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

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Abstract: Contextualizing the justice dimension in the law of qiṣāṣ 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 qiṣāṣ legal justice. This article examines the contextualization of the meaning of justice in the construction of qiṣāṣ 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 qiṣāṣ 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 qiṣāṣ law allows flexibility by contextualizing the meaning of justice to be adapted and applied in society.

Keywords: Islamic criminal law; qiṣāṣ; justice value; humanity value.

garansi kehidupan dari Tuhan sebagai Pembuat Hukum. Kedua, pelaksanaan hukuman qisas 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 qisas memungkinkan untuk diterapkan secara fleksibel dengan mengontekstualiasikan 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 qisas law is still considered an alternative law in suppressing the homicide rate. This research emphasizes and focuses on the provisions of qisas diyat, and its justice can be an alternative law on premeditated murder. In this context, the meaning of justice needs to be expressed so that the community examines the functionality of qisas 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 qisas law as law enforcement spirit in the community. On the one hand, this effort is important to reveal the meaning of justice contained in qisas 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, while Sari concludes that qisas is a value of restorative justice. On the other hand, Zawawi & Hussin found that qisas law prioritizes the human dimension with evidence

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

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

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

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The contextualization of the justice dimension in *qiṣāṣ* law needs to be studied more deeply to reveal its humanity basis. The value of justice embodied in *qiṣāṣ* law needs to be understood contextually based on contemporary legal developments. This effort is intended to understand more comprehensively the esoteric meaning of *qiṣāṣ* 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. Therefore, it is necessary to analyze the value of *qiṣāṣ* 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). Only a few verses talk about *qiṣāṣ* 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. 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. Following this perspective, the contextualization of the meaning of justice in *qiṣāṣ* law is important to explore the human values contained in *qiṣāṣ* law.

Taking these points, this research investigates the contextualization of the meaning of justice in *qiṣāṣ* 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, *qiṣāṣ* law is understood as a

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medium of education/teaching (al-ĭslaḥ wa al-tahżīb) and for preventing crime (al-radd wa al-żarj). In addition, the understanding of qīṣāṣ 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-qisṭ and al-mīzān. These three words in Arabic also contain the meaning of justice or fair. By differentiation, the word al-‘adl is closer in meaning to al-sawiyah, which means equal justice, while the word al-qisṭ has the meaning of al-ıstıqamah, in the sense of justice by doing straight. The word al-mızan comes from the root word wazn, 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 Muktazilah, 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.

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

17 Lois Ma’luf, Al-Munjid Fi Al-Lugab (Bairut: Dār al-Masyriq, n.d.).


The meaning of justice in Islamic law can be understood from these three words. The word ‘adl in the Qur'an is mentioned 29 times,\textsuperscript{20} al-qist is repeated 25 times,\textsuperscript{21} and al-mi\-\textit{\=z}an 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-inhaf 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.\textsuperscript{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.\textsuperscript{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 Q.S. al-Infitar verses 6-7. This verse informs about fair values in the form of understanding balance in creating the human body.\textsuperscript{24} It means that a framework without balance will be challenging to achieve. Based on this analogy, Quraish Shihab stated that balance

\textsuperscript{20} Muhammad Fu’ad ‘Abd Al-Baqi, \textit{Al-Mu’jam Al-Mufahras Li Alfuz Al-Qur’\=an Al-Karim} (Bairut: Dar al-Fikr, 1992).
\textsuperscript{21} Ibid., 691–692.
\textsuperscript{22} Abd Muin Salim, \textit{Fiqh Siyasah: Konsepsi Kekuasaan Politik Dalam Al-Qur’an} (Jakarta: Rajawali Pers, n.d.).
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 each part. 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, between individual and communal benefit or monodualistic balance.

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. The application of noble religious values needs to be prioritized in implementing Islamic law.

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, Islamic teachings will create a life full of equality of values, freedom, and justice.\(^\text{30}\)

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.\(^\text{31}\) 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 \textit{taklīf} 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.

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Qiṣāṣ Law in the Framework of Justice

Qiṣāṣ law is one type of Islamic criminal law different from ḥudūd law. The difference lies in the violation of rights.³² Qiṣāṣ is a form of sanction for violating the rights of Allah and servants, while the ḥudūd that is violated is the right of Allah.³³ As a public rule, qiṣāṣ 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 Mubarok’s findings, qiṣāṣ complexity five legal theories such as penology.³⁵ Qiṣāṣ emphasizes social order that normative basis is on the value of justice. If judging from the language aspect, the word qiṣāṣ means al-musawa wa al-ta’addul, equal and balanced, which actually has the same meaning as “adl”. It means, qiṣāṣ 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 qiṣāṣ is diyat, or the payment of a fine and forgiveness from the victim and its family victim.

The purpose of establishing the qiṣāṣ 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 (qaṭl 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'zir*. Third, unintentional killing (*qatl al-khaṭa‘*) is the act of taking the life of another person who is not wanted and is also not accompanied by the 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-jarah* (life and wound). In this context, *qisas* law contains the value of restorative justice with a civil settlement.39 *Qiṣāṣ* 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 *qiṣāṣ* 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 *qiṣāṣ* there is an alternative punishment, namely *diyat*, if the victim’s family does not demand *qiṣāṣ*, 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 *qiṣāṣ* and *diyat* are

37 Ibid., 145–146.
39 Sari, “Implementasi Hukuman Qisas Sebagai Tujuan Hukum Dalam Al-Qur’an.”
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). However, these aims promote the active 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 *qiṣāṣ* in its implementation involves all parties and the victim's family has the right to determine the punishment for the perpetrator, whether *qiṣāṣ*, *diyat*, or forgiving, oriented towards conflict reconciliation.

Psychologically, *qiṣāṣ* law contains the purpose of *al-tabzīb*, educating, in preventive, repressive, and rehabilitative power. The three goals basically arise from the spirit of justice in *qiṣāṣ* 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.

*Qiṣāṣ* 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 qisāṣ depends on the type of murder. Thus, qisāṣ 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 prevention based on public awareness of the implications that arise from these acts.

Essentially, determining the qisāṣ punishment is not motivated by the victim's family's revenge, anger, and lust. Qisāṣ 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, qisāṣ 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, qisāṣ becomes the value of justice that guarantees justice.43

Not all crimes against the psychological and physical body lead to qisāṣ punishment, but only intentional murder and torture are subject to qisāṣ. Meanwhile, other crimes are only sentenced to diyat according to the provisions of Islamic criminal law. Qisāṣ 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 qisāṣ 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. Qisāṣ is

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

essentially enforced so that there is a guarantee of human dignity, namely the continuity of human life itself.\textsuperscript{45}

\textit{Qis\={a}s} 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.\textsuperscript{46} Justice is the central pillar of \textit{qi\={s}\={a}s} law and, through the concept of \textit{diyyat}, unseparated from the value of justice. In this context, the value of restorative justice is superior to retributive justice.\textsuperscript{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. \textit{Qis\={a}s} 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, \textit{qi\={s}\={a}s} 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 \textit{qi\={s}\={a}s} 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 \textit{qi\={s}\={a}s}, there are also transcendental rights that law enforcers or criminals must fulfil. These transcendental rights, namely

\textsuperscript{46} Ali, \textit{Hukum Pidana Islam}, 3.
\textsuperscript{47} Absar, “Restorative Justice in Islam with Special Reference to the Concept of Diyya.”
the rights of God, can be aligned with the rights of society. If all the conditions for the imposition of qīṣāṣ 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.

**Contextualization of the Meaning of Justice in Qīṣāṣ Law**

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

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

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49 Sodiqin, “Restorative Justice Dalam Tindak Pidana Pembunuhan: Perspektif Hukum Pidana Indonesia Dan Hukum Pidana Islam”.


Prudence is highly prioritized when qiṣāṣ 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 qiṣāṣ 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 qiṣāṣ law, it will be fatal and persecute the convict (perpetrator), the convict's family (perpetrator), or even 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)". Punishment errors can occur due to carelessness and negligence during the legal process.

The importance of prudence when imposing a sentence—in qiṣāṣ law and other criminal law rules—can generally foster public trust. One of them is the enforcement of qiṣāṣ law according to the basic principles stipulated in Islamic doctrine and/or general provisions that apply. Among them is implementing "in the same way" (mišlab or mumāsulab) is a form of justice or the appropriateness of diyat punishment as a form of humanization. Qiṣāṣ 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 qiṣāṣ laws adapted to the conditions of society and the development of science, crime and technology. A principle of elasticity makes qiṣāṣ law able to blend with certain conditions and situations. The execution that is handed down is not applied textually,

54 Fath Ridwan, Min Falsafah Al-Tasyri' Al-Islāmi (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-Falsafatubu (Bairut: Dar al-Fikr, n.d.).
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 beheading.\(^{59}\) Likewise, in Yemen, executing by beheading the perpetrators of murder or even against same-sex sexual offenders.\(^{60}\) With qīṣāṣ, 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 qīṣāṣ 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


\(^{58}\) https://law.utexas.edu/humanrights/projects/afghanistans-new-penal-code-whether-or-not-to-codify-hudud-and-qisas/


\(^{60}\) Sufmi Dasca Ahmad, Dialektika Hukuman Mati (Surakarta: CV. Indotama Solo, 2017).

\(^{61}\) Darussamin, “Qisas Dalam Islam Dan Relevansinya Dengan Masa Kini”.”

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 under universal human values. 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. This effectiveness can be seen from reducing the number of law violations, and it needs massive socialization. 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. Likewise, Manan's findings, the application of Islamic law in West Aceh has been going well,

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although there are still no Islamic behaviours.\textsuperscript{68} Thus, Hascall's research question “should qisas be considered a form of restorative justice?”\textsuperscript{69} will be answered scientifically based on empirical data. This condition can foster public trust (Muslim and non-Muslim) in Islamic criminal law.

The development of Islamic criminal law, especially q\textsuperscript{i}s\textsuperscript{a}s\textsuperscript{a}s in Indonesian society, is relatively small. Initially, Islamic criminal law, especially the discourse of q\textsuperscript{i}s\textsuperscript{a}s\textsuperscript{a}s 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.\textsuperscript{70} Q\textsuperscript{i}s\textsuperscript{a}s\textsuperscript{a}s law has become an academic discourse stated being lesser, such as its implementation without the principle of legality of punishment;\textsuperscript{71} and also it is considered an act that justifies de-humanistic crimes.\textsuperscript{72} Whereas q\textsuperscript{i}s\textsuperscript{a}s\textsuperscript{a}s 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 q\textsuperscript{i}s\textsuperscript{a}s\textsuperscript{a}s law gradually decrease. Theoretically speaking, this development is a “green light” for q\textsuperscript{i}s\textsuperscript{a}s\textsuperscript{a}s 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, q\textsuperscript{i}s\textsuperscript{a}s\textsuperscript{a}s law—which is applied in the form of legislation.\textsuperscript{73}


\textsuperscript{70} Read Paisol Burlian, Implementasi Konsep Hukuman Qishash Di Indonesia (Jakarta: Sinar Grafika, 2015).


Indonesian people in this context need to understand the difference between qiṣāṣ 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. Qiṣāṣ punishment is particular for the crime of intentional murder and torture. Death executions are used for other serious crimes, such as ḥad zinā muḥsan by stoning (rajam), or ḥad al-riddah (apostasy), al-baġy (rebellion), and al-ḥirābah (robbery or security disturbances). Nevertheless, all still comply with the stipulated provisions.

Thus, the understanding of the meaning of justice for the qiṣāṣ 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 qiṣāṣ provision in the sense of death execution is a maximum punishment provision because not all criminal acts included in the qiṣāṣ legal category must end (convicted) with the death penalty, especially when in the proving process there are doubts; or because of forgiveness from the victim’s family.

The statement indicates that the provisions of the punishment in qiṣāṣ 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. That is, the qiṣāṣ 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.

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74 Read M.Nurul Irfan and Masyrofah, Fiqh Jinayah (Jakarta: Amzah, 2013).
75 Syahrur, Prinsip Dan Dasar Hermenutika Hukum Islam Kontemporer, 212.
76 More details see in Ahmad Wardi Muslich, Hukum Pidana Islam (Jakarta: Sinar Grafika, 2005).
If the ‘boundary’ theory is used as a legal parameter, then all criminal laws in Indonesia that regulate murder can be categorized as qiṣṭāṣ 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, qiṣṭāṣ 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 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 qiṣṭāṣ 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 (shubbat) in the trial process. If the act of murder is not conclusively proven in the trial, then the qiṣṭāṣ 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 qiṣṭāṣ punishment in the maximum sense is still carried out.79 It indicates that the provisions in qiṣṭāṣ law and other rules in Islamic criminal law are transparent (qat’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 qat’i al-dalālah (firmly appointing the law) and at the same time ḥannī al-dalālah (not firmly

79 Syahrur, Prinsip Dan Dasar Hermeneutika Hukum Islam Kontemporer, 212.
appointing the law). Certainly, \textit{qiṣāṣ} 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, \textit{qiṣāṣ} law is an instrument to control people's social lives. This construction actually raises a grand narrative in \textit{qiṣāṣ} law. Islam fights for the benefit of 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.

The illustration is in line with people who do not understand the wisdom of \textit{qiṣāṣ} law. It proves that most people see and think about phenomena that are \textit{juz'ī} (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 \textit{qiṣāṣ} law there is a great benefit (\textit{kulli}) 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. Obviously, in the \textit{qiṣāṣ} 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 \textit{qiṣāṣ} law is essentially designing an ideal community life in accordance with the provisions of transcendent values, prohibited from molesting, killing, or stealing in the community. The decision-making process is carried out strictly, so there is no room for

\begin{itemize}
  \item \cite{08} Laode Ismail Ahmad, “Rekonstruksi Teks-Teks Hukum Qath'i Dan Teks-Teks Hukum Zhanni: Meretas Jalan Menuju Pendekatan Tekstual-Kontekstual,” \textit{Asy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum} 49, no. 2 (2015): 230–250.
  \item \cite{09} Shihab, \textit{Wawasan Al-Qur'an: Tafsir Tematik Atas Pelbagai Persoalan Umat}, 162.
  \item \cite{10} Zainuddin, “Restorative Justice Concept on Jarimah Qishas in Islamic Criminal Law”.
\end{itemize}
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 qisas 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 qisas is precisely to create social justice while protecting the rights of people's lives.

If the law of qisas is compared with other laws, its perfection and complexity will appear. The provisions of punishments or 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 ḥudūd and qisas-diyyat, which are dogmatic. Although there are human rights (ḥaqiq 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-diyyat. Likewise, jarimah ḥudūd 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 ṭaf' al-kharaj (removing difficulties) and al-tadrīj (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

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with it.\textsuperscript{84} Even the disinterest—or it could be in the form of rejection—is due to the community's assumption that \textit{qi\textasciitilde{s}a\textasciitilde{s}} law—or Islamic criminal law—is cruel.\textsuperscript{85} Therefore, implementing Islamic criminal law, especially \textit{qi\textasciitilde{s}a\textasciitilde{s}} 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 \textit{qi\textasciitilde{s}a\textasciitilde{s}} 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 customs and traditions.\textsuperscript{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.\textsuperscript{87} Alternatively, it could be by reviving Islamic norms in the community as religious-customary law.

In fact, Indonesia is based on \textit{rechtstaat} (UUD 1945) and not on \textit{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.\textsuperscript{88} Moreover, the Indonesian people are

\begin{itemize}
\item Zaka Firma Aditya and Rizkisyabana Yulistaputri, “Romantisme Sistem Hukum Di Indonesia: Kajian Atas Kontribusi Hukum Adat Dan Hukum Islam
\end{itemize}
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 qīṣāṣ 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 establishment of the Shari‘ab Court. According to Sihombing that the application of Islamic law—including qīṣāṣ 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. 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 qīṣāṣ law, which prioritizes justice, even humanity, and divinity values. The implementation of qīṣāṣ law in society or human life can be oriented towards creating benefit and harmony. Dunn states that Islamic law is compatible with human rights. Nevertheless, on the other hand, the public also needs to understand that qīṣāṣ 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 *takwīl* 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 *qiṣāṣ* law.

**Conclusion**

To sum, following previous analysis, this research can conclude that justice in *qiṣāṣ* 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 *qiṣāṣ* law, namely the human dimension and the divine dimension, so that in *qiṣāṣ*, it is clear to realize its essential purpose, namely: realizing the benefit of social life.

Thus, *qiṣāṣ* law is one part of Islamic criminal law that is integrative. In *qiṣāṣ*, there is a union between restorative and retributive justice to develop harmony. The criminological verse in Qur’an explicitly states the *qiṣāṣ* 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 *qiṣāṣ* law and the flexibility of the *diyat* law as an alternative law. The evidence that the essence of the criminological verse implies that the *qiṣāṣ* 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 (*qiṣāṣ* law) in Indonesian law. Moreover, the opportunity for formal application of Islamic criminal law has been wide open.

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