



Contextualization of Theft Criminal Verse in Indonesian Positive Law

Marli Chandra¹, M. Ainun Najib²

¹Universitas Islam Negeri Sunan Ampel: E-mail: mcand23@uinsa.ac.id; Jl. Ahmad Yani No.117, Jemur Wonosari, Surabaya, Jawa Timur 60237

² Universitas Islam Negeri Sunan Ampel: E-mail: mhainunnajib@gmail.com; Jl. Ahmad Yani No.117, Jemur Wonosari, Surabaya, Jawa Timur 60237

Abstract

The widespread abandonment of Islamic Criminal Law reveals a significant lack of comprehensive understanding of its principles. Many legal systems operate under the assumption that they are entirely separate from Islamic law, yet Islamic thinkers have historically influenced various global legal systems, including the approach to punishment for theft. Thus, there is a need to contextualize Islamic Criminal Law to illustrate that it can adapt to modern times. This research employs a normative legal framework with a conceptual and comparative approach, focusing on the crime of theft as addressed in Islamic criminal law, Indonesian positive law, and Iranian positive law. The study concludes that these three legal systems share a common goal: to deter theft. However, the forms of punishment differ. Indonesian positive law primarily emphasizes imprisonment as the main consequence. In contrast, Islamic criminal law advocates for hand-cutting, intending to deter future criminal behavior. Iranian law, on the other hand, incorporates multiple levels of punishment, ranging from finger-cutting to imprisonment as a last resort. Ultimately, each legal system determines the appropriate sentence for theft based on the context of the crime, the offender's background, and the specific circumstances surrounding the event.

Article history (leave this part):

Submission date: 27 January 2024
Received in revised form: 23 April 2024
Acceptance date: 1 November 2024
Available online: 29 November 2024

Keywords:

Theft; Criminal Law; Islamic Criminal Law; Contextualization

Funding:

This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

Competing interest:

The author(s) have declared that no competing interests exist.

How to Cite (leave this part):

Najib, M. A., and M. Candra. "Kontekstualisasi Ayat Pidana Pencurian Dalam Hukum Positif Indonesia". *Al-Daulah: Jurnal Hukum Pidana Dan Ketatanegaraan*, Vol. 13, no. 1, June 2024, doi:10.24252/al-daulah.v13i1.45284.

© The authors (2024). This is an Open Access article distributed under the terms of the Creative Commons Attribution (CC BY)



Introduction

Islam's determination of punishment is based solely on standard texts found in the Qur'an and hadith. These texts are considered the highest sources of authority in Islam, meaning that all legal provisions must align with and not contradict them.¹ However, Islam encourages individuals to explore these sources to uncover the laws they contain. This process of legal discovery is known as *ijtihad* in Islamic law. *Ijtihad* refers to the exertion of one's abilities to interpret the law by examining the arguments presented in the Qur'an and hadith.²

¹ Marsaid, *Al-Fiqh Al-Jinayah (Hukum Pidana Islam) Memahami Tindak Pidana Dalam Hukum Islam*, ed. Jauhari (Palembang: CV. Amanah, 2020), p. 24.

² Agus Miswanto, *Ushul Fiqh: Metode Ijtihad Hukum Islam* (Magelang: Unimma Press, 2019), p. 13.

Ijtihad can be described as the process of examining the arguments found in the Qur'an and hadith to identify the laws contained within them, using academic methods. Consequently, ijtihad serves as a standard for determining the quality of legal reasoning (istinbāt). It is essential to establish academic guidelines to ensure that the outcomes produced meet predetermined criteria. This aligns with the views of Zakariyyā al-Anṣarī, who stated that there are specific academic principles that must be followed during the ijtihad process to ensure that the resulting laws are genuinely derived from thorough contemplation of the Qur'an and hadith.³ These guidelines are also intended to guarantee that the legal products generated are free of defects, particularly those aimed at reform.

Legal istinbāt is essential for establishing new legal rules and modifying outdated ones that are no longer suitable for contemporary circumstances. Ijtihad serves as a method and a guideline for conducting legal istinbāt.⁴ As stated in a fiqh rule, the law evolves in accordance with its illah (reason). When the reason for a particular law change, the law itself also adapts. This is inevitable, as reasons are influenced by changing times. Historically, Islamic law has undergone significant transformations from its original state, with older laws being abandoned when they fail to address current needs effectively.

An example of punishment for theft can be found in Surah Al-Māidah, verse 38. This verse states that the punishment for theft is the cutting off of the hand. However, if this verse is only understood in a literal sense, one might conclude that all instances of theft warrant this punishment. This is not the case. Many procedures and conditions must be met before such a punishment can be applied. It is important to note that a verse from the Qur'an does not stand alone; it is interconnected with other verses and sources of law, such as hadith. Consequently, scholars have engaged in legal reasoning (istinbāt) to provide a more detailed understanding of the verse. Their interpretations confirm the obligation to cut off the hands of thieves, but only when various necessary conditions are satisfied.⁵

This conclusion is certainly different from what is stipulated by countries with *common law* or *civil law* legal systems such as Indonesia, which focuses more on imprisonment. However, the criminal law by cutting hands as stipulated by the verse in the Qur'an is still preserved by countries with legal systems whose sources are based on Islam such as Iran with minor changes in its provisions. Some countries adopt hand-cutting as the main punishment, and some emphasize more on deprivation of freedom of movement. If understood more deeply, then what is determined by each country in determining the sentence for the crime of theft can be consolidated. This is the position of this article, to explain the relationship between the products of *salaf* law and *khalaf* law in the crime of theft. This article also aims to explain that the renewal of the law is a mercy of Allah, as expressed by Yūsuf Qarḍawī, so that the products of *salaf* law, which adhere to the original texts, cannot be contradicted by the products of *Khalaf* law, which update the law.⁶

Method

This paper presents a normative study that investigates the legal rules embedded in the positive laws of Indonesia, Iran, and Islamic Law. It employs both conceptual and comparative approaches. The conceptual approach analyses the crime of theft from its philosophical

³ Zakariyya Al-Anshari, *Ghayah al-Wushul* (Surabaya: Al-Hidayah, n.d.), p. 147.

⁴ Zakariyya ibn Ghulām, *Min Uṣūl Al-Fiqh 'Alā Manhaj Ahli Al-Ḥadīth* (Dar Al-Kharaz, 2002), p. 65.

⁵ Waḥbah Al-Zuhailī, *Al-Fiqh Al-Islāmī Wa Adillatuhū*, Vol 7 (Suriyah: Dar Al-Fikr, 1989), p. 5429.

⁶ Yusuf Al-Qaradhawi, *Perkembangan Fiqh Antara Statis Dan Dinamis*, trans. Saifullah M. Yunus (Kairo: Maktabah Wahbah, 2022), p. 21.

foundations while contextualizing it within the realities of modern society. Simultaneously, the comparative approach examines the differences and similarities in the views of scholars and academics regarding theft. By synthesizing these two approaches, this study aims to establish connections between the criminalization of theft as articulated in legal texts and its interpretation in practical contexts.

Result And Discussion

1. Criminal Provisions of Theft in Islamic Law

Theft in Islamic law falls under the category of *jarīmah ḥudūd*. This refers to criminal offenses that have specific regulations established by *shāri'* in both the Qur'an and hadith.⁷ There is a scholarly consensus that the punishment for theft is the amputation of the hand. This agreement is based on the clear obligation to carry out this punishment, as outlined in Surah al-Mā'idah, verse 38, which states:

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جِزَاءً بِمَا كَسَبَا نَكَالًا مِنَ اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ

This verse explains that thieves, both men and women, must have their hands cut off. Cut off the hand as a reward for the theft they have committed. Apart from being a retribution, cutting hands is a punishment decreed by Allah against the perpetrators of the crime of theft.⁸

The punishment for theft, as stated in the verse above, is a consequence of the act committed. In Hegel's terminology, within a quasi-mathematical framework, the act of theft violates the rights of others, and punishment serves as a means to enforce the rights that have been infringed upon.⁹ Thus, the practice of hand-cutting is not only a form of retaliation but also a method of atonement for the offense committed.

As a definitive principle, there should be no further explanation needed regarding the verse. By adhering to the literal interpretation of the text, it can be concluded that all theft offenses, without exception, must be punished. This punishment entails the cutting off of both hands, rather than the cutting off of feet.¹⁰

Islamic law possesses two interrelated characteristics: it is both static and dynamic.¹¹ The verse concerning theft, which states *فَاقْطَعُوا أَيْدِيَهُمَا* (meaning "cut off their hands"), is considered static.¹² This text is immutable and cannot be changed or updated since it is the word of Allah. The only potential for modification lies in the *nāsikh-mansūkh* mechanism, which is determined directly by Allah, but that opportunity has now been closed. Therefore, the specific text *فَاقْطَعُوا أَيْدِيَهُمَا* remains static. In contrast, the context surrounding this text is dynamic, encompassing aspects such as the conditions of theft and the definitions surrounding it. This dynamic nature can be explored through *fiqh ḥudūd* (Islamic criminal law). *Fiqh ḥudūd* allows for a broader interpretation and understanding of Islamic law. From the study of *fiqh ḥudūd*, we learn that the application of the punishment for theft is not as straightforward as suggested by the *Zāhiri*

⁷ Syamsuri et al., *Hukum Pidana Islam Indonesia* (Depok: PT Rajawali Buana Pusaka, 2020), p. 10.

⁸ Abu Al-Hasan Maqatil Ibn Sulaiman, *Tafsir Maqatil Ibn Sulaiman*, Vol. 1 (Beirut: Dar Ihya' Al-Turats, 2003), p. 473-474.

⁹ Sue Shaper, "The Justification of Punishment" (RICE University, 1974), 114-115.

¹⁰ Ibn Rushd Al-Ḥafīd, *Bidāyah Al-Mujtahid Wa Nihāyah Al-Muqtaṣid*, Vol. 4 (Kairo: Dar Al-Hadis, 2004), p. 235.

¹¹ Al-Qaradhawi, *Perkembangan Fiqh Antara Statis Dan Dinamis*, p. 87.

¹² Abdul Hamid Hakim, *Al-Sullam* (Jakarta: Makatabah As-Saadiyah Putra, 2008), p. 38.

madhab. In practice, numerous procedures and requirements must be fulfilled before the law of cutting off hands can be implemented.

There are at least two main requirements that must be fulfilled: formal and material requirements. When it comes to material requirements, four conditions must be met. First, the act committed must be classified as theft; the law regarding the cutting off of hands does not apply to other crimes. Theft is defined as the act of taking someone else's property secretly. Therefore, openly committed acts, such as robbery, do not fall under the category of theft. Second, the value of the stolen item must reach a certain threshold, known as one niṣāb. While some opinions suggest that any theft, regardless of the amount, warrants the punishment of having a hand cut off—based on the apparent verse and a hadith from Abū Hurairah that Allah cursed thieves—fiqh scholars, however, agree that another hadith narrated by al-Bukhārī and Muslim clarifies that the punishment of cutting off a hand will only be enforced if the stolen item is valued at ¼ dinar or more. Thus, both the rope thief and the egg thief can have their hands cut off, but only if the value of what they stole meets or exceeds this ¼ dinar threshold.¹³

Thirdly, the stolen item must be considered a treasure or something of significant value. Theft involving items that lack value cannot warrant the punishment of cutting off the hand, regardless of the amount stolen. Fourthly, the stolen goods must have been taken from a place that has a guardian or is considered secure (hirz). This means that goods taken from an unsecured location do not qualify for this punishment. Many traditions explain the definitions and limitations of what constitutes hirz in the context of theft, such as the accounts of Aisha and Hasan. However, these cannot be universally applied. Therefore, the definition of hirz is contingent upon the customs of the specific region where the theft occurred. If a location recognizes the stolen item as being in hirz, then the thief can face the punishment of having their hand cut off. This is referred to in Islamic criminal law as hirz mithl.¹⁴

In addition to the material requirements above, there are also formal requirements that must be met for the law of hand cutting to be applied. This material requirement specifically explains the circumstances of the perpetrator of the theft. The condition referred to is that the perpetrator must be an adult, i.e. one who has reached the age of majority and is subject to *taklīf* to follow the laws of Allah. People who have reached puberty are considered to be aware of the prohibition of theft, so they deserve to have their hands cut off.¹⁵ Another requirement is that the person who steals must be of sound mind, so children and the insane cannot be punished by cutting off their hands. The same condition also applies to people who steal out of force or compulsion, such as economic necessity. The hands of a thief cannot be cut off if their record of guilt is erased at that point. Additionally, the thief must not possess the stolen goods; otherwise, it could lead to ambiguity regarding the punishment. For instance, a thief who steals items that they have lent to someone else, or who takes goods they have rented, cannot have their hands amputated. These conditions must be fulfilled for the ḥudūd punishment of cutting off the hand to be applied. If these conditions are not met, the crime is no longer considered part of the jarīmah ḥudūd and instead falls under the category of ta'zīr. In cases of ta'zīr, the punishment does not

¹³ Bahauddin Abd Al-Raḥman, *Al-'Iddah Sharḥ Al-'Umdah* (Kairo: Dar Al-Hadis, 2003), p. 604-605.

¹⁴ Bahauddin Abd Al-Raḥman, *Al-'Iddah Sharḥ Al-'Umdah* p. 605-606.

¹⁵ Shihābuddīn Al-Ramlī, *Nihāyah Al-Muḥtāj Ilā Sharḥ Al-Minhāj*, Vol. 7 (Beirut: Dar Al-Fikr, 1983), 462.

involve cutting off hands, but rather it is left to the discretion of the judge, who will determine the appropriate consequences based on the offender's need for rehabilitation.¹⁶

Beyond these provisions, there is a difference of opinion regarding the phrase *فَأَقْطَعُوا* *أَيْدِيَهُمَا*, which translates to "cut off their hands." The issue lies in determining which part of the arm is included in the definition of "hand." Scholars from the four main Islamic jurisprudential schools (madhhabs) have debated this matter. The Mālikī and Shāfi'ī schools assert that "hand" refers to the *كوع* (elbow). This interpretation is supported by Ibn Rushd al-Ḥafīd in his work *Bidāyah al-Muḥtaj*, representing the Mālikī stance,¹⁷ and by al-Zuhrī in his book *Sirāj al-Wahhāj*, reflecting the Shāfi'ī perspective.¹⁸ Conversely, the Ḥanafī and Ḥanbali schools maintain that the term *أَيْدِيَهُمْ* refers to the wrist, though they use different terminology. The Hanafī school employs the term *زند*, as quoted by 'Abdullāh ibn Muḥammad in *Majma' al-Anhār fī Sharḥ Multaqā al-Abḥar*,¹⁹ while the Hanbali school uses *مفصل الكف*, as noted by Ibn Qudāmah in his book *'Umdah al-Fiqh*.²⁰

Essentially, the disagreement lies in the minimum and maximum limits of punishment for theft. Terminologically, the "hand" is considered to encompass the joint between the palm and the elbow. Hence, the minimum limit for hand cutting is at the wrist, while the maximum is at the elbow. Wahbah Zuḥailī attempts to consolidate various opinions by noting that the majority of scholars believe the cut should occur at the wrist.²¹ However, he also presents an alternative view that suggests cutting only the fingers may suffice. Ultimately, the differences in opinion focus on which specific part of the hand should be cut, all while remaining within the established limits of what constitutes a hand. This punishment is designated because the hand is a primary tool in committing theft, including taking and handling stolen goods. This rationale underscores why the command from Allah is to cut off the hand, rather than to impose other forms of punishment.²²

This opinion certainly contravenes all of the aforementioned agreements stipulating that the hand is defined as the joint between the palm and the elbow. However, upon closer examination, the view that diverges from the majority (jumhur) is not necessarily at odds with the text of the Qur'an. There exists a perspective that can bridge the interpretation of the Qur'anic text in Surah Al-Mā'idah, verse 38, with the opinion regarding the cutting off of fingers as a punishment for theft (*ḥudūd*). While the original meaning of the hand refers to the joint from the palm to the elbow, as agreed upon by the majority and summarized by Al-Zuḥailī, there is also a figurative (*majazī*) meaning. A *majazī* meaning refers to a definition that extends beyond the original yet remains related to it, either through a bound connection (*isti'ārah*) or an unbound connection (*mursal*).²³

¹⁶ Abū Al-Ḥasan 'Alī Ibn Sa'īd, *Manāhij Al-Taḥṣīl Wa Natāij Laṭā'if Al-Ta'wīl*, Vol. 10 (Dar Ibn Hazm, 2007), p. 43.

¹⁷ Al-Ḥafīd, *Bidāyah Al-Mujtahid Wa Nihāyah Al-Muqtaṣid*, p. 235.

¹⁸ Muhammad Al-Zuhri, *Al-Sirāj Al-Wahhāj 'alā Matni Al-Minhāj*, 8th ed. (Beirut, Lebanon: Dar Al-Kotob Al-Ilmiyah, 2016), p. 512.

¹⁹ Abdullah ibn Muhammad, *Majma' Al-Anhar Fī Sharḥ Multaqā Al-Abḥar*, Vol. 1 (Turki: Al-Matba'ah Al-'Amirah, 1328), p. 623.

²⁰ Ibn Qudāmah, *'Umdah Al-Fiqh* (Al-Maktabah Al-Ashriyah, 2004), p. 137.

²¹ Al-Zuhailī, *Al-Fiqh Al-Islāmī Wa Adillatuhū*, p. 5429.

²² Al-Ramlī, *Nihāyah Al-Muḥtāj Ilā Sharḥ Al-Minhāj*, p. 466.

²³ Muhammad Yāsīn Ibn 'Īsā Al-Fādānī, *Ḥusn Al-Ṣiyāghah* (Rembang: Al-Maktabah Al-Anwariyah, n.d.), p. 95-96.

In this case, the compound concerned is *mursal*. If deciphered, the original meaning of cut hands is cut wrists, while the *majazī* meaning is cut fingers. This is known in linguistics as *majāz mursal kulliyah*. This *majāz* mentions the whole, but it means a part of it.²⁴ That is to say, the whole of the hand referred to in Sūrat al-Māidah above is the wrist, and the fingers belong to the wrist. Thus, even though the verse mentions the whole hand (the wrist), what is meant by is a part of the hand (the fingers). *majazī* meaning (the part/finger) does not necessarily occur. Rather it is based on the *qarīnah* found in the process of *istīnbāṭ* the law that results in cutting off the fingers of the hand for the perpetrator of theft.

Such rules have been enacted into positive laws by countries with *Islamic law* systems, such as Iran. In Iran's *Penal Code*, Chapter Seven Article 278 states that the punishment for thieves is *ḥad*. Then in Article 278 letter (a), it is stated that in the first theft, all the fingers of the perpetrator shall be cut off, leaving the thumb and the palm of the hand. Even Iran has a penalty for theft that is widely used in other countries, which is imprisonment. This is stated in a letter (c) that for the third time, theft was then imprisoned for life.²⁵ As a country based on Islamic law, Iran is bold enough to update the law against the perpetrators of theft outside the provisions agreed upon by the four madhhabs above. Of course, Iran is not updating the law for no reason. They are trying to bring the law in line with the times.

2. Contextualization of the Theft Penal Verse to the Indonesian Criminal Code

The punishment for theft, as previously outlined, is *ḥad*, which involves the amputation of hands under specific conditions. If these conditions are not satisfied, the alternative punishment is *ta'zīr*, which allows the judge or ruler to determine the appropriate penalty.²⁶ In contrast, Indonesian positive law, specifically the Criminal Code, stipulates that thieves are subject to imprisonment. This form of punishment has been consistently applied over time, both in the old and new Criminal Codes. The old Penal Code states that "Any person who unlawfully takes property, wholly or partially belonging to another, shall be guilty of theft and may be punished with a maximum imprisonment of five years or a fine of nine hundred rupiahs."²⁷ The new Criminal Code specifies that "Any individual who unlawfully takes any property that wholly or partially belongs to another shall be guilty of theft and may face a maximum imprisonment of five years or a maximum fine of category V."²⁸

There are differences in how punishment is imposed, Islamic criminal law prescribes the punishment for theft as the amputation of a hand, while Indonesian positive law imposes penalties such as imprisonment or fines. However, upon closer examination, certain provisions reveal the relationships or interconnections between Islamic law and positive law. This understanding is essential in addressing the perception that Indonesian positive law contradicts Islamic law. Given that the majority of Indonesia's population is Muslim,²⁹ it is particularly sensitive if Indonesian law is seen as opposing Islamic law. Additionally, since Islamic law is perceived to possess absolute truth, any law that contradicts it is inherently flawed. Therefore, a contextual understanding is necessary to illustrate that Islamic law is both universal and dynamic. When a law is established without considering Islamic law as its foundation, it should be recognized that

²⁴ Muhammad Yāsīn Ibn 'Īsā Al-Fādanī, *Ḥusn Al-Ṣiyāghah*, p. 105.

²⁵ "Iran: Islamic Penal Code," National Legislative Bodies / National Authorities, 1991.

²⁶ Rokhmadi, *Hukum Pidana Islam* (Semarang: CV. Karya Abadi Jaya, 2015), p. 186.

²⁷ Article 362 of Law Number 1 of 1946; Hukum Pidana.

²⁸ Article 476 of Law Number 1 Year 2023 Kitab Undang-Undang Hukum Pidana.

²⁹ Viva Budy Kusnandar, "RISSC: Populasi ; Indonesia Terbesar Di Dunia," databoks, 2021.

it can still maintain a relationship with Islamic law. This is because Islam represents a set of values that transcends external forms, implying that, fundamentally, every legal product that aligns with the principles of Islamic law can be regarded as a reflection of Islamic law itself.³⁰

One example of the contextualization of Islamic law within Indonesia's positive law is the treatment of theft committed out of necessity for basic survival. Islamic law stipulates that such theft should not incur the punishment of hand-cutting. According to Imām Ramlī, the offender cannot be penalized because the elements of guilt are not fulfilled; in his terms, "the pen of the recorder is lifted."³¹ A similar approach is observed in Indonesian positive law. In cases of theft driven by economic necessity, the legal framework seeks restorative justice. As outlined in the Memorandum of Understanding, certain minor offenses can be addressed through restorative justice measures. This includes theft as specified in Article 364 of the Criminal Code, which pertains to cases where the value of the stolen goods is below 25 rupiahs. When an individual steals out of desperation to sustain their life, the value of the stolen items will likely fall below this threshold. Consequently, such instances of theft can be processed through restorative justice, allowing the perpetrator to avoid formal punishment.³²

In addition to theft by force, theft perpetrated by individuals deemed insane can also be examined within the framework of Indonesian criminal law. Islamic law holds that those who are insane are not held accountable for their actions, as they cannot comprehend the teachings of the Qur'an and, thus, are unaware of the prohibition against theft. Consequently, the insane are not subjected to taklīf, or the obligation to adhere to the commandments of Allah.³³ Similarly, in Indonesian positive law, the principle of presumption *juris de jure* posits that all individuals are assumed to know the law. However, an exception is made for those who are insane, as their mental impairments impede their understanding of legal statutes. Therefore, individuals with mental disorders cannot be convicted due to the presence of exculpatory circumstances.³⁴

When considering theft committed by children, it's important to note the relationship between positive law and Islamic law. Islamic law does not prescribe punishments for robbery committed by minors, as they lack the necessary understanding of legal principles. Children are not yet considered mukallaf, meaning they do not bear the responsibility to adhere to the law. However, as the future leaders of the nation, children are given ta'dīb (education) to instil in them the understanding that certain behaviours are wrong.³⁵ There are various forms of ta'dīb, with *ḍarba ta'dībīn* (spanking for educational purposes) being the most common. It's essential to

³⁰ Abdul Basyit, "Pengaruh Pemikiran Ibn Taymiyyah Di Dunia Islam," *Rausyan Fikr: Jurnal Pemikiran Dan Pencerahan* 15, no. 2 (2019), <https://doi.org/10.31000/rf.v15i2.1810>.

³¹ Al-Ramlī, *Nihāyah Al-Muḥtāj Ilā Sharḥ Al-Minhāj*.

³² "Nota Kesepakatan Bersama Ketua Mahkamah Agung Republik Indonesia, Menteri Hukum Dan Hak Asasi Manusia Republik Indonesia, Jaksa Agung Republik Indonesia, Kepala Kepolisian Republik Indonesia Tentang Pelaksanaan Penerapan Penyesuaian Baasan Tindak Pidana R" (2012).

³³ Al-Ramlī, *Nihāyah Al-Muḥtāj Ilā Sharḥ Al-Minhāj*.

³⁴ Article 44 paragraphs (1) and (2) of Law Number 1 Year 1946; Hukum Pidana. Articles 38-39 of Law Number 1 Year 2023; Kitab Undang-Undang Hukum Pidana.

³⁵ Al-Ramlī, *Nihāyah Al-Muḥtāj Ilā Sharḥ Al-Minhāj*.

distinguish this form of spanking from general spanking, as it is conducted within specific boundaries that should not result in harm to the child.³⁶

To protect children from criminal threats, positive law has enacted the Juvenile Justice System Law. This law explains that when children commit criminal offenses, including theft, the first approach is to implement a restorative justice system through diversion. If the diversion process is unsuccessful, the punishment for children is significantly less severe than that imposed on adults. One of the possible punishments for children is counselling, which aims to educate them and help them understand that their actions are wrong.³⁷ This aligns with the concept of ta'dīb in Islam.

Similarities between positive law and Islamic law can also be found in their formal elements. For example, the amount of stolen goods must reach one niṣāb for specific punishments to apply. If the value of the stolen item does not meet this threshold, the punishment is not considered ḥudūd (fixed punishment) such as the cutting off of hands, but rather ta'zīr (discretionary punishment). One niṣāb is defined as ¼ dinar, which, given the current price of a dinar at around four million, equates to approximately one million.³⁸ Therefore, for theft involving items valued below one million, the punishment is not ḥudūd but ta'zīr.³⁹ Among the punishments outlined in ta'zīr is imprisonment, which is also part of the Criminal Code.

In summary, most punishments for theft under Indonesian positive law are guided by Islamic law principles. However, since the primary punishment for theft in Islamic law is the amputation of hands, positive law does not fully adhere to Islamic law. Yet, upon closer examination of the substantive issues, compatibility between positive and Islamic law emerges. The reasoning behind the ḥudūd punishment of cutting off the hands of theft perpetrators is that the hands are the limbs used to commit the crime; therefore, severing them effectively eliminates the ability to steal.⁴⁰ This concept is known as the incapacitation theory, which suggests that reducing a perpetrator's capacity to commit another offense is key to preventing reoffending. An example of this theory in practice can be seen in Iran, which has reformed its law to allow for the severing of fingers instead of cutting off the wrist.

The prison sentence outlined in Indonesian positive law is founded on the incapacitation theory. Although imprisonment may not deter offenders from committing future crimes, it effectively prevents them from harming society while they are incarcerated. In essence, imprisonment incapacitates the offender by physically restricting their freedom and ability to commit further crimes. Thus, both the punishments set forth in positive law and Islamic law share the same philosophical foundation.

In addition to these philosophical similarities, the relationship between positive law and Islamic law regarding the crime of theft can be observed in the fact that positive law reflects a renewal of Islamic law, particularly in Surah Al-Māidah, verse 38. Iranian positive law, for instance, adopts the interpretation of some scholars who argue that the punishment for theft

³⁶ Harry Pribadi Garfes and Khairunnas, "Batasan Memukul Anak Untuk Melaksanakan Sholat Menurut Hukum Islam Dan Hukum Positif," *Islamitsch Familierecht Journal* 2, no. 02 (2021): 106–25, <https://doi.org/10.32923/ifj.v2i02.2015>.

³⁷ Articles 5-6, 71 of Law Number 11 Year 2012. Sistem Peradilan Pidana Anak.

³⁸ Anang Panca, "Info Terbaru Harga 1 Dinar Emas Saat Ini," harga.web.id, 2022.

³⁹ Marsaid, *Al-Fiqh Al-Jinayah (Hukum Pidana Islam) Memahami Tindak Pidana Dalam Hukum Islam*, 208.

⁴⁰ David Scott, *Penology* (London: SAGE Publications Ltd, 2008), p. 24.

should only involve cutting off the fingers. This interpretation is based on the *majāzī* meaning derived from *majāz mursal kullīyyah*. However, if we adjust the '*alāqah*' to focus on *sababīyyah mursal*, a different legal interpretation emerges. *Mursal sababīyyah* refers to the cause, while what is being addressed is the effect. In the context of cutting hands, the "hands" are the cause, and their existence allows for the potential action of theft.⁴¹ Therefore, when we apply the verse on theft to the *mursal sababīyyah*, the ruling implies the necessity to eliminate an individual's ability to commit theft. Consequently, imprisonment can be seen as consistent with Surah Al-Māidah, verse 38, due to its shared goal of removing the perpetrator's capacity to offend.

It can thus be argued that prison sentences are a form of legal reform within Islam that does not alter or diminish the original provisions. This aligns with the Islamic principle of "preserving valid previous rules while embracing new ones that are more relevant."⁴² Furthermore, as Satjipto Rahardjo noted, the law exists for the benefit of humans, not the other way around. Therefore, if a law is misaligned with human development, it must be revised.⁴³

The integration of imprisonment into the framework of Surah Al-Māidah, verse 38, adheres to the principles of *majāz*. In this context, there needs to be a relationship (*'alāqah*) and supporting context (*qarīnah*) to utilize the *majāzī* interpretation.⁴⁴ The '*alāqah*' at hand is the causal relationship between "hands" and "ability." The *qarīnah* under consideration pertains to *qarīnah al-hall*, reflecting the current conditions of legal development that render the punishment of cutting hands impractical and no longer ideal.

In summary, I believe that incorporating prison sentences as a form of legal reform is appropriate and aligns with the established parameters of reform. This reform does not serve as a critique of Surah Al-Māidah, verse 38 itself, but rather questions the limited interpretation held by some scholars who restrict its meaning strictly to the cutting of wrists. Previous criticisms from earlier scholars led to the ruling of cutting fingers, which has been applied in Iran. Therefore, the interpretation provided examines the *qiyas* based on the perspectives of earlier scholars, using a different '*alāqah*.'⁴⁵

Conclusion

A thorough examination of the criminal regulations surrounding theft reveals that there is no inherent conflict between positive law and Islamic criminal law regarding the penalties prescribed for stealing. The primary distinction lies in the conceptual approach, yet the underlying principles remain aligned. Consequently, we can no longer assert that positive law is incompatible with Islamic law. Both systems of law derive their punitive measures for theft from the same philosophical foundation, which emphasizes the incapacitation of the offender—a concept well-known in penology. Thus, whether the punishment involves the amputation of a hand or imprisonment, the ultimate goal remains consistent, albeit executed differently due to the historical contexts in which they exist.

⁴¹ Al-Fādanī, *Ḥusn Al-Ṣiyāghah*, p. 105.

⁴² Penyusun Mu'tamar Islam di Jedah, *Majallah Majma' Al-Fiqh Al-Islami*, Vol. 5 (Maktabah Al-Shamilah, 2008), p. 2647.

⁴³ Satjipto Rahardjo, "Hukum Progresif: Hukum Yang Membebaskan," *Jurnal Hukum Progresif* 1, no. 1 (2011): 1–24, <https://doi.org/https://doi.org/10.14710/hp.1.1.1-24>.

⁴⁴ Al-Fādanī, *Ḥusn Al-Ṣiyāghah*, 93-94.

⁴⁵ David Tan, "Metode Penelitian Hukum: Mengupas Dan Mengulas Metodologi Dalam Menyelenggarakan Penelitian Hukum," *Nusantara: Jurnal Ilmu Pengetahuan Sosial* 8, no. 8 (2021): 2463–78.

CRedit Authorship Contribution Statement

Marli Cahndra: Conceptualization, Methodology, Writing-original Draft. **M. Ainun Najib:** Supervision, Methodology, Writing - review & editing

Declaration of Competing Interest

The authors declare that they have no competing financial interests or personal relationships that could influence the work reported in this paper.

Data Availability

Data will be made available on request

References

- Al-Anshari, Zakariyya. *Ghayah al-Wushul*. Surabaya: Al-Hidayah, n.d.
- Al-Fādānī, Muhammad Yāsīn Ibn 'Īsā. *Ḥusn Al-Ṣiyāghah*. Rembang: Al-Maktabah Al-Anwariyah, n.d.
- Al-Ḥafīd, Ibn Rushd. *Bidāyah Al-Mujtahid Wa Nihāyah Al-Muqtaṣid*. Kairo: Dar Al-Hadis, 2004.
- Al-Qaradhawi, Yusuf. *Perkembangan Fiqh Antara Statis Dan Dinamis*. Translated by Saifullah M. Yunus. Kairo: Maktabah Wahbah, 2022.
- Al-Raḥman, Bahauddin Abd. *Al-'Iddah Sharḥ Al-'Umdah*. Kairo: Dar Al-Hadis, 2003.
- Al-Ramlī, Shihābuddīn. *Nihāyah Al-Muḥtāj Ilā Sharḥ Al-Minhāj*. Beirut: Dar Al-Fikr, 1983.
- Al-Zuhailī, Waḥbah. *Al-Fiqh Al-Islāmī Wa Adillatuhū*. Suriah: Dar Al-Fikr, 1989.
- Al-Zuhri, Muhammad. *Al-Sirāj Al-Wahhāj 'alā Matni Al-Minhāj*. 8th ed. Beirut, Lebanon: Dar Al-Kotob Al-Ilmiyah, 2016.
- Basyit, Abdul. "Pengaruh Pemikiran Ibn Taymiyyah Di Dunia Islam." *Rausyan Fikr: Jurnal Pemikiran Dan Pencerahan* 15, no. 2 (2019). <https://doi.org/10.31000/rf.v15i2.1810>.
- Garfes, Harry Pribadi, and Khairunnas. "Batasan Memukul Anak Untuk Melaksanakan Sholat Menurut Hukum Islam Dan Hukum Positif." *Islamitsch Familierecht Journal* 2, no. 02 (2021): 106–25. <https://doi.org/10.32923/ifj.v2i02.2015>.
- Ghulām, Zakariyya ibn. *Min Uṣūl Al-Fiqh 'Alā Manhaj Ahli Al-Ḥadīth*. Dar Al-Kharaz, 2002.
- Hakim, Abdul Hamid. *Al-Sullam*. Jakarta: Makatabah As-Saadiyah Putra, 2008.
- Kusnandar, Viva Budy. "RISSC: Populasi Muslim Indonesia Terbesar Di Dunia." databoks, 2021.
- Marsaid. *Al-Fiqh Al-Jinayah (Hukum Pidana Islam) Memahami Tindak Pidana Dalam Hukum Islam*. Edited by Jauhari. Palembang: CV. Amanah, 2020.
- Miswanto, Agus. *Ushul Fiqh: Metode Ijtihad Hukum Islam*. Magelang: Unimma Press, 2019.
- Muhammad, Abdullah ibn. *Majma' Al-Anhar Fī Sharḥ Multaqā Al-Abḥar*. Turki: Al-Matba'ah Al-'Amirah, 1328.
- National Legislative Bodies / National Authorities. "Iran: Islamic Penal Code," 1991.
- Nota Kesepakatan Bersama Ketua Mahkamah Agung Republik Indonesia, Menteri Hukum dan Hak Asasi Manusia Republik Indonesia, Jaksa Agung Republik Indonesia, Kepala Kepolisian Republik Indonesia Tentang Pelaksanaan Penerapan Penyesuaian Baasan Tindak Pidana R (2012).
- Panca, Anang. "Info Terbaru Harga 1 Dinar Emas Saat Ini." harga.web.id, 2022.

- Penyusun Mu'tamar Islam di Jedah. *Majallah Majma' Al-Fiqh Al-Islami*. Maktabah Al-Shamilah, 2008.
- Qudāmah, Ibn. *'Umdah Al-Fiqh*. Al-Maktabah Al-Ashriyah, 2004.
- Rahardjo, Satjipto. "Hukum Progresif: Hukum Yang Membebaskan." *Jurnal Hukum Progresif* 1, no. 1 (2011): 1–24. <https://doi.org/https://doi.org/10.14710/hp.1.1.1-24>.
- Rokhmadi. *Hukum Pidana Islam*. Semarang: CV. Karya Abadi Jaya, 2015.
- Sa'id, Abū Al-Ḥasan 'Alī Ibn. *Manāhij Al-Taḥṣīl Wa Natāij Laṭā'if Al-Ta'wīl*. Dar Ibn Hazm, 2007.
- Scott, David. *Penology*. London: SAGE Publications, 2008.
- Shaper, Sue. "The Justification of Punishment." RICE University, 1974.
- Sulaiman, Abu Al-Hasan Maqatil Ibn. *Tafsir Maqatil Ibn Sulaiman*. Beirut: Dar Ihya' Al-Turats, 2003.
- Syamsuri, Abdul Basit Junaidy, Nur Lailatul Musyafa'ah, and Moh. Mufid. *Hukum Pidana Islam Indonesia*. Depok: PT Rajawali Buana Pusaka, 2020.
- Tan, David. "Metode Penelitian Hukum: Mengupas Dan Mengulas Metodologi Dalam Menyelenggarakan Penelitian Hukum." *Nusantara: Jurnal Ilmu Pengetahuan Sosial* 8, no. 8 (2021): 2463–78.