
Islamic Criminal Law Criticism Of Article 5 Of The Universal Declaration Of Human Rights On The Application Of Qishash Punishment

Adzanah Mariska Salsabila^{1*}, Enceng Arif Faizal², Deden Najmudin³,
Mohamad Syahreza Pahlevi⁴

¹²³Sunan Gunung Djati State Islamic University Bandung, Indonesia

⁴Istanbul Sabahattin Zaim University, Turkey

e-mail: adzanahmariskas@gmail.com^{1*}, encengariffaizal@uinsgd.ac.id²,
deden.najmudin@uinsgd.ac.id³, mshpahlevi687@gmail.com⁴

*Corresponding Author

▪ Received: 17-12-2025

▪ Revised: 19-01-2026

▪ Accepted: 21-01-2026

Abstract

The application of *qishash* punishment in Islamic criminal law is often debated because it is considered to be contrary to Article 5 of the Universal Declaration of Human Rights (UDHR), which rejects all forms of cruel, inhuman, and degrading punishment. This accusation is certainly misleading because it views *qishash* only from a symbolic-artificial perspective. The purpose of this study is to interpret Article 5 of the UDHR, analyse the concept of *qishash* punishment in *fiqh jinayah*, and critique Article 5 of the UDHR in relation to the application of *qishash* punishment. This research uses qualitative research with a normative juridical method through a statute approach, conceptual approach, and comparative approach through library research on primary and secondary legal sources, which are then critically analysed. The results of this study are able to criticise Article 5 of the UDHR with two main arguments, namely, first, *qishash* is not a cruel, inhuman, and degrading punishment; second, there is caution in the application of *qishash* punishment through various critical theories and logic (emotivism theory, deconstruction theory, logical fallacy, cultural relativism theory, critical human rights theory, and postcolonial theory). The novelty of this research lies in its attempt to critique the human rights perspective on the application of *qishash* punishment by offering a *maqāṣid al-syarī'ah* approach, namely *qishash* as a mechanism for protecting the right to life (*hifz al-naḥs*) as well as a form of substantive and proportional justice. The academic contributions of this research include enriching the study of Islamic criminal law with an integrative perspective, offering a critical analysis of the interpretation of Article 5 of the UDHR, and providing normative references for the development of a more contextual national criminal law.

Keywords: *Human Rights, Death Penalty, Criticism, Article 5 UDHR, Qishash*

Abstrak

Penerapan hukuman *qishash* dalam hukum pidana Islam sering diperdebatkan karena dianggap bertentangan dengan Pasal 5 *Universal Declaration of Human Rights* (UDHR) yang menolak segala bentuk hukuman yang kejam, tidak manusiawi, dan merendahkan martabat manusia. Tudingan ini tentu saja menyesatkan karena memandang *qishash* hanya dari sisi simbolik-artifisial. Tujuan dari penelitian ini ialah untuk menginterpretasikan Pasal 5 UDHR, menganalisis konsep hukuman *qishash* dalam *fiqh jinayah* dan mengkritik Pasal 5 UDHR terkait dengan penerapan hukuman *qishash*. Penelitian ini menggunakan jenis penelitian kualitatif dengan metode yuridis normatif melalui *statue approach*, *conceptual approach*, dan *comparative approach* melalui studi pustaka (*library research*) terhadap sumber hukum primer dan sekunder yang kemudian dianalisis secara kritis. Hasil penelitian ini mampu mengkritisi Pasal 5 UDHR dengan dua argumentasi pokok yakni pertama *qishash* bukan sebagai hukuman kejam, tidak manusiawi, serta merendahkan martabat manusia; kedua terdapat kehati-hatian dalam penerapan hukuman *qishash* melalui berbagai teori kritik dan logika (*emotivism theory*, *deconstruction theory*, *logical fallacy*, *cultural relativism theory*, *critical human rights theory*, dan *postcolonial theory*). Kebaruan penelitian ini terletak pada upaya mengkritisi pandangan Hak Asasi Manusia terhadap penerapan hukuman *qishash* dengan menawarkan pendekatan *maqashid al-syari'ah*, yakni *qishash* sebagai mekanisme perlindungan hak hidup (*hifz al-nafs*) sekaligus bentuk keadilan substantif dan proporsional. Kontribusi akademik dari penelitian ini meliputi pengayaan kajian hukum pidana Islam dengan perspektif integratif, tawaran analisis kritis terhadap penafsiran Pasal 5 UDHR, serta penyediaan rujukan normatif bagi pengembangan hukum pidana nasional yang lebih kontekstual.

Kata kunci: Hak Asasi Manusia, Hukuman Mati, Kritik, Pasal 5 UDHR, *Qishash*

INTRODUCTION

The phenomenon of fear among human rights activists reveals an epistemic inconsistency between the discourse of liberation that has been constructed and the practice of courage that has failed to be implemented. Since the 14th century, Ibn Taymiyyah has asserted, "*Indeed, Allah establishes a just state even if it is non-Muslim, and does not establish an unjust state even if it is Muslim. Therefore, the enforcement of Islamic criminal law is part of Allah's justice on earth.*"¹ The fear of human rights activists is seen as a performative contradiction, on the one hand calling for resistance, on the other hand showing compliance with repression.² The most prominent paradox in human rights activism is when the subjects who carry the narrative of courage actually display excessive fear, so that the space for advocacy turns into a space for

¹ Ibn Taymiyyah, *Al-Siyāsah Al-Shar‘iyyah Fī Iṣlāḥ Al-Rā‘ī Wa Al-Ra‘iyyah* (Jeddah: Dar al-Ilm al-Fawā'id, 1429), h. 219.

² Amri Saputra Shukri Bin Suparti, "Contemporary Human Rights Law: A Bibliometric Analysis of the Literature from an Islamic and International Law Perspective," *ELQONUN: Jurnal Hukum Ketatanegaraan* 3, no. 2 (2025): 60–71, <https://doi.org/10.19109/t9nbz833>.

negotiation with a sense of personal safety.³ Instead of expanding the democratisation of public space, the fear of human rights activists actually narrows the discourse, signifying the failure of the transformation of discourse into praxis. Human rights activists are so eloquent when talking about pluralism and freedom of religion, but suddenly become tongue-tied when pluralism demands recognition of the enforcement of Islamic criminal law. Defending Islamic criminal law in the name of Western human rights concepts is an oxymoron, an attempt to celebrate freedom with instruments rooted in restriction.⁴

Modern legal tradition has given rise to the Universal Declaration of Human Rights (UDHR), known as the Universal Declaration of Human Rights (DUHAM) of 1948, which is regarded by many as a landmark in the development of international law.⁵ The Universal Declaration of Human Rights, which is universal in nature, is interpreted as an ideal legal concept designed to transcend national, religious and cultural boundaries.⁶ Article 5 of the UDHR states, “*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*”. This article is touted as a *grundnorm* (basic norm) as a form of prevention against arbitrary treatment of citizens by the state and to protect human dignity from punishment that is considered inhumane.⁷ Thus, this interpretation has become an important foundation for the movement to abolish torture and punishment that is considered cruel, inhuman, and degrading in various parts of the world due to limitations influenced by cultural values and moral standards based on differences in each layer of society.⁸

Islamic criminal law, known as *fiqh jinayah*, has always been a *locus* of debate in the discourse on justice, human rights, and the legitimacy of state power.⁹ This line of thinking then debates the existence of the Islamic criminal law system that recognises *qishash* punishment,

³ Robert Knox, “Mobilising and Constraining: The Dynamics of Human Rights Discourse in Two Mexican Social Movements,” *The International Journal of Human Rights* 27, no. 4 (2022): 675–93, <https://doi.org/10.1080/13642987.2022.2142211>.

⁴ Heru Susetyo, “Human Rights Regime: Between Universality and Cultural Relativism, An Indonesia Experience,” *Indonesian Journal of International Law* 16, no. 2 (2019): 191–209, <https://doi.org/10.17304/ijil.vol16.2.749>.

⁵ Mustafa Burak Şener, “A Review of the Meaning and Importance of the Universal Declaration of Human Rights,” *Uluslararası Politik Araştırmalar Dergisi* 7, no. 3 (2021): 15–25, <https://doi.org/10.25272/icps.962292>.

⁶ Cekli Setya Pratiwi, “Bridging the Gap Between Cultural Relativism and Universality of Human Rights: Indonesia Attitudes,” *JILS (Journal of Indonesian Legal Studies)* 5, no. 2 (2020): 450–78, <http://journal.unnes.ac.id/sju/index.php/jils>.

⁷ Nashwan Mohammed Sulaeiman Saud Suwaid Armoosh Rami Salih Salman Husain Al-Obaidi Dmytro Chornomordenko, “Integrating Islamic Criminal Law and International Human Rights Law in Counter-Terrorism Efforts: A Critical Analysis,” *Al Istimbath: Jurnal Hukum Islam* 9, no. 1 (2024): 396–410, <https://doi.org/10.29240/jhi.v9i1.11199>.

⁸ H. S. Asnawi, “Hak Asasi Manusia Islam Dan Barat: Studi Kritik Hukum Pidana Islam Dan Hukuman Mati,” *Supremasi Hukum* 1, no. 1 (2019): 29, <https://doi.org/10.14421/sh.v1i1.1888>.

⁹ Iwan Meisarah Tri Anjani, “A Review of Islamic Criminal Law on the Crime of Military Desertion,” *Hukum Islam* 25, no. 1 (2025): 1–22, <http://dx.doi.org/10.24014/hi.v25i1.36992>.

where the West considers *hudud* and *qishash* punishments to be cruel and difficult to restore, whereas the Islamic perspective positions them as a form of substantive and proportional justice.¹⁰ The application of *qishash* punishment is not limited to ensuring justice for the victim and the perpetrator, but also for the benefit of the people as stated in the core fiqh rule جَلْبُ الْمَصَالِحِ وَدَفْعُ الْمَفَاسِدِ. Allah SWT says in Surah al-Baqarah verse 178, which means, “*O believers! The law of retaliation is set for you in cases of murder ...*”. This is then reinforced in the following verse, which reads,

وَلَكُمْ فِي الْقِصَاصِ حَيَوةٌ يَا أُولِي الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ

“*There is security of life for you in the law of retaliation, O people of reason, so that you may become mindful of Allah.*”¹¹ (QS. al-Baqarah [2]: 179)

Qishash takes into serious consideration the principle of بِالشُّبُهَاتِ بِالْحُدُودِ (al-*hudūdu tasquṭu bisy-syubuhāt*) which means avoiding *hudud* in cases of doubt and ensuring a cautious approach. This principle is upheld alongside other fundamental principles of Islamic criminal law enforcement, such as تَحْقِيقُ الْعَدَالَةِ (*taḥqīqul ‘adālah*) which is proportional justice and emphasises that punishment must be balanced without exceeding limits, and تَحْقِيقُ الرَّحْمَةِ (*taḥqīqur raḥmah*) which is the principle of compassion that opens up space for forgiveness and compensation through the mechanism of *diyat*.¹² *Maqāṣid al-syarī‘ah* constructs *qishash* into the category of *hifz al-naḥs* (protection of life), because with strict sanctions against the crime of murder, human rights to life can be better guaranteed in the eyes of the public interest and place human life with full respect.¹³

Qishash punishment in Islamic criminal law is often marginalised by the universalist perspective of human rights as a form of cruel punishment that contradicts and is contrary to the norms upheld by Article 5 of the UDHR. Western legal thinkers with secular rationalism consider that the physical punishment applied in *qishash* disregards the principle of human dignity that is inherent in nature, so that *qishash* is seen as a barbaric law because they only examine it from a symbolic-artificial perspective. In fact, Islamic criminal law based on *maqāṣid al-syarī‘ah* presents *qishash* punishment as a mechanism to uphold the right to life

¹⁰ Yusif Mamedov, “Islamic Criminal Procedure Law: Human Rights Issues,” *Scientific and Theoretical Almanac Grani* 23, no. 10 (2020): 47–57, <https://doi.org/10.15421/172092>.

¹¹ Kementerian Agama Republik Indonesia, *Al-Qur’an Dan Terjemahannya* (Jakarta: Lajnah Pentashihan Mushaf Al-Qur’an, 2019), h. 27.

¹² Mahendra Kusuma Rosida Diani, “Qishash Diyat Dalam Hukum Pidana Islam Lebih Mencerminkan Keadilan Dari Sisi Korban,” *Jurnal Dinamika* 2, no. 2 (2022): 45–54, <https://journal.unbara.ac.id/index.php/dinamika/index>.

¹³ Abū Ishāq Al-Shāḥibī, *Al-Muwaḥḥaqāt Fī Uṣūl Al-Sharī‘ah Juz 2* (al-Qohiroh: Dar al-Hadith, 1388), h. 320.

(*hifz al-nafs*) and enforce justice to the fullest extent.¹⁴ This intersection of understanding presents a normative dialectic that reveals a fundamental difference in paradigms.

Abdul Rahman Jamil Al Hakim, in his thesis entitled “*Implementasi Konsep Hak Asasi Manusia pada Hukum Qisas dalam Perspektif Fikih Jinayah*” asserts that the principle of *ushul al-khamsah* forms the basis for the protection of human rights, particularly the right to life and justice.¹⁵ Amiril Ahmad and Syaiful Arief in “*Hukuman Mati Perspektif Al-Qur’an dan Hak Asasi Manusia: Analisis Komparatif*” show that the death penalty has a basis of legitimacy, both in the Qur'an and in human rights values, so that the two are not in fundamental conflict because, in essence, this difference arises from a matter of interpretation.¹⁶ Meanwhile Mardhatillah in “*Hukuman Mati dalam Islam Antara Teks Suci dan Hak Asasi Manusia*” concludes that the Qur'an and hadith allow the death penalty with certain elements and its application remains subject to the principles of justice, protection of life, and benefit through the *maqāṣid al-syarī'ah* approach.¹⁷ This has led to a gap, namely the absence of comprehensive research that positions *qishash* not merely as a legal-formal issue, but as a philosophical instrument that reflects substantive justice and provides criticism in the context of the debate on international human rights principles.

The relationship between Islamic criminal law and human rights, particularly with regard to the application of *qishash*, is often studied by contemporary Islamic legal scholars and thinkers.¹⁸ Some emphasise apologetic aspects that seek to defend the existence of *qishash* from accusations of being a cruel punishment, while others focus on criticising the practice of *qishash* from the perspective of the universality of human rights. However, most of these studies are still dichotomous, on the one hand defending the normative validity of *qishash* based on the Qur'an and hadith textually, and on the other hand rejecting *qishash* on the grounds that it is inconsistent with Article 5 of the UDHR. The novelty of this research lies in its attempt to criticise the human rights perspective that often considers *qishash* as cruel punishment, by

¹⁴ Aryani Eva, “Hukum Islam, Demokrasi Dan Hak Asasi Manusia,” *Jurnal Ilmiah Universitas Batanghari Jambi* 17, no. 2 (2017): h. 24-31, <http://ji.unbari.ac.id/index.php/ilmiah/article/view/357>.

¹⁵ Abdul Rahman Jamil Al Hakim, “Implementasi Konsep Hak Asasi Manusia Pada Hukum Qisas Dalam Perspektif Jinayah” (Sekolah Tinggi Ilmu Islam dan Bahasa Arab (STIBA) Makassar, 2022), https://eprints.stiba.ac.id/id/eprint/236/1/Arif_Rahman_Ja%27Far_Al-Hakim.pdf.

¹⁶ Amiril Ahmad Syaiful Arief, “Hukuman Mati Perspektif Al-Qur’an Dan Hak Asasi Manusia,” *Al Quds: Jurnal Studi Alquran Dan* 7, no. 3 (2023): 475–88, <https://doi.org/10.29240/alquds.v7i3.4352>.

¹⁷ Mardhatillah, “Hukuman Mati Dalam Islam Antara Teks Suci Dan Hak Asasi Manusia,” *Nihayah: Journal of Islamic Studies* 1, no. 2 (2025): 102–22, <https://journal.an-nur.org/index.php/nihayah>.

¹⁸ Faradisya Diandra Putri Muhammad Eko Saputro, Andhika Febriansyah, “A Discourse of Capital Punishment in the Islamic Law and Human Rights Law,” *Contemporary Issues on Interfaith Law and Society* 2, no. 1 (2023): 31–60, <https://doi.org/10.15294/ciils.v2i1.31373>.

offering a *maqāṣid al-syarī'ah* approach, namely *qishash* as a mechanism for protecting the right to life (*hifz al-nafs*) as well as substantive and proportional justice. This difference is not merely a matter of positive law, but an epistemological contradiction between two different value systems. With this approach, *qishash* is understood not merely as a repressive punishment, but as a restorative and preventive justice system that balances the rights of victims, perpetrators, and society. The academic contributions of this research include enriching the study of Islamic criminal law with an integrative perspective, offering a critical analysis of the interpretation of Article 5 of the UDHR, and providing normative references for the development of a more contextual national criminal law. The objectives of this research are to interpret Article 5 of the UDHR, analyse the concept of *qishash* punishment in *fiqh jinayah*, and critique Article 5 of the UDHR in relation to the application of *qishash* punishment.

METHOD

This study uses qualitative research with a normative juridical method (doctrinal law) through a statute approach by examining and analysing Article 5 of the Universal Declaration of Human Rights (UDHR), a conceptual approach to analysing the concept of *qishash* in Islamic criminal law, which is then compared with Article 5 of the UDHR, and also uses a comparative approach to analyse the differences in paradigms related to the concepts and values upheld in *qishash*. The type of data used is secondary qualitative data obtained through library research with primary sources in the form of the Qur'an, Hadith, Universal Declaration of Human Rights (UDHR) 1948, classical *fiqh* books, and contemporary *fiqh* books. Secondary sources include books on Islamic criminal law and modern human rights law, legal journal articles, dictionaries, and legal encyclopaedias. Data collection was carried out through documentation and critical literature by examining legal texts, normative interpretations, and relevant academic analyses. The data obtained was then analysed through the stages of inventory, identification, classification and systematisation of legal materials, which were then critically interpreted to find the normative meaning and relevance between the human rights principles in Article 5 of the UDHR and the application of *qishash* punishment in Islamic criminal law.

RESULTS AND DISCUSSION

Interpretation of Article 5 of the Universal Declaration of Human Rights (UDHR)

Article 5 of the UDHR explicitly states, “*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*”. Historically, this Article was born after the humanitarian tragedy of World War II with a universal spirit to protect human dignity, thus

becoming one of the fundamental principles of modern international law.¹⁹ The philosophical foundation of Article 5 of the UDHR is a secular humanist view that positions humans as the highest moral centre (anthropocentric ethics).²⁰ This framework constructs human dignity as inherent, which cannot be diminished or even eliminated for any reason, whether religious, cultural, or political.²¹ Therefore, all forms of punishment that cause physical suffering or are considered inhumane, such as the death penalty,²² flogging, amputation, or *qishash*, are often seen as contrary to the spirit of Article 5 of the UDHR.²³

The interpretation of Article 5 of the UDHR in international legal practice is classified into two major approaches. First, the absolute approach (absolute interpretation) which states that the prohibition of torture and cruel punishment is absolute (non-derogable right) and argues that there is no justification based on religion, security or culture that would justify violating this norm.²⁴ Second, the contextual approach, which asserts that the enforcement of Article 5 of the UDHR must take into account the cultural diversity, legal systems, and moral values of a society.²⁵ This proves that what is considered ‘cruel’ in one context may not necessarily be considered so in another context, as long as the punishment is imposed with the principles of justice and proportionality, as proven by Devi Nilam Sari in her research entitled “*Implementasi Qisas Sebagai Tujuan Hukum dalam Al-Qur’an*”.²⁶ However, the principle of absoluteness is more dominant in global practice, so that countries with religious-based legal systems are often positioned as human rights violators.²⁷

¹⁹ Claudio Corradetti, “Relativism and Human Rights: A Theory of Pluralist Universalism,” *SSRN* 3, no. 1 (2022): 91, <http://dx.doi.org/10.2139/ssrn.4279609>.

²⁰ Anjas Saputra Nurul Al-Fatihah Rahman Kurniati, “Hukuman Mati: Dilema Antara Maslahat Mursalah Dan Hak Asasi Manusia Di Indonesia,” *Al Adalah: Jurnal Politik, Sosial, Hukum Dan Humaniora* 2, no. 4 (2024): 149–59, <https://doi.org/10.59246/aladalah.v2i4.974>.

²¹ Sebastian Muders, “Human Dignity: Final, Inherent, Absolute?,” *Rivista Di Estetica* 75, no. 1 (2020): 84–103, <https://doi.org/10.4000/estetica.7319>.

²² Anak Agung Ayu Nanda Saraswati Marinka Aniceta Heganevada Simbolon, “The Evidentiary Basis of The Prohibition of Torture as Jus Cogens and Its Legal Implications for Indonesian National Law,” *Jurnal Bina Mulia Hukum* 9, no. 2 (2025): 197–219, <https://jurnal.fh.unpad.ac.id/index.php/jbmh/article/view/1087>.

²³ Arafah Pramasto, “Reconciling Islam and Human Rights A Narrative Review of Reform, Resistance, and Realignment,” *Sinergi International Journal of Islamic Studies* 2, no. 3 (2024): 149–61, <https://doi.org/10.61194/ijis.v2i3.606>.

²⁴ Tamyiz Mukharrom Supriyanto Abdi, “Harmonizing Islam and Human Rights Through the Reconstruction of Classical Islamic Tradition,” *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 7, no. 1 (2023): 40–57, <https://doi.org/10.22373/sjhk.v7i1.16436>.

²⁵ John Sinartha Wolo Bayu Dwi Anggono Al Khanif Ahmad Basarah, “Human Rights in the Grip of Cultural Relativism: A Critical Examination of Policies and Challenges in Indonesia,” *Pena Justisia: Media Komunikasi Dan Kajian Hukum* 24, no. 1 (2025): 174–89, <https://doi.org/10.31941/pj.v24i1.5944>.

²⁶ Devi Nilam Sari, “Implementasi Hukuman Qisas Sebagai Tujuan Hukum Dalam Al-Qur’an,” *Muslim Heritage: Jurnal Dialog Islam Dengan Realitas* 5, no. 2 (2020): 263–86, <https://doi.org/10.21154/muslimheritage.v5i2.2342>.

²⁷ Rosma Yeti, “Penjatuhan Pidana Mati Dalam Perspektif Hukum Islam Dan Hak Asasi Manusia (HAM),” *Dinamika: Jurnal Ilmiah Ilmu Hukum* 26, no. 4 (2020): 490–503, <https://jim.unisma.ac.id/index.php/jdh/article/view/5503>.

The Concept of *Qishash* in Islamic Criminal Law (*Fiqh Jinayah*)

The concept of *qishash* is a key pillar in the *fiqh jinayah* system, which emphasises the principles of substantive justice and proportional justice.²⁸ According to al-Raghib al-Ashfahani, the word *al-qishash* comes from the word *al-qashsh*, which means ‘to follow in the footsteps’, that is to follow *al-dam* (blood) with *al-qawad* (revenge).²⁹ Etymologically, *qishash* is defined as ‘retaliating in kind’, while terminologically, *qishash* is the act of retaliating against a criminal act with a punishment commensurate with the act, as explained by Ibn Qudamah.³⁰ *Qishash* in Islamic criminal law is supported by a solid normative basis, reflected in the Qur'an, hadith, and the consensus of scholars. Allah SWT says in Surah al-Maidah verse 45 to emphasise the principle of proportional justice in *qishash*,³¹

وَكَتَبْنَا عَلَيْهِمْ فِيهَا أَنَّ النَّفْسَ بِالنَّفْسِ وَالْعَيْنَ بِالْعَيْنِ وَالْأَنْفَ بِالْأَنْفِ وَالْأُذُنَ بِالْأُذُنِ وَالسِّنَّ بِالسِّنِّ وَالْجُرُوحَ
فِصَاصًا ۗ فَمَنْ تَصَدَّقَ بِهِ فَهُوَ كَفَّارَةٌ لَّهُ ۗ وَمَنْ لَمْ يَحْكَمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الظَّالِمُونَ

“We ordained for them in the Torah, “A life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth and for wounds equal retaliation.” But whoever waives it charitably, it will be atonement for them. And those who do not judge by what Allah has revealed are ‘truly’ the wrongdoers.” (QS. Al-Mā'idah [5]: 45)

Furthermore, the matter of *qishash* punishment is emphasised in various hadiths of the Prophet, which place *qishash* as a mechanism for enforcing substantive justice. One of these is found in a hadith narrated by Bukhari and Muslim, which states,³²

عَنْ ابْنِ مَسْعُودٍ، قَالَ قَالَ رَسُولُ اللَّهِ ﷺ: «لَا يُحِلُّ دَمُ امْرِئٍ مُسْلِمٍ يَشْهَدُ أَنْ لَا إِلَهَ إِلَّا اللَّهُ وَأَنَّي رَسُولُ اللَّهِ إِلَّا بِإِحْدَى ثَلَاثٍ: النَّفْسُ بِالنَّفْسِ، وَالنَّبِيُّ الرَّائِي، وَالْمَارِقُ مِنَ الدِّينِ التَّارِكُ لِلْجَمَاعَةِ

“From Ibn Mas‘ūd (ra), the Messenger of Allah ﷺ said: “The blood of a Muslim who bears witness that there is no deity but Allah and that I am the Messenger of Allah is not lawful, except in one of three cases: a life for a life (*qiṣāṣ*), a married adulterer, and one who abandons his religion and separates himself from the community (apostasy).”

Scholars differ in their opinions on categorising types of criminal homicide.³³ However, in general, fuqaha in Islamic criminal law classify criminal acts of murder into three categories,

²⁸ Abu al-Hasan bin Muhammad bin Habib Al-Mawardi, *Al-Aḥkām Al-Sultāniyyah Wa Al-Wilāyāt Al-Dīniyyah* (Kuwait: Jami'ah Kuwait - Qism al-'Ulum al-Siyasah, 1058), h. 306-307.

²⁹ Al-Rāghib Al-Aṣfahānī, *Al-Mufradāt Fī Gharīb Al-Qur'ān Juz 1* (Kairo: Maktabah Nāẓar Muṣṭafā al-Bāz, n.d.), h. 522.

³⁰ Ibn Qudāmah, *Al-Mughnī Juz 11* (Riyadh: Dar 'Alama al-Kutub, 1223), h. 598-599.

³¹ Kementerian Agama Republik Indonesia, *Al-Qur'an Dan Terjemahannya*, 2019, h. 146.

³² Al-Imam Zainuddin Ahmad bin Abdul Lathif Az-Zabidi, *Mukhtashar Shahih Al-Bukhari Juz 1 Dan 2* (Beirut: Dar al-Kutub al-'Ilmiyyah, 2007), h. 494.

³³ Ahmad Hashari, *As-Siyasatu Al-Jazaiyyah Jilid 3* (Beirut: Dar al-Jayl, 1993), h. 60.

namely intentional murder (*al-qatl al-'amd*), semi-intentional murder (*shibh al-'amd*), and unintentional murder (*al-qatl al-khafa'*).³⁴ *Qishash* is only applied in cases of intentional murder, where the perpetrator had the intention and awareness to commit the act, which is then proven through the means used to prove the extent of the intentionality of the act. In addition, *qishash* is not only a punishment for intentional murder, but also a punishment for perpetrators who commit intentional abuse. Imam al-Nawawi in his book *al-Majmū'* and Ibn Rushd in *Bidāyah al-Mujtahid*, *qishash* is a form of justice that approximates divine justice because it gives the victim (in abuse) or their heirs (in murder) the right to choose between demanding retribution, accepting *diyah* (blood money), or granting forgiveness (*'afw*).³⁵ From a legal philosophy perspective, *qishash* punishment serves as an educational (*ta'dib*) and preventive (*zajr wa rad'*) measure.

Contemporary criminal jurisprudence literature such as the works of 'Abd al-Qādir 'Audah (*al-Tashrī' al-Jinā'ī al-Islāmī*) and Wahbah al-Zuhaylī (*al-Fiqh al-Islāmī wa Adillatuh*) affirm *qishash* as a legal system that balances legal certainty (*ḥaqq Allah*) and human welfare (*ḥaqq al-'abd*). Contemporary scholars reveal that the existence of *qishash* highly upholds the Islamic law's commitment to human rights because it protects every soul from crime (*ḥifz al-nafs*). Furthermore, *qishash* is *ḥaqq al-ādami* (human rights), not merely *ḥaqq Allah*, which means that the implementation of *qishash* punishment is the right of individuals, especially the victim or their heirs, to demand justice for the criminal acts that befell the victim.³⁶ In this case, the state or ruler cannot execute *qishash* punishment without a demand from the entitled party. Ibn Qudamah and al-Nawawi agree that this *ḥaqq al-ādami* shows that Islamic criminal law not only prioritises divine interests but also gives full recognition to human rights in a social and moral context. The victim's guardian was given the choice to demand *qishāsh*, accept *diyah*, or even grant voluntary forgiveness (*'afw*) as stated in QS. Al-Baqarah [2]: 178, which means, "But if the offender is pardoned by the victim's guardian, then blood-money should be decided fairly and payment should be made courteously."³⁷

³⁴ Ahsin Sakho Muhammad, *Ensiklopedi Hukum Pidana Islam* (Jakarta: PT Kharisma Ilmu, 2007), h. 180-351.

³⁵ Muhyi al-Din An-Nawawi, *Al-Majmū' Sharḥ Al-Muhadzab Li Al-Shīrāzī Juz 20* (Jeddah: Maktabah al-Irsyād, 1277), h. 397.

³⁶ Wahbah Al-Zuhaylī, *Al-Fiqh Al-Islāmī Wa Adillatuh Juz 6* (Damaskus: Dar al-Fikr li al-Toba'ah wa al-Tauzi' wa al-Natsr bi Damsyq, 1984), h. 217-218.

³⁷ Ibn Rushd Al-Qurthubi, *Bidāyah Al-Mujtahid Wa Nihāyah Al-Muqtaṣid Juz 2* (Beirut: Dar al-Ma'rifah, 1982), h. 425-426.

Criticism of Islamic Criminal Law against Article 5 of the Universal Declaration of Human Rights (UDHR) Regarding the Application of *Qishash* Punishment

Qishash punishment in Islamic criminal law is often marginalised by the universal perspective of human rights as a form of cruel punishment that contradicts and is contrary to the norms upheld by Article 5 of the UDHR. In fact, Islamic criminal law based on *maqāṣid al-syarī'ah* presents *qishash* punishment as a mechanism to uphold the right to life (*hiḏz al-naḑs*) and enforce justice to the fullest extent.³⁸ In essence, the philosophical basis of *qishash* law is reformatory, namely to rehabilitate the perpetrator's behaviour and regulate the social morality of society. The reformatory nature of *qishash* punishment embodies the principle of deterrence as a form of protection for society from murder and prevents society from committing similar crimes.³⁹ This intersection of understanding presents a normative dialectic that reveals a fundamental difference in paradigms. It is clear that the concept of justice in Western law emphasises protection for the perpetrator, while *fiqh jinayah* emphasises a balance between the rights of the perpetrator, the victim, and society.⁴⁰ Essentially, both positive law and *fiqh jinayah* normatively place the perpetrator, victim, and society as subjects of justice. However, *fiqh jinayah* constructs the three in an integrated manner within a single regime of accountability oriented towards substantive justice, unlike positive law, which still places them within a fragmented and procedural normative framework, so that justice often stops at legal certainty rather than comprehensive restoration.

Fundamentalist Islamic movements are prevalent in Western countries, where anyone or any group that wishes to enforce Islamic law is labelled as radical, hardline and fanatical. In reality, it is these people who have a shallow understanding of Islamic law and are themselves fanatics who are phobic about Islam. Even more sadly, many legal experts in Muslim-majority countries continue to deify their own ideas by insisting that *hadd* and *qishash* punishments are not appropriate to be enforced. Wahbah Zuhaili, in his book *al-Fiqh al-Islāmī wa Adillatuh*, states emphatically that it is these attitudes and arguments that can cause them to become infidels.⁴¹ The statement that Islamic law is not appropriate to be enforced in modern society includes support for individualistic tendencies. On the other hand, there are accusations levelled

³⁸ Eva, "Hukum Islam, Demokrasi Dan Hak Asasi Manusia," h. 24-31.

³⁹ Ali Sodiqin, *Hukum Qisas: Dari Tradisi Arab Menuju Hukum Islam* (Yogyakarta: Tiara Wacana, 2010), h. 157-159.

⁴⁰ Absar Aftab, "Restorative Justice in Islam with Special Reference to the Concept of Diyya," *Journal of Victimology and Victim Justice* 3, no. 1 (2020): 38–56, <https://doi.org/10.1177/2516606920927277>.

⁴¹ Abdul Hayyie Al-Kattani, *Terjemahan Fiqh Islam Wa Adilatuhu Jilid 7 Wahbah Zuhaili* (Jakarta: Gema Insani Press, 2011), h. 281-283.

at Islamic law that it does not sufficiently respect human rights. This argument is based on an anthropocentric paradigm, in which the highest source of legitimacy comes from humans themselves.⁴² In fact, Islamic *fuqaha* are known as the most disciplined and principled scholars in upholding human values, which is a real commitment in the construction and formulation of the laws they produce. Regarding the preservation of human dignity and honour, the Qur'an has declared human rights very clearly and explicitly as stated in Surah al-Isra verse 70,

وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْبَرِّ وَالْبَحْرِ وَرَزَقْنَاهُمْ مِنَ الطَّيِّبَاتِ وَفَضَّلْنَاهُمْ عَلَى كَثِيرٍ مِمَّنْ خَلَقْنَا

تَفْضِيلًا ۝٧٠

“Indeed, We have dignified the children of Adam, carried them on land and sea, granted them good and lawful provisions, and privileged them far above many of Our creatures.”⁴³

Thus, there are many criteria and very strict limitations that must be met in the implementation and application of *qishash* punishment.

The rejection of the application of *hadd* and *qishash* sanctions in international legal discourse generally stems from the interpretation of Article 5 of the UDHR, which prohibits torture and cruel, inhuman, and degrading treatment or punishment. This interpretation, however, is built normatively and abstractly on the basis of the West's historical experience with repressive punishment practices, then imposed universally by generalising all physical criminal sanctions as human rights violations. Such an approach systematically ignores the epistemological and juridical context of *fiqh jinayah*, including the objectives of punishment, victim protection, and very strict standards of proof. Within this framework, the discourse on international human rights not only functions as an instrument for protecting human dignity, but also operates as a hegemonic mechanism that eliminates alternative models of justice, so that legal violence no longer takes the form of physical violence, but rather the normative delegitimisation of other legitimate legal systems.

The first criticism is that the death penalty or *qishash* punishment is cruel, inhumane, and degrading to human dignity. The emotivism theory proposed by Alfred Jules Ayer and Charles Leslie Stevenson,⁴⁴ who were philosophers and figures of logical positivism, states that moral

⁴² Bimo Pradipto Asmorojati Naufal Akmal Oesman Rania Aisyka Rabihatul Hayah Nadea Salsabilla Muhamad Mirza Alfarisi Nurjanah, “Penerapan Nilai-Nilai Penalaran Silogisme Dalam Case Fuzzy Logics,” *Jurnal Cakrawala Ilmiah* 3, no. 11 (2024): 3147–52, <https://mail.bajangjournal.com/index.php/JCI/article/view/8159>.

⁴³ Kementerian Agama Republik Indonesia, *Al-Qur'an Dan Terjemahannya* (Jakarta: Lajnah Pentashihan Mushaf Al-Qur'an, 2019), h. 70.

⁴⁴ Alfred Jules Ayer, *Truth and Logic* (London: Victor Gollancz, 1936), h. 103-115.

statements are merely expressions of emotion, not factual truths. The cruel argument put forward by human rights activists is clearly irrational because cruelty is only a feeling and does not indicate fact; cruelty cannot be proven empirically; cruelty is only a feeling, not evidence; and cruelty is not a matter of right or wrong but rather an emotional reaction. This is further reinforced in the theory of deconstruction criticism, which emphasises that *qishash* punishment as a cruel act is not correct because this dichotomy is merely a hierarchical Western moral discourse construction.⁴⁵ Human rights activists are mistaken in assuming that *qishash* punishment is inhumane and degrading to human dignity. They have committed logical fallacies in the form of ethnocentric fallacy, false dilemma, and strawman fallacy by feeling pity for someone who is in fact a criminal who does not deserve compassion.⁴⁶ If human rights activists pity murderers who have become destroyers, then who will protect society from the threat of murder?⁴⁷ In essence, the main principle of *qishash* is proportional justice, whereby human beings inherently possess dignity and equality (لَقَدْ خَلَقْنَا الْإِنْسَانَ فِي أَحْسَن تَقْوِيمٍ). If a person violates the dignity of another human being (through injury or murder), then they have violated their own humanity..

The statement that the death penalty or *qishash* punishment is cruel comes from countries that use secular legal systems such as France, the United States, Turkey, India, Azerbaijan, Tajikistan, Albania, Mexico, and many more. Oki Fadli, in his research entitled “*Hukuman Mati terhadap Tindak Pidana Pembunuhan dalam Perspektif Hukum Pidana Islam dan Hukum Pidana Positif*” emphasises that the purpose of this secular system is to separate state affairs from religion, which clearly is not a characteristic that is in line with the identity of an Islamic state.⁴⁸ Yusuf al-Qaradhawi argues that secularism is not part of Islamic tradition, but rather a Western tradition that is being adapted to the Islamic context. Furthermore, Yusuf al-Qaradhawi emphasises that the application of the death penalty and *qishash* punishment is not a form of cruel punishment because its application takes into account the principles of *maqāṣid al-syarī‘ah*. In fact, this prominent Islamic scholar and intellectual strongly opposed the application of the death penalty that was not based on Islamic sharia standards, which became clear when he was sentenced to death by an Egyptian court in 2015. Al-Qaradhawi's rejection

⁴⁵ Seradona Altiria, “Dekonstruksi Derrida Pada Kajian Linguistik Kognitif,” *Kolita 21: Konferensi Linguistik Tahunan Atma Jaya Kedua Puluh Satu Tingkat Internasional* 21, no. 21 (2023): 270–80, <https://doi.org/10.25170/kolita.21.4857>.

⁴⁶ Al-Kattani, *Terjemahan Fiqih Islam Wa Adilatuhi Jilid 7 Wahbah Zuhaili*, h. 281-283.

⁴⁷ Syekh Muhammad Ali Ash-Shabuni, *Tafsir Ayat-Ayat Ahkam Jilid 1* (Depok: Keira Publishing, 2016), h. 188.

⁴⁸ Oki Fadli, “Hukuman Mati Terhadap Tindak Pidana Pembunuhan Dalam Perspektif Hukum Pidana Islam Dan Hukum Pidana Positif” (Universitas Islam Sultan Agung Semarang, 2025), <https://repository.unissula.ac.id/39795/>.

clearly reflects his criticism of the Egyptian judicial system, which applies the death penalty as a tool to silence opposition parties or to obstruct those who hold different views from those in power.

The rejection of the death penalty in contemporary human rights discourse is explicitly represented by Turkey's capitulation, basing its argument on human dignity standards according to the European secular human rights paradigm, a position that problematically ignores non-Western paradigms of justice, including Islamic criminal law, as argued by Asa'ari in his research in the *Islamika Journal* entitled “*Dampak Kapitulasi Terhadap Peradilan Turki Utsmani*”.⁴⁹ The view of Turkish criminal law scholars who classify the death penalty and *qishash* as cruel and inhuman punishment is rooted in a secular-anthropocentric interpretation that reduces human dignity to the perpetrator's right to life alone, thereby ignoring the moral and social dimensions of true justice. This approach is clearly considered partial by Islamic criminal law because it negates the rights of victims and the moral responsibility of perpetrators for murder. *Qishash* is not a form of arbitrary state violence as alleged by the Turkish legal system, but rather a mechanism of divine justice built on strict evidence, proportionality of sanctions, and the granting of forgiveness through *diyat*. The claim that the death penalty is inhumane clearly reflects the internalisation of European human rights standards that impose universal measures of humanity, as expressed by Zul Khaidir Kadir in his study entitled “*Kriminalisasi Nilai Moral: Konstruksi Kebijakan Kriminal di Arab Saudi dan Turki*”.⁵⁰

The second criticism is that the death penalty or *qishash* punishment is difficult to revoke. Human rights activists always criticise the physical punishment contained in *qishash*, which is essentially a manifestation of the *fiqh jinayah* principle *أَلْحُدُودُ تَسْقُطُ بِالشُّبُهَاتِ* (*al-ḥudūdu tasquṭu bisy-syubuhāt*) which means that *hudud* is invalidated by *syubhat*.⁵¹ Judges cannot impose sanctions arbitrarily in the application of *qishash* punishment. Implementing Islamic law based on certainty is a requirement in Islamic criminal law, as stated in the fundamental principle *بِنَاءِ الشَّرِيعَةِ عَلَى اليَقِينِ لَا عَلَى الشَّكِّ* “*Sharia is built on certainty, not on doubt*”.⁵² Rasulullah saw. emphasised that every human being should hold fast to what they believe to be true and abandon things that cause doubt. This clearly indicates that there is caution in the application of sanctions for *hudud* and *qishash* crimes, as stated by the Rasulullah saw.

⁴⁹ Asa'ari, “Dampak Kapitulasi Terhadap Peradilan Turki Utsmani,” *Islamika: Jurnal Ilmu-Ilmu Keislaman* 18, no. 2 (2018): 49–64, <https://doi.org/10.32939/islamika.v18i02.310>.

⁵⁰ Zul Khaidir Kadir, “Kriminalisasi Nilai Moral: Konstruksi Kebijakan Kriminal Di Arab Saudi Dan Turki,” *Jurnal El-Thawalib* 6, no. 1 (2025): 71–84, <https://jurnal.uinsyahada.ac.id/index.php/thawalib/index>.

⁵¹ Jaih Mubarak Enceng Arif Faizal, *Kaidah Fiqh Jinayah* (Bandung: Pustaka Bani Quraisy, 2004), h. 61.

⁵² Faizal, h. 39.

عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا، أَنَّ النَّبِيَّ ﷺ قَالَ: اذْرُؤُوا الْحُدُودَ عَنِ الْمُسْلِمِينَ مَا اسْتَطَعْتُمْ، فَإِنْ كَانَ لَهُ مَخْرَجٌ فَدَعُوهُ، فَإِنَّ الْإِمَامَ أَنْ يُحْطِيَ فِي الْعَمْرِ خَيْرٌ مِنْ أَنْ يُحْطِيَ فِي الْعُثُوبَةِ

“... From ‘Ā’ishah (ra), she reported that the Messenger of Allah ﷺ said: “Avert the application of *hudūd* punishments from the Muslims as far as possible. If there is any means by which the accused may be released, then release him, for indeed an error by the ruler (judge) in granting pardon is better than an error in imposing punishment.”

In addition, the application of *qishash* punishment in Islamic criminal law contains a restitutive dimension that provides space for reconciliation and restoration for victims, their families or heirs through mechanisms of forgiveness and *diyat* (compensation).⁵³ This principle shows that the Islamic judicial system is not only oriented towards retribution or punishment, but also accommodates the values of humanity, restoration, and restorative justice. The granting of *diyat* rights is part of the embodiment of the balance between the rights of Allah and the rights of humans, where justice is upheld without negating the possibility of forgiveness and peace. Thus, *diyat* functions as a legal instrument that not only compensates for material losses, but also as a means of maintaining social harmony and moral balance in society in accordance with *maqāsid al-syarī‘ah*.⁵⁴

The enforcement of *qishash* punishment as the most controversial topic in the modern legal system continues to spark debate in various legal, academic and social discourses. Research conducted by Chairul Mukmin proves that there has been a significant reform regarding the regulation of the death penalty through Law Number 1 of 2023 concerning the Criminal Code (KUHP) to annul the colonial Dutch Criminal Code.⁵⁵ Articles 98 to 102 of Law Number 1 of 2023, which regulate the death penalty, are proven to be closely related to various categories in *fiqh jinayah*, such as *qishash*, *hudud*, and *ta'zir*. When the New Criminal Code imposes the death penalty for premeditated murder, this reflects the enforcement of the principle of *qishash* to maintain state stability.⁵⁶ Basically, the debate on the death penalty involves two main schools of thought, namely retentionists who support the application of the death penalty for serious crimes and abolitionists who reject the death penalty on the basis of human rights

⁵³ ‘Abd Al-Qādir‘ Audah, *At-Tasyri’ Al-Jinā’ī Al-Islāmī Muqāranan Bi Al-Qānūn Al-Wad’ī Juz 2* (Beirut: Mu’assasah ar-Risalah, 1992), h. 157-167.

⁵⁴ Abdurrahman Madjrie Fauzan Al-Anshari, *Qishas Pembalasan Yang Hak* (Jakarta: Khairul Bayan, 2003), h. 10-11.

⁵⁵ Republik Indonesia, “Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana (KUHP)” (2023).

⁵⁶ Chairul Mukmin, “Hukuman Mati Pada UU Nomor 1 Tahun 2023 Pasal 98 Sampai 102 Tinjauan Maqosid Syariah Yusuf Al-Qardhawi,” *Universitas Islam Indonesia* (Universitas Islam Indonesia, 2025), h. 149, dspace.uui.ac.id/123456789/55091.

considerations and the risk of miscarriage of justice. Dita Melati Putri, through her research entitled “*Hukuman Pidana Mati dalam KUHP Baru dan Perspektif Abolisionalis serta Retensionis*” refutes allegations by human rights groups that the application of capital punishment and *qishash* punishment is difficult to restore. Because in reality, the New Criminal Code seeks to balance retributive and rehabilitative aspects, thereby illustrating Indonesia's legal efforts to maintain the death penalty with stricter and more selective application.⁵⁷

Critical theory in criticising Article 5 of the UDHR. Article 5 of the UDHR is used as a basis by human rights activists to reject the enforcement of *qishash* punishment in Islamic criminal law.⁵⁸ This paradigm demonstrates the existence of epistemological problems when analysed through the lens of cultural relativism theory, critical human rights theory, and postcolonial theory. The concepts of ‘cruelty’ and ‘humanity’ in the context of law as recognised by cultural relativism theory are relative to the value systems and cultures of a society.⁵⁹ *Qishash* in Islamic criminal law is not seen as cruelty, but rather a form of moral and social justice to uphold the protection of human rights (*hifz al-nafs*) and prevent crime through a balance between the rights of victims and perpetrators.⁶⁰ Furthermore, critical human rights theory highlights that universalism of human rights tends to ignore cultural plurality and non-Western moral values by imposing a single ethical standard born of modern European historical experience, thereby disregarding the philosophical and historical context of Islamic criminal law (*fiqh jinayah*).⁶¹

Postcolonial theory assesses that the discourse of universal human rights is a form of reproduction of colonial epistemic domination that makes Western legal values the sole standard of civilisation.⁶² This theory reveals that *qishash* needs to be understood contextually and dialogically by respecting the moral autonomy of Muslim communities because *qishash* clearly reflects the sovereignty of Islamic criminal law and divine justice, not cruelty as liberally

⁵⁷ Dita Melati Putri, “Hukuman Pidana Mati Dalam KUHP Baru Dan Perspektif Abolisionalis Serta Retensionis,” *Eksekusi: Jurnal Ilmu Hukum Dan Administrasi* 2, no. 4 (2024): 1–13, <https://doi.org/10.55606/eksekusi.v2i4.1451>.

⁵⁸ Pavle Kilibarda, “Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in International Law: Towards a Generic Definition?,” *EE Elgar* 20, no. 1 (2022): 435–61, <https://doi.org/10.4337/9781789900972.00034>.

⁵⁹ João Ferreira Dias, “Can Cultural Relativism Affect the International Protection of Human Rights?,” *Revista Jurídica Portucalense* 37, no. 1 (2024): 321–39, [https://doi.org/10.34625/issn.2183-2705\(36\)2024.ic-14](https://doi.org/10.34625/issn.2183-2705(36)2024.ic-14).

⁶⁰ Muḥammad Abū Zahrah, *Al-Jarīmah Wa Al-'Uqūbah Fī Al-Fiqh Al-Islāmī* (Damaskus: Dar al-Fikr, 1984), h. 62-63.

⁶¹ Kjersti Skarstad, “Critical Human Rights Research,” *Journal of Human Rights*, 2024, <https://doi.org/10.1080/14754835.2024.2354173>.

⁶² Elif Cagla Yıldız, “Postcolonial Approaches to International Human Rights Law: The TWAIL Case,” *Public and Private International Law Bulletin* 43, no. 1 (2023): 353–69, <https://doi.org/10.26650/ppil.2023.43.1181972>.

interpreted in Article 5 of the UDHR. Furthermore, in various classical logic literature, the statement by human rights activists that *qishash* punishment violates Article 5 of the UDHR is an illogical statement that falls under sophistry.⁶³ In other words, the accusation that *qishash* is a cruel punishment is based only on moral assumptions that appear to be rational, which cannot be proven objectively or contextually in the *fiqh jinayah* system, which is in line with the study conducted by Rifky Adji Sukmana in his research entitled “*Paradigma Keadilan dalam Penegakan Hukum Negara Berdasarkan Teori Kebenaran Perspektif Filsafat Hukum Islam*”.⁶⁴ When viewed through the lens of syllogism, it is clear that the claim that ‘*qishash* is cruel, inhumane, and degrading to human dignity’ is not valid epistemologically and logically because it has no tested premises, does not fulfil the form of deductive reasoning (syllogistic), and contains emotional fallacies as described in Aristotle's theory of syllogism.⁶⁵ Conversely, when analysed through a contextual approach, *qishash* can actually be proven to be an instrument of justice, not a form of cruelty.

The application of *qishash* punishment is not limited to ensuring justice for the victim and perpetrator, but also for the benefit of the people, in accordance with the core principle of جَلْبُ الْمَصَالِحِ وَدَفْعُ الْمَفَاسِدِ. *Qishash* punishment is enforced based on various principles in the enforcement of Islamic criminal law, such as تَحْقِيقُ الْمَصْلَحَةِ (*taḥqīqul maṣlahah*) to create benefit, تَحْقِيقُ الْعَدَالَةِ (*taḥqīqul ‘adālah*) *qishash* is enforced as substantial and proportional justice, تَحْقِيقُ الرَّحْمَةِ (*taḥqīqur raḥmah*) the application of *qishash* punishment opens up opportunities for forgiveness and *diyat*, تَحْقِيقُ الْكَرَامَةِ الْإِنْسَانِيَّةِ (*taḥqīqul karāmah al-insāniyyah*) *qishash* punishment upholds human values not only for the victim, but also for the perpetrator, as well as تَحْقِيقُ السَّلَامِ (*taḥqīqus salām*) which emphasises *qishash* in social peace and eliminates the cycle of revenge. From the perspective of *maqāṣid al-syarī‘ah*, *qishash* is positioned as a legal instrument that aims to preserve life (*hiḥfz al-naḥfs*), protect society from criminal acts, and uphold social justice.⁶⁶ Thus, *qishash* cannot be reduced to merely a physical act of retaliation, but must be understood as a legal mechanism rooted in the values of justice, respect for the rights of victims, and recognition of human rights and dignity.

⁶³ Putri Yasmin Br Gultom Najla Adelia, “Kesalahan Berpikir (Logical Fallacies),” *Jurnal Pendidikan Tambusai* 9, no. 1 (2025): 1859–64, <https://jptam.org/index.php/jptam/article/view/24493>.

⁶⁴ Rifky Adji Sukmana Kurniari Lomba Sultan, “Paradigma Keadilan Dalam Penegakan Hukum Negara Berdasarkan Teori Kebenaran Perspektif Filsafat Hukum Islam,” *Jurnal Ilmiah Falsafah: Jurnal Kajian Filsafat, Teologi Dan Humaniora* 8, no. 8 (2023): 17–32, <https://doi.org/10.37567/jif.v8i2.1589>.

⁶⁵ Shalza Alifia Yasha Shafira Amalia Razak Muhammad Parhan, “Silogisme Aristoteles: Fondasi Logika Formal Dalam Pemikiran Filsafat,” *Dar El-Ilmi : Jurnal Studi Keagamaan, Pendidikan Dan Humaniora* 12, no. 1 (2025): 55–68, <https://doi.org/10.52166/darelilmi.v12i1.9382>.

⁶⁶ Al-Shāḥibī, *Al-Muwafaqāt Fī Uṣūl Al-Sharī‘ah* Juz 2, h. 30.

CONCLUSION

The application of *qishash* punishment in Islamic criminal law is not a form of cruelty as alleged by human rights activists and does not contradict Article 5 of the Universal Declaration of Human Rights, but rather a symbol of divine justice that upholds human dignity through the protection of the right to life (*hifz al-nafs*). The various arguments put forward by human rights activists are clearly irrational and illogical, focusing only on the symbolic-artificial aspect. Through a contextual approach and critical analysis using cultural relativism theory, critical human rights theory, postcolonial theory, and various classical logic theories, this study asserts that the assessment of *qishash* must be carried out based on an autonomous Islamic epistemological framework, not the single moral standard of Western culture. The existence of *qishash* punishment not only guarantees justice for victims and perpetrators, but also for the benefit of the people in accordance with the core principle of *جَلْبُ الْمَصَالِحِ وَدَفْعُ الْمَفَاسِدِ*. *Qishash* stands alongside various principles in the enforcement of Islamic criminal law such as *taḥqīqul maṣlahah*, *taḥqīqul ‘adālah*, *taḥqīqur raḥmah*, *taḥqīqul karāmah al-insāniyyah*, and *taḥqīqus salām*, which prove that *qishash* is the embodiment of substantive justice that can truly be felt, as well as an emphasis on proportional justice.

This study contributes by offering a critique of Islamic criminal law against the dominant secular-anthropocentric interpretation of Article 5 of the UDHR and shows that *qishash* cannot be simply categorised as cruel punishment or degrading to human dignity. However, due to its normative-doctrinal nature, this study has not examined empirical practices and contemporary jurisprudential dynamics. Therefore, further research needs to develop an interdisciplinary and comparative approach to enrich the dialogue between Islamic criminal law and the international human rights regime.

REFERENCES

- Abdi, Tamyiz Mukharrom Supriyanto. “Harmonizing Islam and Human Rights Through the Reconstruction of Classical Islamic Tradition.” *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 7, no. 1 (2023): 40–57. <https://doi.org/10.22373/sjhk.v7i1.16436>.
- Adelia, Putri Yasmin Br Gultom Najla. “Kesalahan Berpikir (Logical Fallacies).” *Jurnal Pendidikan Tambusai* 9, no. 1 (2025): 1859–64. <https://jptam.org/index.php/jptam/article/view/24493>.
- Aftab, Absar. “Restorative Justice in Islam with Special Reference to the Concept of Diyya.” *Journal of Victimology and Victim Justice* 3, no. 1 (2020): 38–56.

<https://doi.org/10.1177/2516606920927277>.

- Al-Anshari, Abdurrahman Madjrie Fauzan. *Qishas Pembalasan Yang Hak*. Jakarta: Khairul Bayan, 2003.
- Al-Aṣṣfahānī, Al-Rāghib. *Al-Mufradāt Fī Gharīb Al-Qurʿān Juz 1*. Kairo: Maktabah Nāzar Muṣṭafā al-Bāz, n.d.
- Al-Kattani, Abdul Hayyie. *Terjemahan Fiqih Islam Wa Adilatuhu Jilid 7 Wahbah Zuhaili*. Jakarta: Gema Insani Press, 2011.
- Al-Mawardi, Abu al-Hasan bin Muhammad bin Habib. *Al-Aḥkām Al-Sulṭāniyyah Wa Al-Wilāyāt Al-Dīniyyah*. Kuwait: Jami'ah Kuwait - Qism al-'Ulum al-Siyasah, 1058.
- Al-Qādir 'Audah, 'Abd. *At-Tasyri' Al-Jinā'ī Al-Islāmī Muqāranan Bi Al-Qānūn Al-Waḍ'ī Juz 2*. Beirut: Mu'assasah ar-Risalah, 1992.
- Al-Qurthubi, Ibn Rushd. *Bidāyah Al-Mujtahid Wa Nihāyah Al-Muqtaṣid Juz 2*. Beirut: Dar al-Ma'rifah, 1982.
- Al-Shāṭibī, Abū Ishāq. *Al-Muwafaqāt Fī Uṣūl Al-Sharī'ah Juz 2*. al-Qohiroh: Dar al-Hadīth, 1388.
- Al-Zuhaylī, Wahbah. *Al-Fiqh Al-Islāmī Wa Adillatuh Juz 6*. Damaskus: Dar al-Fikr li al-Toba'ah wa al-Tauzi' wa al-Natsr bi Damsyq, 1984.
- Altiria, Seradona. "Dekonstruksi Derrida Pada Kajian Linguistik Kognitif." *Kolita 21: Konferensi Linguistik Tahunan Atma Jaya Kedua Puluh Satu Tingkat Internasional 21*, no. 21 (2023): 270–80. <https://doi.org/10.25170/kolita.21.4857>.
- An-Nawawi, Muhyi al-Din. *Al-Majmū' Sharḥ Al-Muhadzab Li Al-Shīrāzī Juz 20*. Jeddah: Maktabah al-Irsyād, 1277.
- Arief, Amiril Ahmad Syaiful. "Hukuman Mati Perspektif Al-Qur'an Dan Hak Asasi Manusia." *Al Quds: Jurnal Studi Alquran Dan* 7, no. 3 (2023): 475–88. <https://doi.org/10.29240/alquds.v7i3.4352>.
- Asa'ari. "Dampak Kapitulasi Terhadap Peradilan Turki Utsmani." *Islamika: Jurnal Ilmu-Ilmu Keislaman* 18, no. 2 (2018): 49–64. <https://doi.org/10.32939/islamika.v18i02.310>.
- Ash-Shabuni, Syekh Muhammad Ali. *Tafsir Ayat-Ayat Ahkam Jilid 1*. Depok: Keira Publishing, 2016.
- Asnawi, H. S. "Hak Asasi Manusia Islam Dan Barat: Studi Kritik Hukum Pidana Islam Dan Hukuman Mati." *Supremasi Hukum* 1, no. 1 (2019): 29. <https://doi.org/10.14421/sh.v1i1.1888>.
- Ayer, Alfred Jules. *Truth and Logic*. London: Victor Gollancz, 1936.

- Az-Zabidi, Al-Imam Zainuddin Ahmad bin Abdul Lathif. *Mukhtashar Shahih Al-Bukhari Juz 1 Dan 2*. Beirut: Dar al-Kutub al-‘Ilmiyyah, 2007.
- Basarah, John Sinartha Wolo Bayu Dwi Anggono Al Khanif Ahmad. “Human Rights in the Grip of Cultural Relativism: A Critical Examination of Policies and Challenges in Indonesia.” *Pena Justisia: Media Komunikasi Dan Kajian Hukum* 24, no. 1 (2025): 174–89. <https://doi.org/10.31941/pj.v24i1.5944>.
- Chornomordenko, Nashwan Mohammed Sulaeiman Saud Suwaid Armoosh Rami Salih Salman Husain Al-Obaidi Dmytro. “Integrating Islamic Criminal Law and International Human Rights Law in Counter-Terrorism Efforts A Critical Analysis.” *Al Istinbath: Jurnal Hukum Islam* 9, no. 1 (2024): 396–410. <https://doi.org/10.29240/jhi.v9i1.11199>.
- Corradetti, Claudio. “Relativism and Human Rights: A Theory of Pluralist Universalism.” *SSRN* 3, no. 1 (2022): 91. <http://dx.doi.org/10.2139/ssrn.4279609>.
- Diani, Mahendra Kusuma Rosida. “Qishash Diyat Dalam Hukum Pidana Islam Lebih Mencerminkan Keadilan Dari Sisi Korban.” *Jurnal Dinamika* 2, no. 2 (2022): 45–54. <https://journal.unbara.ac.id/index.php/dinamika/index>.
- Dias, João Ferreira. “Can Cultural Relativism Affect the International Protection of Human Rights?” *Revista Jurídica Portucalense* 37, no. 1 (2024): 321–39. [https://doi.org/10.34625/issn.2183-2705\(36\)2024.ic-14](https://doi.org/10.34625/issn.2183-2705(36)2024.ic-14).
- Eva, Aryani. “Hukum Islam, Demokrasi Dan Hak Asasi Manusia.” *Jurnal Ilmiah Universitas Batanghari Jambi* 17, no. 2 (2017): 24–31. <http://ji.unbari.ac.id/index.php/ilmiah/article/view/357>.
- Fadli, Oki. “Hukuman Mati Terhadap Tindak Pidana Pembunuhan Dalam Perspektif Hukum Pidana Islam Dan Hukum Pidana Positif.” Universitas Islam Sultan Agung Semarang, 2025. <https://repository.unissula.ac.id/39795/>.
- Faizal, Jaih Mubarak Enceng Arif. *Kaidah Fiqh Jinayah*. Bandung: Pustaka Bani Quraisy, 2004.
- Hakim, Abdul Rahman Jamil Al. “Implementasi Konsep Hak Asasi Manusia Pada Hukum Qisas Dalam Perspektif Jinayah.” Sekolah Tinggi Ilmu Islam dan Bahasa Arab (STIBA) Makassar, 2022. https://eprints.stiba.ac.id/id/eprint/236/1/Arif_Rahman_Ja%27Far_Al-Hakim.pdf.
- Hashari, Ahmad. *As-Siyasatu Al-Jazaiyyah Jilid 3*. Beirut: Dar al-Jayl, 1993.
- Kadir, Zul Khaidir. “Kriminalisasi Nilai Moral: Konstruksi Kebijakan Kriminal Di Arab Saudi Dan Turki.” *Jurnal El-Thawalib* 6, no. 1 (2025): 71–84.

- <https://jurnal.uinsyahada.ac.id/index.php/thawalib/index>.
- Kementerian Agama Republik Indonesia. *Al-Qur'an Dan Terjemahannya*. Jakarta: Lajnah Pentashihan Mushaf Al-Qur'an, 2019.
- . *Al-Qur'an Dan Terjemahannya*. Jakarta: Lajnah Pentashihan Mushaf Al-Qur'an, 2019.
- Kilibarda, Pavle. "Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in International Law: Towards a Generic Definition?" *EE Elgar* 20, no. 1 (2022): 435–61. <https://doi.org/10.4337/9781789900972.00034>.
- Knox, Robert. "Mobilising and Constraining: The Dynamics of Human Rights Discourse in Two Mexican Social Movements." *The International Journal of Human Rights* 27, no. 4 (2022): 675–93. <https://doi.org/10.1080/13642987.2022.2142211>.
- Kurniati, Anjas Saputra Nurul Al-Fatihah Rahman. "Hukuman Mati: Dilema Antara Maslahat Mursalah Dan Hak Asasi Manusia Di Indonesia." *Al Adalah: Jurnal Politik, Sosial, Hukum Dan Humaniora* 2, no. 4 (2024): 149–59. <https://doi.org/10.59246/aladalah.v2i4.974>.
- Mamedov, Yusif. "Islamic Criminal Procedure Law: Human Rights Issues." *Scientific and Theoretical Almanac Grani* 23, no. 10 (2020): 47–57. <https://doi.org/10.15421/172092>.
- Mardhatillah. "Hukuman Mati Dalam Islam Antara Teks Suci Dan Hak Asasi Manusia." *Nihayah: Journal of Islamic Studies* 1, no. 2 (2025): 102–22. <https://journal.an-nur.org/index.php/nihayah>.
- Meisarah Tri Anjani, Iwan. "A Review of Islamic Criminal Law on the Crime of Military Desertion." *Hukum Islam* 25, no. 1 (2025): 1–22. <http://dx.doi.org/10.24014/hi.v25i1.36992>.
- Muders, Sebastian. "Human Dignity: Final, Inherent, Absolute?" *Rivista Di Estetica* 75, no. 1 (2020): 84–103. <https://doi.org/10.4000/estetica.7319>.
- Muhammad, Ahsin Sakho. *Ensiklopedi Hukum Pidana Islam*. Jakarta: PT Kharisma Ilmu, 2007.
- Muhammad Eko Saputro, Andhika Febriansyah, Faradisya Diandra Putri. "A Discourse of Capital Punishment in the Islamic Law and Human Rights Law." *Contemporary Issues on Interfaith Law and Society* 2, no. 1 (2023): 31–60. <https://doi.org/10.15294/ciils.v2i1.31373>.
- Mukmin, Chairul. "Hukuman Mati Pada UU Nomor 1 Tahun 2023 Pasal 98 Sampai 102 Tinjauan Maqosid Syariah Yusuf Al-Qardhawi." *Universitas Islam Indonesia*. Universitas Islam Indonesia, 2025. dspace.uui.ac.id/123456789/55091.
- Nurjanah, Bimo Pradipto Asmorojati Naufal Akmal Oesman Rania Aisyka Rabihatul Hayah Nadea Salsabilla Muhamad Mirza Alfarisi. "Penerapan Nilai-Nilai Penalaran Silogisme

- Dalam Case Fuzzy Logics.” *Jurnal Cakrawala Ilmiah* 3, no. 11 (2024): 3147–52. <https://mail.bajangjournal.com/index.php/JCI/article/view/8159>.
- Parhan, Shalza Alifia Yasha Shafira Amalia Razak Muhammad. “Silogisme Aristoteles: Fondasi Logika Formal Dalam Pemikiran Filsafat.” *Dar El-Ilmi: Jurnal Studi Keagamaan, Pendidikan Dan Humaniora* 12, no. 1 (2025): 55–68. <https://doi.org/10.52166/darelilmi.v12i1.9382>.
- Pramasto, Arafah. “Reconciling Islam and Human Rights A Narrative Review of Reform, Resistance, and Realignment.” *Sinergi International Journal of Islamic Studies* 2, no. 3 (2024): 149–61. <https://doi.org/10.61194/ijis.v2i3.606>.
- Pratiwi, Cekli Setya. “Bridging the Gap Between Cultural Relativism and Universality of Human Rights: Indonesia Attitudes.” *JILS (Journal of Indonesian Legal Studies)* 5, no. 2 (2020): 450–78. <http://journal.unnes.ac.id/sju/index.php/jils>.
- Putri, Dita Melati. “Hukuman Pidana Mati Dalam KUHP Baru Dan Perspektif Abolisionalis Serta Retensionis.” *Eksekusi: Jurnal Ilmu Hukum Dan Administrasi* 2, no. 4 (2024): 1–13. <https://doi.org/10.55606/eksekusi.v2i4.1451>.
- Qudāmah, Ibn. *Al-Mughnī Juz 11*. Riyadh: Dar ’Alama al-Kutub, 1223.
- Republik Indonesia. Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana (KUHP) (2023).
- Sari, Devi Nilam. “Implementasi Hukuman Qisas Sebagai Tujuan Hukum Dalam Al-Qur’an.” *Muslim Heritage: Jurnal Dialog Islam Dengan Realitas* 5, no. 2 (2020): 263–86. <https://doi.org/10.21154/muslimheritage.v5i2.2342>.
- Şener, Mustafa Burak. “A Review of the Meaning and Importance of the Universal Declaration of Human Rights.” *Uluslararası Politik Araştırmalar Dergisi* 7, no. 3 (2021): 15–25. <https://doi.org/10.25272/icps.962292>.
- Simbolon, Anak Agung Ayu Nanda Saraswati Marinka Aniceta Heganevada. “The Evidentiary Basis of The Prohibition of Torture as Jus Cogens and Its Legal Implications for Indonesian National Law.” *Jurnal Bina Mulia Hukum* 9, no. 2 (2025): 197–219. <https://jurnal.fh.unpad.ac.id/index.php/jbmh/article/view/1087>.
- Skarstad, Kjersti. “Critical Human Rights Research.” *Journal of Human Rights*, 2024. <https://doi.org/10.1080/14754835.2024.2354173>.
- Sodiqin, Ali. *Hukum Qisas: Dari Tradisi Arab Menuju Hukum Islam*. Yogyakarta: Tiara Wacana, 2010.
- Sultan, Rifky Adji Sukmana Kurniari Lomba. “Paradigma Keadilan Dalam Penegakan Hukum

- Negara Berdasarkan Teori Kebenaran Perspektif Filsafat Hukum Islam.” *Jurnal Ilmiah Falsafah: Jurnal Kajian Filsafat, Teologi Dan Humaniora* 8, no. 8 (2023): 17–32. <https://doi.org/10.37567/jif.v8i2.1589>.
- Suparti, Amri Saputra Shukri Bin. “Contemporary Human Rights Law: A Bibliometric Analysis of the Literature from an Islamic and International Law Perspective.” *ELQONUN: Jurnal Hukum Ketatanegaraan* 3, no. 2 (2025): 60–71. <https://doi.org/10.19109/t9nbz833>.
- Susetyo, Heru. “Human Rights Regime: Between Universality and Cultural Relativism, An Indonesia Experience.” *Indonesian Journal of International Law* 16, no. 2 (2019): 191–209. <https://doi.org/10.17304/ijil.vol16.2.749>.
- Taymiyyah, Ibn. *Al-Siyāsah Al-Shar‘iyyah Fī Islāḥ Al-Rā‘ī Wa Al-Ra‘iyyah*. Jeddah: Dar al-Ilm al-Fawā’id, 1429.
- Yeti, Rosma. “Penjatuhan Pidana Mati Dalam Perspektif Hukum Islam Dan Hak Asasi Manusia (HAM).” *Dinamika: Jurnal Ilmiah Ilmu Hukum* 26, no. 4 (2020): 490–503. <https://jim.unisma.ac.id/index.php/jdh/article/view/5503>.
- Yıldız, Elif Çağla. “Postcolonial Approaches to International Human Rights Law: The TWAIL Case.” *Public and Private International Law Bulletin* 43, no. 1 (2023): 353–69. <https://doi.org/10.26650/ppil.2023.43.1181972>.
- Zahrah, Muḥammad Abū. *Al-Jarīmah Wa Al-‘Uqūbah Fī Al-Fiqh Al-Islāmī*. Damaskus: Dar al-Fikr, 1984.