

BUILDING RESTORATIVE JUSTICE ON CRIME OF MURDER DEALING WITH ISLAMIC CRIMINAL LAW PERSPECTIVE

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ABSTRACT

This study aims to explain the restorative justice aspect of crime of murder in the perspective of Indonesian Criminal Law and Islamic Criminal Law. The study method used in this study was a normative legal study. Legal study method was conducted based on the mechanism adopted by most types of legal study which emphasized the reference of legislation. The data used were collected from primary data and secondary data as a result of previous studies, which were then analyzed using synthesis analysis. The study results showed that *First*, based on the perspective of Indonesian criminal law, crime of murder and abuse could only be resolved through the court. The parties involved did not have the opportunity to play a role in communicating/ mediating in order to find the best solution for them, thus abolishing the opportunity for alternatives to punishment other than imprisonment/death penalty. In Indonesian criminal law, crime of murder and persecution are the domain of the state. Therefore, the authority to determine the settlement is in the hands of the government. *Secondly*, the perspective of Indonesian criminal law, the victims of crime of murder and persecution systematically will be forgotten parties, so there were many interests of victims/heirs which were not accommodated. Even if there was an opportunity to submit the process demand, it was not easy, it had to be represented by the government (Police and Prosecutors), and the decision was in the hand of the judge (court). Meanwhile in Islamic criminal law, victims/heirs of crime of murder occupy a key position in resolving criminal acts.

Keywords: Islamic Criminal Law, Restorative Justice, Murder and abuse

A. INTRODUCTION

As known before, the Criminal Code used by the Indonesian people is a legacy of Dutch colonialism. The Criminal Code was born from the thoughts of outsiders, so that it is not necessarily in accordance with the background and

development of the Indonesian nation. The discourse on criminal law reform in Indonesia has become increasingly prominent in the midst of the many problems that arise in the legal field. Starting from the problems in the legislation itself, the justice system, interventions to law, inconsistencies in law enforcement, legal instruments, legal culture, and the lack of fulfilment of a sense of justice and benefit for the community.¹

The today's face of law enforcement in Indonesia is still dominated by legal positivism aspect and ignores the aspect of justice and legal benefit for the community. As a result, law enforcement practices in Indonesia are still normative and often override substantive aspects. Law enforcement that is only based on legal positivism aspect will actually eliminate the real legal meaning. Such law enforcement practices often lead to dissatisfaction in the parties to the dispute. The parties feel dissatisfied because they feel that they do not get justice and/or benefit from the existing legal process. The interests of victims, perpetrators, and the community are often forgotten in the judicial process. Whereas, the suffering of the victims should be recoverable through court decisions, the perpetrators can be rehabilitated, and a sense of community justice must be realized.

Settlement of criminal acts in Indonesia, including acts of murder, is still dominated by retributive justice, which assumes that proportional punishment is the best answer for a crime. Retributive justice holds that the state must be more focused and plays a role in punishing criminal acts perpetrators rather than focusing on victims because of several considerations, namely moral responsibility for unlawful behavior, equal freedom under the law, and democratic self-defense.² In the current criminal law system there are several issues that need to be considered, including the position of victims of crime in the criminal justice system, the effectiveness and efficiency of the criminal justice system, and efforts

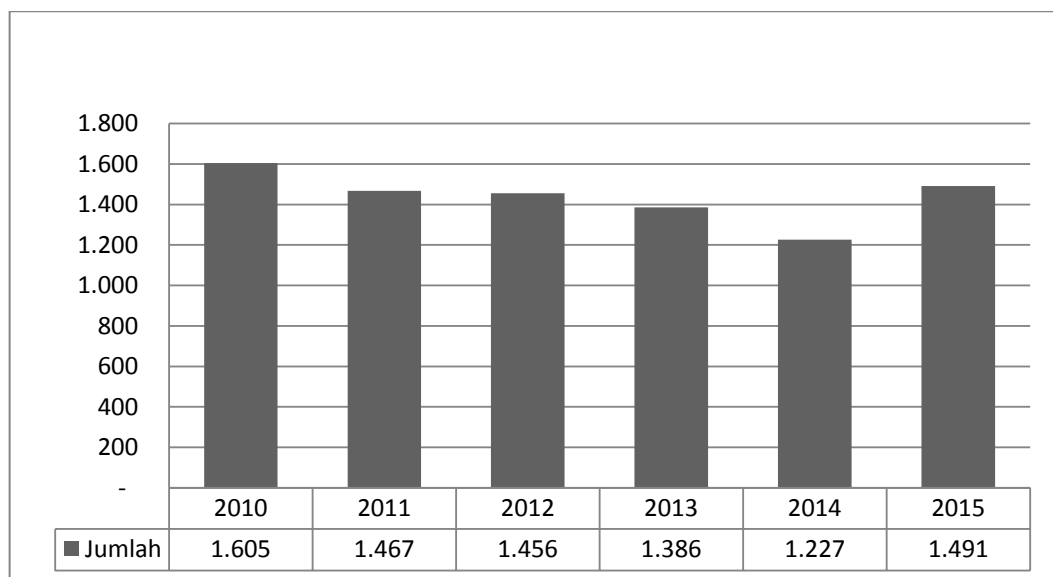
¹ Gayus Lumbuun, et al. (2014). *Problematika Hukum dan Peradilan di Indonesia*, Jakarta: Komisi Yudisial RI

² Dan Markel, (2005). *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, vol. 40, (t.p.: t.p.), 427-435.

to fulfil a sense of justice for all parties.³ This then makes it necessary to consider restorative justice within law enforcement in Indonesia.

One of the restorative justice elaboration space of criminal law based on the perspective of Islamic criminal law is in the crime of murder. The consideration is that there are still a number of problems in the settlement of the criminal acts, namely the fulfilment of the principle of benefit and justice for the parties. In addition, the settlement of crime of murder has not been considered effective in minimizing and or preventing crime of murder. This can be seen from the intensity of the crime of murder which is still one of the most prominent crimes in most provinces in Indonesia (Central Bureau of Statistics, 2015: 60). Data on murders in Indonesia can be seen in the following table (Central Bureau of Statistics, 2016);

Data of Murders in Indonesia



Although the discussion on restorative justice in Indonesia has been done a lot, however in the practice of law enforcement, restorative justice is still a foreign matter. Whereas there are several potential benefits of using restorative justice in

³ Gabbay, Zvi D, (2005). *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, Journal of Dispute Resolution, Volume 2005 | Issue 2, University of Missouri School of Law Scholarship Repository, 351-355

the criminal justice system, namely the lower rate of criminal acts recurrence compared to the system of punishment, higher satisfaction of victims and perpetrators compared to settlement through judicial processes, lower rate of victim's trauma, and long-term economic benefits for the community and government.⁴

B. PROBLEMS

The formulation of the problems in this study is:

1. How is the Settlement for the Crime of murder in Indonesian Criminal Law and Islamic Criminal Law?
2. How is the application of Restorative Justice for the Crime of murder in the perspective of Islamic Criminal Law?

C. DISCUSSION

1. Restorative Justice

Restorative Justice is a problem-solving approach to crime which involves the parties themselves, and the community generally, in an active relationship with statutory agencies.⁵ Restorative justice can also be defined as a process to involve, as much as possible, those who have a stake in a specific offense to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible.⁶

Restorative justice work based on several principles, making room for the personal involvement of those mainly concerned (particularly the perpetrator and the victim, but also their families/ communities), seeing crime problems in their social context, a forward looking/preventative problem-solving orientation, and flexibility of practice.⁷ Moralizing,

⁴ Ian Marder, (2014). *Opportunities to use Restorative Justice in the Moroccan Criminal Justice Process*, Morocco: SFCG, 7-11

⁵ Tony F. Marshall (1999). *Restorative Justice: An Overview*. London, Home Office Research Development & Statistics Directorate, 5.

⁶ Howard Zehr, & Ali Gohar, (2002). *The Little Book of Restorative Justice*. Pennsylvania: Good Book's, 40

⁷ Tony F. Marshall (1999). *Restorative Justice: An Overview*. London, Home Office Research Development & Statistics Directorate, 5.

healing, empowering, and transforming are main principles of restorative justice on solving crime problems. These principles are assembled into programs including victim perpetrator mediation; community and family group conferencing; circle sentencing; peacemaking circles; & reparative probation and community boards and panels,⁸

Restorative justice programs are based on several underlying assumptions; that the response to crime should repair as much as possible the damage suffered by the victim; that the perpetrators should be guided to understand that their behavior is not acceptable and that it has some real consequences for the victim and community; that perpetrators can and should take responsibility for their action; that victims should have an opportunity to express their needs and to participate in determining the best way for the perpetrator to make amelioration, and that the community has a responsibility to contribute to this process.⁹

Restorative justice is a philosophy that looks upon crime as a violation of people and relationships rather than the breaking the laws.¹⁰ Restorative justice assumes that crime relates to private relations between people. It is not a public matter. Thus the state remains aside while victims and perpetrators resolving their disputes.¹¹ The source of crime in the perspective of restorative justice is bad conditions and social relations within society. Prevention of crime depends on the responsibility of the community (including local government and central government in relation to social policy in general) to deal with social conditions that can cause crime. Restorative justice argues that the consequences of a crime cannot be resolved by the parties themselves without any steps that facilitate the parties to be actively involved in the settlement of crime.

⁸ UNODC, (2006). *Handbook on Restorative Justice Programmes*, (New York: United Nation), 14-25

⁹ UNODC, (2006). *Handbook on Restorative Justice Programmes*, (New York: United Nation), 8.

¹⁰ BCACL, (2006). *Restorative Justice and People with Developmental Disabilities*, (Canada: BCACL), 1.

¹¹ Mutaz M. Qafishes, (2012) *Restorative Justice in the Islamic Penal Law: A Contribution to the Global System*, *International Journal of Criminal Justice Sciences*, Vol. 7, 487.

Crime settlement must be carried out within a flexible framework of justice and synergizing between the judiciary, the parties, and the community, in a balanced position and does not dominate each other.¹²

There are several components of work in restorative justice to be implemented. The first component of a restorative process is “truth-telling”. The perpetrator must first acknowledge what he has done and openly disclose everything related. In restorative justice, the perpetrator of the crime can apologize, show remorse, and be responsible for correcting the losses caused by his actions.¹³ Meanwhile, the victims can give statements directly (without being represented by the state) to the panel of judges (victim impact statement). Through this statement, the victim can convey what is actually needed in the trial process aimed at seeking justice.¹⁴ This step of truth-telling must be carried out voluntarily, integrally, and involves all related parties, or what is called an encounter, a meeting. Restorative justice allows perpetrators and victims to meet in the context of a joint search for solutions that are good for all parties.¹⁵

From the concept above, it appears that restorative justice basically aims to provide key decisions to those who feel the most harmful impact of crime, to create more healing process of seeking justice, more transformative, and minimizing the possibility of future violations. The main objective to be achieved from the restorative judicial process is reconciliation between parties, by actively involving related parties in a crime. Even so, restorative justice does not necessarily then merely focus on forgiveness or reconciliation, because it is a choice that can be taken

¹² Tony F. Marshall (1999). *Restorative Justice: An Overview*. London, Home Office Research Development & Statistics Directorate, 6.

¹³ Tom R. Tyler, (2006). *Restorative Justice and Procedural Justice: Dealing with Rule Breaking*, *Journal of Social Issues*, Vol. 62, No. 2, 315.

¹⁴ Kuat Puji Prayitno, (2012). *Restorative Justice Untuk Peradilan Di Indonesia (Perspektif Yuridis Filosofis Dalam Penegakan Hukum in Concreto)*, *Jurnal Dinamika Hukum* Vol. 12 No. 3 September 2012, 418

¹⁵ Greg Mantle (2005), *Restorative Justice and Three Individual Theories of Crime*, *International Journal of Criminology*, 3.

and fully handed over to the litigant parties and there is no compulsion to choose that option.¹⁶

2. Settlement of the Crime of Murder

a. Indonesian Criminal Law

In terminology, murder is defined as the process, action, or way of killing. Murder is an act of taking away someone's life in a way that violates the law, or that is not against the law. The Criminal Code does not define murder explicitly. The Criminal Code only regulates criminal acts of deliberate murder, premeditated murder, killings at one's own request, and murder of infants or babies, as stipulated in the Criminal Code Book II, Chapter XIX, Articles 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349 and 350.

Normatively, the crime of murder cannot be resolved through an out of court system and can only be resolved through an in court system. In Indonesian criminal law, criminal act of murder is included in the category of general offenses, meaning that investigators are still authorized to process the case without the consent of the injured party (victim).¹⁷ The perpetrators of the crime of murder will still be processed through a judicial process even though there are no reports from the victim's party and or peace has occurred between the two parties.

In the Indonesian criminal law system, the parties cannot determine what is the process and outcome of the settlement of this crime, because it is absolutely the authority of the government. The interests of the parties for it have been taken over by the state. Both parties cannot determine what the ideal solution for them is. It is not possible for the perpetrator to communicate with the victim/heir regarding the settlement of a crime. Communication that can be done is only limited to apology and regret from the perpetrator, and

¹⁶ Howard Zehr, & Ali Gohar, (2002). *The Little Book of Restorative Justice*. Pennsylvania: Good Book's, 6

¹⁷ Lamintang, (2011). *Dasar-dasar Untuk Mempelajari Hukum Pidana Yang Berlaku di Indonesia*, Bandung: Citra Aditya Bakti, 217-218

this cannot change the case settlement process even though the victim/heir has forgiven and is willing to make peace with the perpetrator. Apology and regret of the perpetrator will only be a mitigation thing as a consideration of the judge at the trial.¹⁸ The victim cannot determine the resolution as expected. The end of all the process of resolving an act of murder, if the perpetrator is found guilty, is that the perpetrator can be sentenced starting at imprisonment until the death penalty. (Articles 340 & 365 of the Criminal Code).

b. Islamic Criminal Law

Murder is a translation of the word *qatl* which means taking away life.¹⁹ In Islamic law, murder is defined as the action of someone that results in the loss of one's life. Murder is an act in the form of removing or taking away someone's life.²⁰ Murder is also defined as the act of separating the relationship between the spirit and the body by removing the life committed by the perpetrator.²¹

3. Restorative Justice in the settlement of crime of murder in the perspective of Islamic Criminal Law

In Indonesian Criminal Law, the victim/family is still a forgotten party. Victims/heirs often feel dissatisfied with court decisions, which do not accommodate the interests of victims for recovery. In a criminal act of murder, the victim/family is the party that immediately feels the consequences of the crime. Therefore victim/family should get more attention in the legal process. The most basic interests of victims are that the victim wants to feel safe, the victim wants to express their feelings, and the victim

¹⁸ Article 8 paragraph (2) Law no. 48 of 2009 on Judicial Power

¹⁹ Ahmad al Fayumi, (1987). *al Misbah al Munir*, (Beirut: Maktabat Lebanon), 187

²⁰ Qadli Zadih Efendi, (2003). *Takmilat Fath al Qadir*, (Beirut: Dar al Kutub al 'Ilmiyyah), Juz X, 220

²¹ Muhammad 'Amim al Birkati, (2003). *al Ta'rifat al Fiqhiyyah*, (Beirut: Dar al Kutub al 'Ilmiyyat), 170

wants to know what will happen next, and the interests must be ensured to be fulfilled immediately.²²

In Indonesian criminal law, victims cannot take an active role in determining the process of seeking justice for themselves. The interests of victims in positive law are taken over by the State and are considered to have been represented by the police and prosecutors, who in fact always act based on normative law. The police and prosecutors will process criminal cases not on behalf of or to defend the interests of victims of crime, but in the name of legislation and on the pretext of minimizing the potential for personal retaliation (emotionalization) and for proper punishment on the basis of rational consideration (rationalization) for victims and the community as a whole.²³ In the trial process, the victim is in a position as a "victim witness" who will be questioned about the occurrence of a crime, not about what he wants (Article 160 of the Criminal Code).

The State takes over all forms of response to criminal acts to ensure a fair legal process for offenders by putting aside the participation of victims. Suffering experienced by victims is only used as an instrument of verification and punishment to the perpetrators of criminal acts. When the perpetrator has been convicted, the sentence has no effect on the restoration of the rights of the victim. The focus of attention in the justice system is not on the victims, but more on the perpetrators of criminal acts. In court, only the perpetrators are given the opportunity to talk about criminal acts from a personal perspective. Meanwhile, the victims only talk about what they have experienced, not about what they feel or need. Even when the perpetrators are imprisoned, the perpetrators still get attention from the Government in the

²² Office for Victims of Crime (OVC), (2001). *First Response to victims of Crime*, Washington, U.S. Department of Justice Office of Justice Programs, 2-5.

²³ Mudzakkir, (2014). "*Pelatihan Hukum Pidana dan Kriminologi*": Fakultas Hukum UGM & Masyarakat Hukum Pidana dan Kriminologi Indonesia (MAHUPIKI)", Yogyakarta: 23-27 Februari 2014, 6

form of consumption and rehabilitation. Criminal offenders are even considered "justice seekers" in criminal law.²⁴

In Islamic law, the crime of murder does not have to be resolved through the court. The settlement of this crime can be carried out through communication/mediation between the parties. The entry point for determining the punishment for the perpetrator is the presence or absence of forgiveness from the victim/heirs. The victim/family has the right to choose whether or not to forgive the perpetrator of the murder.²⁵ Victims of murder have full rights to determine a fair settlement and can also determine what penalties will be imposed for the perpetrator.²⁶ If the victim's family is not willing to forgive, the offender will be punished by *qiṣāṣ*. *Qiṣāṣ* is a form of punishment imposed on the perpetrator of the crime of murder or abuse, in the form of an act similar to what the perpetrator has done to the victim (death penalty).²⁷ If the victim's family is willing to forgive the perpetrator, then the perpetrator can be free from punishment by paying *diyat*, a sum of money that must be given from the perpetrator to the victim/family of the crime of murder.²⁸

Qiṣāṣ is commonly understood as the first alternative punishment for deliberate murderers.²⁹ However *qiṣāṣ* is not the only form of settlement of murder.³⁰ There are other punishment alternatives, namely *diyat*, or even pure forgiveness, and the choice of sentence can be communicated between the perpetrator and the victim, and the state/judge only acts as a facilitator that guarantees the fulfilment of the rights of the victims/heirs.³¹ That is due to in the crime of murder, the right of the servant (victim) takes precedence over

²⁴ Mudzakkir, (2011). *Kedudukan Korban Tindak Pidana Dalam Sistem Peradilan Pidana Indonesia*, Yogyakarta; Jurnal Ilmu Hukum UII, vol. 14, no.1 Maret, 2011, 31-32

²⁵ Al Tirmidzi, *Jami' al Tirmidzi*, (Riyad: Bait al Afkar al Dauliyyat, tt), 246

²⁶ Sayyid Sabiq, (2004). *Fiqh al Sunnah*, (Kairo, Dar al Hadits), 782

²⁷ Abdul Qadir 'Audah, *Al Tasyri' al Jinaiy Muqoranan bi al Qanun al Wadh'i*, (Beirut: Dar al Katib al 'Arabi, tt). I, 663

²⁸ Sayyid Sabiq, *Fiqh al Sunnat*, (Kairo: Fath al 'Ilam al 'Arabi,tt), Juz II, 351

²⁹ Al Rafi'i, (1997). *Fathu al Aziz Syarhu al Wajiz*, (Beirut: Dar al Kutub ilmiyah), Juz X, 119

³⁰ Al Tirmidzi, *Jami' al Tirmidzi*, (Riyad: Bait al Afkar al Dauliyyat, tt), 246

³¹ Musthofa Khin, et al (1992). *al Fiqhu al Manhajy 'alaa Madhzabi al Imam al Syafi'i*, Jilid 8, Damaskus: Darul Qolam, 16

the right of God.³² Thus, victims of acts of murder occupy a key position in resolving the crime of murder in the perspective of Islamic Law. As the most disadvantaged party, he gets a decent place to ensure that his rights in the context of recovery due to criminal act can be done properly.

There are several similar things in the Islamic criminal law and Restorative Justice, namely communication, protection of victims, empowerment of perpetrators, and peace. Communication between litigant parties that occur in the perspective of Islamic law is relevant to value in restorative justice where all parties involved and concerned with a criminal act can be actively and voluntarily involved in the discussion to resolve criminal acts through active and communicative relations within the corridor of applicable legislation. The pattern of relations can be assembled, among others through penal mediation.

In Islamic criminal law, the victim occupies a key position, which is far more profitable than his position in Indonesian criminal law. This is relevant to restorative justice, where the main orientation is to bring justice by improving the impacts/losses experienced by the parties as much as possible, especially for victims, which are caused by criminal acts. One of the main keys in restoring balance after the occurrence of a crime is the recovery of the victim. Victim protection is absolutely necessary, even in circumstances where the perpetrator cannot be responsible, the state must be present to protect the victim, as the state protects the perpetrator.

In Islamic criminal law, perpetrators of murder may be punished other than the death penalty, for example by paying *diyat*. The concept of empowering these perpetrators has relevance to restorative justice, the perpetrator does not need to go to jail if he apologizes to the victim, shows remorse, and is responsible for recovering the victim's losses. In viewing the perpetrators of criminal acts, Restorative justice orients towards alternative to imprisonment, by looking for alternative sentences other than imprisonment that are more appropriate and beneficial for the perpetrators.

³² Abdul Wahhab Kholaf, (1956). *Ilmu Ushul Fiqh*, Kairo: Syabab al Azhar, 210-211.

The most striking difference between Islamic criminal law and Indonesian criminal law is that it is possible to settle through forgiveness/peace in Islamic criminal law. Perpetrators of murder who have been forgiven can be free from punishment if they have reconciled and been forgiven by the victim. In line with that, restorative justice focuses on resolving conflicts by actively involving the stakeholders. Restorative justice encourages a peaceful response to conflict, encourages tolerance and inclusiveness, builds respect for diversity, and realizes a responsible society. The main objective to be achieved from the forgiveness/peace is reconciliation between litigants.

D. CONCLUSIONS

In Indonesian criminal law, acts of murder can only be resolved through judicial process. The perpetrator was imposed imprisoned until the death penalty. Related parties, including victims, cannot determine the ideal settlement according to their perspective. Meanwhile in Islamic criminal law, acts of murder can be settled through an alternative way other than the court, namely forgiveness. The victim occupies a key position that has the right to determine the form of settlement of an act of murder. It is possible for the perpetrator and the victim to meet together to discuss the best settlement model to bring justice to all parties. Communication, protection of victims, empowerment of actors, and peace, are the values contained in Islamic criminal law, in line with restorative justice. Settlement of acts of murder can be conducted by accommodating the interests of victims, empowering actors, active processes, especially those capable of resolving conflicts are expected to minimize the potential for future acts of murder.

REFERENCES

- Abdul Qadir 'Audah, *Al Tasyri' al Jinaiy Muqoranan bi al Qanun al Wadh'i*, (Beirut: Dar al Katib al 'Arabi, tt). I
- Abdul Wahhab Kholaf, (1956). *Ilmu Ushul Fiqh*, Kairo: Syabab al Azhar
- Ahmad al Fayumi, (1987). *al Misbah al Munir*, (Beirut: Maktabat Lebanon)
- Al Rafi'i, (1997). *Fathu al Aziz Syarhu al Wajiz*, (Beirut: Dar al Kutub ilmiyah),
Juz X
- Al Tirmidzi, *Jami' al Tirmidzi*, (Riyad: Bait al Afkar al Dauliyyat, tt)
- Al Tirmidzi, *Jami' al Tirmidzi*, (Riyad: Bait al Afkar al Dauliyyat, tt)
- Article 8 paragraph (2) Law no. 48 of 2009 on Judicial Power
- BCACL, (2006). *Restorative Justice and People with Developmental Disabilities*, (Canada: BCACL)
- Dan Markel, (2005). *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, vol. 40, (ttp.: t.p.,)
- Gabbay, Zvi D, (2005). *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, Journal of Dispute Resolution, Volume 2005 | Issue 2, University of Missouri School of Law Scholarship Repository
- Gayus Lumbuun, et al. (2014). *Problematika Hukum dan Peradilan di Indonesia*, Jakarta: Komisi Yudisial RI
- Greg Mantle (2005), *Restorative Justice and Three Individual Theories of Crime*, *International Journal of Criminology*
- Howard Zehr, & Ali Gohar, (2002). *The Little Book of Restorative Justice*. Pennsylvania: Good Book's
- Ian Marder, (2014). *Opportunities to use Restorative Justice in the Moroccan Criminal Justice Process*, Marocco: SFCG
- Kuat Puji Prayitno, (2012). *Restorative Justice Untuk Peradilan Di Indonesia (Perspektif Yuridis Filosofis Dalam Penegakan Hukum in Concreto)*, Jurnal Dinamika Hukum Vol. 12 No. 3 September 2012

- Lamintang, (2011). *Dasar-dasar Untuk Mempelajari Hukum Pidana Yang Berlaku di Indonesia*, Bandung: Citra Aditya Bakti
- Mudzakkir, (2011). *Kedudukan Korban Tindak Pidana Dalam Sistem Peradilan Pidana Indonesia*, Yogyakarta; Jurnal Ilmu Hukum UII, vol. 14, no.1
Maret, 2011
- Mudzakkir, (2014). “*Pelatihan Hukum Pidana dan Kriminologi*”: Fakultas Hukum UGM & Masyarakat Hukum Pidana dan Kriminologi Indonesia (MAHUPIKI)”, Yogyakarta: 23-27 Februari 2014
- Muhammad 'Amim al Birkati, (2003). *al Ta'rifat al Fiqhiyyah*, (Beirut: Dar al Kutub al 'Ilmiyyat)
- Musthofa Khin, et al (1992). *al Fiqhu al Manhajy 'alaa Madhzabi al Imam al Syafi'i*, Jilid 8, Damaskus: Darul Qolam
- Mutaz M. Qafishes, (2012) *Restorative Justice in the Islamic Penal Law: A Contribution to the Global System*, *International Journal of Criminal Justice Sciences*, Vol. 7
- Office for Victims of Crime (OVC), (2001). *First Response to victims of Crime*, Washington, U.S. Department of Justice Office of Justice Programs
- Qadli Zadih Efendi, (2003). *Takmilat Fath al Qadir*, (Beirut: Dar al Kutub al 'Ilmiyyah), Juz X
- Sayyid Sabiq, (2004). *Fiqh al Sunnah*, (Kairo, Dar al Hadits)
- Sayyid Sabiq, *Fiqh al Sunnat*, (Kairo: Fath al 'Ilam al 'Arabi,tt), Juz II
- Tom R. Tyler, (2006). *Restorative Justice and Procedural Justice: Dealing with Rule Breaking*, *Journal of Social Issues*, Vol. 62, No. 2
- Tony F. Marshall (1999). *Restorative Justice: An Overview*. London, Home Office Research Development & Statistics Directorate
- UNODC, (2006). *Handbook on Restorative Justice Programmes*, (New York: United Nation)

**PERLINDUNGAN HUKUM ABORSI BAGI KORBAN
PEMERKOSAAN MENURUT UNDANG–UNDANG NOMOR 36
TAHUN 2009 TENTANG KESEHATAN**

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ABSTRAK

Aborsi atau istilah latinnya *Abortus* adalah tindakan pengeluaran hasil konsepsi (pertemuan sel telur dan sel sperma) dengan dikeluarkannya janin (*fetus*) atau embrio sebelum memiliki kemampuan untuk bertahan hidup diluar rahim. Penelitian ini termasuk penelitian normatif. Tujuan dari penelitian ini yaitu untuk mengetahui faktor–faktor yang menjadi penyebab terjadinya aborsi dan bentuk perlindungan aborsi bagi korban pemerkosaan menurut Undang–Undang Nomor 36 Tahun 2009 tentang Kesehatan.

Hasil penelitian menunjukkan : 1) Faktor–faktor yang menjadi penyebab terjadinya aborsi yaitu faktor ekonomi, faktor usia, faktor psikologis, faktor penyakit ibu, faktor herediter. 2) Perlindungan hukum aborsi bagi korban pemerkosaan sudah diatur dalam Pasal 75 ayat (2) Undang–Undang Nomor 36 Tahun 2009 tentang Kesehatan dan sebelum dilakukan tindakan aborsi harus melakukan konseling dengan konselor yang berkompeten dan berwenang, tindakan aborsi ini dapat dilakukan sebelum umur kehamilan 6 minggu dihitung dari hari pertama haid terakhir kecuali ada ke daruratan medis, dilakukan oleh tenaga medis yang profesional dan memiliki sertifikat dari menteri. Perlindungan hukum ini diperkuat juga dalam Pasal 77 dimana Pemerintah wajib memberikan perlindungan bagi perempuan yang melakukan aborsi agar tidak terjadi tindakan aborsi yang tidak bermutu, melanggar norma dan peraturan perundang–undangan.

Kata Kunci : Perlindungan Hukum, Aborsi, Hukum Kesehatan