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Contextualization of Theft Criminal Verse in Indonesian Positive Law

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Abstract

Research Objective: This study investigates the significant abandonment of Islamic Criminal Law by examining its adaptability to contemporary contexts. It seeks to challenge the assumption that this legal framework is separate from modern legal systems through a historical analysis of Islamic jurisprudential influences on global punishment frameworks. **Research Methodology:** Employing a normative legal framework, the research adopts both conceptual and comparative approaches, specifically analyzing theft punishments within Islamic criminal law, Indonesian positive law, and Iranian positive law. **Results:** The comparative analysis reveals that, although all three legal systems share a common objective of deterrence, they employ distinct methodologies for punishment: Indonesian law predominantly utilizes imprisonment, Islamic law prescribes hand-cutting as a form of deterrent, and Iranian law implements a graduated system that ranges from finger-cutting to imprisonment. **Findings and Implications:** This research demonstrates that, despite the methodological differences in punishment approaches, each legal system bases its sentencing decisions on contextual factors, including the nature of the crime, the offender's background, and specific circumstances. **Conclusion:** While these legal systems share a fundamental goal of deterrence, they reflect different philosophical frameworks and cultural contexts. This underscores the idea that Islamic Criminal Law can be interpreted in a contextual manner, despite its distinctive punishment methods. **Contribution:** This study enriches jurisprudential discourse by challenging misconceptions regarding the contemporary relevance of Islamic Criminal Law. **Limitations:** The study's emphasis on a single category of offense restricts a comprehensive analysis of broader criminal law approaches. **Suggestions:** Future research should expand comparative analyses to encompass additional legal systems and a wider range of offenses

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

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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]

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 (*istinbāṭ*). 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 *istinbāṭ* 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 *istinbāṭ*. [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.

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 (*istinbāṭ*) 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]

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 Qaraḍawi, 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 research employs a normative legal methodology to thoroughly explore the legal frameworks governing theft in the positive legal systems of Indonesia and Iran, alongside classical Islamic jurisprudence. The methodological framework comprises two complementary analytical approaches.

Firstly, a conceptual approach examines the criminalization of theft from its philosophical

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[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.

[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 (Suriah: 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.

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and jurisprudential foundations while also contextualizing these principles within contemporary socio-legal environments. This approach facilitates a critical analysis of the underlying rationales that inform punitive measures across the examined legal traditions.

Secondly, a comparative legal analysis methodology is utilized to identify, contrast, and evaluate the similarities and differences in scholarly interpretations of theft within these legal systems. This comparative aspect focuses on both doctrinal formulations found in authoritative legal texts and the academic discourse surrounding these provisions, specifically examining punishment typologies, contextual application factors, and the underlying philosophies of deterrence.

Data collection primarily involved a comprehensive textual analysis of relevant statutory provisions, jurisprudential commentaries, and scholarly literature across the three legal traditions. By systematically synthesizing these two methodological approaches, this study establishes significant connections between the codified provisions for criminalizing theft and their interpretive applications in judicial and scholarly contexts. This approach highlights the dynamic relationship between normative legal frameworks and their practical implementation.

Result And Discussion

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-Māidah, verse 38, which states:

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُما جَزاءً بِما كَسَبا نَكالاً 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] 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 أَيْدِيَهُما (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

[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.

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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 أَيْدِيَهُما 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 Ẓāhiri mazhab. 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 (*ḥirz*). 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 *ḥirz* in the context of theft, such as the accounts of Aisha and Hasan. However, these cannot be universally applied. Therefore, the definition of *ḥirz* is contingent upon the customs of the specific region where the theft occurred. If a location recognizes the stolen item as being in *ḥirz*, then the thief can face the punishment of having their hand cut off. This is referred to in Islamic criminal law as *ḥirz 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

[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.

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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 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 فَاقْطَعُوا أَيْدِيَهُما, 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 Syāfi'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 أَيْدِيَهُم 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-Māidah, 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 (*majāzī*) meaning. A *majāzī* 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

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[16] Abū Al-Ḥasan 'Alī Ibn Sa'īd, *Manāhij Al-Tahṣīl Wa Natāij Laṭāif 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.

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connection (mursal).[23]

In this case, the compound concerned is *mursal.* If deciphered, the original meaning of cut hands is cut wrists, while the *majāzī* 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). *majāzī* meaning (the part/finger) does not necessarily occur. Rather it is based on the *qarīnah* found in the process of *isṭinbāṭ* 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.

Comparative Analysis with 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

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[23] Muhammad Yāsīn Ibn ʻĪsā Al-Fādanī, *Ḥusn Al-Ṣiyāghah* (Rembang: Al-Maktabah Al-Anwariyah, n.d.), p. 95-96.

[24] Muhammad Yāsīn Ibn ʻĪsā 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.

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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 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]

Contextualizing Islamic Law in Modern Legal Systems

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 behaviour are wrong.[35] There are various forms of ta'dīb, with ḍarba ta'dībin (spanking for educational purposes) being the most common. It's essential to distinguish this form of spanking from general spanking, as it is conducted within specific

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[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*.

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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.

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.

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 should only involve cutting off the fingers. This interpretation is based on the majāzī meaning derived from *majāz mursal kulliyyah*. However, if we adjust the 'alāqah to focus on sababiyyah mursal, a different legal interpretation emerges. Mursal sababiyyah 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 sababiyyah, 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

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[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.

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

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"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

This research demonstrates that, despite the apparent differences in punishment methodologies for theft across Islamic criminal law, Indonesian positive law, and Iranian legal frameworks, these systems share fundamental deterrent objectives and take contextual factors into account in their sentencing decisions.

The analysis reveals that Islamic criminal law exhibits inherent flexibility, allowing for contextual reinterpretation while remaining rooted in foundational Qur'anic principles. Through the application of linguistic interpretive mechanisms such as *majāz mursal kulliyah* and *mursal sababiyyah*, contemporary practices—such as finger amputation (codified in Iranian law) and imprisonment (as practiced in Indonesia)—can be reconciled with the Qur'anic injunction found in Surah al-Māidah, verse 38.

Furthermore, the comparative analysis establishes that seemingly disparate legal systems often converge in their recognition of exculpatory circumstances, treatment of juvenile offenders, consideration of economic necessity, and application of graduated penalties based on the severity of the offense. This convergence challenges the perception that modern legal systems operate entirely independently of Islamic jurisprudential influence.

In conclusion, while imprisonment may appear distinct from the literal Qur'anic prescription, it serves the fundamental purpose of incapacitating the offender from committing further theft. This aligns with the underlying objective of the original injunction through a purposive rather than strictly textual interpretation.

These findings contribute to a more nuanced understanding of how Islamic criminal law can adapt to contemporary contexts and demonstrate that jurisprudential principles can evolve while preserving essential values. This supports the notion that Islamic criminal law remains

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[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.

relevant within modern legal frameworks when appropriately contextualized.

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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

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