

## **Qisas Reorientation (A Study about Sanctions in Criminal Act of Murder: a Comprehension from Hermeneutics Philosophy)**

**Mahmutarom HR.**

University of Wahid Hasyim, Law Faculty  
X/22 Menoreh Tengah Street, Sampangan, Semarang 50236, Indonesia  
mahmutarom@unwahas.ac.id

**Abstract**-This paper tries to deeply investigate about the qisas reorientation, especially from the hermeneutics philosophy and its relation to the sanctions in criminal act of murder. Qisas, related to the Islamic law, has showed the principle of balance, legality, proportionality, reconciliation, transpiration and equality. Eventhough qisas has many benefits for both the victim and the criminal actor, it need a further study to considere it for the criminal law renewal in Indonesia.

**Keywords:** qisas, reorientation, hermeneutic, murder sanction.

### **Background**

The problem of criminal act is a central problem in Criminal Law, even though, in Indonesia, the discussion of it rarely exists in Indonesian library of Law. This problem of criminal act is even likely considered as the Judge's duty in doing some of the duties, which, in this case, the special authority or *yudex-factie* is also given<sup>1</sup>.

While in the process of Criminal Judicature, there should be many parties whose importance needs to be protected, even it is the importance of Criminal Actor, the importance of society or nation, or the importance of victim. The existence of the imbalance in each importance protection is worried that its law purposes, which are to create the order and the peace in the society<sup>2</sup> and to solve the conflicts that are caused by the criminal act<sup>3</sup>, will be hardly realized. The difficulty and the chaos of the criminal judicature are precisely on the reality that criminal judicature always touches the basis of society's life and human's life prosperity as the whole. The family's prosperity cannot also be forgotten, whose position is a part of the society itself.<sup>4</sup>

Thus, going back to the tradition and religion to look for the justice value, which can be the basis of wisdom determination in the field of law renewal, is a thing that is considered as the best thing to do. It is the same with Francis Fukuyama's idea, which says that *social capital* is the basis in designing and building law, which is accommodative towards all kinds of importance, including the importance which has global nuance<sup>5</sup>. This kind of conviction is based on the view, which says that designing and building law that relies on *will to power* and the force towards society to pull and exile the social cultural source for modernity project, which is considered as the thing that enlightens and frees, is proven that it is such a failure to complete its promises. The invitation to go back to the religion and the tradition is a form of side taking on plurality and heterogeneity, which should be the characteristic and the basic framework in designing and building national law in many countries, including Indonesia.

---

<sup>1</sup>Loebby Luqman, *Pemidanaan dan Bagaimana?* Dalam jurnal *Hukum dan Pembangunan*, (Jakarta : Fak Hukum Universitas Indonesia), 1984 halaman 576).

<sup>2</sup> Notohamidjojo, *Soal Soal Pokok Filsafat Hukum*, (Jakarta : BPK Gunung Mulia, 1975), hlm. 21.

<sup>3</sup>Hulsman dalam Muladi dan Barda Nawawi Arief, *Pidana dan Pemidanaan*, (Semarang : Fak Hukum UNISSULA, 1982), halaman. 7-8.

<sup>4</sup> Roeslan Saleh, *Mengadili sebagai Pergulatan Kemanusiaan*, (Jakarta : Aksara Baru, 1979), halaman 31.

<sup>5</sup> Francis Fukuyama, *The Great Disruption : Human Nature and the Reconstruction of Social Order*, (New York The Free Press, 1999), halaman. 194-211.

In law philosophy and social philosophy constellation, at least there are two classic paradigms to explain and to understand the essence of the order society's life. *First*, -to follow what has been said by von Wright in *Hammersley*- which can be called *Aristotelian* paradigm, and *second*, the *Galilean* paradigm.<sup>6</sup> In understanding law in Indonesia, which has strong eastern characteristic and has the religious nuance, the right paradigm that is used is the Aristotelian paradigm because of its *teleological finalistical* characteristic. We have to realize that modern law in Indonesia now grows from the positivism paradigm which has *Galilean* concept. In the view of *Galilean* which has *mechanistical causal* characteristic, a criminal actor will be imprisoned as the logical consequences from the law enforcement without relating to the law values and purposes, which is the basis of the law itself. This positivistical model influence keeps getting in the law executive and law science's mind, which finally estranges the law from its society.

By claiming that law science is also the science about society's life and behavior, so, all of these positivism followers try to write those causalities in their forms as the legislation law.<sup>7</sup> Justice has been considered that it is given by making positive law (act), so it can be said that modern law does not appear from the God's influence anymore.<sup>8</sup> This is caused by the law that has been working mechanically and freely from the world's value, besides, the core of the law is the value or morality that is taken from the society where that law occurs. Thus, forming justice and purpose of the law that is established in that value-free act becomes more far from the justice which exists and develops in the society.

In the criminal theory, at least there is a theory that emphasizes the aspect of reprisal, and a theory that emphasizes the aspect of purpose, i.e., returning the criminal actor into a good citizen through the process of punishment in some certain times as what the judge has decided. Islamic law is considered as the law that emphasizes the aspect of reprisal. It can be seen from the *qisas* stipulation, by giving the equal and same punishment with the thing that the actor has done. There is no death penalty, or judicial hanging for the murderer in Al-Quran. It is the punishment that suits the things that the actor has done. By doing *qisas* it is hoped that our soul will be kept from the murderers and will be kept from the act of murdering each other.

### **The Meaning of Qisas in Islamic Law**

Literally, the word "*qisas*" is from Arabic language, which means "looking for track". While in terms of Islamic law, it means that the criminal actor has to be reprisalized as what he/she has done, if he/she murders, he/she has to be murdered, if he/she cuts part/parts of body, part/parts of his/her body has to be cut, also. In Islamic law, *qisas* can be meant as the same reprisal with the act of murdering, hurting, damaging or omitting the use of parts of body, which suits the violation that the criminal actor has done.

From the *fiqh* experts, for the murder and its punishment/sanction, it depends on the type or the way of how the murder is done. Murder in Islam can be divided into:

1. Intentionally Murder, a murder that is done by using tools, which are usually used to murder. This kind of murder needs *qisas*, or the murderer has to be murdered, too, unless the murderer is forgiven by the family of the victim by paying some fine (*diat*) in strong category or being forgiven at all.
2. Intentionally Look Alike Murder, an intentionally murder that is done by hitting victim, by using tools which are not commonly used to murder. This kind of murder does not need *qisas*, the murderer needs to pay fine in strong category to the victim's family, which is paid in the form of installment for three years, and is paid every year; This is based on Hadist

---

<sup>6</sup> Soetandyo Wignyosoebroto, "Dua Paradigma Klasik dalam Filsafat Hukum dan Filsafat Sosial untuk Menjelaskan dan Memahami Hakikat Ketertiban dalam Kehidupan Bermasyarakat Manusia", (Materi *Pelatihan Penulisan Proposal Thesis dan Disertasi bidang Hukum*, Semarang : Yayasan Dewi Sartika, 2005), halaman 1.

<sup>7</sup> Sutandyo Wignyosoebroto, "Positivisme and Doktrin Positivisme dalam Ilmu Hukum, dan Kritik-Kritik terhadap Doktrin ini", (Materi *Pelatihan Penulisan Proposal Thesis dan Disertasi bidang Hukum*, Semarang: Yayasan Dewi Sartika, 2005), halaman 2.

<sup>8</sup> Adji Samekto, FX, *Studi Hukum Kritis: Kritik terhadap Hukum Modern*, (Semarang : Badan Penerbit UNDIP, 1995) halaman 10.

riwayat At Tirmidzi from Abdullah bin Amru, he said : Rasulullah has said : “ Please know that unintentionally or intentionally look alike murder, like the murder that uses stick or whip, the murderer has to pay fine in the form of 100 camels, which among those 100 camels, there has to be 40 pregnant camels”.<sup>9</sup>

3. Unintentionally Murder, a murder that does not need *qisas*. However, the murderer has to pay fine in weak category, which is paid in the form of installment for three years, and is paid in every year.
4. The Unborn Child Murder, if a murder happens to the unborn baby, and if the murder is done by criminal act, the murderer has to pay an absolute fine, either it has been born, but in a death condition already, or it is dead in the womb. However, if the baby is born in life condition, but then it is dead, the murder needs to pay fine in the form of 100 camels, while some other experts say that the murder needs to pay just 5 camels or 100 goats.<sup>10</sup>

About kinds of fine punishment (diat) in Islamic law, for the act of murder, it is mentioned in below points:

1. Serious fine , i.e., paying 100 camels, which contain 30 3 to 4 years old female camels, 30 4 to 5 years old female camels, and 40 pregnant female camels.
2. Light fine, i.e., paying 100 camels, containing 20 1 to 2 years old female camels, 20 2 to 3 years old female camels, 20 2 to 3 years old male camles, 20 3 to 4 years old female camels, and 20 4 to 5 years odl female camels.<sup>11</sup>

If those fines are out of the murderer’s ability, the fine can be decided under the agreement. Even if the murderer is still not able to pay the fine, he/she can only be forgiven by the victim’s family without paying any fine. Therefore, what is important in solving this kind of criminal problem is that the existence of reconciliation, or the act of reconciling between both sides, by prioritising good relationship and not just a revenge.

On the other hand, the obligation of paying fine is not only from the source of the murderer’s money. Other sources like the money from the murderer’s closest family/relatives are possible, too, if the murderer is not able to pay the fine or poor. This is based on the decision that, if there is a problem in the victim’s family because their real father is murdered, their closest relatives and even the society around them needs to take responsibility to take care of the victim’s family. Thus, it is logical if the closest relatives of the murderer has moral and material obligation to help the victim’s family as long as they help them sincerely<sup>12</sup>.

Besides the obligation between the murderer and the victims’s family, there is an obligation between the murderer and God, too. The murderer who does not do *qisas* must free the slaves, or do fasting for two months in a row without any failure. If the murderer fails for one day, he/she has to do fasting from the beginning. This kind of stipulation is to omit, or at least to detract his/her sin from murdering.<sup>13</sup>

While *qisas* for the people who do violence which causes some wounds and physical defect, some fiqh experts take the Prophet’s hadist:

“From Abu Bakar bin Muhammad bin Amru bin Hazm who had ever officiated the judicature in medina, in the umar bin Abdul Aziz’s government, from his father, the father of his grandfather (Amru bin Hazm: Prophet Muhammad actually sent a letter Yemen people, then Abu Bakar mentioned the hadist. In that hadist (letter): Actually, whoever murders the devout people intentionally and cruelly, the death penalty has to be done to those who do the murder, unless the family of the victim is willing to forgive the murderer. Actually, the fine of the murder is 100 camels, if the cutting is victim’s nose, the fine is 100 camels; if the cutting is the tounge, the fine is 100

<sup>9</sup>Sulaiman Rasyid, *Fiqh Islam*, (Jakarta, Attahiriyah, 1976), halaman 408

<sup>10</sup> As Shun’ani. *Op-Cit* , halaman 859 dst.

<sup>11</sup> Sulaiman Rasyid, *Op-Cit*, halaman 408-411.

<sup>12</sup>Ketentuan ini tidak berarti Islam menimpakan sanksi hukum kepada orang yang tidak bersalah untuk menanggung kesalahan orang lain, tetapi dalam kerangka tolong menolong dan saling membantu antar sesama. Lihat Abu Bakar Muhammad, *Op-Cit*, halaman 907 dan M. Asyirbini Al Khatib, *Iqna*, (Beirut Libanon : Darul Fikr, 1995), halaman 496.

<sup>13</sup> Abu Bakar Muhammad, *Op-Cit*, halaman 867 dst.

camels; if the cutting of the lips, the fine is 100 camels; if it is the genital cutting, the fine is 100 camels; if the cutting/the damaging is the two scrotums, the fine is 100 camels; if it is the damaging of the vertebrae bones, the fine is 100 ekor camels; if the damaging is the two eyes, the fine is 100 camels; if the cutting is one of legs, the fine is 50 camels; if the damaging is 1/3 of the head the fine is (1/3 X 100 camels-pen); a stab until the body's cavity, the fine is 1/3; a punch that changes the body/breaks the bones, the fine is 15 camels, every fingers is 10 camels; every tooth is 5 camels; every jab is 5 camels, and a man who is killed because he kills a woman, the murderer has to pay 1000 dinar (A story by Abu Daud in Al Marasil, by An Nasa'i Ibn Khuzaimah, Ibnu Jarud, Ibn Hibban and Ahmad)".<sup>14</sup>

Though many muftis have different opinions about the validity of that hadist because there is no relationship of the sanad,<sup>15</sup> however, that hadist is very famous in all of history experts and fiqh experts.<sup>16</sup> In other story, Umar bin Khattab had determined that if a man is defeated and causes the lost of his hearing ability, the lost of his vision, and the lost of his sexual desire, thus, the one who defeats that man has to pay four kinds of fine cumulatively.<sup>17</sup>

### **Qisas Reorientation: A Study about Sanctions in Criminal Act of Murder from a Hermeneutics Philosophy Comprehension**

The controversy about Islamic law struggle and the social changes, which becomes one of the fundamental problems of Islamic law philosophy, has been happening for a long time. This problem polarization is at least heading to the extreme view.<sup>18</sup> *First*, Islamic law is considered that it has no *hikmah* and *illat* behind its *legal formal* formula because it is the God's desire. While God has no time and place boundaries so that Islam, which is a part of His command, has no *trans-historical* characteristic. That is why human's mind has no other ability except understanding the doctrine in religious texts. *Second*, Islamic law is considered that it has *illat*, *hikmah* and purposes. If it does not, it means that God creates a wasteful thing, something that is impossible in God's existence, that gives human intelligence and mind to understand the natural secrets and the social symptoms. With intelligence and mind, human can understand the characteristic, the essence, and the purpose of the law. It has its consequence, where Islam law is always related to, and is always understood based on the background, the social-cultural that surrounds it, so that the function of the mind has an important role. The thoughts of the Islamic law thinkers in Indonesia show this tendency.<sup>19</sup>

One of the indication of the influence of the theories in that developed thought can be measured by the approach of *maslahah* (human's prosperity, *human welfare*), and has started to develop since the era of Umar bin Khattab, where, in determining the law, it does not need to be the same with the era of the Prophet. Social, political, economic, and any other conditions force the law stipulation to change its strategy in reaching the purpose of the law, i.e., the human's benefit.

To understand the stipulation about sanctions for the criminal actors, as what has been explained above, there are some things that cannot be avoided by anyone. *First*, one thing that has to be understood is that, wherever it is, law cannot be freed from the context of time and place, including the God's law. It can be seen in the history of marriage law in the era of Prophet Adam, where there was still a possibility of a marriage among siblings, as long as it is not happening between twins because there is no other ones to marry. In the era of Prophet Musa, polygamy is permitted freely without any boundary, including marriage among siblings because the amount of men was rare at that

---

<sup>14</sup> As Shan'ani, *Op-Cit*, halaman 878-879.

<sup>15</sup> Sanad adalah sumber yang menyebutkan dari mana asal diketahuinya suatu hadits, dikatakan sahih apabila sanadnya itu sampai pada Rasulullah, misalnya dari A, A dari B dst sampai ke Nabi Muhammad, SAW.

<sup>16</sup> As Shan'ani *Op-Cit*, halaman 879.

<sup>17</sup> *Ibid*, halaman 888.

<sup>18</sup> Mahsun Fuad, *Op-Cit*, halaman 16.

<sup>19</sup> Hal ini dapat dilihat dengan munculnya istilah *Reaktualisasi Hukum Islam* (Munawwir Sadzali), *Pribumisasi Islam* (Abdurrahman Wahid), *Agama Keadilan* (Masdar F. Mas'udi), *Fiqh Madzhab Sosial* (KH Sahal Mahfud) dll.

time, as the effect of the King Fir'aun's policy to kill all of the male babies. A stipulation that is not valid anymore in this era. This proves that law cannot be freed from the social condition wherever that law is valid.

*Second*, there is a reality, which says that God's orders (*Divine Instruction*) always depend on texts (*kitabah, qawliyyah*), while texts itself fully depend on media "language"<sup>20</sup>. This language becomes the cross-opinion source of all time because it is a result from community's agreement and human's cultural product.

Alqur'an describes itself as *risalah* (message), and from *risalah*, it represents the communication relationship between the sender and the recipient through the codes or language system. Because it is impossible for the sender in the context of Alqur'an to object of the scientific study, thus, it is proper if the scientific entrance for the study of text of Alqur'an is reality and culture. Reality controls the movements of the human as the target of the text and controls the first text recipient, i.e., *rasul* and the culture that transfigures in the form of language.<sup>21</sup> This explanation has placed the culture and the reality as the starting point in the text study, and it means that this study is started with the empirical facts in the form of life problems that are faced by human beings.

In understanding Alqur'an, we should place the Alqur'an as the moral source and not as the source of the legal law or in the meaning as the act.<sup>22</sup> Understanding Alqur'an as the legal law source in many countries including Indonesia will experience some problems if there is no power as the guard which can force textually the validity of that stipulation. Thus, the thing that can be the source of the Islamic law is the principles, the values, or the moral purposes of the Alqur'an, not the *harfiah* or literal text. Maintaining the implementation of the *harfiah* of the Alqur'an stipulation by closing our eyes towards social changes which have been happening explicitly in front of our eyes is the same with destroying directly the purposes and the intentions of its social morality."<sup>23</sup>

There was an interesting thing that happened when Umar bin Khattab became the chaliph, it is in the story :

"Hatib bin Abi Balta'ah's kids stole a camel owned by a Bani Mazinah man. Umar then called those kids, and they admitted all of the things that they had done. Then, Abdurrahman bin Hatib (the parent of the thief -pen) was ordered to see the caliph. The Caliph Umar said, "Hattib's kids have stolen the camel owned by a man from bani Mazinah, and they have admitted their fault". Then, Umar said, "Oh, katsir bin As-Shilt (an executioner), take them and cut their hands". After Katsir took those kids, Umar then ordered messengers who had called them to follow them, and said, "For the God's sake, if I do not know that you are the ones who order him and make them (the kids who stole the camel) hungry, -if one of them eats those haram things, then, it becomes halal for him-, then I will cut his hands. And For the God's sake, if I do not cut his hands, then I will obligate you all to pay the change, that will make you hungry." "Oh, Muznian, how many camels do I have to change?". "Four hundred" said the man. Umar then said to the father of those kids. "Go home and take eight hundred money, then give it to this man", and the cutting of the hands is canceled".<sup>24</sup>

---

<sup>20</sup> Amin Abdullah, dalam pengantar buku Khalamaned M. Abou El Fadl, *Atas Nama Tuhan, Dari Fikih Otoriter ke Fikih Otoritatif*, Alih bahasa : Cecep Lukman Yasin, (Jakarta : Serambi, 2004), halaman xi

<sup>21</sup> Nasr Hamid Abu Zaid, *Tekstualitas Al-Qur'an, Kritik terhadap Ulumul Qur'an*, (Yogyakarta : LkiS, 2003), halaman 19-20

<sup>22</sup> Fazlur Rahman, *Islam*, (Chicago and London : University of Chicago Press, Second Edition, 1979), halaman. 37.

<sup>23</sup> Fazlur Rahman, *Islam and Modernity, Transformation of an Intellectual Tradition*, (Chicago and London : The University of Chicago Press, 1982), halaman 19.

<sup>24</sup> Muhammad Baltaji, *Metodologi Ijtihad Umar bin Al-Khattab*, alih bahasa : Masturi Irham, (Jakarta : Khalifa, cetakan pertama, 2005), halaman 261. Lihat juga dalam `Ibnul Qayyim Muhammad bin Abu Bakar bin Ayyub, *A'lam Al-Muwaqqi'in*, juz 3, (Kairo Mesir : Al-Manar), halaman 33. Kasus ini juga membuktikan bahwa untuk kasus pencurian tidak hanya menjadi hak Allah dengan sanksi yang sudah dibakukan, yaitu potong tangan, tetapi Umar sudah mempolopori dengan kearifannya mengganti sanksi potong tangan dengan denda dua kali lipat harga barang yang dicuri tanpa harus melalui proses rekonsiliasi, tetapi dengan ijtihadnya sendiri.

Thus, from the case above, it can be concluded that Umar basically did not want the law that did not pay attention to the things that were not in the purpose of that law itself. The disobedience of the law purposes will affect the cause of the crime (*kriminogen* factor) which is not desired by the law maker itself. The principle that is done by Umar can be based on the hadits, which is explicitly informed, that Rasulullah has said :

“Avoid (cancel) the had (punishment) as long as you can from Muslim people because it is better for imam (hakim) to be wrong in giving the forgiveness than to be wrong in giving the had. If you find a way out (reason for omitting had) for a Muslim, then keep yourself from giving the punishment towards him/her”.<sup>25</sup>

Furthermore, Umar said that omitting *had* in unclear problems is better than doing it, and Umar proved his words by saying that it is prohibited to call “thief” if someone steals something in famine season. Either national famine or personal, which means the famine that happens to someone him/herself only, i.e., when the society do not get their job to get their enough halal prosperity to fulfill their daily needs. Because of that compulsion, Ibn Qayyim stated that the things that are stolen become *syubhat* (it is unclear whether it is the thing that can be taken or not) because, for those thing owners, if the people around them need those things, it is obligated to give those things to those who need them<sup>26</sup>.

To be able to understand the *qisas* stipulation that is related to the murder or violence criminal act towards human’s body, it is determined in Alqur’an Surah Maidah verse (45) which means :

“ And We have ordered them in Taurat, that soul is revenged with soul, eyes are revenged with eyes, nose is revenged with nose, ears is revenged with ears, teeth is revenged with teeth, wound has the *qisas*, too. Whoever lets the revenge go (forgives/not asking the *qisas*), then letting that go will melt his/her sin, and whoever is not based on the law that is based on what Allah had descended, then they are *dzalim*”

In the Tafsir of Al Muhtamir , the meaning of *and Whe have ordered them in Taurat* is that that stipulation is valid for the Jews, which is contained in Taurat<sup>27</sup>, which in Jews’ tradition before the Taurat was descended, if there someone in a group was murdered, then, the revenge was done by murdering the murderer, even the group of the murderer’s wealth would be taken or omitted. One soul had to be revenged with a hundreds of soul or more, or, the things that were out of line could also be done, too. While the women from that group would be their mistresses or slaves. The men from that group would be also their slaves or attendants. This kind of thing happened in uncertain times, until someone could free these slaves from such misery.

Thus, it can be said that that thing is a great progress for such era. Such stipulation also means that there is a prohibition not to have such behavior to do some revenges that are out of line. Moreover, all of the innocent people were murdered or were being slaves, which is contradictory with the principles of fair and civilized humanity.

Other stipulation that is related to *Qisas* is the decree of Allah *Subhanahu wa Ta’ala*,

“O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct. This is an alleviation from your Lord and a mercy. But whoever transgresses after that will have a painful punishment. And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous.” (*Qs. al-Baqarah: 178-179*).

Allah decided one syariah stipulation with the greatest hikmah. From those hikmahs, there are some that are known by human beings, but there are also some that are know by Allah only. In *qisas* there are hikmahs, too, they are:

---

<sup>25</sup> *Ibid*, halaman 265

<sup>26</sup> *Ibid*.

<sup>27</sup> Asmaji Aes Muhtar, *Al Muhtamir Tafsir Al Qur’an*, ( Johor Baru Malaysia : Perniagaan Jahabersa, 2004), halaman 262.

1. To keep the society from the evil and to keep everyone from the act of killing everybody else, which is mentioned by Allah *Subhanahu wa Ta'ala* in his decree,

*“And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous.”* (Qs. al-Baqarah: 179).

2. To realize the justice and to help the molested people, by giving the ease to the victim's family to revenge the criminal doer, as what has done to the victim. That is why Allah said:

*“And do not kill the soul which Allah has forbidden, except by right. And whoever is killed unjustly - We have given his heir authority, but let him not exceed limits in [the matter of] taking life. Indeed, he has been supported [by the law].”* (Qs. al-Isra': 33).

3. To be the media of taubat and to be the purification of sins that has been done, because qisas becomes the *kafarah* (sins purification) for the sinners. It has been explained by Rasulullah *shallallahu 'alaihi wa sallam* in his saying,

*“Do the bai'at to me in order not to do the syirik, stealing, and zina.’ He reads them a verse, (and then he said), ‘Whoever does it, Allah Subhanahu wa Ta'ala will give pahala, and whoever breaks some, it will be given the punishment as the abolition of the sins. Also, whoever breaks it and then Allah covers it, then it the business will be handed to Allah, if He wished to give azhab, then He will do it, and He wished to forgive, He will do it.”* (Mutafaqun 'alaihi).

While the last verses that are related to murder is the al Qur'an surah al Hujarat verse 9

*“And if two factions among the believers should fight, then make settlement between the two.....”*

While in verse 10

*“The believers are but brothers, so make settlement between your brothers. And fear Allah that you may receive mercy.”*

Furthermore, the historical study of the syariat history is a certainty that should be passed through to reveal the syariat entity. One thing that cannot be opposed is that syariat as the text is the cultural product that cannot be separated from the structure and the socio-culture that form cognition and historical psychology.

The model of the structural and socio-cultural factors are precisely given by the Al Qur'an itself to determine a stipulation that suits the existed society's condition. As what has been discussed before, in *qisas* problem, the first descended verse is still supported by the previous syariat, which in this case is Q.S. Al-Maidah verse 45 by keeping the validity of the stipulation in Taurat. While Q.S. Al Baqarah verse 178 gives the chance of the reconciliation existence and says that it is not just a revenge. Then, in Q.S Al Hujarat verse 9-10, it is clearly and obviously that human is ordered to do the reconciliation or the act of reconciling that is done by having such fair attitude if there is a murder between the devout people. In this verse, it is not discussed the discussion about qisas anymore.

In history, Umar bin Khattab has given the model in understanding the text of Al Qur'an contextually, which is not always the **same** with the tradition in Prophet Muhammad SAW era, in implementing and validating the law, because the condition and the problem that are faced by Umar are very different with the Prophet's era. Umar did not share all of his properties from the war loot as what the

Prophet did<sup>28</sup>, however, all of the properties were included in the treasury fund first, then they would be shared to the people who needed it. They got the prosperities because they joined the war fighting against the enemies. Not only those who joined the war, those who did not join the war like the widows also got the prosperities. The poor people also got the prosperities as the form of creating peace among the citizens. While the rest were given to the governmental administration. A good step of renewal, either in *managerial* as the head of nation, or as the *mujtahid* and *mujaddid* (the law digger and the law reformer).

## Closing

From the hermeneutic approach towards Islamic law stipulation which controls about qisas, which especially is related to the murder crime that can be known that in Islamic law, there is an explicitness in sanction making with the principle of balance between the act and the sanction which has to be accepted by the actor. This becomes one of the forms of legality and proportionality principles. However, the application is very flexible and contextual by prioritizing the reconciliation through the active role of the judge as the representative of the government. If there have happened the reconciliation by giving the forgiveness from the victim or his/her family to the criminal actor, so there is a moral obligation for the criminal actor to give back the victim's or his/her family's kindness, which can be in the form of giving the diat (the change/help). In this case, the principle of take and give cannot be meant that reconciliation is created because of the diat giving, but, it is because there is a forgiveness, where the one who is forgiven has the moral obligation to give back the victim's kindness by doing some kindness, too.

The principle of equality is by giving the same space and position in the atmosphere of kinship and respecting each other between the actor and the victim or each family in doing reconciliation. Reconciliation as the effort of the solution of both sides' conflict becomes the main factor as the form of equality and fraternity principle. If this horizontal solving has reached, then the importance of the society and the government needs to be considered. In this case, the judges have their freedom to do the qisas, or not changing it with other kinds of sanction or punishment. Then, after that, the vertical sanction by doing the obligation to fast for two months in a row or free the slaves (now can be meant as the obligation to give alms in some certain numbers of money to the poor people, or any kinds of form according to the judges) needs to be done. These three models of responsibility is as the form of the implementation of the balance principle which has transcendental characteristic.

The principle of transparency is by giving the chance to the victim who has an active role and the chance to access to all of judiciary levels. The principle of the active judges in the form of reconciliation, creates the benefits or in the effort of avoiding the *madllarat* which becomes the main purpose of the law. In the case of the contradiction between the law certainty (*nash*) and the benefits, the priority is the benefits as the form of judiciary. However, if there happened the contradiction between the benefits and the *madllarat*, the priority is avoiding the *madllarat*. This is as the government's responsibility in the effort of protecting the society from the things that can be dangerous for human beings. These principles can be the source in the law renewal, especially for the criminal law renewal in Indonesia, that still runs the criminal law from the Dutch colonization in the past, which is built based on the law spirit, which is based on the *mechanical jurisprudence* spirit.

---

<sup>28</sup> Pada masa Nabi rampasan perang dibagi habis adalah wajar, karena pada tahap awal hanya yang ikut berperang saja yang mendapatkan hak atas rampasan perang itu. Saat itu belum begitu ada persoalan yang menyangkut adanya janda dan anak-anak yatim yang ditinggal suami/orang tua yang meninggal dunia atau gugur di pertempuran

## References

Abu Al Walid Muhammad bin Ahmad bin Rasyad Al Qurthubi, *Bidayah Al-Mujtahid wa Nihayah Al-Muqtashid*, (Jilid II, Kairo : Ahmad Kamil, 1333 H)

Abu Raihan Muhammad bin Ahmad Al Baruni Al-Khawarizmi, *Al-Atsar Al-Baqiyah an Al-Quruni Al-Khaliyah*, 1876,

Adji Samekto, FX, *Studi Hukum Kritis*,: Kritik terhadap Hukum Modern, Semarang : Badan Penerbit UNDIP, 1995

Agus Hasan Bashori, *Koreksi Total Buku Fikih Lintas Agama, Membongkar Kepalsuan Paham Inklusif-Pluralis*, (Jakarta : Pustaka Al-Kautsar, 2004).

Amin Abdullah, in pengantar buku Khalamaned M. Abou El Fadl, *Atas Nama Tuhan, Dari Fikih Otoriter ke Fikih Otoritatif*, Alih bahasa : Cecep Lukman Yasin, (Jakarta : Serambi, 2004),

As Shan'ani, *Subulussaalam*, Alih bahasa : Abubakar Muhammad, (Surabaya : Al Ikhlas, 1995), halaman 837

Asmaji Aes Muhtar, *Al Muhtamir Tafsir Al Qur'an*, ( Johor Baru Malaysia : Perniagaan Jahabersa, 2004), p. 262.

Fazlur Rahman, *Islam and Modernity, Transformation of an Intellectual Tradition*, (Chicago and London : The University of Chicago Press, 1982), p. 19.

\_\_\_\_\_, *Islam*, (Chicago and London : University of Chicago Press, Second Edition, 1979), p. 37.

Francis Fukuyama, *The Great Disruption : Human Nature and the Reconstruction of Social Order*, (New York The Free Press, 1999), p. 194-211.

Hulsman in Muladi and Barda Nawawi Arief, *Pidana dan Pemidanaan*, (Semarang : Fak Hukum UNISSULA, 1982),

Ibrahim Husein, "Sampai di mana Ijtihad Dapat Berperan", makalah dalam Diskusi Panel, 15<sup>th</sup> Maret 1989, Bandung : IAIN Sunan Gunung Djati

Ibnul Qayyim Muhammad bin Abu Bakar bin Ayyub, *A'lam Al-Muwaqqi'in*, juz 3, (Kairo Mesir : Al-Manar)

Ismail Muhammad Syah, dkk, *Filsafat Hukum Islam*, (Jakarta : Bumi Aksara & Departemen Agama RI, 1999)

Loebby Luqman, *Pemidanaan dan Bagaimana?* Dalam jurnal Hukum dan Pembangunan, (Jakarta : Fak Hukum Universitas Indonesia), 1984

M. Asyirbini Al Khatib, *Iqna*, (Beirut Libanon : Darul Fikr, 1995), p. 496.

Masdar F. Mas'udi, *Agama Keadilan, Risalah Zakat (Pajak) dalam Islam*, (Jakarta : Pustaka Firdaus, 1993)

\_\_\_\_\_, "Mengenal Islam Emansipatoris", Studium General di Universitas Wahid Hasyim Semarang, 21<sup>st</sup> April 2005.

Muhammad Baltaji, *Metodologi Ijtihad Umar bin Al-Khattab*, alih bahasa : Masturi Irham, (Jakarta : Khalifa, first printing, 2005),

Muhammad Husain Haikal, *Umar bin Khattab, Sebuah Telaah Mendalam tentang Pertumbuhan Islam dan Kedaulatannya Masa itu*, Cetakan Ketiga, Alih bahasa : Ali Audah, (Jakarta : Litera Antar Nusa, 2002),

Quthb Ibrahim Muhammad, *Kebijakan Ekonomi Umar bin Khattab*, Jakarta : Pustaka Azzam, 2002, serta Ruway'i Ar-Ruhaily, *Fikih Umar*, (Jakarta : Al-Kautsar), 1994.

Muhammad Yusuf Musa, *Tarikh Al-Fiqh Al-Islami*, Kairo Mesir : Dar Al-Kutub Al-Haditsah, 1958

Nasr Hamid Abu Zaid, *Tekstualitas Al-Qur'an, Kritik terhadap Ulumul Qur'an*, (Yogyakarta : LkiS, 2003),

Notohamidjojo, *Soal Soal Pokok Filsafat Hukum*, (Jakarta : BPK Gunung Mulia, 1975),

Nurkholis Madjid, et. al., *Fiqh Lintas Agama, Membangun Masyarakat Inklusif-Pluralis*, (Jakarta : Yayasan Wakaf Paramadina – The Asia Foundation, 2004),

Roeslan Saleh, *Mengadili sebagai Pergulatan Kemanusiaan*, (Jakarta : Aksara Baru, 1979),

Satjipto Rahardjo, "Mempertahankan Pikiran Holistik dan Watak Hukum Indonesia". Jurnal *Masalah-Masalah Hukum*, Edisi Khusus, Semarang : Fakultas Hukum Undip.

Sobhi Mahmassani, in Yusdani, *Peranan Kepentingan Umum dalam Reaktualisasi Hukum : Kajian Konsep Hukum Islam Najamuddin At Tufi*, (Yogyakarta : UII Press, 2000),

Soetandyo Wignyosoebroto, "Dua Paradigma Klasik dalam Filsafat Hukum dan Filsafat Sosial untuk Menjelaskan dan Memahami Hakikat Ketertiban dalam Kehidupan Bermasyarakat Manusia", (Materi *Pelatihan Penulisan Proposal Thesis dan Disertasi bidang Hukum*, Semarang : Yayasan Dewi Sartika, 2005)

\_\_\_\_\_, *Positivisme dan Doktrin Positivisme dalam Ilmu Hukum, dan Kritik-Kritik terhadap Doktrin ini*", (Materi *Pelatihan Penulisan Proposal Thesis dan Disertasi bidang Hukum*, Semarang: Yayasan Dewi Sartika, 2005),

Sulaiman Rasyid, *Fiqh Islam*, (Jakarta, Attahiriyah, 1976),

Syu'bah Asa, *Dalam Cahaya Al-Qur'an, Tafsir Ayat-ayat Sosial Politik*, (Jakarta : Gramedia Pustaka Utama, 2000)

Taufik Adnan Kamal. 1989, *Islam dan Tantangan Modernitas, Studi atas Pemikiran Hukum Fazlur Rahman*, Bandung : Mizan