the Indonesian criminal code procedure (Act Number 8/1981). The process of Indonesia's criminal justice system, as stipulated in the criminal procedure act, basically exhibits the same pattern found in other civil law countries. In general,[72] the investigator (police) will start to investigate a case whenever one of the following three conditions is met: a report (*laporan*) is filed with the police, a complaint (*pengaduan*) is filed with the police, or the perpetrator is caught red-handed while committing a crime. The investigator is obliged to investigate whether either the report or the complaint actually relates to a criminal offense. If this is affirmed, the next stage is to find the suspect. The case is then transferred to the prosecutor to determine the indictment that will be brought against the accused in a trial. Subsequently, the judge in the trial will try the case and will finally hand down a verdict on whether to sentence or acquit the defendant. Both the defendant and the prosecutor have the right to file an appeal to a high court and to the Supreme Court for the second and final appeal.

The above criminal justice system process is illustrated in the scheme below:

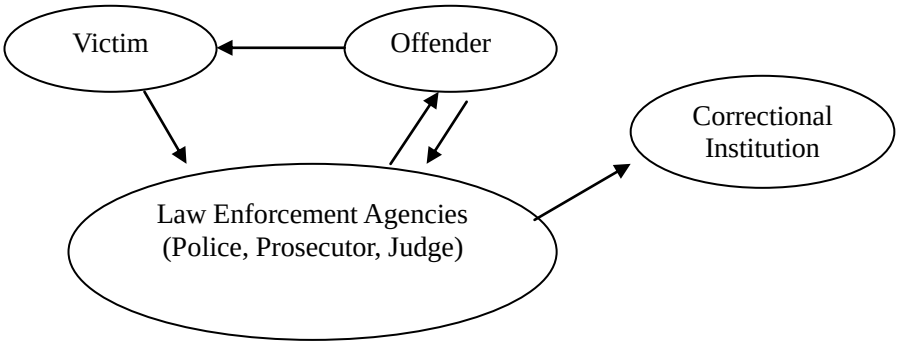
Figure 1: Scheme of the Criminal Justice System



[72] In particular, there are cases that entail special procedural law. For instance, in corruption cases, the Corruption Eradication Commission has the authority to act as the investigator and prosecutor, and in human rights cases, the National Commission on Human Rights has absolute authority to act as the investigator.

The above scheme shows that the current criminal justice system is an offender-centered model. All of the law enforcement agencies are focused on the offender. The victim has no place to express his/her interest in the case that involves him/her as the injured party. The victim's role in this system is to help the law enforcement agencies as a witness to prove that the offender is guilty. The figure below clarifies the position of the victim in this system.

Figure 2: Position of the Victim in the Current Criminal Justice System



The above scheme depicts the agencies to which the victim will report her/his case after realizing that s/he has become a crime victim. Subsequently, s/he will become a witness of the crime, helping the law enforcement agencies to prove that the offender is blameworthy by giving testimony in a police investigation report and testifying in a criminal court. It is evident from the above two schemes that the victim's interest has been abandoned and ignored in this system. This exclusion is what the restorative justice notion aims to reframe through a holistic perception of crime.

This chapter builds on several questions. Whereas we have confirmed the absence of restorative justice values within Indonesia's current criminal code procedure, my first question is do these values exist within the country's indigenous practices and religion? If they do exist, to what extent has the Indonesian government acknowledged them? Is there any possibility of transforming them into new forms that can be applied in the current era?

However, the discussion in this chapter is limited to indigenous law, which is known in Indonesia as *adat* law (or in simplified terms as customary law), Islamic criminal law, and community policing. The reason for focusing on just these three practices is because they have played an important role in the development of Indonesia's legal practices and specifically of its legal culture.

3.1. Restorative Justice in Light of Customary Law: *Adat, Adat* Law, Customary Law, and *Adat* Criminal Law

Indonesia's country-based legal tradition has been categorized, mostly by foreign scholars, as that of civil law as opposed to common law. Civil law is based on Romano-Germanic law which is differentiated from Anglo-Saxon (Anglo-American) law. The key difference between civil law and common law is that civil law relies less on court precedents and more on legal codes, whereas common law places more emphasis on court precedents.[73] Hence, the choice of legal system to be established in a country is a critical matter that has significant consequences. The civil law system, because of its heavy reliance on codes, is more rigid in the context of law enforcement. Once an individual's behavior is determined to constitute a criminal offense, the criminal justice system is set in motion and is responsible for settling the case.

The choice of a legal system for Indonesia was made by its former colonizer, the Netherlands, and was based on the civil law tradition. This included the field of criminal law. After independence, the Indonesian government retained the civil law tradition.[74] The first codified Indonesian criminal code was entitled *Wetboek van Straftrecht voor Netherlands Indische/WvSNI* (Criminal Code for Netherlands Indie)[75] which was established in 1915[76] and came into effect on January 1, 1918. The code applied to anyone who committed a criminal offense in Netherlands Indie. This period was the cornerstone for the application of modern law as a means of settling criminal cases in Indonesia, and the induction of a relatively new system for settling criminal disputes. Prior to this time, most Indonesians applied indigenous *adat* law and Islamic law. In fact, most *adat* law is influenced by Islamic law and is similar to customary law in light of its common law tradition.

Therefore, the perception that Indonesia is a "pure" civil law country is incorrect. Fachri Bey notes that the Indonesian legal system is based on Roman-Dutch law, customary law, and Islamic law.[77] Customary law, as I will discuss, is closer to common law than to civil law in term of its flexibility. The term "customary law" in the Indonesian context is actually used

[73] Toni M. Fine, *American Legal System: A Resource and Reference Guide* (Anderson 2002) 3.
[74] Roelof H. Haveman, *The Legality of Adat Criminal Law in Modern Indonesia* (Tatanusa 2002).
[75] Netherlands Indie was the name given to Indonesia before its independence, and was often written as Netherlands Oost Indie (Netherlands East Indie). However the word Oost disappeared from the official title of this Southeast Asian colony during the nineteenth century, and the Dutch generally only used the term Netherlandsch-Indie (Netherlands-Indies) when referring to Indonesia.
[76] Declared by Crown Ordinance (*Koninklijk Besluit*) of October 15, 1915, Ned.Stb.33; declared in Indonesia by Ind. Stb. 1915, Number 732.
[77] 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.

to translate the term *adat* law (*adatrecht*), which does not always share the same meaning as customary law. However, since there are a number of similarities between these terms, many scholars simplify them. To clarify the differences between *adat*, *adat* law, customary law, and *adat* criminal law, I will present an overview of each of them below.

3.1.1 *Adat*

According to several sources, the term "*kebiasaan*" (customary) is believed to originate from the word *adah*, an Arabic word that refers to a variety of behavioral actions that are repeatedly carried out.[78] This variety of repetitive action is what leads to the association between the terms *adat* and custom (*kebiasaan*). Consequently, *adat* has been defined as community behaviors that are steady, constantly performed, and, thereby, obligatory.[79]

However, I Gede AB Wiranata asserted other meanings when defining *adat*. He argued that *adat* should be assumed by a community to be a preformed custom that exists both before and after the community.[80] This definition implies that *adat* is also open to new action (*to become adat*, emphasis added), as long as the previously mentioned conditions apply.

3.1.2 *Adat* Law *(Adatrecht).*

The word "law" is translated as the Indonesian word *"hukum."* So, *adat* law is a translation of *hukum adat*, or of the well-known term, *adatrecht.* Like *adat*, *hukum* originated from Arabic, and specifically from the word "*hukm.*" The plural form of *hukm* is *ahkam* which means order, command, or provision.[81] Christiaan Snouck Hurgronje, a Dutch legal scholar, coined the term *adatrecht* that appeared in his book *De Acehers* (Acehnese people) in 1894. He also used this term, translated in English as "*adat* law," to differentiate between a social control system that included sanctions and the singular "*adat"* denoting a social control system without sanctions.[82]

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[78] I Gede AB Wiranata, *Hukum Adat Indonesia, Perkembangannya dari Masa ke Masa (Indonesian Adat Law, Its development from time to time)* (Citra Aditya Bakti 2005) 3.

[79] "Obligatory" in this definition should be understood simply in terms of custom as there are no sanctions applied, even if the action which has become custom is not performed. There is only a sense that something is missing and feels strange if a member of the community fails to perform this *adat*. This differs from a definition of custom that entails its obligatory performance and the imposition of sanctions if it is not performed. To differentiate between *adat* that has legal consequences (sanctions) and *adat* that has no legal consequences, the word "law" should be added after "*adat"* to specify *adat* law or customary law (*hukum kebiasaan*) that has legal consequences. See Dominikus Rato, *Pengantar Hukum Adat (Introduction to Adat Law)* (LaksBang Pressindo 2009) 5.

[80] Wiranata (n 78).

[81] Dominikus (n 79) 4.

[82]Wiranata (n 78) 9. Christiaan Snouck Hurgronje (February 8, 1857–26 June, 1936) was an Orientalist and expert on the Arabic language and Islam. He enrolled in the Faculty of Theology at Leiden University in 1875,

Hurgronje's differentiation laid the ground for further research to clarify the basic distinction between the terms *adat* and *adat* law. His definition was widely accepted and adopted by subsequent generations of *adat* law experts such as Cornelis Van Vollenhoven, Ter Haar, Soepomo, and Soekanto.[83] The extent of the acceptance of this definition of *adat* law is evident, for example, in the following statement by Soekanto:[84]

> "This set of *adats* is mostly not written or codified, but has coercive power and sanctions (and is therefore law). They have legal consequences. This set is called *adat* law (*hukum adat*)."

In his statement above, Soekanto clearly wished to emphasize the point that coercion, sanctions, and legal consequences were the accepted parameters for differentiating *adat* and *adat* law.

3.1.3 Customary Law

As previously stated, *adat* can be understood as repetitive behavioral actions. This definition then leads to the association of *adat* with "custom" since the two words are virtually identical from this perspective. This equation of the two terms continues when the word law is added to both *adat* and custom, the latter becoming customary law (*hukum kebiasaan*). In my view, this generalization also results from the definition of customary law that precedes the definition of *adat* law. Perceptions of there being some similarity between the two terms lead to the simplification that customary law is also *adat* law. *Black's Law Dictionary*, for example, defines customary law as follows:[85]

> "Law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws."

From the above definition, customary law is basically law that is derived from custom and that is accepted as legal requirements or obligations regarding how to behave. This

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but then switched to Arabic in the Faculty of Literature. In 1884, he traveled to Mecca to acquire practical knowledge on Arabic and to understand the mindsets of the Aceh people. This was because despite almost 300 years of Dutch occupation in Netherland-Indie, the Aceh, who were well known for their strong Islamic tradition, were not colonized. On Hurgronje's suggestion, the Aceh acceded to Dutch colonization in 1917. For further details, see Dewan Redaksi Ensiklopedi Islam, *Ensiklopedi Islam* (Ikhtiar Baru Van Hoeve 1994) 278; see also Dominikus (n 79) 7.

[83] Soepomo, *Bab-bab Tentang Hukum Adat(Chapters on Adat Law)* (Pradnya Paramita 1982).

[84] Soekanto, *Meninjau Hukum Adat Indonesia. Suatu Pengantar untuk Mempelajari Hukum Adat. (Reviewing Indonesian Adat Law: An Introduction to Study Adat Law)* (Rajawali 1985) 2.

[85] Bryan A Garner, *Black's Law Dictionary* (7 edn., St. Paul 1999) 391.

definition is close to the definition of *adat* law provided by Cornelis Van Vollenhoven as being: "a body of rules of behavior of natives and foreign Orientals, which on the one hand are enforced by sanction (therefore "law") and, on the other hand, are not codified (therefore "adat")."[86] Since both definitions are rooted in custom, many writers have simplified these two terms. However, *adat* law has other characteristics that differ from customary law which I will discuss a little further on in this chapter.

The equation between *adat* law and customary law is not acceptable, as Van Dijk, a scholar in this field, points out:[87]

> "It is not appropriate to translate adatrecht as customary law (*hukum kebiasaan*) for replacing *hukum adat* (adat law)…because what is meant by customary law is a set of rules which emerge by virtue of custom. This means that people have been behaving in a certain way for so long that a desirable rule of conduct emerged regarding their behavior. When people were looking for a real source from which the rule was established, almost always they would find a certain community in the society as the base."

Analyzing Van Dijk's objection, I Gede AB Wiranata concluded that it referred to different legal sources of customary law and *adat* law. *Adat* law is based on the existence of a certain community that has "legislative power" to set rules in a society, whereas customary law is not based on legislative power.[88]*Adat* law is a characteristic Indonesian or Malay-Polynesian law, whereas customary laws are found around the world. Customary law in the Netherlands is known as *gewoonterecht*, that is, custom that has force and power, but often has to contend against legal acts (*wettenrecht*).[89] In this regard, the anthropologist, Bronislaw Malinowski asserted that the difference between a custom and law is based on two criteria: the source of its sanction and its enforcement. In the case of custom, the community, rather than an individual or group, is the source of both its sanction and its enforcement, whereas in the case of a law, the sources of sanction and enforcement are competent central agencies, or specific bodies within a community.[90]

This argument also applies to the distinction between customary law and *adat* law. Van

[86] Haveman (n 74) 5.
[87] Wiranata (n 78) 8
[88] Wiranata (78) 9–10.
[89] Dominikus (n 79) 5.
[90] Soekanto dan Soerjono Soekanto. *Pokok-pokok Hukum Adat (Main Points of Adat Law)* (Alumni 1978) 17.

Dijk wrote that customary law emphasizes repetition of customs that then become law. By contrast, even though there is an element of custom in *adat* law, it places more emphasis on a particular community institution that has the authority to establish it as law.[91]

Thus, even though *adat* law is often translated as customary law, and many writers have drawn a simplistic association between the two terms, it is important to understand the difference between them. Roelof H. Haveman, translated *adat* law as being customary law, but also explained the difference between the terms. He wrote: "Adat law is customary law. More specifically: adat law is a type of customary law."[92] So, even though Haveman stated that *adat* law was customary law, he then specified that *adat* law was a type of customary law. Furthermore, in an explanatory footnote, he clarified that the word *adat* came from an Arabic word that means "custom." However, he noted that *adat* law extended a little further than customary law and also included elements that were not based on custom, such as *desa* (village) regulation.[93]

Haveman's explanation is in line with the view of Cornelis van Vollenhoven. According to Van Vollenhoven, *adat* law is something other than customary law (*gewoontenrecht*) since its legal sources also include village ordinances (*peraturan-peraturan desa*), ordinances of native monarchs (*peraturan-peraturan dari raja-raja bumi putra*), and *fiqh* ordinances (*peraturan-peraturan fiqh*).[94]

In conclusion, *adat* law evidently differs from customary law. Whereas some of the characteristics of *adat* law fit with the definition of customary law, others, as I have shown, do not.

3.1.4. *Adat* Criminal Law

Adat criminal law or unwritten criminal law is known in Dutch as *ongeschreven strafrecht*.[95] According to Soerojo Wignjodipuro, *adat* criminal law is one of the areas within the field of *adat* law that was marginalized by colonial law.[96] Nils Cristie, a Norwegian

[91] Wiranata (n 78) 9–10.
[92] Haveman (n 74) 5.
[93] ibid.
[94] *Fiqh* is a branch of knowledge in Islam that explains *shari'a* Islam (Islamic law) based on Al Qur'an and Al Hadist. Djojodiguno disagreed with Van Vollenhoven when he opined that village and monarch ordinances were not a part of *adat* law, He believed that categorizing the two ordinances as *adat* law was a mistake since they both belonged to the category of ordinance or regulation law. See I Gusti Ketut Sutha, *Bunga Rampai Beberapa Aspekta Hukum Adat (Potpourri of Adat Law Aspect).* (Liberty 1987) 11.
[95] E. Utrecht. *Rangkaian Sari Kuliah Hukum Pidana I (Lecture Series on Criminal Law I).* (Pustaka Tinta Mas. 1994) 7.
[96] Soerojo Wignjodipuro, *Pengantar dan Asas-asas Hukum Adat (Introduction and Principles of Adat Law)* (Gunung Agung 1982) 18. In general, indigenous laws were marginalized by colonial laws. As in Indonesia, African customary laws were also marginalized by European laws through the process of colonization. For

criminologist, paints a similar picture when he states that the King's justice "stole conflict" from citizens. As a consequence, by 1200 CE, local systems of restorative justice were more or less extinguished in most of Europe.[97] In his comparison of Scotland and Indonesia, John Braithwaite pointed to the total disappearance of restorative justice in Scotland during the nineteenth century, which he attributed to English dominance. By contrast, he argued that in Indonesia, *adat* law was never extinguished by the Dutch. In fact, *adat* criminal laws work in parallel with Dutch criminal law of the Indonesian state.[98] In my view, Braithwaite's statement is only partially correct. The existence of *adat* law (including *adat* criminal law) is acknowledged and recognized within the Indonesian Constitution.[99] However, in practice, if *adat* law conflicts with state law, then law enforcement agencies will use state law instead of *adat* law.

To present a clear picture of *adat* criminal law, I commence this section with a description of the term *adat* criminal law. This is actually a vague concept since *adat* law does not differentiate between criminal law and civil law as European law does. Moreover, as Soepomo explains, *adat* law does not make a separation between an infringement of the law that obliges the accused to take responsibility based on the judge's verdict within a criminal court, and a tort that obliges the defendant to take responsibility within a civil court.[100] This inclusion of criminal and civil law within *adat* law is largely unrecognized.

The distinction between criminal law (public law) and civil law (private law) originates in Europe and in Western legal culture. According to Hans Kelsen, the division was based on legal relations. Private law represents relations between coordinates of equal legal standing, whereas public law represents a relation between a superordinate subject and a subordinate subject, the former being of higher legal standing than the latter. Kelsen further noted that the characteristic relation in public law is that between the state and a citizen.[101]

Since *adat* law does not separate criminal law and civil law, scholars have employed different terms when referring to *adat* criminal law. Barend Ter Haar Bzn tends to use the

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further details, see Lawrence Meir Friedman, *The Horizontal Society* (Yale University Press 1999) 128.

[97] Braithwaite (n 1) 130.

[98] ibid.

[99] "The State recognises and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law." Article 18B (2) of the Indonesian Constitution.

[100] Soepomo (n 83) 110.

[101] According to Kelsen, till date, no one has succeeded in arriving at a fully satisfactory explanation of the difference between private and public law. Therefore, the most widely disseminated view hinges on the classification of legal relations as mentioned above. Hans Kelsen, *Introduction to The Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L Paulson trs, Clarendon Press 1996) 92.

term *delict adat*, while Soerjono Soekanto prefers *adat* deviation law (*hukum penyelewengan adat)*.[102] I Gede AB Wiranata uses the term *adat* infringement law (*hukum pelanggaran adat*), which is a translation from the Dutch term *adat delicten recht*. Roelof H. Haveman clearly selected *adat* criminal law as he used this for his book title. I prefer to use *hukum pidana adat*, because the English translation is close to Haveman's concept of *adat* criminal law. Even though there are many different terms, they all refer to the same meaning of criminal law in the sense of modern law, as adopted by European scholars.

The emergence of the various terms described above can be attributed to the fact that in principle, *adat* law simply combines what modern law divides, that is, criminal law and civil law. Therefore, scholars' efforts have tended to focus on categorizing *adat* law in the same frame as modern law categories, one set of which is criminal law and civil law.

Apart from the issue of terms, a second challenge for scholars is to define what *adat* criminal law is. Some scholars have devised definitions to clarify *adat* criminal law that are generally based on the characteristics of criminal law. For example, Van Vollenhoven defined *adat* criminal law (*delict adat*) as a prohibited act.[103] This definition had been further analyzed by Anto Soemarman, for whom the central point of *delict* (criminal act) within *delict adat* is that it is a prohibited act. A prohibited act that entails a sanction as its legal consequence is, within criminal law, identical with a criminal act or offense. However, as mentioned earlier, *adat* law differs from European and Western jurisprudence in that it does not separate criminal law from civil law. Therefore, Van Vollenhoven's conception of *delictadat* (*adat* criminal law) contains all of the forms and variations of the act, including its subjective and objective consequences.[104] Moreover, the basic difference between *delict adat* and criminal law (*strafrecht*) is that the prohibited act, including its sanction, is already stipulated within an act (law), whereas in *delict adat*, a part of the prohibited act is not stipulated in advance. Therefore, the form of the act and its sanction are not static.[105]

Ter Haar, a student of Van Vollenhoven, subsequently defined a *delict* as any disturbance to the balance, and any obstruction of properties of a person or a group, materially or immaterially. These acts (disturbances or obstructions) then invoke a reaction, that is, an *adat* reaction, the severity of which is decided by *adat* law. Because the balance (of the cosmos and the community) has been disturbed, it should be healed and restored to what

[102] Nyoman Serikat Putra Jaya, *Relevansi Hukum Pidana Adat dalam Pembaharuan Hukum Pidana Nasional (Relevancy of Adat Criminal Law within National Criminal Law Legal Reform)* (Citra Aditya Bakti 2005) 34
[103] Wignjodipuro (n 96) 228.
[104] Anto Soemarman, *Hukum Adat, Perspektif Sekarang dan Mendatang (Adat Law, Today and Tomorrow)* (Adicita Karya Nusa 2003) 55.
[105] ibid.

it previously was (mostly through the payment of money or goods).[106] I Gusti Ketut Sutha extended Ter Haar's analysis to further clarify criminal law in relation to *adat* criminal law (*delictadat*):[107]

> So according to the concept of *adat* law, if the provision of [the] adat *norm* has been breached, then an *adat* reaction will be invoked. Essentially, the substance of [an] *adat* reaction is not affliction or pain but returning the cosmic balance which has been disturbed by the obstruction.

Soepomo, another student of Van Vollenhoven, defines *adat* criminal law in a similar way to his mentor. He views all acts that conflict with the *adat* rule of law as illegal acts. Moreover, he contends that *adat* law equips itself with the means to repair the law (*rechtserstei*) if *adat* law is breached.[108]

I Gede AB Wiranata argues that *adat* infringement law encompasses all acts or occurrences that contravene the appropriateness, harmony, order, safety, sense of justice, and legal awareness of a community, regardless of whether they are committed by a subject or by an *adat* ruler.[109]

Nyoman Sarikat Putra Jaya, citing Lesquiliier, concludes that an *adat* criminal act (*tindak pidana adat*) is an act that violates the sense of justice and appropriateness within a community, thereby disturbing the peace and balance of the community. An *adat* reaction emerges to heal and restore the peace and balance that has been broken. It aims to restore a "magical" peace and to eliminate or neutralize inauspicious circumstances that were caused by the *adat* infringement.[110] The above explanation of how *adat* criminal law works highlights a basic difference between criminal law that is rooted in European law and *adat* criminal law. *Adat* criminal law focuses on restoring the damage that was caused by the infringement, whereas criminal law focuses on the offender and overlooks the others who are involved. In this regard, Artidjo Alkotsar, a judge of the Supreme Court explained that the ethical relevance of dispute settlement procedures within *adat* law is of maintaining the relationship between the dispute parties and, in turn, between the dispute parties and the community as a whole. The resolution of the dispute within *adat* law is always oriented

[106] B.Ter Haar Bzn, *Asas-asas dan Susunan Hukum Adat (Beginselen en stelsel van Adatrecht)* (K. Ng. Soebakti Poesponoto trs, Pradnya Paramita 1981).
[107] Ketut (n 94) 84.
[108] Soepomo (n 83) 110.
[109] Wiranata (n 78) 167.
[110] Nyoman (n 102) 34.

toward "dispute settlement" in a holistic sense, whereas in European or Western procedural law, the orientation is toward handing down a verdict. Therefore, in *adat* law, after conducting dispute settlement, personal relations and community kinship within the *adat* community continue to be maintained. Conversely, in Europe and in Western law, after the verdict is given, the relationship among the dispute parties is severed.[111]

The purpose of *adat* criminal law is basically to maintain the relationship between the offender, victim, and the community so that balance and peace within the community can be restored. *Adat* criminal law shares the same purpose as restorative justice. This can be concluded from John Braithwaite's statement below:[112]

> "For informal justice to be restorative justice, it has to be about restoring victims, restoring offenders, and restoring communities as a result of participation of a plurality of stakeholders. As long as there is a process that gives the stakeholders affected by an injustice an opportunity to tell their stories about its consequences and what needs to be done to put things right, and so long as this is done within a framework of restorative values that include the need to heal the hurts that have been felt, we can think of the process as restorative justice."

This view that *adat* criminal law and restorative justice share the same purpose may be examined by investigating *adat* criminal law itself. According to Soekanto, there are four ways of identifying *adat* law,[113] one of which is from unwritten norms that can be investigated by living within the *adat* community.[114] In Indonesia, *adat* law has been categorized by Van Vollehoven into 19 Circle Laws (*Rechtskringen*).[115] Preliminary field research within the Baduy community, which practices the nineteenth *adat* law based on Van Vollenhoven categorization, revealed that their criminal procedure scheme entailed some values that fit with the restorative justice values determined by Braithwaite. The scheme is portrayed below:[116]

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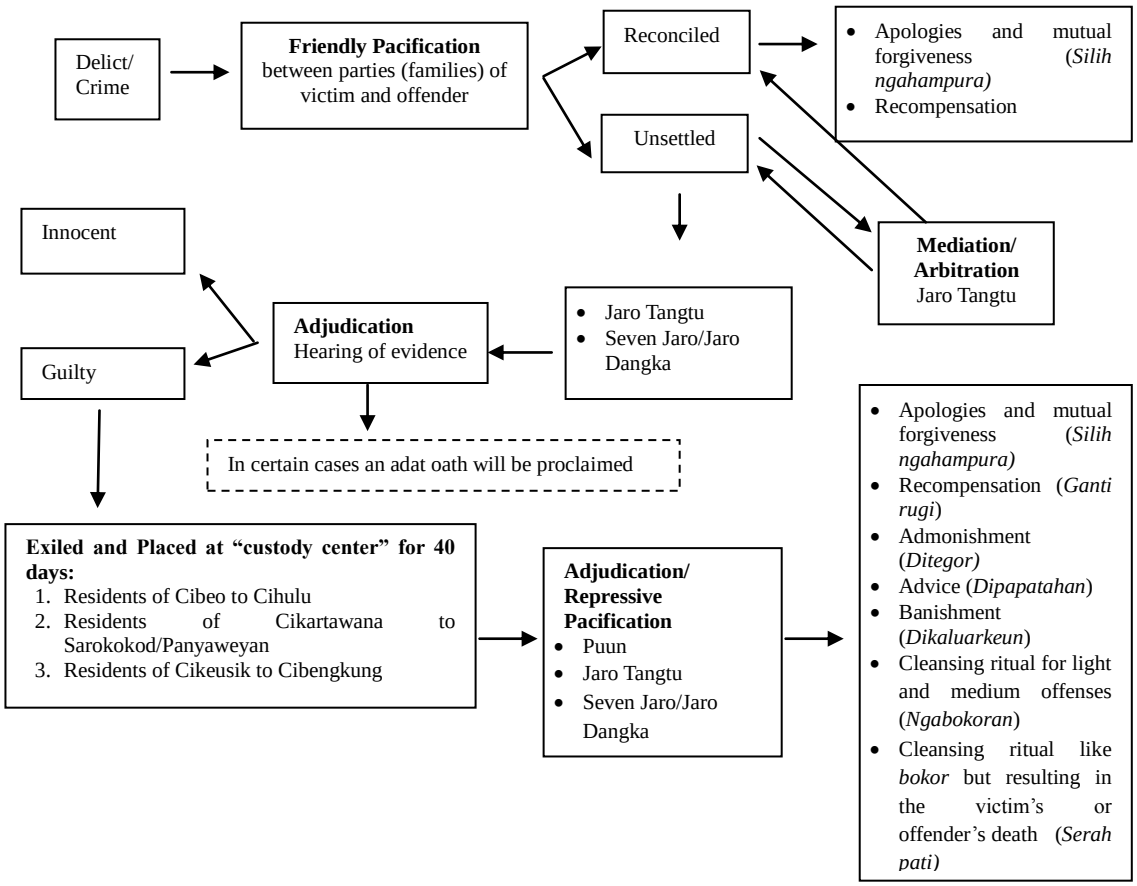
[111] Soemarman (n 104) v-vii.
[112] Braithwaite (n 1) vii.
[113] The other three are traditional legal codes; ordinances for indigenous people; and ordinances of kings.
[114] Soekanto (n 84) 62.
[115] 1. Ajteh, 2. Gajo, Alas dan Batak, 3. Minangkabau, 4. South Sumatera, 5. East Sumatera, Malaya, and West Borneo, 6. Bangka and Biliton, 7. Borneo (except Malaya and West Kalimantan), 8. Minahasa, 9. Gorontalo, 10. South Celebes, 11. Tanah Toraja, 12. Ternate Archipelago, 13. Ambon, 14. Netherlands-New Guinea, 15. Timor, 16. Bali and Lombok, 17. Central Java and East Java (including Madura) 18. Jogjakarta and Surakarta, 19. West Java. See Haveman (n 74) 26.
[116] Ferry Fathurokhman and Alexandra Landmann, *Ancestral Tradition, Social Control, and Sanctions in South Banten: '1001 Rules of the Wiwitan Polity' (Part 2)* (2013) Vol. 9, Number 26, Graduate School of Human and Socio-Environmental Studies, Kanazawa University Journal 97.

Figure 3: Criminal Procedural Scheme of the Baduy



Legend of Figure:

Jaro Tangtu = Head of a village within inner Baduy (*Baduy Dalam*), which has three villages that uphold sacred values.
Seven Jaro/Jaro Dangka = Village figures who have an investigation function. There are seven such persons spread out across seven villages in Baduy.
Puun = Top leaders of the Baduy community who live in each of the three villages of inner Baduy.

The above scheme demonstrates that some values or features of restorative justice do exist within *adat* criminal law. Immediately after the crime occurs, the families of the victim and of the offender intentionally meet to put things right by discussing what might be done to repair the harm caused by the crime. This process occurs spontaneously in Baduy, because everyone in the community is connected to each other. Therefore, if someone commits a crime, s/he does not just injure the victim, but simultaneously injures the entire community by disrupting harmony within the community. In addition, s/he brings shame to her/his own family. That is why most families of offenders do not resist the "friendly pacification" process. However, a disagreement may arise during this stage. Therefore, a mediator, known

as a *jaro tangtu*, may intervene to settle the case during a subsequent adjudication stage. Interestingly, up to this point, the Baduy criminal dispute settlement procedure has the same methodology as the Navajo peacemaking circle that I briefly described in chapter two. The *jaro tangtu* in Baduy seems to have the same role as that of the *naat'aanii* among the Navajo.[117]

Nevertheless, adjudication does not always end well. A deadlock situation may lead to a disagreement. Therefore, the scheme provides subsequent stages to cope with failed mediation. In terms of restorative justice, there are two important points to emphasize during the subsequent stage. First, the victim's interest is neither abandoned nor ignored. In this case, the 'state' provides for penalties that represent the victim's interests, namely, apology and mutual forgiveness and recompense. Second, these penalties may be imposed coercively. According to the maximalist as opposed to the purist conception of restorative justice, the outcome of the restorative justice process may be enforced. Interestingly, while proponents of restorative justice engage in a debate as to whether restorative justice should be implemented voluntarily or may be imposed forcefully, the Baduy community has been practically implementing a combination of the two approaches: voluntary and coercive (in case of failure) for hundreds of years.

3.2. 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.[118] Leaving aside this image and the growth of Muslim populations around the world,[119] 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).[120] *Samudera Pasai* is

[117] Johnstone (n 31) 37–8.
[118] 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.
[119] 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/.
[120] 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

recognized as the first Islamic Kingdom that was located in Northern Sumatera (Aceh) and founded during the early thirteenth century CE.[121] 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).[122] 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.[123] A total of 87.2% of Indonesia's population is Muslim.[124] 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.[125] 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*[126] (Islamic law), which includes Islamic criminal law.[127] A decade has passed since 2004 when Islamic criminal law first prevailed in Aceh regarding certain criminal offenses such as adultery, gambling, *khalwat* (intimate relations outside of marriage), and selling and drinking alcohol.[128]

The question that grounds this section is whether any restorative justice values exist

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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.

[121] Cammack (n 120).

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

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

[124] 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.

[125] 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.

[126] 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.

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

[128] Bey (n 77).

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.

3.2.1 *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)[129] and constitutes God's right (*haq* Allah). From the above definitions, Ahmad Wardi Muslich has characterized *hudud* as follows:[130]

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 a 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 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),[131] (3)

[129] Al Hadist is the second legal source in Islamic law after the Qur'an.
[130] Ahmad Wardi Muslich. *Hukum Pidana Islam* (*Islamic Criminal Law*) (Sinar Grafika 2005).
[131] 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.

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.[132] 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.

3.2.1.1 Theft

The legal basis for *hudud* relating to theft is prescribed in Quran *surah* Al Maidah: 38.[133] 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:[134] (1) Taking (other's) property furtively, (2) the object that is stolen is property,[135] (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.[136]

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

[132] 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.

[133] 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).

[134] Muslich (n 130) 83.

[135] 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*.

[136] Muslich (n 130) 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 punish the offender. However, according to Hambali's school and Syiah Zaidiyah, the confession should be proclaimed twice. The last evidence, i.e., oath, is a development of the Syafi'i school to resolve a situation in which there is none of the two previous evidences (witness and confession). 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.

argues that redress can only be imposed when hand amputation is not imposed and vice versa.[137] 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.

3.2.1.2 '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.*[138]

3.2.2. *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).[139] 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 offenses:

[137] The reason is that Al Quran only stipulates hand amputation without stipulating redress.
[138] Muslich (n 130) 104-05.
[139] ibid 149.

homicide and maltreatment. However, these are subdivided into several types:[140]

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[141]

"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

[140] ibid xi.
[141] 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.

retaliation as in *Lex Talionis*.[142] 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.

Punishments for Qisas and Diyyat Offences

1. Murder

The Prophet Muhammad named murder as one of the four greatest sins in Islam:[143]

> 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)

According to Muslich, the punishment types applied to the murderer are as follows:[144]

1. Basic Punishment.
   a. *Qisas*.
   For murder, the *qisas* is capital punishment.
   b. Kaffarat
   This punishment entails freeing a slave or fasting for two months,[145] and is subject to debate. The Syafi'i school argues that as one of the main forms of punishment, this is a basic punishment for the offender. However, according to the *Hanafiyah*, *Malikiyah*, and *Hanabilah* schools, this is not a basic punishment in the case of murder.
2. Substitute Punishment.
   a. Diyyat.
   The above *qisas* can be mitigated through conversion into *diyyat* if the victim forgives the offender. In this case, the offender should pay *diyyat* amounting to 100 camels or

[142] 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.
[143] Sahih Al-Bukhari Volume 9, Book 83, Number 10.
[144] Muslich (n 130)
[145] See An Nisa:92

1,000 dinar.[146] The payment of the *diyyat* should come from the offender's own assets and should be paid as a lump sum with no installments.

b. Ta'zir.

This is a substitute punishment, and its implementation is subject to the policies of each state. According to the *Malikiyah* School, if the *qisas* is diverted because of forgiveness, then the offender is obliged to comply with *ta'zir*. The *ta'zir* punishment prescribed for murder by the *Malikiyah* School is 100 lashes and exile for one year. Nevertheless, many Islamic scholars do not consider *ta'zir* to be mandatory for murder. In this case, the judge is given the authority to decide whether to impose *ta'zir*.

3. Additional Punishment.

The additional punishment for murder is cancellation of the offender's will and inheritance rights. This additional punishment is based on a *hadith* narrated by Nasa'i and Daruquthni that there should be no inheritance rights for a killer.

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 punishments for this criminal offence are:

1. Basic Punishment.

a. Diyyat.

The amount of the *diyyat* is the same as for murder. However, in this case there are several differences in the payment modality compared with murder. One of these differences is that the payment for manslaughter that resembles murder may be made by the offender's family in installments within three years.

b. Kaffarat

Except for *Malikiyah*, most Islamic schools agree that *kaffarat, which involves* freeing a slave or fasting for two months, is a basic punishment for manslaughter that resembles murder. However Maliki's school (*Malikiyah*) opined that there was only one basic punishment for this crime, namely, *diyyat*.

2. Substitute Punishment.

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

The substitute punishment for this crime is *ta'zir.* If the *diyyat* cannot be enforced because the victim grants forgiveness, or because of other reasons, then the state (represented by the judge) may mitigate the punishment through its conversion into *ta'zir* that is appropriate to the offense (depending on the judge's consideration).

3. Additional Punishment.

The additional punishment for manslaughter that resembles murder is also cancellation of the offender's will and inheritance rights. According to *Al Hadith,* a person who commits homicide may not receive an inheritance. According to Muslich, the word "*qootilun"* (killer) in the *hadith* narrated by Nasa'i and Daruquthni refers to homicide in general, including murder and manslaughter.

3. Manslaughter by mistake (*Alqatlul khoto*)

Manslaughter by mistake means that the offender had no intention either of committing a criminal act or of killing the victim. However, in this case an element of negligence or recklessness can be attributed to the offender. The punishments for this criminal offense are:

1. Basic Punishment.
   a. *Diyyat*

   The amount of *diyyat* in cases of manslaughter by mistake is the same as in cases of murder and manslaughter that resembles murder, i.e., 100 camels. The difference is that the camel breed for this *diyyat* is less expensive than for the previous *diyyat*. Islamic scholars have termed this *diyyat mukhafaffah* (light *diyyat*), whereas the previous *diyyat* is known as *diyyat mughalladzah* (heavy *diyyat*). Like manslaughter that resembles murder, the *diyyat* for this crime may also be paid by offender's family in installments within three years.

   b. *Kaffarat* (Freeing a slave or fasting for two months)
2. Substitute Punishment

   The substitute punishment for this crime is merely fasting for two months, if the offender fails to find a slave to be freed as the *kaffarat*. All Islamic scholars agree that there is no *ta'zir* as a substitute punishment for this crime.
3. Additional punishment.

   With the exception of Imam Maliki, most Islamic schools agree that the additional punishment for this crime is cancellation of the offender's will and inheritance rights. Imam Maliki opined that manslaughter by mistake did not entail the loss of the

offender's will and inheritance rights. This was because the offender did not intend to kill the victim. Moreover, the initial act is not categorized as a criminal act.

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, for *qisas* and *diyyat,* the victim is given the right to determine the best punishment for the offender. The victim also is given an opportunity to forgive the offender, which results in certain legal consequences. Therefore, *qisas* and *diyyat* may be dropped if the victim grants forgiveness, or if *sulh* (reconciliation) occurs.

3.2.3 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 and has not been prescribed by *syara*.[147] 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 compensation for the victim may be implemented with little resistance in the *ta'zir* category.[148] 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:[149]

[147] Muslich (n 130) 248–9.
[148] Ammar, (n 118) 173.
[149] M Yasar Kandemir, *40 Hadiths for Children with Stories* (Erkam Publishing 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).

3.3. Police-Community Partnership Forum (FKPM) as a modern form of *Adat* Law[150]

The Police-Community Partnership Forum (FKPM) is another mechanism for restoratively resolving disputes, including criminal disputes, outside of the criminal justice system. It is a communication medium between the police and the community that is voluntarily conducted to discuss social problems that need to be resolved by the community and the police to support police function.[151]

FKPM is based on police discretionary power that is assured through its legal grounding in the Ordinance of Indonesian Police Chief Number 7/1998 and the Decree of Indonesian Police Chief (Skep/433/VII/2006).

According to the above legislation, subjects under the jurisdiction of FKPM are:[152]

1. All cases that are stipulated in Book III (Misdemeanors) of the Indonesian Penal Code.
2. Criminal offenses that incur the imposition of a maximum sentence of three months of imprisonment.

[150] This section draws on field research that was financed by Kanazawa University and conducted from February 4–15, 2013, mostly in Lasem, Rembang Central Java, as well as in Pandeglang, Banten, Jakarta.
[151] According to UN standards, the ideal ratio between police and citizens is 1:400. However, currently, this ratio is 1:650.
[152] Appendix of Decree of Indonesian Police Chief (Skep/433/VII/2006) 54.

3. Petty crimes: light maltreatment of animals (Art. 302), light maltreatment (Art. 352), light theft (Art. 364), light embezzlement (Art. 373), light fraud (Art. 379), simple receiving of stolen property (Art. 482), and simple defamation (Art. 315).
4. To resolve social conflict.

Ideally, an FKPM should be formed in every Indonesian village, which would theoretically result in a total of 72,944 FKPMs in the country.[153] However, because of several problems, there is generally one FKPM formed for every three villages.[154]

The FKPM structure consists of one police officer and several community representatives who are selected through a deliberation process (*musyawarah*). Community here means either a geographical community or a community of interest.[155] Therefore besides a FKPM that is formed based on a geographical community, a FKPM may also be formed based on a community of interest, for example, one involving a profession, ethnicity, religion, or hobby. For instance in Pandeglang Regency, Banten Province, a FKPM has been formed by a community of *ojek* drivers.[156]

The chair of the FKPM should always be from the concerned community. The police officer's role is merely that of either the secretary or the vice chair of the FKPM. According to Hermanto, this is to ensure fairness in the process of settling a case within a community.[157] Typically the structure of the FKPM consists of a chair, a secretary, and divisions that differ from one FKPM to another.

Lasem, a subdistrict in Rembang Regency, is considered to have successful FKPMs. Lasem is constituted by twenty villages, and therefore has twenty FKPMs.

Since their establishment in 2007, the FKPMs in Lasem have settled 19 cases outside of the criminal justice system. These cases include domestic violence, adultery, fights between villages, theft, inheritance, and irrigation conflicts. Interestingly, some of the cases mentioned above are not within the subject-matter jurisdiction of FKPM as previously discussed. In fact, two of these cases, inheritance and irrigation conflict, belong to the jurisdiction of civil law rather than criminal law. It seems that in front of FKPMs, the concept and practice of separating civil law and criminal law had become somewhat blurred. In my view, FKPM is a

[153] Up to 2012, Indonesia had 34 provinces, 410 regencies and 98 cities, 72,944 villages, 251,857,940 inhabitants, and 387,470 police officers.
[154] Interview held with the Brigade Police and Endin Nuryadin, the administrative head of the community counseling unit at the Pandeglang Resort Police station (Pandeglang, Banten, Indonesia, February 4, 2013).
[155] Decree of the Indonesian Police Chief (No Pol. Skep/433/VII/2006) 11.
[156] *Ojek* is a privately-owned motorcycle taxi that forms an alternative means of public transportation in Indonesia, and is usually run by the owner.
[157] Interview held with the Adjunct First Police Inspector (Aiptu) at Hermanto and the head of the community counseling unit at the Lasem Sector Police station (Rembang, Central Java, February 14, 2013).

transformed form of *adat* law that has been adapted to the current context.

There are two noteworthy cases involving domestic violence and theft, respectively, that I will discuss here.

The domestic violence case involved a young married couple engaged in a quarrel that resulted in physical domestic violence committed by the husband. The husband rammed his wife's head into the wall. She consequently sustained severe injuries to her head and a bruised eye. Hermanto, the head of the community counseling unit at Lasem Sector Police, stated that he and the other FKPM members at Karasgede village waited three days for the situation to subside before offering the couple the option of solving the case through the FKPM. The couple, their parents, and officials of the FKPM met in a *musyawarah* forum (conference) to discuss the case and determine the best resolution. Together, they solved the case, agreeing to end the domestic violence case peacefully. The husband admitted that he was wrong and apologized for what he had done and the wife granted him forgiveness. The conference culminated with a joint decision letter that included a promise that the act would not be repeated, a decision to divorce, and the return of the wife's certificate of vehicle ownership.

The chair of a FKPM, as the mediator, along with official members should also check, post-conference, whether the agreed points in the joint decision letter have actually been implemented. In this case, following the conference, Hermanto as the vice chair of Karasgede FKPM heard and received a report that the husband had postponed implementing one point in the joint decision letter i.e., the return of the certificate of vehicle ownership to his wife. Hermanto then met the husband and found that the certificate had been pawned to a pawn shop. Adopting a personal approach, Hermanto reminded the husband how important the joint decision letter was. The husband then made some efforts to get the certificate back and returned it to his wife.

Interestingly, although the decision to divorce was included in the joint decision letter, the young couple decided to continue their marriage. According to Hermanto, they actually still loved each other; the decision to divorce was based on their parents' suggestion.

The second case of theft involved a teenager who stole part of a scale at a traditional market in Lasem. The boy was later apprehended by a villager when he tried to sell the stolen good. The case was handed over to the FKPM to be solved. A conference was held with the juvenile delinquent and his parents, the victim, and FKPM members who deliberated and sought the best outcome for the case. The parents of the juvenile felt ashamed of what their son had done. Both the juvenile and his parents apologized to the victim. The victim, who

had merely sought an apology from the offender, accepted their apology. Nevertheless, the delinquent's parents insisted on giving back something equivalent to the stolen object, that is, part of a scale. Now, the boy has grown up and become a driver in Lasem.[158]

The same outcomes for the above-mentioned cases that were settled within an FKPM may not have been achieved within the traditional criminal justice system. Although a juvenile offender would have the same feelings of shame if s/he was charged under the criminal justice system, that shaming is qualitatively different from the kind of shaming that occurs within a conference setting such as a FKPM. This argument is probably in line with what Braithwaite called reintegrative shaming that differs from disintegrative shaming within the traditional criminal justice system. To clarify the difference between these two varieties of shaming, I quote Braithwaite, as cited by Johnstone:[159]

> The crucial distinction is between shaming that is re-integrative and shaming that is disintegrative (stigmatization). Re-integrative shaming means the expression of community disapproval…. is followed by a gesture of reacceptance into the community of law-abiding citizens … Disintegrative shaming (stigmatization), in contrast, divides the community by creating a class of outcast

Furthermore, Zehr described the shame that is invoked within the traditional criminal justice system in the following way:[160]

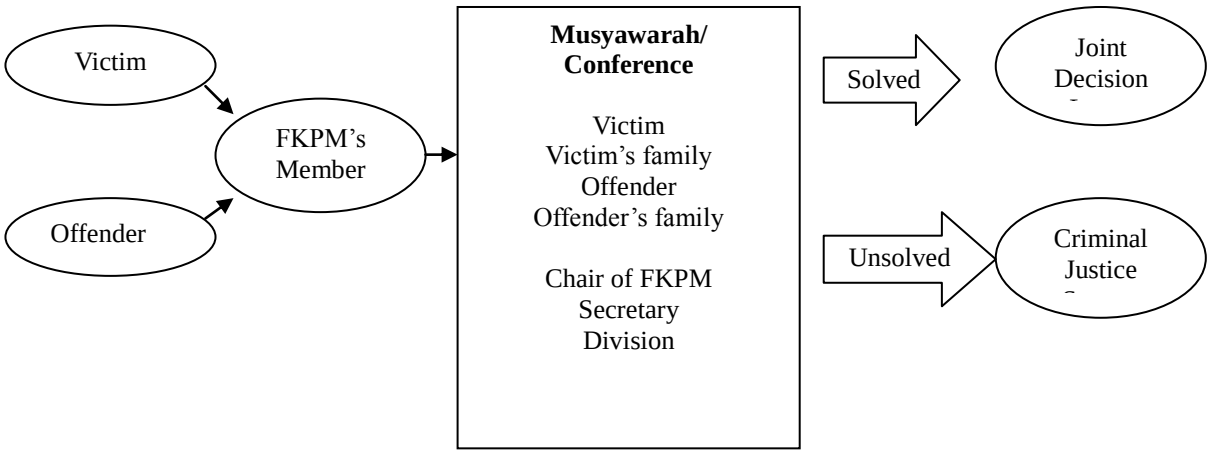
> The shame that our criminal justice system reflects is a stigmatizing shame. It says that …what you did is bad, but you are also bad, and there is really nothing you can do…You will always be an ex-offender.

FKPM evidently offers Alternative Dispute Resolution (ADR) in lieu of the criminal justice system. The typical process of dispute settlement would proceed as follows. In most cases, the incident would be reported by the victim to a FKPM member. The FKPM would then follow up, analyze the case, and determine the interest parties that should be invited to the FKPM forum. Usually the parties that attend the forum are the victim and his/her supporters, the offender and his/her supporters (the supporters are mostly family members), the chair and secretary of the FKPM, and other FKPM members or parties if needed, depending on the case. The forum is led by the FKPM chair as the mediator. If mediation is

[158] Hermanto (n 157).
[159] Johnstone (n 31) 99
[160] ibid 98.

successful, the process will be concluded with the establishment of a joint decision as an agreement that focuses on three main outcomes. These are an apology, redress, and a promise that there will be no repeat offense. So far, there has been no case of failed mediation in Lasem. However, if the mediation ends in a disagreement, the case will be transferred to the formal criminal justice system. Schematically, the whole process of ADR within a FKPM is illustrated below:

Figure 4: ADR Scheme within a FKPM



The place for holding the conference, as shown in the above scheme is usually a police-community partnership office (*Balai Kemitraan Polisi dan Masyarakat*). This is commonly set up in a village-based office (kantor desa). However in practice, this location is flexible following the choice of the disputant parties. The mediator should make sure that the conference venue is a neutral one for both the victim's side and the offender's side.

3.4 Conclusion.

In conclusion, redress or compensation, remorse, repentance, forgiveness, and reconciliation are values of restorative justice that exist within *adat* criminal law, Islamic criminal law, and community policing. These three legal practices still prevail regarding particular subject matter jurisdiction in Indonesia, and are recognized by Indonesian law. As the discussion in this chapter affirms, restorative justice values are embedded within them. In my view, they will play an important role in developing the concept of restorative justice in Indonesia. Therefore, I suggest that particular values that share similarities with the notion of restorative justice will contribute a significant foundation for exercising restorative justice in

Indonesia. These would provide a valuable base for implementing formal, state-recognized programs of restorative justice in the near future. This chapter reveals that 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.

In the next chapter, I will discuss restorative justice for juveniles in the particular context of Indonesia. In my view, it is in this context that these three legal practices will become a strong foundation for implementing restorative justice for juveniles.

Chapter Four

RESTORATIVE JUSTICE FOR JUVENILES IN INDONESIA

Children are a national asset that ensures the sustainability of a country. They carry the future of a nation on their shoulders. Therefore, it is necessary to devise a set of safeguards for children to protect them during the period of their physical and mental development. However, they may experience problems in their lives, for example, if they come into conflict with the law. Therefore, special methods of evaluation and treatment should be formulated specifically for children who are in conflict with the law. In this context, restorative justice plays a very important role in safeguarding these children's future.

In the Indonesian context, the population within the age range of 0–17 years was 82.6 million in 2011. This means that 33.9%, or more than one third of Indonesia's population, is composed of children.[161] The age categories and the terms "child" or "children" used here refer to those described in the UN Convention on the Rights of the Child.[162] Within the field of criminal law, a specific term carries legal consequences. There are two categories for the term "child" in criminal law: (1) a child as someone considered too young to bear criminal responsibility, and (2) a child as someone perceived as being able to bear criminal responsibility. The first category is often simply called a "child," whereas terms for the second category vary according to each country. In New Zealand, for example, the term "child" is applied to the first category and the term "young person" is applied to the second.[163] For this thesis, I employ the term "juvenile" when referring to the second category, and "child" for the first category.[164] Therefore, stipulating the age of criminal responsibility to distinguish between a child and a juvenile is a critical matter in the field of criminal law. In Indonesia, some changes have been made to the categorization of a child and juvenile as I describe below.

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

[162] Article 1 of the Convention states that: "…a child means every human being below the age of eighteen years…" See UN Resolution 44/25 of 1989 on the Convention on the Rights of the Child.

[163] A child is defined as "a boy or girl under the age of 14 years," whereas a young person is defined as "a boy or girl over the age of 14 years but under 17 years, and does not include any person who is or has been married or in a civil union." See the New Zealand Children, Young Persons, and Their Family Act Number 24 of 1989. However, several exemptions have been made for prosecuting children in the Youth Court. For further details, see Section 272 (Jurisdiction of Youth Courts and children's liability to be prosecuted for criminal offenses).

[164] The Juvenile Court Act Number 3/1997 and Juvenile Justice System Act Number 11/2012 just use the term "*anak*," which literally means "child" for both categories. The combined use of the terms "child" and "juvenile" in this thesis is derived from the Convention on the Rights of the Child and The Beijing Rules.

4.1 Age of Criminal Responsibility for Juveniles

The United Nations (UN) Resolution Number 40/33 of 1985 on UN Standard Minimum Rules for the Administration of Juvenile Justice (often called "The Beijing Rules") recognizes that juveniles need special treatment owing to their early stage of human development. This special treatment includes particular care and assistance relating to their physical, mental, and social development. Beside these, they also require legal protection in conditions of peace, freedom, dignity, and security. Therefore, formulating the age of criminal responsibility for juveniles is one measure for creating a safeguard that ensures special treatment for juveniles.

The Beijing Rules do not stipulate a fixed age of criminal responsibility for juveniles. In their Annex, they merely state that the age at which criminal responsibility commences should not be fixed at too low a level.[165] This is because the formulation of law depends on the history and culture of a nation. In Japan, for instance, the age range for criminal responsibility is set between 14 and 19 years,[166] whereas in New Zealand it is set between 14 and 17 years.[167] The formulation of the age limit thus differs among countries depending on their individual economic, social, political, and legal systems.[168]

In the context of *adat* criminal law, the provision on the minimum age of criminal responsibility of juveniles varies between *adat* laws. In the case of the Baduy, the age of criminal responsibility is set at 10 years as the minimum age and 15 years as the maximum age. If a juvenile commits a criminal act, s/he is relocated from the youth camp (a male youth above the age of 15 years sleeps in the village hall and is educated by the *Pu'un*) to the parents' residence as the first application of Baduy jurisdiction. If the parents declare their inability to reeducate their child, the child is then handed over to the *adat* jurisdiction to be educated.[169] A child below 10 years, who commits a crime, will be returned to his/her parents. All the harm or damage caused by the crime will be repaired by the parents.[170]

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165 The criterion of "too low" is actually difficult to measure since every country has its own law that reflects its values and culture. Even within the same continent, the minimum age of criminal responsibility varies from country to country. For example, within the European countries of Scotland, Ireland, France, Sweden, Spain, and Luxemburg, criminal responsibility begins at 8, 10, 13, 15, 16 and 18 years of age, respectively. See G. Van Bueren, *International rights of the child (Section C: Children and the justice system)* (University of London Press 2006) downloaded from:

<www.londoninternational.ac.uk/sites/default/files/international_rights_child.pdf> accessed on February 15, 2014.

166 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).

167 See the Children, Young Persons and Their Families Act of New Zealand, No. 24 of 1989, section 2, subsection 1.

168 See the commentary section of The Beijing Rules, section 2.2 of the Annex.

169 Fathurokhman (n 116).

170 Interview held with Jaro Dainah, head of Kaduketer Village, Baduy, (Banten, Indonesia, 2010).

Regarding Islamic criminal law, Al Quran and Al Hadith do not specify the age of criminal liability for minors.[171] The Quran merely states a general condition, *baligh.*[172] Therefore, *ulama* (Islamic scholars) have conducted *ijtihad*[173] to determine the *baligh* criteria, as delineated by Ali Imron and depicted in Table 2 below.[174]

Table 2: *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 the state of being asleep or awake 2. Coarse pubic hair growth 3. Hair growth in armpits 4. The sense of smell becomes sensitive 5. Change in the vocal cords 6. Age range is approaching or reaching 18 years old. Females: 1. Menstruation 2. Pregnancy The average age for males and females is 18 years

[171] Ali Imron, *Kontribusi Hukum Islam Terhadap Pembangunan Hukum Nasional (Studi Tentang 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).

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

[173] *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.

[174] Imron (n 171).

		old.
3	Hanafi School	Males: 1. Minimum age of 12 years and/or 2. *Ihtilam* (discharge of semen) regardless of whether or not this 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*

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 the context of Indonesia's current legislation, legal provisions for juveniles who commit crimes are contained in the Juvenile Criminal Justice System Act, hereafter referred to as JCJSA (Act Number 11/2012), and in the Juvenile Court Act, hereafter called JCA (Act Number 3/1997). Prior to the enactment of the above two Acts, they were stipulated in the Indonesian Penal Code (Act number 1/1946), Article 45[175] of Chapter III pertaining to exclusion, mitigation, and enhancement of punishment.

The Indonesian Penal Code known as *Kitab Undang Hukum Pidana* (KUHP) sets the maximum age of criminal responsibility for the juvenile category below 16 years. This means that those who commit crimes at the age of 16 years or over are legally treated as adults. However, the Indonesian Penal Code does not set a minimum age of criminal responsibility for juveniles.

Article 67 of JCA provides the judge with three alternatives verdicts for minor

[175] Abrogated by Article 67 of JCA.

offenders[176] (under the age of 16 years). These alternatives are:

(1) The person found guilty may be returned to his or her parents, guardian, or foster parents without any sanction;

(2) The person found guilty may be placed at the disposal of the government without any sanction. This may be applied if the person breaches a particular criminal[177] act within two years of having previously been convicted for one of the criminal acts mentioned above.

(3) The offender may be sentenced and punished.

In criminal law, there are two kinds of sentence: punishment and treatment. The first two alternatives described above refer to treatment, whereas the third refers to punishment. Although the above provision considers treatment as a sentence to protect the future of minors by stipulating their maximum age limit of criminal responsibility, it fails to fulfill another important aspect of legal protection. It does not stipulate a minimum age of criminal responsibility. This omission conflicts with the recommendations of the Beijing Rules. Moreover, the concept of responsibility becomes meaningless without the stipulation of a lower age limit. Therefore, an amendment is required regarding the age of criminal responsibility and other critical matters relating to juveniles.

In 1997, the Juvenile Court Act (Law No. 3/1997) was established to regulate and replace general legal provisions for juveniles under the KUHP, which was then repealed. Under this Act, juveniles between the ages of eight and eighteen years, who are also unmarried, fall within the jurisdiction of the juvenile court.

If a child below the age of eight years commits a delinquent act, the investigator will assess whether that child can continue to be educated by their parents or whether s/he should be sent to the social department to be educated after hearing the opinion of the probation officer.[178]

However, the age of eight years was subsequently considered to be too low for a juvenile to be held criminally responsible. There have been several cases that have triggered this consideration regarding the amendment of the minimum age of juveniles. One of these cases was the "RJ" case, involving an eight-year-old boy who engaged in a fight with his

[176] Indonesia's Ministry of Justice has translated "*orang yang belum dewasa*" as "minor" instead of "juvenile."
[177] Articles 489, 490, 492, 496, 497 (misdemeanours concerning the general security of persons and property and the public health), 503–505, 514, 517–519 (misdemeanours relating to public order), 526 (misdemeanours against the public authority), 531 (misdemeanours relating to destitute persons), 532 (misdemeanours relating to morals) 536 and 540 (misdemeanours relating to morals), Penal Code of Indonesia, official translation of Ministry of Justice of Indonesia, www.refworld.org/docid/3ffc09ae2.html accessed on November 15, 2011.
[178] Article 5 of JCA.

schoolmate. This case became one of the landmark contexts for a petition filed at the Indonesian Constitutional Court to amend the minimum age of criminal responsibility within JCA. The petition was filed jointly by the Indonesian Commission on Child Protection (*Komisi Perlindungan Anak Indonesia*) and the Medan Foundation of Studies and Child Protection Center (*Yayasan Pusat Kajian dan Perlindungan Anak Medan*).

The Constitutional Court in its decision number 1/PUU-VII/2010 undertook a judicial review of the petition. It stated in its verdict that the phrase "8 years old" in Article 1 verse 1, Article 4 verse 1, and Article 5 verse 1 of JCA, including its explanation, conflicted with the Constitution of the Republic of Indonesia. The phrase was, therefore, conditionally unconstitutional and had no binding power unless it was reinterpreted as "12 years old." This minimum age for a juvenile was reaffirmed in JCJSA No. 11 of 2012, which will replace JCA on July 31, 2014, two years after its enactment.

A simplified representation of the long history of formulating the age of criminal responsibility for juveniles in Indonesia is provided in Table 3 below:

Table 3: The Age of Criminal Responsibility for Juveniles

Regulation	**Age of Criminal Responsibility for Juveniles**	
	Minimum Age (Years)	**Maximum Age (Years)**
Penal Code	-	under 16
JCA	8	under 18
Constitutional Court Decision	Amendment of minimum age in JCA from 8 to 12	
JCJSA	12	under 18

4.2.The Necessity of Restorative Justice in the Case of Juvenile Delinquency

Currently, juvenile cases fall within the jurisdiction of JCA, which does have several measures specifically for juvenile offenders to protect their mental development. These

include, for instance, holding the trial in camera,[179] or disallowing representatives of law enforcement agencies from wearing formal uniforms when investigating, prosecuting, and trying juvenile offenders.[180] However, the main weakness of JCA is that is it does not provide for any means of diverting a case.[181]

Frequently, this weakness in law enforcement generates dissatisfaction and anger within Indonesian society. This has been evident in recent cases, such as those of RJ and AAL, involving juveniles who had to face adjudication by the juvenile criminal court. These cases highlight the flaws in the current juvenile criminal justice system.

What follows are descriptions of the above two cases that draw attention to these flaws in Indonesia's current juvenile justice system. Both cases have been extracted mainly from media reportage.

4.2.1 The RJ case: A Young Detainee[182]

Is, a third grade elementary school student, stayed home for ten days. He did not want to go to school, because he was afraid of being bullied by his classmate, RJ, at 05663 Elementary School in Langkat, North Sumatera. RJ used to bully Is by performing *menokok*[183] on his head. An, Is's mother, reported the bullying to the school. As a result, Jamal, a teacher at the school, summoned RJ to address the situation. The teacher's investigation, however, became contentious. RJ denied that he had bullied Is. Jamal lost control and slapped RJ's face. Upset by his confrontation with his teacher, RJ went to look for Is to take revenge, but found only Ar, Is's elder brother, who was a sixth grade student at the same school. They fought and both were injured, with RJ suffering a bloody lip and a scratch to his face. Ar was more severely injured. Based on a doctor's *visum et repertum* (meaning "seen and discovered"), Ar sustained a bruised hip and ribs. His mother, An, then visited Edah, RJ's mother, asking her to take financial responsibility for Ar's medical care. An took Ar to a paramedic, but the pain did not stop and the paramedic suggested that An see a doctor. Since Edah refused to fund further medical treatment, An reported the case to the police. The RJ case subsequently went all the way up to the Stabat District Court in Langkat.

[179] Article 8 (1) of JCA.
[180] Article 6 of JCA.
[181] As I explained in chapter 2, the diversionary system of restorative justice is based on a time line operation that allows law enforcement agencies to divert the case in lieu of the formal criminal justice system.
[182] Diah Novianti, *Berawal dari Permintaan Berobat ke Dokter, Kasus Raju pun Merebak*, Antara News.Com. <www.antaranews.com/berita/1141214462/berawal-dari-permintaan-berobat-ke-dokter-kasus-raju-pun-merebak> last accessed on March 10, 2014.
[183] A North Sumatera term for the practice of humiliating someone by knocking their head.

RJ failed to appear in court three times when summoned by the public prosecutor. When he finally appeared in court a week after his latest court summons, Justice Tiurmaida found him and his parent to be in complete disregard of the court and of the victim's interests, and decided to detain RJ. This decision incited considerable public tension and interest, because RJ was apparently under eight years old and there was no detention house for juveniles in North Sumatera. Therefore, RJ would have to share a room with an adult detainee. Sudjono Evi, the head of the Pangkalan Brandan Detention House, administered a special policy for RJ. Even though the judge's order was to detain RJ, Sudjono disobeyed the Stabat District Court order and released RJ. Justice Tiurmaida finally suspended his decision to detain RJ after his parents paid one million rupiah to Ar's family as redress.

RJ was later found guilty, but returned to his parents without punishment.[184]

Controversy concerning RJ's age

According to Article 1 of Act No. 3/1997, a person who is over the age of eight years, but below 18 years of age, and not yet married, is considered to be a juvenile for the purposes of the juvenile court. RJ's exact age could not be clarified since several versions of his age existed. Based on his mother's testimony in the police investigation report, RJ was born in May 1997, which would make him eight years and three months old at the time that he committed the assault. His family card, however, indicates that he was born on December 9, 1997, which would mean that he was just seven years and eight months old when the incident occurred. Therefore, the court, in this case could not try him and he could not be held criminally responsible. The prosecutor sought further evidence and found that RJ was born on December 5, 1996 based on his educational file at his elementary school.

RJ's actual age was critical to determine whether he was old enough to be tried in the juvenile court. Ultimately, the court determined that RJ met the age requirement to be tried in the juvenile court based on the police investigation and RJ's educational file. However, public opinion held that RJ was too young to be tried and detained, because a family card is also significant evidence, and is a legal document.

This became a landmark case for amending the minimum age of a child's criminal responsibility. The age of eight years was considered to be too young to bear criminal

[184] Based on Article 24 (1) Act No. 3/1997.

responsibility. Currently, as I previously mentioned, the minimum age stipulated in Article 1 of Law No. 3/1997 has been amended by the Constitutional Court to 12 years.

4.2.2 The AAL Case[185]

A 15-year-old boy, identified only as "AAL," became a symbol of the injustice of Indonesia's law enforcement system. The issue began when AAL and his friend found a pair of sandals near the house of a police officer, First Brig. Ahmad Rusdi Harahap. AAL took the sandals and put them into his bag. Later, in May 2011, Rusdi summoned AAL and charged him with the theft of his sandals. Rusdi's partner, First Brig. Simson Jones Sipayung, who was present with Rusdi during the informal interrogation, then beat AAL to obtain a confession. AAL's parents reported the beating to the police internal affairs division. The Central Sulawesi Police disciplinary court ruled against Rusdi and Simson and sentenced them to 21 days of incarceration at a police detention center. In retaliation, Rusdi filed a charge of theft against AAL.

AAL was never detained, but the public was outraged by this case. Though AAL was believed to be guilty of stealing the sandals, the majority felt that juvenile criminal court was not the best solution for this case since the crime was not serious and AAL was only a teenager. A court process would too harshly stigmatize him as a thief. During the trial, many individuals, nongovernmental organizations, and the National Commission for Child Protection, a government agency concerned with children's issues, supported AAL and collected thousands of pairs of sandals that came to symbolize the perceived injustice of law enforcement. The movement was called "1000 sandals to free AAL" and spread throughout the archipelago. Though the case occurred in Palu, Central Sulawesi, it gained prominence beyond Palu and Sulawesi Island. Volunteers from Jakarta, Solo, and Jogjakarta took part in the movement.[186]

The collected sandals were given to law enforcement agencies, such as the police and the prosecutor's office, as these agencies were believed to be the most culpable for processing and passing the case to court.

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[185] *Flip-flop Boy Testifies at Komnas PA,* The Jakarta Post (January 12, 2012, 8:22 AM), <www.thejakartapost.com/news/2012/01/12/flip-flop-boy-testifies-komnas-pa.html>. See also Ruslan Sangadji, *Palu Boy Found Guilty; Freed by the Court*, The Jakarta Post (January 5, 2012, 8:28 AM), <www.thejakartapost.com/news/2012/01/05/palu-boy-found-guilty-freed-court.html>

[186] Apriadi Gunawan, *Indonesia Gets Failing Grade Juvenile Justice System*, The Jakarta Post (July 28, 2007, 12:05 PM), <www.thejakartapost.com/news/2007/07/28/indonesia-gets-failing-grade-juvenile-justice-system.html> last accessed on March 10, 2014.

Justice Rommel F. Tampubolon, a judge at Palu District Court, ultimately found AAL guilty of stealing "someone's"[187] sandals. As with the RJ case, Justice Rommel returned AAL to his parents without imposing any punishment.

4.3.Restorative Justice as a Safeguard for Protecting Children's Futures

The RJ and AAL cases are just two among many cases involving juvenile delinquents. Widespread public support in relation to these cases reflects the general opinion that the criminal court process is an inappropriate way of settling criminal disputes involving juvenile delinquents, especially for petty crimes.

Societal perceptions are also endorsed by the recommendations of the Beijing Rules. 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."[188]

According to the Beijing Rules, discretion is permitted in juvenile cases to enable diversion from the criminal justice system at all stages and levels. Diversion here, and also in the context of this thesis, means to divert a case into other dispute settlement processes instead of settling it in the criminal justice system. Therefore, the diversion operates before and outside of a criminal trial. This diversion is not constitutive of treatment provided in most material criminal law processes as a part of the sentence structure, besides punishment. Such diversions, as mentioned in the Beijing Rules, are acceptable, because juveniles play an important role as the next generation that sustains a state. This notion corresponds to that of the Declaration of The Rights of The Child (UN General Assembly Resolution 1386). The Declaration states that children shall enjoy special protection and shall be given opportunities and facilities, by law and 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 interests of the child shall be of paramount consideration.[189]

[187] The sandals actually submitted as evidence in the court were of a different brand than those the victim's. Rusdi's sandal brand was Eiger, whereas the sandals held in evidence were of the Ando brand.
[188] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") adopted by the General Assembly Resolution 40/33, November 29, 1985.
[189] Principle 2 of the Declaration of the Rights of the Child (General Assembly Resolution 1386 (XIV) of November 20, 1959 in Paulus Hadisuprapto, *Delinkuensi Anak: Pemahaman dan Penanggulangannya (Juvenile Delinquency and its Alleviation)* (Bayumedia 2008) 236.

Based on this concept, we should determine the best method of settlement for juveniles in conflict with the law to create a safeguard that protects the future of children and juveniles. One such method is restorative justice.

4.4.JCJSA: A New Chapter in Handling Juvenile Cases

As I described earlier, the influence of the civil law tradition in Indonesia has rendered most legal provisions less flexible. This includes juvenile law, which is rigid and provides for no possibility of discretion or for a diversion program.[190] Even if a case has already been resolved through *musyawarah*[191] among the parties in conflict, as there is no legal basis for *musyawarah* in juvenile law, the state can exercise jurisdiction and "reindict" the case. However, there are many cases that are not serious and that can be resolved through the application of *musyawarah* which has the same values and ideas as restorative justice.

The perception of JCA as being obsolete has led to the birth of JCJSA, a new act that was passed by the Indonesian Parliament and enacted on July 30, 2012. JCJSA is founded on the principle that a juvenile who is in conflict with the law should have the right to special protection, including from incarceration.

JCJSA includes three child categories: a juvenile as a delinquent, victim child, and witness child. Importantly, in contrast to JCA, it provides for a diversionary system in lieu of the criminal court. Here, a diversionary system should be understood not merely as a temporary criminal policy, but rather as a permanent system that is designed to settle and divert a case from the traditional criminal justice system process.

JCJSA contains 15 chapters composed of 108 articles. The provisions regarding diversion as a restorative program are contained in chapter two. Article 6 declares the following objectives of diversion:

a. To achieve reconciliation between the victim and juvenile;[192]
b. To settle a juvenile case outside of the court process;
c. To divert a juvenile from freedom deprivation;
d. To encourage the community to participate; and
e. To instill a sense of responsibility in the juvenile.

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[190] In terms of restorative justice, a diversion program shares the same meaning as in Black's Law Dictionary: a program that refers certain criminal defendants before trial to community programs, on-the-job training, education and the like, which if successfully completed may lead to the dismissal of the charge. Bryan A Garner, 'Black's Law Dictionary' (New Pocket edn., 1998) 200

[191] *Musyawarah* is a method for settling a dispute peacefully that involves all stakeholders.

[192] Juvenile here refers to a child in conflict with the law (child as delinquent) according to Article 1 of JCJSA.

It is obligatory to apply diversion to criminal offenses that are subject to sentences of not more than seven years of imprisonment and that do not involve recidivism.[193] Outcomes of the diversion agreement, as provided by JCJSA, may be:[194]

a. Reconciliation with or without redress;
b. Return of juveniles to parents/guardians;
c. Participation of juveniles in education or training at an educational institution or at the Institution of Social Welfare Exertion (*LPKS/Lembaga Penyelenggaraan Kesejahteraan Sosial*) for no longer than three months; or
d. Community service.

Musyawarah will be applied within JCJSA as a mechanism for implementing diversion, as stated in Article 8 subsection 1:

"The diversion process is conducted through *musyawarah* involving the juvenile and parents/guardian, victim and/or parents/guardian, probation officer, and professional social worker based on the restorative justice approach."[195]

The diversionary form of *musyawarah* that has now obtained a legal base in JCJSA can be seen to share the same approach as FGC.

What makes JCJSA unique is that it offers three opportunities for juveniles to obtain a restorative settlement through diversion: at the investigation stage, the prosecution stage, and the adjudication stage.[196] Thus, a conventional criminal trial becomes the *ultimum remedium*[197] or last resort for settling a case if the diversion process fails to reach consensus.

It should, however, be noted that under JCJSA, it is obligatory for the diversion process to be exercised by law enforcement agencies. If juveniles comply with the diversion process, they are subject to a sentence of not more than two years imprisonment, or a maximum fine of two hundred million *rupias*.[198] The outcome of the diversion agreement is guaranteed by the head of the district court, thus ensuring that the agreement is legally acknowledged.

The three stages of the diversion process in JCJSA are shown below:

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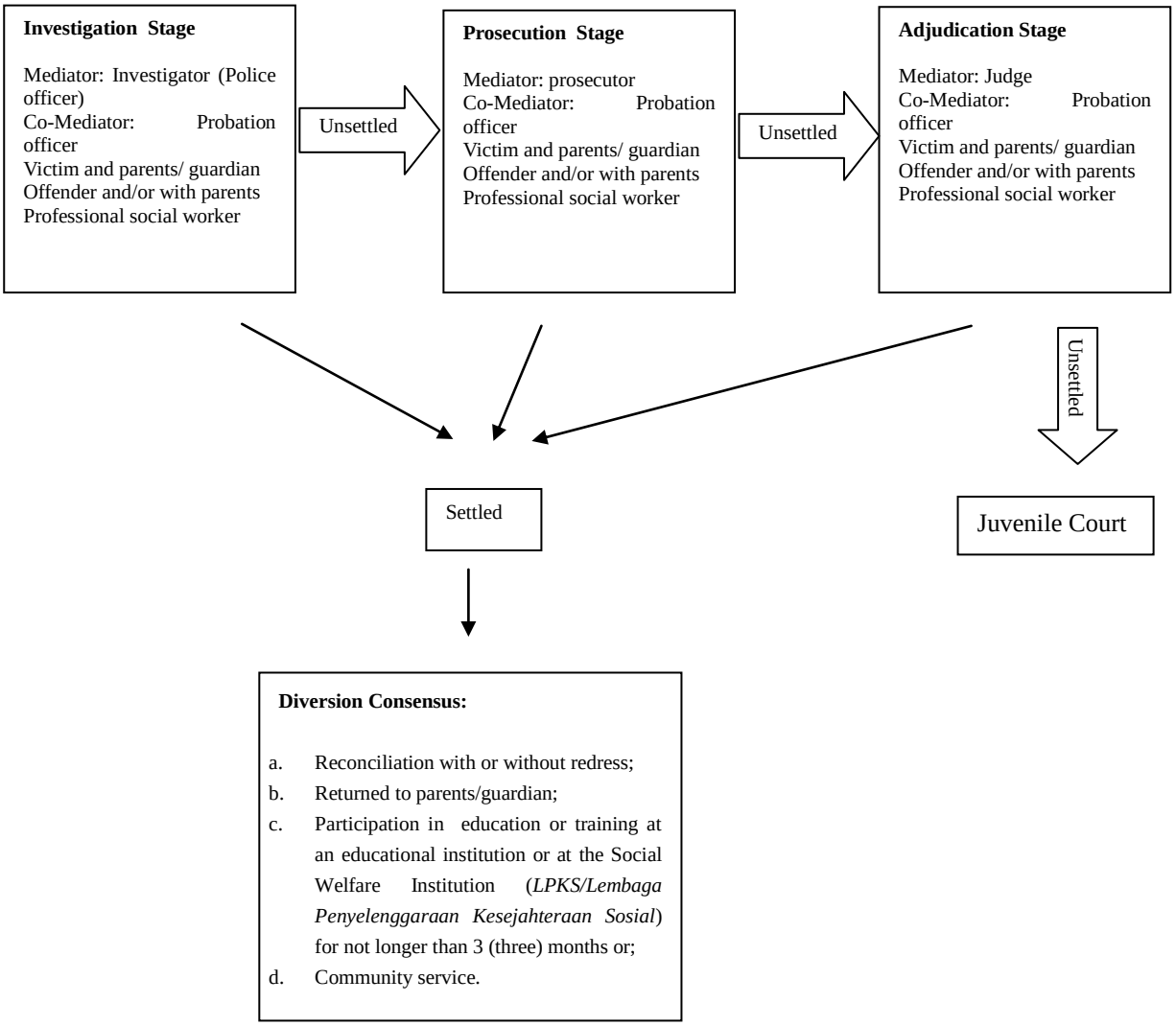
[193] Article 7, subsection 1 of JCJSA. The provision of the penal sanction as a subsequent legal consequences of article 7 i.e. article 96, has been repealed by the constitutional court decision number 110/PUU-X/2012.
[194] Article 11 of JCJSA.
[195] Translated from Art. 8 (1) *proses diversi dilakukan 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.*
[196] Art. 7 (1), 29, 42, and 52 of JCJSA.
[197] *Ultimum remedium* is a basic principle in the criminal law field which means that the use of criminal law should be the last resort after all other means fail to settle the case.
[198] Art. 96 JCJSA.

Figure 5: JCJSA Diversion Flow Chart[199]



It is evident that the last three options for the diversion consensus in the above figure address the offender, whereas the first one is formulated to meet the victim's interest. Therefore, Eglash's observation that the victim is not the "meat and potato" of the diversion process also applies here. JCJSA is still more offender-oriented than victim-oriented. However, this does not mean that JCJSA ignores the victim's interest. Many of its articles clear state that the victim plays a key role in determining whether or not diversion occurs since this process requires voluntary consent of the victim party.

[199] Based on Articles 7, 8, 9 and 13 of JCJSA.

4.5 Conclusion

In conclusion, JCJSA is ‘a dream come true;’ an act that can be predicted to protect the future of children and juveniles. Based on Indonesian legal history, it is unlikely that Indonesians would experience difficulty or resistance relating to the exercise of diversion, as stated in JCJSA. This is because *musyawarah* is a routine dispute resolution strategy in their daily lives. However, there are several points to be considered. To date, there have been no statistics available on the extent to which *musyawarah* has succeeded in resolving conflict in Indonesia. Restorative justice itself remains to be comprehensively evaluated. Whereas the data show some successful cases, others have met with failure. What is clear is that restorative justice is not a panacea. However, given the negative impacts of the current criminal justice system on juveniles, employing restorative justice for juveniles would be the best choice for handling juvenile cases. To minimize the failure of restorative justice, several preparations should be carried out in advance of its implementation. Among these, well-trained mediators, safe and neutral places for both victims and offenders, and impartiality would be some of the critical factors that would determine the success of restorative justice. In chapter 5, I discuss potential obstacles and challenges relating to JCJSA enforcement.

Chapter Five

POTENTIAL PROBLEMS AND CHALLENGES OF IMPLEMENTING RESTORATIVE JUSTICE IN INDONESIA

Recent experiences of law enforcement, as illustrated by the RJ and AAL cases described in chapter four, highlight the failure of modern law in the Indonesian context. The Indonesian Penal Code (*WvSNI*) was actually copied from the Netherland Penal Code (*Wetboek van Strafrecht/WvS*), though some changes were made in alignment with Indonesian society. Despite the enactment of JCA as *lex specialis* alongside the Penal Code, both share the same values. Whereas the Code and JCA reflect values of individualism, Indonesian societal values are more communal than individual. This conclusion is clearly recognized in the preamble of the Indonesian Constitution: "…and achieving *social justice* for all the people of Indonesia" (emphasis added).[200] Based on my study of Indonesia's legal history, I suggest that individualism is not, on the whole, suited to Indonesian culture. This has been practically evident in several instances of the failure of law enforcement, the RJ and AAL cases being just two examples.

JCA's failure is that it provides no means for diverting a case in lieu of the juvenile court. This failure was even forecasted by a Dutch scholar hundreds of years ago. On October 31, 1837, the Dutch Government appointed. C.J. Scholten van Oud-Haarlem as the chair of a committee formed to prepare the enactment of the legislation of the Netherlands in Netherlandsch-Indie (Indonesia) based on the principle of concordance. Scholten van Oud-Haarlem then submitted the committee report to Raad van State, the highest level advisory institution in the Dutch Kingdom. However, J. Van der Vinne, a special member of the Raad van State, criticized Scholten's report, stating that the enforcement of Dutch law would not be appropriate (*niet geëigend*) in the Indonesian context. He objected as follows:[201]

"For a land that has millions of people who are not Christian and idol worshippers

[200] The Indonesian Constitution was founded on five philosophical principles of the *Pancasila* which are officially stated in its preamble. Social justice is the fifth principle of the *Pancasila*. The other four are: (1) belief in the one and only God, (2) a just and civilized humanity, (3) the unity of Indonesia, and (4) democracy guided by wisdom in the unanimity arising out of deliberations amongst representatives of the people. See the preamble of the Constitution of the Republic of Indonesia.

[201] Supomo and Djokosutono, *Sedjarah Politik Hukum Adat (Djilid II) (Political History on Adat Law (Volume II))* (Djambatan 1954)18–9.

> with different religions and traditions, whilst its people who are Muslims have a huge loyalty to their religion, laws and written customary law, the prevalence of Nederland's law would be an infringement/breach of the rights and customs of non-European people, and would also destroy their legal order and institutions that were previously connected to one another."

Cornelis van Vollenhoven, a Leiden scholar and proponent of *adat* law, also affirmed the existence of *adat* law. He reminded the Netherlander that: "when the first ship flying the tricolor at its mast dropped anchor in the archipelago, the land was not constitutionally 'barren and empty'. It was brimful with institutions of government and authority: there was government by and over tribes, villages, federations, republics and principalities"[202]

The above two scholars clearly conveyed their recognition of Indonesia's own values as reflected within *adat* law. Soekarno, the first president of Indonesia, named *musyawarah* as one of Indonesia's three greatest indigenous assets.[203] Peter Burns defined *musyawarah* as a process of non-coercive negotiation involving all interested parties.[204]

In my view, the lack of acknowledgement within JCA of the general values of *adat* law, such as *musyawarah*, and of some general Islamic values such as forgiveness and compensation, has led to its failure. The legal formulation of JCA disregards Indonesian legal culture. To further develop this argument, I propose to use the concept of legal culture introduced by Lawrence Meir Friedman, a legal sociologist at Stanford University.

According to Friedman, a legal system consists of three subsystems. These are: a legal structure, legal substance, and a legal culture. The structure refers to the institutions and processes within a legal system. It is clearly a basic element of a legal system. The substance is composed of substantive rules as well as rules about how an institution should behave. Friedman described the last element, legal culture, in this way:[205]

> Social forces are constantly at work on the law—destroying here, renewing there; invigorating here, deadening there; choosing what part of 'law' will operate, which

[202] Peter Burns, *The Leiden Legacy: Concepts of Law in Indonesia* (KITLV 2004) 48.
[203] The other two assets that he named were *gotong royong* and *mufakat*. G*otong royong* can be simply defined as people helping each other by working together. The terms *musyawarah* and *mufakat* tend to be applied together as one term. *Mufakat* is the result of the negotiation process, or the fruit of the *musyawarah* process and the unanimous consensus of the collective, Burns (n 202) 244.
[204] ibid.
[205] Lawrence Meir Friedman, *The Legal System. A Social Science Perspective* (Russel Sage Foundation 1975) 15.

> parts will not; what substitutes, detours and bypasses will spring up; what changes will take place openly or secretly. For want of a better term, we can call some of these forces the legal *culture*. It is the element of social attitude and value.

This does not mean that legal structure and legal substance are less important. Friedman does acknowledge that both elements are real components of a legal system, but as he noted, they are best applied for designing a blueprint, not a working machine. Furthermore, Friedman argued that the problem with structure and substance was that they were static, and likened them to a still photograph of the legal system. This picture lacked both motion and truth, and, like an enchanted courtroom, was petrified and immobile as if under some odd, eternal spell.[206]

According to Friedman, a legal culture refers to the attitudes, values, and opinions held in a society with regard to law, the legal system, and its various parts. He argued that a legal culture determines when, why, and where people use a law, legal institution, and legal process; and when they use other institutions, or do nothing. In other words, cultural factors are an essential ingredient in turning a static structure and collection of norms into a body of living law. Adding the legal culture to the picture is like winding up a clock or plugging in a machine. It sets everything in motion.[207]

To apply these concepts to the Indonesian context, the legal substance of JCA, in particular, does not correspond with the legal culture. Even though JCA was enacted independently without Dutch intervention, it seems that Dutch values, rooted in individualism, have influenced some of Indonesia's legal scholars and practitioners. Individualism is clearly revealed at the practical level in an adversarial system that is not suited to Indonesian society. This perhaps can be understood by referring to the concept of non-transferability of law proposed by Robert B. Seidman, a professor emeritus at Boston University. According to Seidman, as cited by Tabalujan, the transference of rules from one culture to another does not work, because a rule cannot be expected to induce the same sort of role performance as it did in its place of origin.[208]

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[206] Friedman cited in Benny S Tabalujan, *Why Indonesian Corporate Governance Failed - Conjectures Concerning Legal Culture* (2002) Columbia Journal of Asian Law. 15 Colum. J. Asian L. 141.
[207] ibid.
[208] Benny Simon Tabalujan, *Legal Development in Developing Countries (The Role of Legal Culture)* (Singapore 2001) 6.

5.1 Possibilities, Obstacles, and Challenges in Implementing Restorative Justice for Juveniles

As I noted in chapter four, JCJSA, which will replace the current JCA, provides for diversion as a means of implementing restorative justice. According to the framework of categories that I developed in chapter two, and the description of JCJSA that I presented in chapter four, the restorative justice approach entailed in JCJSA can be categorized as a conference in terms of its form. Regarding its timeline operation, restorative justice within JCJSA is a diversionary system with a multistage operation, meaning that there are three opportunities at different stages for implementing it: during the investigation, prosecution, and pretrial phases. In terms of its enforcement, restorative justice within JCJSA is basically a voluntary or purist model. However, with some exceptions, JCJSA can also be categorized as a coercive model in light of the provision on additional punishment in Article 71, verse 2. This states that fulfillment of an *adat* obligation (*pemenuhan kewajiban adat*) is an additional punishment within JCJSA. Therefore, if the judge hands down a verdict that includes fulfillment of an *adat* obligation, the convicted person should also comply with the obligation imposed by his/her *adat.* As previously discussed, *adat* law emphasizes repairing relationships, redress/compensation, and balancing the cosmos. Thus, coercive enforcement of restorative justice is possible within JCJSA, regardless of whether the juvenile offender consents.

Considering the existence of restorative justice values within *adat* law and Islamic criminal law, Indonesian society is unlikely to experience any difficulty in exercising restorative justice. With JCJSA, *adat* law has found a legal base. Nevertheless, this does not mean that there will be no obstacles and challenges faced in implementing restorative justice, which in its official form, is a new method for handling criminal disputes in Indonesia. Therefore, in analyzing potential obstacles and challenges that may arise in the process of implementing restorative justice in Indonesia, we should look to a country that has prior experience of using a restorative justice approach. Some countries have already recognized restorative justice and are employing it. New Zealand is an example of a country that employs Family Group Conferencing (FGC) as its restorative justice program. It would, therefore, provide a good comparative example as the use of FGC for young persons through the Children, Young Persons and Their Family Act has prevailed since the Act was passed in 1989.

Though the statistics reveal several successful and satisfying cases that have been evaluated, a number of disappointing cases relating to the use of FGC have also been evident. Charles Barton cites studies done by Maxwell and Morris in 1990–91. Maxwell and Morris examined the perspectives of both victims and offenders who attended FGCs. From the data samples of the victims they researched, they found that victims willingly attended FGCs in only 41% of cases. In 49% of cases, the victims who attended FGCs felt satisfied with the outcome. About 25% of victims felt worse as a result of attending FGCs.[209]

From the perspectives of offenders, Maxwell and Morris found that only a third of young offenders participated and often said little during their FGCs. In a sample of 14–16 years old offenders referred to FGCs in 1990–91, 26% were reconvicted within 12 months, 64% were reconvicted after just over four years, and 24% were repeatedly reconvicted over the same period.[210]

These pessimistic statistics constitute an important lesson for Indonesian law enforcement agencies and stakeholders who will be involved in diversion activities within JCJSA in the near future. Analysis of the unsatisfactory FGC results has led to the identification of some causative factors in their failure. Primary among these are lack of preparation, untrained mediators, and disempowerment. Braithwaite added that we cannot expect much from one two-hour conference.[211] This means that preconference preparation is a critical factor in the success of a conference. In my view, the key lesson that emerges from these findings is the importance of a well-trained mediator who can mitigate the other two factors, namely, lack of preparation and disempowerment.

However, ensuring that mediators are well trained, as a critical factor for ensuring successful implementation of restorative justice, is not easy to achieve at the practical level of *musyawarah.* Adequate time and sufficient preparation are required to hold a satisfying *musyawarah*, and a rushed effort can easily meet with failure. RJ's case exemplifies this point. Jamal, the teacher who tried to settle the case, failed to reach a consensus and restore peace. The worst outcome occurred as he could not control his own anger. Obviously, Jamal lacked the impartiality and training to be a good mediator. Impartiality is one of the keys to ensuring that a *musyawarah* is conducted fairly. If a party feels that the *musyawarah* is being mediated by a partial mediator, this is the first sign that it will proceed unfairly and fail.

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[209] Charles Barton, *Empowerment and Retribution in Criminal and Restorative Justice,* <www.voma.org/docs/barton_emp&re.pdf> accessed on January 31, 2013.
[210] ibid.
[211] Personal communication at the 5th Annual Conference of Asian Criminological Society, Mumbai, April 15, 2013.

Barton provides a criterion that could perhaps be an indicator of whether restorative justice is well conducted or not. He states:[212]

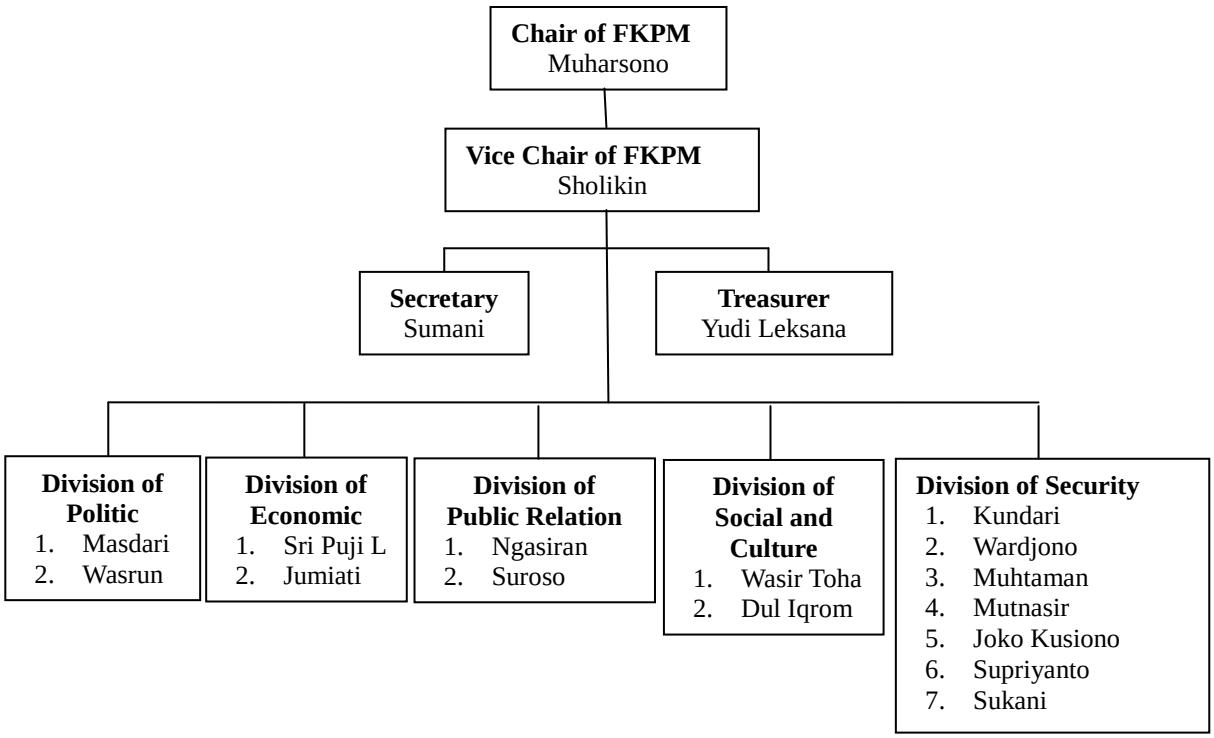
> Restorative justice fails in cases where one or more of the primary stakeholders is silenced, marginalized, and disempowered in processes that are intended to be restorative. Conversely, restorative justice succeeds in cases where the primary stakeholders can speak their minds without intimidation or fear, and are empowered to take an active role in negotiating a resolution that is acceptable and is right for them.

Based on my experience and on the above guideline, I suggest that a potential obstacle in achieving diversion within JCJSA hinges on the mediator. As depicted in the JCJSA diversion flow chart (Figure 3) in chapter four, the diversion will be mediated by an investigator, prosecutor, or juvenile judge, depending on the stage of its occurrence. In my view, this is a weakness in JCJSA. As we already know, within the conventional criminal justice system, the roles of the investigator and prosecutor are to represent the state, while at the same time representing the victim. This joint role does not make them a good choice as mediators since their previous roles were not impartial. However, this lack of impartiality does not apply to a judge, as judges are required to be independent and impartial, even to the state. They do not represent any interest party; they represent justice.

This hypothesis is in line with my research finding in Karasgede village in Lasem. According to Hermanto, a police officer in charge of maintaining twenty FKPMs in Lasem, a police officer should not be a mediator in the FKPM context. The mediator should be the chair of a FKPM, whose appointment results from deliberation within the community. Therefore, the fairness of *musyarawah* is assured and its outcome is easier to accept.[213] According to the data available on FKPMs in Lasem, a police officer is always appointed as the vice chair of an FKPM. A typical FKPM structure in Karasgede is shown below:

[212] ibid.
[213] Hermanto (n 157).

Figure 6: Karasgede FKPM structure



As shown in the above figure, the police officer, Sholikin, is the vice chair of the FKPM. This FKPM structure is a typical one in Lasem. The Lasem police headquarters has 32 police officers. Twenty of them are vice chairs of FKPMs in villages in Lasem.[214] Muharsono, the chair of the Karasgede FKPM, stated that he was appointed by the villagers as FKPM chair through a deliberation process and has since been a mediator in every conflict in Karasgede. "I do not know why they chose me, but every time I mediate cases, the disputants seem to listen to my directions and end up with a joint decision agreement (*surat keputusan bersama*)."[215]

Suyoto, the village head of Karasgede, said that prior to the establishment of the FKPM in 2007, people in the village tended to solve their conflicts through the mechanism of *musyawarah* without police involvement. "Now with the inclusion of police in the FKPM, the decision among disputant parties is guaranteed by the police as the law enforcement agency, and is more certain (*marem*). Moreover, the result of the *musyawarah* is now written up in a joint decision agreement."[216]

[214] Interview held with the AKP (Adjunct Com. Police), Ari Trestriawan, Chief of the Lasem police force, Rembang, Central Java Indonesia, on February 13, 2013.
[215] Interview held with Muharsono, Chair of Karasgede FKPM, Rembang, Central Java, Indonesia on February 14, 2013
[216] Interview held with Suyoto, Head of Karasgede Village, Rembang, Central Java, Indonesia on February 14,

FKPMs have demonstrated their effectiveness in handling conflicts within communities. However, I emphasize the point that the mediator is a decisive factor that may lead to a successful case of restorative justice. The disputants accept the written agreement without any resistance since they trust the mediator. Presumably, the same situation would not occur if the mediator was a police officer or prosecutor.

In addition, the mindset of most police officers and prosecutors in Indonesia are predominantly influenced by the positivist paradigm. This makes them strict and overly rigid in following rules, regardless of variations and anomalies that occur within cases. Nani Rusiani, the acting head of the unit II, subdirectorate I, Directorate of General Crime of the Banten police region, stated that she often dropped juvenile cases and diverted them with the involvement of all the interest parties to *musyawarah.* Consequently, she was often blamed by her superior and ended up being given a new assignment in a different division. Previously, she headed the woman and child protection unit in the Serang police station.[217] What Nani did, in fact, was to use police discretionary power in accordance with Article 18 (1) of the Police Indonesian Republic Act.[218] Nevertheless, the use of this discretionary power is a never-ending source of debate between proponents of positivism and of "living law," even within the police force.

Apart from a mindset that is partial and lacks independence within and beyond the police, public trust in Indonesia's law enforcement agencies is eroding. The social movement and solidarity that emerged in the AAL case testifies to public distrust in Indonesian law enforcement agencies, particularly the police and prosecutors. JCJSA attempts to reduce these potential problems by requiring the government to administer education and training for law enforcement agencies and related parties.[219] Even so, the problem concerns not only the lack of ability to mediate, but also the nature of the roles of the police and prosecutor. Historically and intrinsically, these roles were designed to represent state interests, with the victim's interest being proportionately minor. Therefore, the roles of the police and prosecutor are not designed to be impartial in terms of mediation, which is required to be neutral towards all parties. Learning from the FKPM structure, I propose that the role of the mediator at the

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2013.

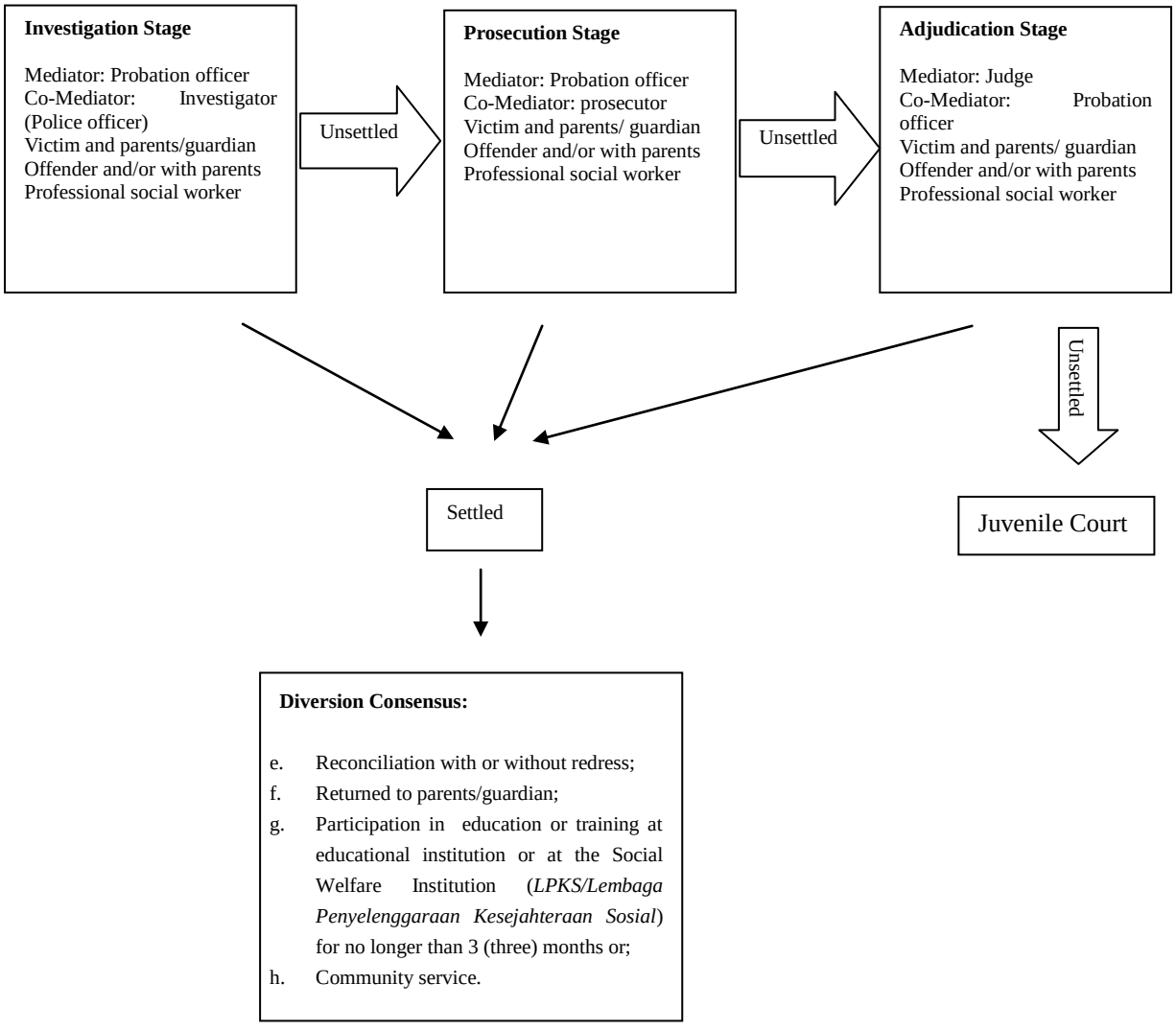
[217] Interview held with Adjunct Com. Police (AKP) Nani Rusiani, acting head of the II subdirectorate, I Directorate of General Crime of the Banten police region, Serang, Banten, Indonesia on February 5, 2013.

[218] 18 (1) Act 2/2002: *Untuk kepentingan umum pejabat Kepolisian Negara Republik Indonesia dalam melaksanakan tugas dan wewenangnya dapat bertindak menurut penilaiannya sendiri*.

[219] Article 92 of JCJSA.

investigation and prosecution stages should be shifted so that the investigator and prosecutor become co-mediators in the diversion process, as shown below.

Figure 7: Ideal Mediator within JCJSA's Diversionary System:



Normatively, probation officers (*pembimbing kemasyarakatan*) are not the principal mediators within JCJSA. However, they have a significant role in the diversion process since their duties include conducting research and providing a comprehensive report on juveniles in

the interest of the diversion process.[220] They are also responsible for reporting to the court if the diversion process is skipped during the investigation and prosecution stages. In my view, the probation officer is more acceptable as a mediator than an investigator or a prosecutor.

Another potential obstacle relating to the enforcement of JCJSA is synchronization among law enforcement agencies. This problem currently occurs within JCA. According to Article 59 (2) of JCA, in giving a verdict, a judge is obliged to consider the report on the juvenile submitted by the probation officer.[221] In the commentary, the word "oblige" (*wajib*) is noted as meaning that if this condition is not fulfilled, then the verdict is null and void (*batal demi hukum*). However, law in theory is not always the same as law in practice. According to Gusti Ayu, head of the subdirectorate of child protection and alleviation, Directorate General of Penitentiary of Justice Ministry,[222] probation officers in the field complain that their reports are ignored by the prosecutor and judge, which does not occur at the investigation stage.[223] The legal consequence of the verdict being declared null and void if the probation officer's report is not considered by the judge, as stated within JCA, does not, therefore, apply in practice.

This provision is maintained within JCJSA and stipulated in Article 60 verses 3 and 4.[224] As shown in the scheme of the JCJSA diversion flow chart (Figure 3), the trial of a juvenile will be held only if all efforts at diversion fail to reach a diversion agreement, or if the agreement is not implemented.[225] At this stage, a judge should consider the probation officer's written report on the juvenile before handing down a verdict. Lack of synchronization among law enforcement agencies in the implementation of JCJSA is another potential obstacle. Although this problem would probably not be entirely apparent, this does not detract from its serious nature. Ignoring the probation officer's report would render the notion of conducting research on juveniles meaningless.

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[220] Article 65 of JCJSA.

[221] *59(2) Putusan sebagaimana dimaksud dalam ayat (1) wajib mempertimbangkan laporan penelitian kemasyarakatan dari pembimbing kemasyarakatan.*

[222] *Kasubdit Perlindungan dan Pengentasan anak direktorat Bimbingan Kemasyarakatan dan pengentasan anak Direktorat Jenderal Pemasyarakatan.*

[223] Interview held with Gusti Ayu Bc.IP. SH. MSi, head of subdirectorate child protection and alleviation, Directorate General of Penitentiary of the Ministry of Justice, Jakarta, Indonesia, February 20, 2013.

[224] 60 (3) Hakim wajib mempertimbangkan laporan penelitian kemasyarakatan dari pembimbing kemasyarakatan sebelum menjatuhkan putusan perkara
(4) Dalam hal laporan penelitian kemasyarakatan sebagaimana dimaksud ayat (3) tidak dipertimbangkan dalam putusan hakim, putusan batal demi hukum.

[225] Article 13 of JCJSA.

5.2 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:[226]

> 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.[227]

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

[226] Johnstone (n 31) 69.
[227] ibid 70.

perpetrator is in the public's interest, would it be right to compel the victim to testify in the trial?[228] Such a case, as described 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*).[229] In terms of the law, and with some notable points, this can be regarded as a public or state right. Repentance can be demonstrated 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

[228] ibid.
[229] 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.

categorized as a *ta'zir* crime that is related to dignity and morals (*kehormatan dan kerusakan akhlak*).[230] In accordance with the nature of *ta'zir*, the determination of the punishment for this crime is left to the state. Therefore, if on one hand a case of this kind is perceived as a breach of an individual's right and on the other hand it 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*) because these components, entailing separate responsibilities to the state (public) and to the victim, can be "packaged" as one punishment. Moreover, 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.[231] This implies that diversion can be employed for a wide range of crimes. As Johnstone has shown, in general, indecent assault is 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 an indecent assault or an obscene act results in the victim's death.[232]

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

[230] Muslich (130) 256.
[231] 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.
[232] 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).

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 occur, as in the RJ and AAL cases, can 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.

5.3 Conclusion

In short, I conclude that four critical factors—the skills and qualities of the mediator, the time available for preparing the encounter of all of the involved parties, the mindset of the law enforcement agency, and synchronization among law enforcement agencies—may lead to a successful restorative justice program. Learning from the FKPM experience, I suggest that neither the police nor the prosecutor should be the primary mediator, because they are not designed to be an impartial party in contrast to the judge. Another point of note is that the Islamic criminal law approach can be utilized as a bridge to alleviate the contention between public and private interests within a restorative justice approach. On one hand, the implementation of this approach leads to public awareness that the victim has a right to decide the resolution for releasing his/her pain and mitigating the harm that was caused by the crime. On the other hand, public interest can still be accommodated through the application of the *ta'zir* concept within Islamic criminal law.

Chapter Six

CONCLUSIONS

Restorative justice is evidently becoming a wide-ranging concept that has been discussed, examined, and implemented in many countries and in various forms. Chapter two revealed that restorative justice is still evolving, leaving ample space for further discussion and transformation. Its flexibility and the rich variety of its forms make restorative justice adaptable to the many different characters of diverse nations. Chapter three affirmed that restorative justice has been practiced within *adat* law in Indonesia. Its values are also found within the practice of community policing in Lasem subdistrict and within Islamic criminal law. There is evidence of the existence and practice of Islamic law in Indonesia. The modern form of law that was introduced to Indonesia in the mid-nineteenth century led to the erosion of both *adat* law and Islamic criminal law.

Chapter four presented two cases that revealed a gap in JCA as a representative form of modern law. JCA obviously does not have a means for diverting a juvenile case in lieu of a criminal trial. Restorative justice within JCJSA provides diversion as a means of addressing this gap. However, some potential challenges may occur in its implementation, which were discussed in chapter five.

Chapter five revealed that the gap described above is rooted in the disregard of Indonesia's legal culture. A legal culture is a significant subsystem within a legal system. It can be viewed analogically as the soul of a body. The chapter demonstrated that restorative justice values are evident in the legal culture, values, and theories of *adat* law, community policing, and Islamic criminal law values, thereby providing convincing evidence that Indonesia has sufficient experience to implement restorative justice without facing significant resistance within society. It can be argued that restorative justice is a component of the legal culture of these systems, as I have described them.

Chapter five also identified potential obstacles and challenges in implementing JCJSA, which center on the mediator and synchronization of law enforcement agencies. As a derivative conclusion, I suggest in this thesis that police officers and prosecutors should not be primary mediators within the diversion process. This recommendation is based on their intrinsic roles and positions, and on evidence obtained from my primary research conducted on an FKPM in Lasem.

Another conclusion that relates to the second objective of this research is that a situation

of contending public and private interests may be alleviated by the adoption of Islamic criminal law values that are related to the concept of restorative justice. The values are general and plausible and can be accepted broadly regardless of religion and ethnicity in Indonesia. The ultimate conclusion of this thesis, as revealed by the sum of its findings, is that restorative justice in Indonesia is an eclecticism of *Adat* law, Islamic criminal law, and modern law.

BIBLIOGRAPHY

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

Bazemore Gordon and Lode Walgrafe, (eds). *Restorative Justice, Repairing the Harm of Youth Crime* (Lynne Rienner Publisher 2010)

Boontharm Dinar, The Sultanate of Banten AD 1750-1808: A Social and Cultural History (DPhill thesis, University of Hull 2003)

Braithwaite John, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002)

Burns, Peter. *The Leiden Legacy: Concepts of Law in Indonesia* (KITLV 2004)

Cammack, Mark E and R Michael Feener. *The Islamic Legal System in Indonesia.* Pacific Rim Law & Policy Journal. 2012. 21 Pac. Rim L. & Pol'y J. 13

Crafword Adam and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice. International Debates.* (Ashgate Publishing 2000)

Cragg Wesley, *the Practice of Punishment, Toward a Theory of Restorative Justice* (Routledge 1992)

Dewan Redaksi Ensiklopedi Islam, *Ensiklopedi Islam* (Ikhtiar Baru Van Hoeve 1994)

Doerner William G and Steven P. Lab, *Victimology* (3rd edn, Anderson Publishing 2002)

Dominikus Rato, *Pengantar Hukum Adat (Introduction to Adat Law)* (LaksBang Pressindo 2009)

Drapkin M D Israel, *Crime and Punishment in the Ancient World* (Lexington Books 1989)

Fathurokhman Ferry and Alexandra Landmann, *Ancestral Tradition, Social Control, and Sanctions in South Banten: '1001 Rules of the Wiwitan Polity' (Part 2)* (2013) Graduate School of Human and Socio-Environmental Studies Journal Kanazawa University. Vol 9 Number 26

Fine Toni M, *American Legal System: A Resource and Reference Guide*. Ohio. Anderson. 2002

Friedman Lawrence Meir, *the Horizontal Society* (Yale University Press 1999)

———————————, *the Legal System: A Social Science Perspective* (Russel Sage Foundation 1975)

Garner, Bryan A. *Black's Law Dictionary* (7th edn, West Group 1999)

Gilissen John and Frits Gorle, *Sejarah Hukum, Suatu Pengantar (*Freddy Tengker trs, *Historiche Inleiding tot het Recht*) (Refika Aditama, 2007)

Hadisuprapto Paulus, *Delinkuensi Anak, Pemahaman dan Penanggulangannya (Juvenile Delinquency and its Alleviation)* (Malang Bayu Media 2008)

Hadley Michael L, *the Spiritual Roots of Restorative Justice* (State University of New York Press 2001)

Haveman Roelof H, *the Legality of Adat Criminal Law in Modern Indonesia.* (Tatanusa 2002)

Hudson Joe and Burt Galaway, (Eds) *Restitution in Criminal Justice, A Critical Assessment of Sanctions* (Lexington Books 1977)

Imron, Ali. *Kontribusi Hukum Islam Terhadap Pembangunan Hukum Nasional (Studi Tentang 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)* (DPhill thesis, University of Diponegoro 2008)

Johnstone Gerry, *Restorative Justice. Ideas, Values, Debates* (Routledge 2011)

----------and Daniel W Van Ness, *Handbook of Restorative Justice* (Routledge 2011)

Keanini, Lyle. ADR in Hawaii Courts: The Role of Restorative Justice Mediators. 12. Asian-Pac. L. & Pol'y J. 174. 2011.

Kelsen Hans, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L Paulson trs, Clarendon Press 1996)

Kementerian Pemberdayaan Perempuan dan Perlindungan Anak dan Badan Pusat Statistik (Ministry of Woman Empowerment and Child Protection, and National Statistic Bureau) *Profil Anak Indonesia 2012 (Indonesian Child Profile 2012)*

Kandemir, M. Yasar. *40 Hadiths for Children with Stories* (Erkam Publishing 2009)

Ketut Sutha I Gusti, *Bunga Rampai Beberapa Aspekta Hukum Adat (Potpourri of Adat Law Aspect)* (Liberty 1987)

Miller Susan L, *After the Crime, the Power of Restorative Justice Dialogue between Victims and Violent Offenders* (New York University Press 2011)

Morris Allison and Gabrielle Maxwell, *Restorative Justice for Juveniles, Conferencing, Mediation and Circles* (Hart Publishing 2001)

Mulligan, Steve. From Retribution to Repair: Juvenile Justice and The History of Restorative Justice (2009) University of LaVerne Law Review. 31. U. La Verve L. Rev.139

Muslich Ahmad Wardi, *Hukum Pidana Islam (Islamic Criminal Law)* (Sinar Grafika 2005)

Nyoman Serikat Putra Jaya, *Relevansi Hukum Pidana Adat dalam Pembaharuan Hukum*

Pidana Nasional (Relevancy of Adat Criminal Law within National Criminal Law Legal Reform) (Citra Aditya Bakti 2005)

Oda Hiroshi, *Japanese Law* (3rd edn Oxford University Press 2009)

Ota Tatsuya, 'The Development of Victim Support and Victim Rights in Asia' in Wing-Cheong Chan (ed), *Support for Victims of Crime in Asia* (Routledge 2008)

Qafisheh, Mutaz M. *Restorative Justice in the Islamic Penal Law: A Contribution to the global system.* International Journal of Criminal Justice Sciences, Vol 7 Issue 1 January – June 2012.

Radbruch Gustav, 'Legal Philosophy' in Kurt Wilk (trs) *The Legal Philosophies of Lask, Radbruch, and Dabin,* (Oxford University Press 1950)

Sullivan Dennis and Larry Tifft (eds), *Handbook of Restorative Justice.* (Routledge 2008)

Soekanto, *Meninjau Hukum Adat Indonesia, Suatu Pengantar untuk Mempelajari Hukum Adat (Reviewing Indonesian Adat Law, an Introduction to Study Adat Law)* (Rajawali 1985)

Soekanto dan Soerjono Soekanto, *Pokok-pokok Hukum Adat (Main Points of Adat Law)* (Alumni 1978)

Soepomo, *Bab-bab Tentang Hukum Adat (Djilid II) (Chapters on Adat Law (Volume II))* (Pradnya Paramita 1982)

Soemarman Anto, *Hukum Adat. Perspektif Sekarang dan Mendatang (Adat Law, Today and Tomorrow) (*Adicita Karya Nusa 2003)

Tabalujan Benny S, *Why Indonesian Corporate Governance Failed-Conjectures Concerning Legal Culture* (2002) Columbia Journal of Asian Law 15 Colum. J. Asian L. 141

Takahashi Norio, *Restorative Justice and Treatment of Offenders* Sonderdruck Aus, Menschengerechtes Strafrecht. Festschrift Fur Albin Eser Zum 70, Geburtstag. Verlag C.H. Beck Muncen 2005

Ter Haar, Bzn. *Asas-asas dan Susunan Hukum Adat (Beginselen en stelsel van Adatrecht)* (K.Ng. Soebakti Poesponoto trs, Pradnya Paramita 1981)

Utrecht E, *Rangkaian Sari Kuliah Hukum Pidana I (Lecture Series of Criminal Law I)* (Pustaka Tinta Mas 1994)

Umbreit Mark and Marilyn Peterson Armour, *Restorative Justice Dialogue, an Essential Guide for Research and Practice* (Springer Publishing Company 2011)

Uddin Asma T, *Religious Freedom Implications of Sharia Implementation in Aceh, Indonesia.* 2010. 7. St. Thomas L.J 603

Van Bueren G, *International Rights of the Child* (University of London Press 2006)

Van Ness Daniel W and Karen Heetderks Strong, *Restoring Justice: an Introduction to Restorative Justice* (4th edn, Anderson Publishing 2010)

Wignjodipuro, Soerojo. *Pengantar dan Asas-asas Hukum Adat. (Introduction and Principles of Adat Law)* (Gunung Agung 1982)

Wiranata I Gede AB, *Hukum Adat Indonesia, Perkembangannya dari Masa ke Masa (Indonesian Adat Law, Its development from time to time)* (Citra Aditya Bakti 2005)

Zehr Howard, *Changing Lens: A New Focus for Crime and Justice* (Herald Press 2005)