

Justice in Islamic Criminal Law: Study of the Concept and Meaning of Justice in The Law of *Qisās*

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Abstract: Contextualizing the justice dimension in the law of *qisās* has a humanitarian basis, so it needs to be understood under the context and development of current law. This endeavor is necessary to have a more thorough and contextual understanding of the esoteric meaning of *qisās* legal justice. This article examines the contextualization of the meaning of justice in the construction of *qisās* law to further elaborate on its human values, using a normative approach with philosophical analysis. This study data consisted of primary and secondary data. Based on the study analysis, it can be concluded in three points. First, the meaning of justice in Islamic law is oriented to realizing human benefit based on humanity and religious values. Justice in recompense punishment is found in the guarantee of life from God as the Lawgiver. Second, the implementation of *qisās* punishment always prioritizes respect for the perpetrators' and victims' rights. This is a form of respect for human values. Third, in terms of applying punishment, the construction of *qisās* law allows flexibility by contextualizing the meaning of justice to be adapted and applied in society.

Keywords: *Islamic criminal law; qisās; justice value; humanity value.*

Abstraks: Kontekstualisasi dimensi keadilan dalam hukum *qisās* pada dasarnya memiliki basis kemanusiaan sehingga ia perlu dipahami sesuai dengan konteks dan perkembangan hukum kontemporer. Upaya ini penting dilakukan agar bisa memahami makna esoteris keadilan hukum *qisās* lebih komprehensif dan kontekstual. Artikel ini mengkaji kontekstualisasi makna keadilan dalam konstruksi hukum *qisās* guna mengelaborasi lebih lanjut nilai-nilai kemanusiaan yang ada di dalamnya. Penelitian ini menggunakan pendekatan normatif dengan analisis filosofis. Data-data dalam penelitian ini terdiri atas data primer dan sekunder. Berdasar kajian dan analisis yang telah dilakukan, diperoleh simpulan bahwa: *pertama*, makna keadilan dalam hukum Islam diorientasikan pada terwujudnya kemaslahatan manusia yang berlandaskan nilai kemanusiaan dan ketuhanan. Keadilan dalam hukuman pembalasan yang setimpal terdapat pada jaminan

garansi kehidupan dari Tuhan sebagai Pembuat Hukum. *Kedua*, pelaksanaan hukuman *qisās* selalu mengedepankan prinsip penghormatan atas hak individual pelaku dan juga keluarga korban. Hal ini merupakan wujud penghargaan terhadap nilai kemanusiaan. *Ketiga*, dari sisi penerapan hukumannya, konstruksi hukum *qisās* memungkinkan untuk diterapkan secara fleksibel dengan mengontekstualisasikan makna keadilan untuk bisa diadaptasikan dan diterapkan di masyarakat.

Kata kunci: *hukum Pidana Islam; qisas; nilai keadilan; nilai kemanusiaan.*

Introduction

A previous study revealed that *qisās* law is still considered an alternative law in suppressing the homicide rate. This research emphasizes and focuses on the provisions of *qisās diyat*, and its justice can be an alternative law on premeditated murder.¹ In this context, the meaning of justice needs to be expressed so that the community examines the functionality of *qisās* as a law under the human dimension and the development of society. Therefore, there needs to be an effort to reposition the understanding of justice in the construction of *qisās* law as law enforcement spirit in the community. On the one hand, this effort is important to reveal the meaning of justice contained in *qisās* law so that the objectivity of objectives and the urgency of law enforcement in society can be assessed.

By understanding its meaning comprehensively, it will discover advantages in qisas law. Karim et al. concluded that qisas law prioritizes the principle of justice,² while Sari concludes that *qisās* is a value of restorative justice.³ On the other hand, Zawawi & Hussin found that *qisās* law prioritizes the human dimension with evidence

¹ Sudarti, "Hukum Qishash Diyat: Sebuah Alternatif Hukuman Bagi Pelaku Kejahatan Pembunuhan Berencana Di Indonesia," *Yudisia: Jurnal Pemikiran Hukum dan Hukum Islam* 12 (2021): 35–50.

² Ridoan Karim, "A Comparative Analysis of Retributive Justice and the Law of Qisas," *Journal of Nusantara Studies* 2, no. 2 (2017): 169–177.

³ Devi Nilam Sari, "Implementasi Hukuman Qisas Sebagai Tujuan Hukum Dalam Al-Qur'an," *Muslim Heritage: Jurnal Dialog Islam dengan Realitas* 5, no. 2 (2020): 263–286.

of forgiveness as a legal solution.⁴ The same thing was found in Wahyuningsih & Hafidz's finding, that *qisās* is more familiar with peace and forgiveness than positive law (KUHP).⁵

This finding is supported by Hasyim, who states that positive law contains inconsistencies in its provisions.⁶ The various previous studies have not looked at the reality of the meaning of justice in *qisās* law. Although on the one hand, there is Absar's research that discusses justice in *diyat*⁷ and Zainuddin's research that discusses justice in *qisās* from the point of view of purpose.⁸

However, a study of this meaning needs to be carried out to explore and contextualize the value of justice in *qisās* law from its human aspect. This study is important because there is no separation between law and religion in Islam.⁹ In reality, Qanun Jinayat has limitations in realizing the benefit of women.¹⁰ Whereas theoretically-normatively, *qisās* law contains the values of justice to realize the benefit of society. Fahmi's research explains that in *qisās* law, there is a humanity aspect.¹¹

The contextualization of the justice dimension in *qisās* law needs to be studied more deeply to reveal its humanity basis. The

⁴ Majdah Zawawi & Nasimah Hussin, "Forgiving the Enemy: A Comparative Analysis of the Concept of Forgiveness in Shari'ah and Malaysian Law," *Pertanika Journal of Social Science & Humanities* 23 (2015): 43–54.

⁵ Sri Endah Wahyuningsih & Jaweda Hafidz, "The Development of the Indonesian Criminal Code Derived from the Yudical Pardon Value in Islamic Law," *Addin: Media Dialektika Ilmu Islam* 11, no. 2 (2017): 295–320.

⁶ A. Dardiri Hasyim, "Extra-Judicial Dispute Resolution and the Realization of Justice in the Indonesia Legal System," *Ay-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum* 55, no. 1 (2021): 1–24.

⁷ Absar Aftab Absar, "Restorative Justice in Islam with Special Reference to the Concept of Diyya," *Journal of Victimology and Victim Justice* 3, no. 1 (2020): 1–19.

⁸ Zainuddin, "Restorative Justice Concept on Jarimah Qisas in Islamic Criminal Law," *Jurnal Dinamika Hukum* 17, no. 3 (n.d.): 335–341.

⁹ Abdurrahman Raden Aji Haqqi, "Religiosity in Criminal Law: Islamic Perspective," *Diponegoro Law Review* 4, no. 1 (n.d.): 1–20.

¹⁰ Yogi Febriandi and dkk, "Seeking Justice Through Qanun Jinayat: The Narratives of Female Victims of Sexual Violence in Aceh, Indonesia," *Qudus International Journal of Islamic Studies* 9, no. 1 (n.d.): 103–140.

¹¹ Ach Fuad Fahmi and dkk, "Aspek Kemanusiaan Dalam Hukuman Qisas", *Ijtihad: Jurnal Hukum Dan Ekonomi Islam*, n.d.

value of justice embodied in *qisās* law needs to be understood contextually based on contemporary legal developments. This effort is intended to understand more comprehensively the esoteric meaning of *qisās* legal justice, so as not to appear perspectives like Okon which require reform of Islamic criminal jurisprudence to be in accordance with international criminal law jurisprudence.¹² Therefore, it is necessary to analyze the value of *qisās* legal justice, which is more contextual without sociological boundaries.

From the scriptural aspect, there are about thirty verses of the Qur'an that talk about criminology (criminal law).¹³ Only a few verses talk about *qisās* law in detail from the criminology verse. On the other hand, there is an assumption that the verses containing the criminal law legalize the use of violence.¹⁴ This assumption arises because the criminological verses are not comprehensively seen regarding the meaning of justice's value. A shallow understanding of the scriptural revelations resulted in the criminalization of religion. Misunderstanding of religious texts actually breeds arrogance and radicalism.¹⁵ Following this perspective, the contextualization of the meaning of justice in *qisās* law is important to explore the human values contained in *qisās* law.

Taking these points, this research investigates the contextualization of the meaning of justice in *qisās* law, by revealing the realities contained in it, such as humanity values, protection of the rights of life, or the value of goodness for perpetrators of crimes. The aim is to provide a critical description concerning the construction of the meaning of justice as a form of Islamic grace that upholds the rights of human life. In this study, *qisās* law is understood as a medium of education/teaching (*al-iṣlāḥ wa al-taḥzīb*) and for preventing crime (*al-radd wa al-ẓaḥr*). In addition, the understanding of

¹² Etim E Okon, "Hudud Punishments in Islamic Criminal Law"," *European Scientific Journal* 10, no. 14 (n.d.): 227–238.

¹³ Zainuddin Ali, *Hukum Pidana Islam* (Jakarta: Sinar Grafika, 2007).

¹⁴ Donald Holbrook, "Using the Qur'an to Justify Terrorist Violence: Analysing Selective Application of the Qur'an in English-Language Militant Islamist Discourse"," *Perspectives on Terrorism* 4, no. 3 (n.d.): 15–28.

¹⁵ Jilani Meftah, "Roots of Sadistic Terrorism Crimes: Is It Islam or Arab Culture?"," *Aggression and Violent Behavior* 42 (n.d.): 52–60.

qisās law is explained from the latent-meaning aspect and not merely the symbolic-artificial aspect. Therefore, the analysis in this study uses a qualitative approach. Data was collected using documentation techniques, while the analysis used content analysis.

The Concept of Justice in Islamic Law

The term 'justice' is from Arabic word, *al-'adl*, often connoted with the words *al-qist* and *al-mizān*.¹⁶ These three words in Arabic also contain the meaning of justice or fair.¹⁷ By differentiation, the word *al-'adl* is closer in meaning to *al-sawiyah*, which means equal justice, while the word *al-qist* has the meaning of *al-iṣṭiqamah*, in the sense of justice by doing straight.¹⁸ The word *al-mizān* comes from the root word *waẓn*, which means scales or the way to weigh, so that the appropriate measure and results are found. Thus, the nature of justice is defined as equal, non-discriminatory, righteous actions, and as a process to get an appropriate and appropriate or proportional measure.

Sociologically speaking, fair behavior is defined as the act of putting something in its place, not being unjust, paying attention to others rights, and not engaging contrary to humanity values. Appropriate action is closely related to the dimensions of equality, straightness, impartiality, not doing injustice and contains prophetic values in the form of humanity and spirituality. According to Muktaẓilah, justice is the primary teaching in Islam besides monotheism. Therefore, the meaning of justice needs to regard the transcendental basis that is absolute for human benefit.¹⁹

The meaning of justice in Islamic law can be understood from these three words. The word '*adl*' in the Qur'an is mentioned 29

¹⁶ M.Quraish Shihab, *Wawasan Al-Qur'an: Tafsir Tematik Atas Pelbagai Persoalan Umat* (Bandung: Mizan, n.d.).

¹⁷ Lois Ma'luf, *Al-Munjid Fi Al-Lughah* (Bairut: Dār al-Masyriq, n.d.).

¹⁸ Al-Ragib Al-Asfahani, *Mufradāt Al-Fāṣḥ Al-Qur'ān* (Damaskūs: Dār al-Qalam, 1992).

¹⁹ Mukhlisin and Sarip, *Keadilan Dan Kepastian Hukum: Menyoal Konsep Keadilan Hukum Hans Kelsen Perspektif "Al-Adl" Dalam Al-Qur'an*, vol. 11 (Media Keadilan: Jurnal Ilmu Hukum, n.d.).

times,²⁰ *al-qist* is repeated 25 times,²¹ and *al-mīzān* is mentioned several times although not all connote a justice understanding. The verses of the Qur'an that explain the meaning of justice can be categorized in several definitions. First, justice as stated in Q.S al-Nisa verse 58, the commentators explain the meaning of *al-'adl* with the definition of "being in the middle and equating" (*al-inḥāf wa al-wasiyah*), being in the middle equating. The basis of equality is the human nature that everyone owns, so that every human being has the similar right to be treated equally and respected.²²

These verses demand fairness in conveying a mandate to those who are entitled. A judge needs to place all disputing parties in an equal and equal position in the legal context. For example, when positioning the seats of the disputing parties, mentioning names, cheerful faces, carefully listening and thinking about their words, and decision-making.²³ However, there is no obligation to equate the two disputing parties in one court decision. Equality of treatment and appreciation is expected to be realized in every legal person, because it is a natural right before the law. Without equal treatment, it will impact the legal justice record that is applied. These patterns are based on the value of justice, which is defined as 'equality' before the law.

Second is the word of justice in the sense of balance in the QS. al-Infitar verses 6-7. This verse informs about fair values in the form of understanding balance in creating the human body.²⁴ It means that a framework without balance will be challenging to achieve. Based on this analogy, Quraish Shihab stated that balance could occur if the parts in the body, group, society, and others run on the same goal with certain conditions, functions, and levels fulfilled by

²⁰ Muhammad Fu'ad 'Abd Al-Baqi, *Al-Mu'jam Al-Mufahras Li Alfāz Al-Qur'an Al-Karīm* (Bairut: Dar al-Fikr, 1992).

²¹ Ibid., 691–692.

²² Abd Muin Salim, *Fiqh Siyasah: Konsepsi Kekuasaan Politik Dalam Al-Qur'an* (Jakarta: Rajawali Pers, n.d.).

²³ Shihab, *Wawasan Al-Qur'an: Tafsir Tematik Atas Pelbagai Persoalan Umat*, 152.

²⁴ M.Dawam Rahardjo, *Ensiklopedia Al-Qur'an: Tafsir Sosial Berdasarkan Konsep-Konsep Kunci* (Jakarta: Paramadina, n.d.), 373.

each part.²⁵ The basis of the balance does not require equations of content, function, and requirements for all related aspects. However, it depends on the size and functionality of the role of each part.

Balance in Islamic law can finally be understood as an attitude of balancing the rights and obligations of every legal person. The implication formulation is that every human being will get something as they strive for, and they must be held accountable for these actions. This construction will move society towards the desired goals together while still being based on justice. Thus, the law can be enforced based on the basic message of Islam for the benefit of universal humanity,²⁶ between individual and communal benefit or monodualistic balance.²⁷

Third, the words fair mean respect for individual rights and granting rights to their owners, as stated in the QS. al-Nahl verse 90. This verse states a form of the prohibition against evil acts because it is an act of violating the law. Including resulting in individual and communal losses, so that it is a form of injustice or injustice.²⁸ The application of noble religious values needs to be prioritized in implementing Islamic law.²⁹

The meaning of justice in the context of Islamic law is in the form of respect for each individual's rights. The results of this judicial process are more a consequence of actions and the protection of rights. Islam respects individual preferences and rights while still adjusting the level and function. In this context, Islam encourages the emergence of respect for human rights in law that refers to the values of justice. When it becomes the basis for implementing human rights,

²⁵ Shihab, *Wawasan Al-Qur'an: Tafsir Tematik Atas Pelbagai Persoalan Umat*, 153–154.

²⁶ Damanhuri Fattah, "Implementasi Nilai Keadilan Dalam Kajian Hukum Islam", *al-Manahij: Jurnal Kajian Hukum Islam* 5, no. 2 (n.d.): 135–152.

²⁷ Bambang Ali Kusumo, "Kesimbangan Monodualistik Antara Kepentingan Masyarakat Dan Individu Dalam Pembaharuan Hukum Pidana Indonesia", *Jurnal Hukum* 31, no. 1 (n.d.): 1685–1712.

²⁸ Rahardjo, *Ensiklopedia Al-Qur'an: Tafsir Sosial Berdasarkan Konsep-Konsep Kunci*, 387.

²⁹ M Ikhwani and Anton Jamal, "Diskursus Hukum Islam Dalam Konteks Keindonesiaan: Memahami Kembali Nilai-Nilai Substantif Agama", *al-Manahij: Jurnal Kajian Hukum Islam* 15, no. 1 (n.d.): 173–186.

Islamic teachings will create a life full of equality of values, freedom, and justice.³⁰

Fourth, the word justice is attributed to the nature of Allah, namely the form of divine grace that is obtained by creatures as long as achieved. This concept of justice is a form of grace and goodness from Allah.³¹ Explicitly the verse underlining justice is contained in the QS. Fushilat verse 46, where this justice is in the form of giving rights to every creature to reach His grace. On the other hand, God's justice also creates a balance between rights and obligations so that every *taklif* given to humans is for their benefit. In the context of Islamic law, the meaning of justice can be interpreted that every implementer and enforcer of law needs to build transcendental awareness. It will be a spirit that fosters the values of justice for universal humanity as a mandate from God taught by Islam. When they make a work contract, what they do is not only an agreement with their superiors or other humans but also an actual work contract with the Most Just of Judges. Law enforcement can be strictly enforced while still adhering to the principle of humanity and can achieve benefits through restorative and retributive justice.

Based on the four meanings of justice, it is fully illustrated that justice in Islamic law has an integrative value content. Instead, it orients to realize the benefit of humans as described in the Islamic legal order. This orientation appears not merely as a consequence of law enforcement but as a transcendental ethical value that needs realizing. Therefore, the meaning of justice in Islamic law is based on human and divine values.

***Qisās* Law in the Framework of Justice**

Qisās law is one type of Islamic criminal law different from *hudud* law. The difference lies in the violation of rights.³² *Qisās* is a form of sanction for violating the rights of Allah and servants, while

³⁰ Ngainun Na'im, "Islam Dan HAM: Perdebatan Mencari Titik Temu," *Ijtihad: Jurnal Wacana Islam dan Kemanusiaan* 15, no. 1 (2015): 83–102.

³¹ Shihab, *Wawasan Al-Qur'an: Tafsir Tematik Atas Pelbagai Persoalan Umat*, 116.

³² Reni Surya, *Klasifikasi Tindak Pidana Hudud Dan Saksinya Dalam Perspektif Hukum Islam*, vol. 2 (Samarah: Jurnal Hukum Keluarga dan Hukum Islam, 2018).

the *ḥudūd* that is violated is the right of Allah.³³ As a public rule, *qisās* is the backbone of the realization of the peace community, and its legal orientation is indeed to realize advantage at the level of social life.³⁴ In Mubarak's findings, *qisās* complexity five legal theories such as penology.³⁵ *Qisās* emphasizes social order that normative basis is on the value of justice. If judging from the language aspect, the word *qisās* means *al-musawa wa al-ta'addul*, equal and balanced, which actually has the same meaning as "*adl*". It means, *qisās* is a punishment that is the same (balanced) as the crime committed by the perpetrator of the crime. Therefore, the punishment that the perpetrator will receive is the same as the crime committed. However, another form of punishment in *qisās* is *diyat*, or the payment of a fine and forgiveness from the victim and its family victim.

The purpose of establishing the *qisās* law is to provide a deterrent effect on the perpetrators and the community so that they do not repeat the crime of murder. In Islamic law, there are three kinds of murder crimes: first, intentional murder (*qatl al-amd*), which is a crime of killing another person's life accompanied by the perpetrator's intention with the usual tools used. The primary law is *qisas*, or if the family of the murdered is forgiven, it is subject to sanctions such as *diyat*, *ta'zīr*, and fasting.³⁶ Second, semi-intentional murder (*syibh al-amd*), namely the crime of killing another person's life that is not accompanied by the intention to kill, and using tools that are not commonly used to commit murder. The primary law is *diyat* and *kaffarat*, and the substitute law is fasting and *ta'zīr*.³⁷ Third, unintentional killing (*qatl al-khata'*) is the act of taking the life of another person who is not wanted and is also not accompanied by the

³³ See Nurul Irfan and Masyrofah, *Fiqih Jinayah* (Jakarta: Amzah, 2013) especially Chapter 1 (one).

³⁴ Kurniawan Bagus Samudro, "Juridical Review of the Death Penalty in Indonesia in Islamic Law Perspective", *Law Development Journal* 2, no. 1 (2020): 37–50.

³⁵ Nafi Mubarak, "Pidana Qisas Dalam Perspektif Penologi", *al-Qanun: Jurnal Pemikiran dan Pembaharuan Hukum Islam* 20, no. 2 (2017): 473–487.

³⁶ A Djazuli, *Fikih Jinayah* (Jakarta: Rajawali Pers, 2000), 144.

³⁷ Ibid., 145–146.

perpetrator's intention. The punishment is the obligation to free the enslaved person and the *diyat*.³⁸

Also, the jurists (*fuqahā*) limit the scope of *qisas* law only to crimes related to the soul (murder) and body (persecution), or termed *al-nafs wa al-jarāh* (life and wound). In this context, *qisas* law contains the value of restorative justice with a civil settlement.³⁹ *Qisās* law significantly affects the social order, especially those who view *qisas* from a religious point of view.

The text rules regarding *qisas* law in the Qur'an, including QS. al-Baqarah verses 178-179 and 194; QS. al-Nisa verse 92; QS. al-Maidah verses 32 and 45; and QS. al-Isra verse 33. The verses that specifically command the implementation of the *qisās* law relating to murder are QS. al-Baqarah verse 178. This order is a form of obligation that must be carried out, especially for the perpetrators of the crime of intentional murder. However, the authorities must carry out the punishment based on the principles of justice and benefit. The purpose of *qisas* guarantees the continuity of life for humans,⁴⁰ as stated in the QS. al-Baqarah verse 179 and also in QS. al-Isra verse 33.

In this context, the word 'life' is interpreted as an effort to give the killer a chance to live. Moreover, in *qisās* there is an alternative punishment, namely *diyat*, if the victim's family does not demand *qisās*, and the victim's family provides forgiveness. On the other hand, at a macro level, such as safety, far from fear of losing their lives and families of victims who have been left behind employing *diyat* payments. The provisions of *qisās* and *diyat* are textually contained in the QS. al-Nisa verse 92 and QS. al-Maidah verse 45. The concept of *diyat* has criminal objectives in Islam, namely: retribution (retaliation), deterrence (prevention), and reformation (restoration)⁴¹ However, these aims promote the active

³⁸ M.Quraish Shihab, *Tafsir Al-Misbah: Pesan, Kesan Dan Keserasian Al-Qur'an, Jilid II* (Jakarta: Lentera Hati, 2002), 550.

³⁹ Sari, "Implementasi Hukuman Qisas Sebagai Tujuan Hukum Dalam Al-Qur'an."

⁴⁰ Chuzaimah Batubara, "Qishash: Hukuman Mati Dalam Perspektif Al-Qur'an," *Miqot: Jurnal Ilmu-Ilmu Keislaman* 34, no. 2 (2010): 207–228.

⁴¹ Topo Santoso, *Menggagas Hukum Pidana Islam: Penerapan Syariat Islam Dalam Konteks Modernitas* (Bandung: asy-Syaamil Press, n.d.).

engagement of the state and are directed at the murderers. It is as if the perpetrator, the victim, the perpetrator's and the victim's family, and the community do not have the authority to resolve the murder. Even though *qisās* in its implementation involves all parties and the victim's family has the right to determine the punishment for the perpetrator, whether *qisās*, *diyat*, or forgiving, oriented towards conflict reconciliation.

Psychologically, *qisās* law contains the purpose of *al-tahzīb*, educating, in preventive, repressive, and rehabilitative power.⁴² The three goals basically arise from the spirit of justice in *qisās* law. Retribution or retaliation in kind arises due to the punishment of killing or ill-treatment that is carried out intentionally. Suppose this is interpreted only to retaliate against criminals who have taken their lives or injure others. This criminal act is very contrary to the purpose of Islamic law (*al-maqāsid al-syarī'ah*), far from the spirit of Islamic law, which is to give grace to human social life. Strong deterrence or prevention from *qisas* law is oriented to deciding on the criminal act so that it does not happen again. The inference is that it is difficult for individuals to lose their lives, which helps foster a sense of collective security.

Qisās also has a goal of reform or improvement through forgiveness from the victim's family. As a result, improving relations will be more conducive, especially the lives of the perpetrators of the forgiven crime. The victim's family is secured due to the *diyat* payment made by the criminal and his family. This relaxation pattern actually encourages the improvement of legal legality in the community not to kill and persecute other people. On the one hand, this reform can be realized by giving lessons to criminals so that they are deterrents and transform themselves from evil to good. In this context, the determination of punishment in *qisas* depends on the type of murder. Thus, *qisās* can be realized if the murder is committed with explicit intents and uses the methods (tools) that the perpetrator has planned. Based on this construction, the community can be protected from acts of murder based on the principle of

⁴² Khusnul Khotimah, "Hukuman Dan Tujuannya Dalam Perspektif Hukum Islam", *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi dan Keagamaan* 1, no. 2 (n.d.): 1–9.

prevention based on public awareness of the implications that arise from these acts.

Essentially, determining the *qisās* punishment is not motivated by the victim's family's revenge, anger, and lust. *Qisās* law will be realized if the victim's family does not forgive the perpetrator, so the judge as a mediator can impose the sentence. On the other hand, *qisās* punishment opens up space for learning or education for the community to improve themselves now and in the future. Therefore, the theological facts of the criminological verses do not merely contain firm threats about criminal acts. However, the verse aims to preserve a life based on social justice. In this context, *qisās* becomes the value of justice that guarantees justice.⁴³

Not all crimes against the psychological and physical body lead to *qisās* punishment, but only intentional murder and torture are subject to *qisās*. Meanwhile, other crimes are only sentenced to *diyat* according to the provisions of Islamic criminal law. *Qisās* punishment is the maximum punishment that does not have to be imposed for every incident of murder and persecution.⁴⁴ However, the firmness of the *qisās* law has a noble goal for the benefit of society, namely the survival of human life. Appropriate retaliation, as the meaning of justice, a guarantee of life from God, is placed as the last choice in its implementation. Although the punishment is not an essential goal of *qisas*, its presence ensures the continuity of human life. *Qisās* is essentially enforced so that there is a guarantee of human dignity, namely the continuity of human life itself.⁴⁵

Qisās law is part of criminal law that adheres to the principle of justice, which underlies the examination process and the targets to be achieved from the judicial process.⁴⁶ Justice is the central pillar of

⁴³ Sudarti, "Hukum Qishash Diyat: Sebuah Alternatif Hukuman Bagi Pelaku Kejahatan Pembunuhan Berencana Di Indonesia."

⁴⁴ Muhammad Syahrur, *Prinsip Dan Dasar Hermeneutika Hukum Islam Kontemporer*, trans. Sahiron Syamsuddin Trans (Yogyakarta: eLSAQ Press, 2007), 224.

⁴⁵ Ali Sodiqin, "Restorative Justice Dalam Tindak Pidana Pembunuhan: Perspektif Hukum Pidana Indonesia Dan Hukum Pidana Islam", *Asy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum* 49, no. 1 (2015): 63–100.

⁴⁶ Ali, *Hukum Pidana Islam*, 3.

qisās law and, through the concept of *diyat*, unseparated from the value of justice. In this context, the value of restorative justice is superior to retributive justice.⁴⁷ Restorative justice is the process of resolving criminal acts involving the perpetrator and the victim's family, even the community represented by the judge, for the mediation and execution process so that there is conflict reconciliation. This restorative justice stands based on the perspective of reconciliation or restoration. Retributive justice is the process of resolving criminal acts committed by judges against the perpetrator – without involving the victim's family – with the orientation of imposing sanctions. This justice is focused on retaliation, with the perpetrator receiving punishment as a kind of retribution. *Qisās* itself has the primary goal of resolving conflicts, which are criminal acts, in society and not only protecting individual interests based on the principle of justice.

As a law based on the paradigm of restorative justice, *qisās* law is oriented to improving society in general and personally in particular through reconciliation, especially between the perpetrator and the victim's family based on the principle of justice. It means, justice is the main focus of law enforcement to realize the benefit of society. Fair, equal and balanced are clearly illustrated in *qisās* law, so its implementation prioritizes respect for individual rights. Respect in this context is the assurance of the soul and the appreciation of human values. In *qisās*, there are also transcendental rights that law enforcers or criminals must fulfil. These transcendental rights, namely the rights of God, can be aligned with the rights of society.⁴⁸ If all the conditions for the imposition of *qisās* law have been met, then one thing that must be seen from the perpetrator's side is if the perpetrator is convincingly proven to have committed murder (killed lives) or deliberately abused other people.⁴⁹

⁴⁷ Absar, "Restorative Justice in Islam with Special Reference to the Concept of *Diyya*."

⁴⁸ Zikri Darussamin, "Qisas Dalam Islam Dan Relevansinya Dengan Masa Kini", *Ajy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum* 48, no. 1 (n.d.): 99–130.

⁴⁹ Sodikin, "Restorative Justice Dalam Tindak Pidana Pembunuhan: Perspektif Hukum Pidana Indonesia Dan Hukum Pidana Islam".

Contextualization of the Meaning of Justice in Qisas Law

At the time of the prophet Muhammad and his companions, the law of *qisās* was rarely implemented because it was not immediately enforced unless it was proven conclusively. In fact, only a few cases ended in *qisās* law. *Qisās* law will fail if there is doubt (*syubhat*) in the proof. In Islamic criminal law, the principle of "punishment must be avoided in the presence of doubtful matters."⁵⁰ This principle is supported by the hadith of the prophet, who also stated: "abandon/avoid punishment (*hudūd*) because of doubts (doubtful things)",⁵¹ or if the victim's family forgives him.⁵²

Qisās punishment also cannot be imposed if there is forgiveness from the victim's family. *Qisās* law wants to create peace framed by justice with a victim-oriented orientation. The construction of restorative justice, which is firmly attached to the *qisās* law actually fosters humanity. Therefore, the concept of restorative justice needs to be strengthened in the Indonesian criminal justice system.⁵³ The values of justice, humanity, and benefit are integrated into the process and objectives of *qisās* law.

Prudence is highly prioritized when *qisās* punishment is imposed. Law enforcers as mediators as well as executors only have two legal certainty, namely: upholding justice legally, or establishing laws based on mistakes. All *qisās* legal certainty cannot be separated from the "decision of the victim's family", including the perpetrator will be sentenced to *diyat*, *ta'zīr* or pardon. Things to consider are the act of murder such as the type of murder, the subject of the murder, or the motive; so that the judge can mediate the conflict. When there is a mistake in implementing *qisās* law, it will be fatal and persecute the convict (perpetrator), the convict's family (perpetrator), or even

⁵⁰ Jalaluddin Abdurrahman bin Abi Bakr al-Suyuti, *Al-Ayyub Wa Al-Nazā'ir*, (Mesir: Maktabah Nur Asiyah, n.d.).

⁵¹ Abu Yusuf and al-Nu'mānīyah, *Al-Rad 'Ala Syi'Ar Al-Ahḡā'i*, Mesir: *Lajnah Ihyā'*, 1357 H.

⁵² Abi Abdillah Muhammad Ibn Yazid al-Qazwiniy, *Sunan Ibn Majah*, *Juz III* (Beirūt: Dār al-Ma'rīfah, 2000).

⁵³ Ahmad Agus Ramdlany, "Restorative Justice in Islamic Legal Philosophy Perspective", *International Journal of Business, Economics and Law* 24, no. 2 (2021): 109–117.

other people. In one of the proposed rules it is emphasized: "A leader/judge is better to be wrong in forgiving, than wrong in punishing (because of a doubt)".⁵⁴ Punishment errors can occur due to carelessness and negligence during the legal process.

The importance of prudence when imposing a sentence—in *qisās* law and other criminal law rules—can generally foster public trust. One of them is the enforcement of *qisās* law according to the basic principles stipulated in Islamic doctrine and/or general provisions that apply. Among them is implementing "in the same way" (*mišlah* or *mumāsalah*)⁵⁵ is a form of justice or the appropriateness of *diyat* punishment⁵⁶ as a form of humanization. *Qisās* law will work effectively if its implementation is under human and divine values. One of the attitudes that shows the elaboration of these values is prudence. Through this attitude, it is hoped that justice can be upheld and the legitimacy of wrongdoing acts in the name of Islamic law can be reduced.

Currently, Islamic countries such as Saudi Arabia or Qatar apply *qisās* laws adapted to the conditions of society and the development of science, crime and technology. A principle of elasticity makes *qisās* law able to blend with certain conditions and situations. The execution that is handed down is not applied textually, namely: killed as when the perpetrator kills or tortures. However, other methods can be used, such as hanging, shooting dead, lethal injection, or beheaded. In Islamic countries such as Brunei Darussalam, *ḥudūd* punishment is applied to crimes,⁵⁷ while in Afghanistan, it is carried out through beheading.⁵⁸ In Saudi Arabia, executions of murderers and drug dealers are carried out by

⁵⁴ Fath Ridwan, *Min Falsafah Al-Tasyri' Al-Islami* (Kairo: Dār al-Kitāb al-Lubnan, 1975).

⁵⁵ Sudarti, "Hukum Qishash Diyat: Sebuah Alternatif Hukuman Bagi Pelaku Kejahatan Pembunuhan Berencana Di Indonesia."

⁵⁶ Al-Jurjawi, *Ḥikmah Al-Tasyri' Wa Al-Falsafatuhu* (Bairut: Dar al-Fikr, n.d.).

⁵⁷ Aharis Mabur, et al, "Konsepsi Pidana Hudud Dalam Qanun Jinayat Aceh-Indonesia Dan Brunei Darussalam," *Kanun: Jurnal Ilmu Hukum* 19, no. 1 (2017): 19–44.

⁵⁸ <https://law.utexas.edu/humanrights/projects/afghanistans-new-penal-code-whether-or-not-to-codify-hudud-and-qisas/>

beheading.⁵⁹ Likewise, in Yemen, executing by beheading the perpetrators of murder or even against same-sex sexual offenders.⁶⁰ With *qisās*, the condition of the community can be more guaranteed in the maintenance of their own rights,⁶¹ although the execution uses a method that is in accordance with the conditions of society and also technological advances.

To date, the Dutch version of criminal law in Indonesia is still based on rationality and customary law. The death penalty is enforced in Indonesia, especially for brutal or sadistic murders (such as multiple murders) and premeditated. This construction is legally based on the Criminal Code (KUHP) in articles 338 to 350. The only one that applies to Islamic law is the Province of Nanggroe Aceh Darussalam (NAD), as stated in Aceh Qanun No. 6 of 2014 concerning Jinayat Law. Although it only contains *ḥudūd* and *ta'zīr* laws, the province can apply *qisās* law.⁶² Other provinces understand and implement Islamic law substantially in various forms of regulation such as the South Sumatra Provincial Regulation No. 13 of 2002 concerning the Eradication of Immorality; Bandung City through OSH Regulation No. 3 of 2005, revised into Local Regulation No. 11 of 2010 concerning the prohibition of immoral acts; or Bone Regency through the Regent's Circular No. 44/1857/VIII concerning Prohibition in the Month of Ramadan.

The majority of provinces in Indonesia are still dialectical Islamic law with the customs and traditions of each region. As Nahdlatul Ulama' (NU), religious organizations in Indonesia also carry out this dialectic by giving birth to three typologies: thoughts that reject absolutism-exclusivism; respect for religious plurality; and

⁵⁹ Elizabeth Peiffer, "The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria," *William & Mary Journal of Race, Gender, and Social Justice* 11, no. 5 (2005): 507–539.

⁶⁰ Sufmi Dasca Ahmad, *Dialektika Hukuman Mati* (Surakarta: CV. Indotama Solo, 2017).

⁶¹ Darussamin, "Qisas Dalam Islam Dan Relevansinya Dengan Masa Kini".

⁶² Eka N.A.M., Sihombing, and Cyntia Hidita, "Analisis Wacana Hukuman Pancung Di Provinsi Aceh," *Jurnal Legislasi Indonesia* 16, no. 4 (2019): 514–523.

under universal human values.⁶³ In this context, it can be interpreted that there is a potential for diversity in implementing Islamic law in Indonesia.

Regardless of the debate, the implementation of Islamic law in Aceh encourages the growth of the spirit of criminal law reform and is a barometer of the effectiveness of implementing Islamic criminal law in Indonesia.⁶⁴ This effectiveness can be seen from reducing the number of law violations,⁶⁵ and it needs massive socialization.⁶⁶ It means that the success rate of Islamic law can contribute to the development of criminal law in Indonesia in general. Research by Suma et al. found that the execution of law violators strengthened the implementation of Islamic law in Aceh.⁶⁷ Likewise, Manan's findings, the application of Islamic law in West Aceh has been going well, although there are still no Islamic behaviours.⁶⁸ Thus, Hascall's research question "should qisas be considered a form of restorative justice?"⁶⁹ will be answered scientifically based on empirical data. This condition can foster public trust (Muslim and non-Muslim) in Islamic criminal law.

⁶³ Moh Dahlan, "Dialektika Norma Hukum Islam Dan Adat-Budaya Dalam Paradigma Ulama Nahdlatul Ulama: Kajian Tipologis," *Jurnal Islam Nusantara* 3, no. 1 (2019): 238–262.

⁶⁴ Abdul Manan and Cut Intan Salasiyah, "Evaluating the Implementation of Sharia in Aceh, Indonesia: Examining the Qanun Jinayah in Bireuen Regency," *Jurnal Ilmiah Peuradeun* 9, no. 3 (2021): 549–566.

⁶⁵ Muhammad Yusuf, "Efektivitas Pelaksanaan Hukum Jinayat Di Aceh," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 3, no. 1 (2019): 117–132.

⁶⁶ Nawir Yuslem, et al, "Efektivitas Sanksi Qanun Nomor 6 Tahun 2014 Tentang Tindak Pidana Khamar, Maisir Khallwat, Zina, Dan Dampaknya Terhadap Perilaku Masyarakat Kota Subulussalam," *Al-Tafahum: Journal of Islamic Law* 3, no. 1 (2019): 147–164.

⁶⁷ Muhammad Amin Suma, et al, "The Implementation of Shari'a in Aceh: Between the Ideal and Factual Achievements," *Abkam: Jurnal Ilmu Syariah* 20, no. 1 (2020): 19–48.

⁶⁸ Abdul Manan, "Acceptance of the Implementation of Islamic Sharia Laws in West Aceh, Indonesia," *International Conference on Humanities, Education, and Social Sciences (IC-HEDS)* (2019): 615–627.

⁶⁹ Susan C Hascall, "Restorative Justice in Islam: Should Qisas Be Considered a Form of Restorative Justice?," *Berkeley Journal of Middle Eastern & Islamic Law* 4, no. 1 (2011): 35–78.

The development of Islamic criminal law, especially *qisās* in Indonesian society, is relatively small. Initially, Islamic criminal law, especially the discourse of *qisās* law, as opposed to its existence, but now it is starting to be used as an alternative to criminal law in Indonesia to reduce the increasing number of murder cases.⁷⁰ *Qisās* law has become an academic discourse stated being lesser, such as its implementation without the principle of legality of punishment;⁷¹ and also it is considered an act that justifies de-humanistic crimes.⁷² Whereas *qisās* law—or Islamic criminal law in general—can cover the Indonesian people's expectations for justice and the maintenance of human values in law. This awareness has emerged, and implications for the community's phobia of *qisās* law gradually decrease. Theoretically speaking, this development is a “green light” for *qisās* law—or Islamic criminal law—to be applied massively and systemically in Indonesia. Even though at a macro level, as Hummel's research findings state that in Western countries, there is still a phobia of Islamic law—of course, *qisās* law—which is applied in the form of legislation.⁷³

Indonesian people in this context need to understand the difference between *qisās* law and death-penalty executions. Understanding this difference is essential so that people are more familiar with the values of justice and humanity in it. *Qisās* punishment is particular for the crime of intentional murder and torture. Death executions are used for other serious crimes, such as *ḥad zīnā muḥsan* by stoning (*rajam*), or *ḥad al-riddah* (apostasy), *al-bağy* (rebellion), and *al-ḥirabah* (robbery or security disturbances).⁷⁴ Nevertheless, all still comply with the stipulated provisions.

⁷⁰ Read Paisol Burlian, *Implementasi Konsep Hukuman Qishash Di Indonesia* (Jakarta: Sinar Grafika, 2015).

⁷¹ Dede Kania, “Cita Politik Hukum Pidana Mati Di Indonesia,” *Jurnal Ilmu Hukum* 4, no. 2 (2014): 161–179.

⁷² Bungasan Hutapea, “Alternatif Penjatuan Hukuman Mati Di Indonesia Dilihat Dari Perspektif HAM,” *Jurnal HAM* 7, no. 2 (2016): 69–83.

⁷³ Daniel Hummel, “Legislating Islamophobia: The Factors for the Existence of Anti-Sharia Laws in the United States,” in *Public Policy and Administration*, 2020, 1–25.

⁷⁴ Read M.Nurul Irfan and Masyrofah, *Fiqh Jinayah* (Jakarta: Amzah, 2013).

Thus, the understanding of the meaning of justice for the *qisās* punishment, like executions, must be embedded in the Indonesian legal paradigm. One theory that can contextualize the meaning of justice is the “boundary” theory as proposed by Muhammad Syahrur. In this theory, it is stated that the *qisās* provision in the sense of death execution is a maximum punishment provision because not all criminal acts included in the *qisās* legal category must end (convicted) with the death penalty, especially when in the proving process there are doubts;⁷⁵ or because of forgiveness from the victim's family.

The statement indicates that the provisions of the punishment in *qisās* law are graded according to the crime committed. Legal indications that lead to the verdict of the judge, as well as the condition of the perpetrator, affects the judge's confidence in deciding the case.⁷⁶ That is, the *qisās* law is not stagnant in realizing the community's ideals. There is a principle of flexibility in crime prevention that appears in order to create an orderly, safe, and comfortable society. Islamic law is indeed formed from divine values in accordance with human nature. As the case between firmness and flexibility, it is rigorous against serious crimes, but he also outlines the rules for dealing with them.⁷⁷

If the ‘boundary’ theory is used as a legal parameter, then all criminal laws in Indonesia that regulate murder can be categorized as *qisās* and *diyat* laws. The act of murder will register into the maximum and minimum punishment category, or the penalty that lies between the two limits. So that in addition to the death penalty, other lower punishment alternatives can be raised according to the conditions, with the lowest limit of the punishment being *diyat*. In practice, *qisās* can be imposed on the perpetrator of the murder as the original law for the crime (maximum limit); while *diyat* is imposed on the perpetrator as the lowest form of alternative punishment. The forgiveness of the victim's family for the perpetrator's actions is

⁷⁵ Syahrur, *Prinsip Dan Dasar Hermeneutika Hukum Islam Kontemporer*, 212.

⁷⁶ More details see in Ahmad Wardi Muslich, *Hukum Pidana Islam* (Jakarta: Sinar Grafika, 2005).

⁷⁷ Marli Chandra, “The Penology of Islamic Criminal Law: Reintroduction of Islamic Penology,” *al-‘Adalah* 15, no. 2 (2018): 345–366.

positioned as the minimum limit of punishment. This pattern certainly involves the victim or family resolving the conflict and is also proof that Islam guarantees protection and benefit to the victim. Through this concept, the act of killing does not necessarily lead to *qisās* or imprisonment of the perpetrator but takes the form of reconciling behavior. According to Daly, this process is also supported through restitution, namely: compensation given by the perpetrator to the victim to improve the victim's condition.⁷⁸

However, alternative punishments can only be raised if the judge believes there are doubts (*shubhat*) in the trial process. If the act of murder is not conclusively proven in the trial, then the *qisās* sentence cannot be imposed on the perpetrator. On the other hand, if it is proven conclusively that the act of murder is categorized as one must be sentenced to death. The action has met the requirements of a criminal act, then the *qisās* punishment in the maximum sense is still carried out.⁷⁹ It indicates that the provisions in *qisās* law and other rules in Islamic criminal law are transparent (*qaṭ'i*) – that is, there is the certainty of sanctions and the social implications they manifest. Although in the view of the majority of scholars, it is said that the source of legal provisions - namely the Qur'an - in the realm of legal indications (*dalālah*) has an element of *qaṭ'i al-dalālah* (firmly appointing the law) and at the same time *ẓanni al-dalālah* (not firmly appointing the law).⁸⁰ Certainly, *qisās* is a law that has an evident basis in the Qur'an oriented towards preventing damage to people's lives based on the value of justice. This context proves a link between the ethics of punishment and morality based on the control of revelation (al-Qur'an and al-Hadith) as the legitimacy of law enforcement for the benefit of society.

By adhering to one vital legal principle, *qisās* law is an instrument to control people's social lives. This construction actually raises a grand narrative in *qisās* law, Islam fights for the benefit of

⁷⁸ Kathleen Daly, "Restorative Justice in Diverse and Unequal Societies", *Law in Context* 17, no. 1 (2000): 167–190.

⁷⁹ Syahrur, *Prinsip Dan Dasar Hermeneutika Hukum Islam Kontemporer*, 212.

⁸⁰ Laode Ismail Ahmad, "Rekonstruksi Teks-Teks Hukum Qath'i Dan Teks-Teks Hukum Zhanni: Meretas Jalan Menuju Pendekatan Tekstual-Kontekstual," *Asy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum* 49, no. 2 (2015): 230–250.

human life, which contains the values of justice and humanity. Shihab illustrates that when a person's leg is amputated, others claim the act is barbaric; but when they find out that the amputee is a doctor, they will be grateful because if not amputated, it will be dangerous for him.⁸¹ The illustration is in line with people who do not understand the wisdom of *qisās* law. It proves that most people see and think about phenomena that are *juḥ'i* (from one point of view) and partialistic. The implication is that it cannot be used as a normative basis for understanding these criminological verses. Even though behind the *qisās* law there is a great benefit (*kuḥli*) that God wants to manifest amid human life. Zainuddin stated that restorative justice through peace and utilization creates justice and balance for perpetrators of crimes and victims.⁸² Obviously, in the *qisās* law, there are benefits for humans themselves that society sometimes does not understand.

The guarantee of "life" implied in the criminological verses guarantees the perpetrators and victims of criminal acts. The enforcement of *qisās* law is essentially designing an ideal community life in accordance with the provisions of transcendental values, prohibited from molesting, killing, or stealing in the community. The decision-making process is carried out strictly, so there is no room for doubt in it. Therefore, placing the *qisas* law as a violation of human rights is inappropriate. On the contrary, actions that violate human rights are actions that Islam prohibits. So only with the implementation of the *qisās* law, God guarantees the realization of a "life" by the nature of human values. Prosperity and peace can be realized based on justice, human values, and divinity. Bunyamin's research concludes that the existence of *qisās* is precisely to create social justice while protecting the rights of people's lives⁸³

If the law of *qisās* is compared with other laws, its perfection and complexity will appear. The provisions of punishments or

⁸¹ Shihab, *Wawasan Al-Qur'an: Tafsir Tematik Atas Pelbagai Persoalan Umat*, 162.

⁸² Zainuddin, "Restorative Justice Concept on Jarimah Qishas in Islamic Criminal Law".

⁸³ Bunyamin, "Qisas Dalam Al-Qur'an: Kajian Fiqih Jinayah Dalam Kasus Pembunuhan Disengaja," *Jurnal al-'Adl* 7, no. 2 (2014): 110–124.

offenses in Western criminal law (including the Criminal Code) have equivalence with *jarimah ta'zir* in Islamic criminal law. This provision is an alternative legal form if the crime committed does not meet the requirements of a criminal act. The reality of this punishment is different from *jarimah hudud* and *qisas-diyat*, which are dogmatic. Although there are human rights (*haqq al-'abd*) in the punishment, transcendental rights (shari'a) should not be violated; and it is static in any condition or situation, especially in the punishment *qisas-diyat*. Likewise, *jarimah hudud* can be carried out when it is proven, and the judge can decide according to the provisions contained in the Qur'an and Hadith; and this is purely God's right. It is different from other criminal offenses, which tend to be dynamic—so that it can be reduced or even abolished—and can be renewed according to the interests of the law and the growing community.

Through consistent law application, public trust will grow and develop to study and apply it. Likewise, applying the rules of *raf' al-kharaj* (removing difficulties) and *al-tadrij* (gradually) can be an entry point for contextualizing *qisas* law as one of the Islamic criminal laws in Indonesia. Through this rule, it is necessary to strive to design people to understand the ins and outs of *qisas* law comprehensively. Because people, in general, are still not interested in applying *qisas* law or Islamic criminal law in general because people are still not familiar with it.⁸⁴ Even the disinterest—or it could be in the form of rejection—is due to the community's assumption that *qisas* law—or Islamic criminal law—is cruel.⁸⁵ Therefore, implementing Islamic criminal law, especially *qisas* law, has a little opportunity in Indonesian society.

In contrast to countries under Islamic law basis, the ideals of applying the material and substance of Islamic criminal law—including *qisas* law as part of state law can be implemented, like Saudi Arabia, all legal bases refer to Islamic law or Afghanistan that is the implementation of Islamic law enforced depending on local tribal

⁸⁴ Hendra Gunawan, “Peluang Dan Tantangan Penerapan Hukum Pidana Islam Di Kota Padangsidempuan,” *al-Maqasid: Jurnal Kesyariahan dan Keperdataan* 5, no. 2 (2019): 200–215.

⁸⁵ Massadi, “Peluang Dan Tantangan Pelaksanaan Pidana Islam Di Indonesia,” *al-Bayyinah: Journal of Islamic Law* 3, no. 2 (2019): 252–268.

customs and traditions.⁸⁶ This is certainly different when a country like Indonesia is not under Islamic perspective, and then the opportunity to apply Islamic criminal law is relatively more difficult. Although on the one hand, Islamic law can contribute to the formulation of Indonesian national law. The relatively easy thing to implement is to incorporate the substance or values contained in Islamic law into national law.⁸⁷ Alternatively, it could be by reviving Islamic norms in the community as religious-customary law.

In fact, Indonesia is based on *rechtstaat* (UD 1945) and not on *machtstaat* (general explanation of the 1945 Constitution) in the administration of the state. This constitutional basis indicates that Indonesia is not a state system based on Islamic law principles; but adheres to legal pluralism, also based on Western and customary law. However, the plurality of laws in Indonesia can integrate Islamic law with the situation and conditions of Indonesian society or even become part of national law.⁸⁸ Moreover, the Indonesian people are the majority Muslim community, so they need legal protection and not conflict with the principles of religion. In this context, the religious element allows coloring positive criminal law enforcement in a society like Indonesia contains the values of justice, humanity, and divinity. Laws that have a human orientation integrated with divine elements can become part of positive law in society.

Based on this description, it can be stated that the implementation of Islamic criminal law—including formal and material *qisās* punishments in the community—has a great opportunity, especially for regions with special autonomy. It is quite possible that Islamic criminal law material, such as Aceh, will be implemented. The law is formulated in the legislation termed *qonun* and/or from the

⁸⁶ Tedy Nopriandi and Risky Fany Ardiansyah, “Paradigm of Death Penalty: Comparative Study in Indonesia, Saudi Arabia and China,” *LaJiL* 2, no. 1 (2020): 57–68.

⁸⁷ Ratni Kasmad, “Peluang Dan Tantangan Integrasi Nilai-Nilai Hukum Islam Dalam Sistem Hukum Nasional,” *Maddika: Journal of Islamic Family Law* 1, no. 1 (2020): 60–71.

⁸⁸ Zaka Firma Aditya and Rizkisyabana Yulistyaputri, “Romantisme Sistem Hukum Di Indonesia: Kajian Atas Kontribusi Hukum Adat Dan Hukum Islam Terhadap Pembangunan Hukum Di Indonesia,” *Jurnal Rechtsvinding* 8, no. 1 (2019): 37–54.

establishment of the *Shari'ah* Court. According to Sihombing that the application of Islamic law—including *qisās* law—is a necessity, due to the provisions of Law no. 11 of 2006 opened the authority of the Aceh Provincial Government to draft and also enact Qanun on Jinayat which can contain criminal threats other than criminal as stipulated in the provisions of Article 241 paragraph (1) and paragraph (2) of the Law.⁸⁹ However, all *Qanuns* still prioritize the value of justice harmonized with the reality of universal humanity and divinity.

Finally, the fundamental problem of criminal law in society lies in implementing the value of justice. One alternative solution lies in the construction of *qisās* law, which prioritizes justice, even humanity, and divinity values. The implementation of *qisās* law in society or human life can be oriented towards creating benefit and harmony. Dunn states that Islamic law is compatible with human rights.⁹⁰ Nevertheless, on the other hand, the public also needs to understand that *qisās* law cannot be separated from the textual-scriptural rules in Qur'an and Hadith, especially related to criminological verses. It signifies that the meaning of verses lines does not undergo a *takwil* understanding or interpretation that departs from the text's intended meaning. Because the results of the interpretation that appear actually have an understanding that eliminates transcendental rights—God's right inherent in *qisās* law.

Conclusion

To sum, following previous analysis, this research can conclude that justice in *qisās* law has a meaning in harmony with human and divine values. These values can actually be implemented in the form of four concepts that can be relied on in law enforcement, namely: "equal," "balance," "respect for individual rights by granting rights to their owners," and "justice implicated in the nature of God." Thus, these four meanings of justice integrate the two dimensions contained in the *qisās* law, namely the human dimension and the

⁸⁹ N.A.M., Sihombing, and Cyntia Hidita, "Analisis Wacana Hukuman Pancung Di Provinsi Aceh."

⁹⁰ Shannon Dunn, *Islamic Law and Human Rights*, in Anver M. Emon & Rumea Ahmed (Ed.), (Oxford: Oxford University Press, 2018).

divine dimension, so that in *qisās*, it is clear to realize its essential purpose, namely: realizing the benefit of social life.

Thus, *qisās* law is one part of Islamic criminal law that is integrative. In *qisās*, there is a union between restorative and retributive justice to develop harmony. The criminological verse in Qur'an explicitly states the *qisās* law in the sense of the law of murder, so that firmness and flexibility aspects are oriented towards criminal acts and victims. It can be explained through the firmness of the *qisās* law and the flexibility of the *diyat* law as an alternative law. The evidence that the essence of the criminological verse implies that the *qisās* law has weighty implications and raises awareness so that people do not commit murder and persecution. Therefore, boundary theory can contextualize and actualize Islamic criminal law (*qisās* law) in Indonesian law. Moreover, the opportunity for formal application of Islamic criminal law has been wide open.

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