

STRIKING A BALANCE: EXPLORING HARMONY IN INDONESIAN CRIMINAL LAW AND ISLAMIC JURISPRUDENCE

Yayan Muhammad Royani^{1*}, Hee Cheol Park²

¹Universitas Islam Negeri Sunan Gunung Djati, Bandung, Indonesia

²Kangwon National University, Chuncheon, South Korea

Citation:

Royani, Yayan Muhammad,
and Hee Cheol Park. 2023.
"Striking a Balance: Exploring
Harmony in Indonesian
Criminal Law and Islamic
Jurisprudence." *Walisongo Law
Review (Walrev)* 5(2): 155–82.
doi:
[https://doi.org/10.21580/wa
lrev.2023.5.2.18196](https://doi.org/10.21580/walrev.2023.5.2.18196).

Copyright © 2023 by Authors

This work is licensed under a
Creative Commons
Attribution-ShareAlike 4.0
International License.



Abstract: The long-established the Indonesian Criminal Code follows a liberal individual's tradition of Dutch criminal law that has always changed. The old criminal code is based on classical and neo-classical thinking, emphasising systematic criminal law structures and legal certainty. The basis of balance in the new criminal code is a response to a base that does not reflect the nation's values. For example, Pancasila is included as a foundation, including the value of the most exquisite element of divinity in its formulation. With the value of divinity, it is necessary to review from the perspective of religious teachings, including Islam. Islamic criminal law reflects the spirit of balance in the criminal provisions of hudud, qisas, and takzir. This article uses a comparative approach and a type of normative research. The results of the article show that the relevance of the primary balance in the new criminal code and Islamic Criminal Law is seen in several aspects, such as the relevancy of the pillar values of the balance in Pancasila, the relevancy of the fundamental balance of the mono-dualistic; the significance of the idea of a balance between the protection of victims

* Corresponding Author: Yayan Muhammad Royani (yayanmroyani@uinsgd.ac.id),
Univesitas Islam Negeri Sunan Gunung Djati, Bandung, Indonesia

and the individualization of criminals; and the fundamental relevance to the balance between formal and material criteria.

Hukum pidana Indonesia yang sudah lama digunakan mengikuti tradisi individu bebas dari hukum pidana Belanda yang selalu berubah. Hukum Pidana lama didasarkan pada pemikiran klasik dan neo-klasik, menekankan struktur hukum pidana yang sistematis dan kepastian hukum. Dasar keseimbangan dalam Hukum Pidana baru adalah respons terhadap basis yang tidak mencerminkan nilai-nilai bangsa. Misalnya, Pancasila dimasukkan sebagai fondasi, termasuk nilai unsur ilahi yang paling indah dalam formulasinya. Dengan nilai ilahi, perlu untuk meninjau dari perspektif ajaran-ajaran agama, termasuk Islam. Hukum pidana Islam mencerminkan semangat keseimbangan dalam ketentuan pidana hudud, qisas, dan takzir. Artikel ini menggunakan pendekatan komparatif dan jenis penelitian normatif. Hasil penelitian menunjukkan bahwa relevansi keseimbangan primer dalam kode kriminal baru dan hukum pidana Islam terlihat dalam beberapa aspek, seperti relevansi nilai-nilai pilar keseimbangannya di Pancasila, relevansi ekuilibrasi fundamental mono-dualistik; pentingnya gagasan kestabilan antara perlindungan korban dan individualisasi penjahat; dan relevansi fundamental untuk kesequilibrium kriteria formil dan materiil.

Keywords: Relevance, Principle of Balance, Criminal Code.

INTRODUCTION

The principle of balance in the new Criminal Code (KUHP) is a reformulation of the liberal individual principle in the current Criminal Code (KUHP) which is a Dutch product (Gunarto 2012:84). According to

O.S Hiariej, the current philosophical value of the Criminal Code is based on classical or neo-classical thinking which requires criminal law to be structured systematically and oriented or focused on legal certainty (Hiariej 2014:4-5).

The Criminal Code in force in Indonesia is outdated and does not accommodate the need for a sense of justice in society and paying attention to living laws (Nurrahman, Adiansyah, and Soponyono 2019:101). Not in accordance with the characteristics of the nation, with evidence in the Criminal Code that articles are still found that are not in accordance with the nature of democracy in Indonesia, such as insulting political leaders, officials or ethnic groups (Lev 1990:467) or public values and interests are not regulated, such as the criminal act of cohabitation.

The balance value of the new Criminal Code is taken from Pancasila as the basis of the state, so that the values contained in each point must be included in the draft Criminal Code Law. According to A. Nurahman and E. Soponyono, the first principle which reads "Belief in One God" is a sign that Indonesian people believe in the existence of God. Therefore, it is necessary to balance values between exploring laws and the laws that live in a society that is based on God's teachings and religious values (Nurrahman et al. 2019:101). According to Satjipto Raharjo, law is not a series of article formulations like a telephone book, but has substance or conditions with meaning and value (Rahardjo 2006:20). In reality, there needs to be a balance between seeing laws as written rules and broader science and knowledge. Therefore, there will be a balance between good regulations supported by good law enforcement.

The two main pillars in implementing the principle of balance are the national legal system and national development (Saifuddin and Heryanti 2021:219). According to Barda Nawawi, the idea of balance in the new Criminal Code is motivated by and originates from the value of balance contained in Pancasila. These five points can be condensed into 3 pillars, namely: 1. The pillar of divinity, 2. The pillar of humanity and 3, the pillar of society (Arief 2014:4). Based on Pancasila, this also means that criminal law must be in accordance with the socio-political, socio-philosophical and socio-cultural values of society (Arief 2008:25).

The idea of balance includes: Monodualistic balance between general/society interests and individual/individual interests; Balance between the protection/interests of perpetrators of criminal acts and victims of criminal acts; Balance between objective and subjective elements/factors; Balance between formal and material criteria; Balance between legal certainty, flexibility/elasticity/flexibility, and justice; and Balance of national values and global/international/universal values (Arief 2011:11).

The 2015 Draft Criminal Code academy text explains extensively the application of the principle of balance by referring to various seminars and expert opinions. In a Criminology seminar in 1976, explained that maintaining criminal law is a means of protecting society against crime by rehabilitating or reforming criminals without reducing the interests of society (Arief 2008:43). The above opinion is reinforced by the National Criminal Law Reform Seminar Report in 1980 which states that the politics of criminal law is related to the purpose of punishment and must be directed towards protecting society and balance and harmony in life in society.

Criminal law attention must also look at the interests of society or the state, victims and perpetrators (Kehakiman 1980:6-7).

The aim of criminal law enforcement relating to community protection can be interpreted as protection from disturbances in harmony or balance. Therefore, criminal law must resolve conflicts caused by criminal acts with the aim of restoring balance and bringing a sense of peace in society (Arief 2014:45-46). Community protection specifically includes victim protection. The idea of the principle of balance in Islam is based on the verses of the Koran as contained in Surah Al-Mulk verse 7 which states that there was no imbalance in the creation of the universe, heaven and earth. In line with this verse, it is found in Surah Al-Infitar verse 7 which states about the balance of creation of creatures called humans.

The principle of balance in Islamic criminal law can be seen from the concept of dividing criminal acts into *hudud*, *kisas* and *takzir*. *Hudud* as a punishment that has been determined in the Koran in its form and punishment is considered to protect public interests that cannot be changed. Meanwhile, *kisas* is a form in which the provisions of the action have been determined but the punishment is handed over entirely to the victim. *Takzir* is a very flexible punishment where the authority to determine the law is given to the ruler (Muhyidin 2019:24).

Based on the division of the concept of rights above, it can be seen from the protection that is the aim of *sharia* or *maqhasid sharia*. According to Muhyidin, the aim of Islamic law is to have a special feature, namely the integration and unity of God's will in creating the universe. This concept gives rise to the idea that *sharia* is a source of law that will definitely bring

about benefits and leave behind damage. From this basic concept various forms of law were born (Muhyidin 2019:6). The division of rights in Islamic law does not mean that there is a strict dichotomy, but rather that they are intertwined to achieve benefit. Laws that originate from Allah SWT cover all aspects of benefit and justice. As in the case of adultery or accusations of adultery (*qadzaf*), even though it appears to be related to an individual, in essence it attacks and injures public values. In the story, it can be seen that the victim's rights determine the implementation of punishment, but the general aim of enforcing these provisions is to create public benefit and fulfill a sense of justice.

The benefits contained in the *Hudud* radius refer to the concept of protecting public and community values so that they cannot be contested. The parties, including a judge or ruler, cannot influence the legal provisions written in the Koran. This is different in *Jarimah Qisas* where the victim has the authority to determine whether a criminal act can be carried out or not (Audah 2007:205). Namely, it focuses on fulfilling the rights of victims which automatically protects the perpetrator if they receive forgiveness. In *Jarimah Takzir*, the benefit is in the form of public protection, but the policy is in the hands of the judge or ruler. Considerations can be based on the benefits or laws that exist in society as well as justice for the perpetrator. The basis is the fulfillment of educational justice in accordance with the level of criminal acts committed. A judge can determine various punishments, including forgiving actions that are deemed to provide more benefit to society and the perpetrator.

Islamic Criminal Law includes the principle of balance contained in the current Criminal Code. The principle of monodualistic balance between the public interest contained in the hudud provisions, as well as the provisions on the principle of individual protection contained in the *jarimah kisas*. The relevance of *jarimah kisas* is found in the principle of protecting victims and perpetrators. Even though the hudud provisions do not contain the concept of protecting and fulfilling the rights of victims, hudud allows for additional punishment in the form of *takzir* or still applying *qisas* and *diyat* if it concerns the soul.

The principle of balance between formal and material criteria is contained in the *takzir*'s finger where a ruler can determine punishment based on the legal benefits that exist in society. Authority is in the hands of a judge while still considering the arguments contained in the text. *Jarimah takzir* itself facilitates various forms of criminal acts that are not specifically specified in the text. Formal and material balance includes the principle of balancing legal certainty with flexibility and justice (Audah 2007:312).

The quest for legal harmony in Indonesian criminal law and Islamic jurisprudence is a complex and ongoing process. Karimullah (2022) and Saputra (2021) both explore the Indonesianization of Islamic law, with Karimullah emphasizing the need for epistemological and axiological adjustments, and Saputra discussing the interpretations of Islamic criminal law verses and their application in Indonesia's positive law. Arifin (2020) highlights the desire for the application of Islamic law in the criminal field, particularly in cases of corruption and bribery. However, Butt (2018) raises concerns about the potential impact of religious conservatism on the

judiciary and the future of Indonesian pluralism. These studies collectively underscore the challenges and opportunities in achieving harmony between Indonesian criminal law and Islamic jurisprudence (Arifin 2020; Butt 2018; Karimullah 2022; Rokhmad 2021; Saputra et al. 2021).

According to Fuad (2022) and Rohmah (2022) explained the attempt to revoke the Qanun through judicial review by domestic civil society organizations at the Indonesian Supreme Court had failed, and Islamic law has become one of the important sources of law in developing national law in Indonesian society. Then, Hannani (2023) and Yani (2023) discourse Islamic law's struggle with modern nation-states is a current reality in contemporary society and The transformation of Islamic law into national law is a difficult task (Fuad, Darma, and Muhibbuthabry 2022; Hannani 2023; Rohmah and Alfatdi 2022; Yani and Barthos 2020). None of the literature mentioned above is as exact as the author suggests. Therefore, this study becomes relevant for further discussion.

Based on the explanation above, researchers feel it is necessary to discuss the relevance of the principle of balance in the draft criminal code to Islamic law. The relevance approach means looking for similarities or differences between two objects. As a country with the largest number of Islamic adherents in the world, contributions of thought, especially in the field of Islamic criminal law, are absolutely necessary. Knowing the relevance of the two legal systems does not only compare norms, more than that, analyze the values contained. So it is hoped that it can expand the scientific knowledge in these two fields of science. It is hoped that the Islamic community in Indonesia can understand the importance of implementing

the Criminal Code as a basis for law enforcement. because both have relevance in legal principles.

METHOD

This type of research is normative law, namely focusing on the analysis of applicable regulations or legal norms. It is a library study where data collection techniques involve collecting secondary data from laws, books, journals and documents related to research. After the data is collected, the next step is to classify the sources of primary, secondary and tertiary legal materials. The analysis method uses a qualitative normative method (Marzuki 2016:55).

The research approach method uses a comparative or comparative approach. According to Barda Nawawi Arief, the comparative approach does not only compare legal material, but also has philosophical value. Apart from legal material, the comparative approach also looks at the intellectual conceptions that are built behind the main legal institutions/institutions of one or several foreign legal systems. It is hoped that the comparison can contribute to thinking about reforming the criminal law system relating to the position of victims (Arief 2011:3-4). The method applied in this research is by comparing the legal norms of the Criminal Code in the form of legal principles with the legal principles of Islamic criminal law.

RESULT AND DISCUSSION

The Basis of Balance and Moderation in Islam

Islam is a religion that unites various dimensions so that it is considered moderate for those who base it on this understanding. The

middle attitude of the Islamic religion can be seen in seeing the reality of life by upholding justice, moderation, and the middle way. According to Ibn 'Asyur, as quoted by Zuhairi Misrawi, he stated that a moderate attitude, not extreme left or right, is a noble attitude which is an Islamic teaching (Misrawi 2007:59).

The basic verse of the Koran about moderation is found in surah al-Baqarah verse 143 which means: *“And thus, we have made you (Muslims), the ummatan wasathan, so that you may be witnesses of human (deeds) and so that the Messenger (Muhammad) may be witnesses of your (deeds). We did not make it the qibla that you (formerly) turned towards, but that We may know) who follows the Messenger and who turns back. Indeed, (moving the Qibla) is very difficult, except for those who are guided by Allah. And Allah will not waste your faith. Indeed, Allah is Most Kind, Most Merciful to Man”* (Q.S alBaqarah/2: 143). The postulate for the idea of the principle of balance in Islam is based on verses from the Koran, including in Surah Al-Mulk verse 7 which reads: *“Who created the seven heavens in layers. You can never see in the creation of the Most Gracious God anything out of balance. So, look over and over again, if you see something that is not balanced.”* Surah Al-Infitar verse 7 reads: *"The One who created you then perfected your existence and made your (body structure) balanced."*

Based on the verses above, the implementation of the value of balance in Islamic moderation is a *manhaj* that promotes moderate, fair, wise thinking, prioritizing goodness and being balanced and proportional. Islamic moderation has universal characteristics such as fair, balanced, tolerant, moderate, open, and egalitarian and dialogical values (Misrawi 2007:59). The pattern of thought that prioritizes moderation in the study of

Islamic law is very different from others, for example textualist thought, Salafi thought, liberal thought, and Islamic reform thought.

The provisions of moderation and balance are also reflected in the provisions of Islamic Criminal Law. The division of criminal law into three forms of action and punishment is highly correlated with the objectives of determining the Shari'a. In hudud law, the provisions on forms of action and punishment are directly based on the text of the Koran and Hadith. No other interpretation is needed because the basic value contained is the universal value of protecting human benefit. This is different from the *qisas* law where the right to carry out punishment depends on the victim, whether there is forgiveness or otherwise appropriate retribution is carried out based on the provisions of *qisas*. Lastly, the law of *takzir*, where the ruler's rights are given a large portion in determining the form or type. The final criminal offense is determined if it is not included in hudud or *qisas*.

The balance referred to in Islamic criminal law is the inclusion of all interests of various parties based on benefit. Not dichotomized by legal necessity such as the application of the principle of formal legality, or vice versa without legal certainty through the implementation of unwritten law. In this case, there is relevance to the current Criminal Code which tries to implement the principle of balance from the basic philosophy of the state, namely Pancasila.

The Relevance of the Value of the Pillar of Balance in Pancasila and Islamic Criminal Law

According to Barda Nawawi Arief, balance in Pancasila refers to the pillars of divinity, the pillars of humanity and the pillars of society (Arief

2014:4). Barda does not explain theoretically how divine, human, and social values become the formula for the principle of balance. Further explanation is that according to him the values of criminal law must be in accordance with socio-political, socio-philosophical and socio-cultural (Arief 2008:25).

The divine principles in Pancasila refer to the religious beliefs of Indonesian citizens. According to Soekarno, the divine dimension is not just a society and nation that have a god, but every Indonesian citizen has a god based on their own beliefs or gods. Soekarno's thoughts about God are based on the diversity of Indonesian society. Soekarno tried to state with his expression "All people should believe in God culturally, that is, there should be no religious egoism" (Soekarno 1964:29–30).

The interpretation of belief in God according to Soekarno is to practice religious teachings in a civilized manner, namely respecting each other. All Indonesian people can practice their beliefs in accordance with their values without having to violate other people's beliefs. In the aspect of applicable religious values, criminal law is deemed necessary to carry out its duty to protect them. So, its formulation requires political, philosophical, and cultural analysis, which in Soekarno's view is that reflection on divinity must be seen from a cultural perspective.

The concept of godly principles in Soekarno's view was influenced by his thoughts as a Muslim and the religion of much of the Indonesian population. According to him, Islam has universal values, so it is in accordance with Pancasila. He has visited a third of the countries in the world and most of them are countries with a majority Muslim population. Pancasila is greatly admired by various countries, especially Muslims

(Soekarno 1990:57). Sukarno continued to pride himself on Pancasila as the basis of the Indonesian state. It is hoped that the long-term orientation towards the future will be able to answer all the challenges in current developments, including in the legal field.

The formulation of Islamic law in Indonesia specifically applies to family law with the Compilation of Islamic Law On the basis that family law applies within the scope of individuals, while Indonesian criminal law still applies to the Dutch era Criminal Code because it is public law. A reformulation of the Criminal Code is needed so that Pancasila values enter and replace outdated values. The reformulation of the Criminal Code which has now changed the principles of individualism and liberalism towards Pancasila values and the values that live in society. So, it was opposed by many leaders who still adhered to the Dutch legal scientific tradition.

The relevance of divine values in the Criminal Code and Islamic criminal law is found in the sources that serve as the basis for the enactment of the law. Based on the principle of material legality, laws that exist and apply in society, including customary law on the basis of religion, can be applied and allow courts to try cases that have no parallel in the Criminal Code (Suartha 2015:235). The divine values reflected in these customs become the source of national criminal law.

Values beyond regulatory formalities refer to the laws that exist in society with various values and forms. It is irrelevant when the source of the applicable custom or law is a human agreement or habit that is not based on revelation. Relevance only exists in the form of unwritten norms when compared with positive law. On the other hand, when positive law is based

on the principle of formal legality, relevance lies in legal provisions which cannot be influenced by other than written provisions (principle of formal legality).

The relevance of the principle of formal legality to Islamic criminal law is found in legal provisions which cannot be influenced by anything outside written law. In contrast to the principle of material legality where the law is based on those living in society. Legal provisions that cannot be changed in Islamic criminal law refer to the concept of hudud. This is a provision of Allah SWT that cannot be changed by humans because the inherent rights are in the public interest. In this regard, the ulama divide rights in Islamic criminal law into the rights of Allah and the rights of servants (Khallaf 1977:210-2016). In more detail into four categories as follows:

1. The pure rights of Allah SWT where servants cannot reduce or change existing provisions in Sharia law. This right is divided into three areas which include worship, *Adhdhara'ibul-maliyah* or taxation and *jarimah hudud* in addition to *qadzaf* and *qisas*.
2. The rights of Allah SWT are mixed with the rights of servants, but the rights of Allah SWT are won. An example is a finger accused of adultery (*qadzaf*). Even if a person accused of adultery receives forgiveness from the accused, he cannot cancel the sanctions he must bear. In this case, the public interest takes precedence over individual rights.
3. Pure servant rights, namely rights related to a servant's property. Especially regarding agreements and *mu'amalah* between individuals. In

this case, a person has the right to exercise their rights or not, it is up to their individual wishes.

4. The servant's rights are mixed with the rights of Allah SWT, but the servant's rights are won. For example, in *jarimah qisas*, where a servant can grant forgiveness, even though there is a public interest which is reflected in giving appropriate punishment.

Based on the division of rights above, the relevance of the principle of balance in the Nilap Pillar of Pancasila and Islamic criminal law can be outlined as follows:

First, the first point about the one and only God reflects the transcendental values that must exist in the souls of all Indonesian people. Faith in God is a national value as well as a strength in advancing the nation and state. In the legal field, divine values cannot be eliminated because they are the ideology of the state. According to Theresia Rifeni, if law is a system of applicable rules that regulate social relations with the political system, then of course law will be connected to ideology (Widiarti 2010:76). God's involvement in a rule is not absolute in a legal state system that is not based on religion (Fauzi :93-94). The relevance of Islamic criminal law from this perspective is not in its entirety, but in the core of divine values which are the source of public law. In Islamic criminal law, the decrees of Allah SWT which cannot be influenced or have no servant rights in them, automatically become public law which has universal value. *Hudud* is a form of criminal act that is based on provisions that have been determined in two sources of the Islamic religion, namely the Koran and Hadith.

Second, the point of just and civilized humanity refers to universal human values. As creatures created by God, humans have equal rights based on values that have existed since before their birth. So, there are no differences based on ethnicity, race, gender, and religion, which means there are no discriminatory actions. In practice, people are asked to respect each other, be tolerant, not be arbitrary and help each other and work together. Human rights law is, among other things, an embodiment of this second point. Respect for basic human rights which must be respected, fulfilled, and protected by the state has similarities so that it can be relevant to Islamic criminal law. Focusing on the rights of servants in implementing criminal law provisions falls into the *Qisas* category. In its implementation, the right to exercise and forgive is very dependent on the victim. God's decree is only a sign if there is inconsistency in determining punishment.

The relevance of the concept of human rights to Islamic criminal law lies in the stated objectives of sharia. The stipulation of punishment in Islamic law aims to protect human rights. For example, to protect the soul, the *qisas* punishment is implemented, for the protection of property, the punishment for cutting off hands is applied, for the protection of the mind, the punishment for drunkards is applied. According to al-Gazali, what is meant by *maslahah* is realizing benefits while rejecting misery (Mas'ud 1995:10). The theory about the purpose of sharia in Islamic law is known as *maqasid sharia*. In its application, we must adhere to moderation and balance, namely achieving the benefit of this world and the hereafter (Mas'ud 1995:6). Based on this goal, the application of law will not solely look at textuality, moreover the contextuality and purpose of the existence of the

Shari'a. From the point of view of Arabic reasoning, legal analysis is not only seen from texts alone but also incorporates rationality and even ethics. The dimensions of Arabic reason consist of *bayani* (textual), *burhani* (rational) and *burhani* (ethical) reason (Ridwan 2016:188–89).

Third, the point of social justice for Indonesian society. According to M. Yamin, social justice for all Indonesian people refers to prosperity. Yamin believes that the Sriwijaya kingdom was founded so that its people would be prosperous and prosperous (Fauzi 1983:93–94). The role in implementing social welfare is not only a manifestation of the state's obligation to fulfill the rights of its citizens, but also understanding the rights and obligations of the people themselves. The reflection is by respecting the rights of others and prioritizing public interests over one's own interests.

The relevance to Islamic criminal law lies in the concept of *takzir*. The authorities have great authority in determining whether an act is prohibited or the form of punishment. As long as it is not regulated in hudud or *qisas*, the determination of *takzir* is based on public benefit. The public interest is represented by the authorities as a representative of the interests of society. The form and punishment for the crime of *takzir* can be determined as flexibly as possible following current developments and public interests. Personal interests are not included in the concept of *taqzir* because the rights rest with the authorities, so that forgiveness and various other forms of policy do not come from the victim but rather the authority or judge.

The Relevance of the Principle of Monodualistic Balance to Islamic Criminal Law

The concept of the monodualistic principle is a balance between general/society interests and individual/individual interests. This concept of integration arises from two understandings in philosophical anthropology, namely the individualist and collective schools. For the individualist school, collectivity or community interests are just a means for personal interests. On the other hand, the collectivist school, which was the forerunner of socialism and communism, views human nature as a social creature, so that the individual is a means for the interests of society (Gunarto 2012:87).

Pancasila views human nature as not merely following an individualistic/liberal ideology or a collective/socialist ideology, but rather as a monodualistic human being. Humans cannot live without society and vice versa, society would not exist without individuals. Therefore, there is a need for balance in looking at individual and social interests. In criminal law, this term is known as "*Daad-dader Strafrecht*" where the law looks at the objective side of the act and the subjective side of the person or maker.

The relevance of the monodualistic principle to Islamic Criminal Law lies in the division of rights determined in the form of criminal acts and punishments. The rights of Allah contained in the hudud have public value in society. Therefore, it cannot be determined otherwise as the principle of formal legality applies. A person will be seen from the actions they commit that fall within the definition of an offense, without paying attention to whether the perpetrator received forgiveness or whether they committed a mistake resulting from negligence.

Qisas has different provisions, the punishment really depends on the victim or family who is responsible. In *Qisas* the type of punishment is in

accordance with the act committed, which in accordance with the literal meaning is balance and commensurability (Zuhaili 1989:261). A person's actions can receive forgiveness, namely not carrying out the punishment when the victim or the family responsible does not demand and provide forgiveness. The relevance in this case is found in the protection/interests of victims and the idea of criminal individualization.

Differences exist in the application of the provisions of the balance principle. In the Criminal Code, the principle of balance applies to every offense or act, criminal liability, or punishment. Meanwhile, in Islamic law, the categorization of balance is based on the distribution of rights. Allah's rights in hudud act as universal public values that cannot be changed in the form of actions or punishment. *Qisas* gives the servant the right to decide whether the law will be treated, replaced with a fine or granted forgiveness. *Takzir* has broader provisions where the form of action and punishment, the authority and rights rest with the person holding the responsibility, namely the ruler or judge.

The Relevance of the Idea of Balancing Protection of Victims' Interests and Criminal Individualization with *Qisas* Provisions

The concept of the idea of balancing the protection of victims' interests and the individualization of crimes in the new Criminal Code is reflected in criminal and sentencing provisions. The old KHUP did not accommodate the interests of victims at all, because the principle used was criminal individualization, namely the focus of attention was on the perpetrator, while the victim was placed outside the system (Mudzakkir 2011:2). According to Tyrone Kirchengast, recognition of the position of

crime victims by the state cannot be separated from the centralization of law, so that all authority in enforcing the law is only between individuals and the state (Kirchengast 2006:1).

From an Islamic legal perspective, the problem of fulfilling victims' rights is not only seen from the fulfillment of personal rights (victims and perpetrators), but also encompasses public interests and benefits. So the aim of law is not only to achieve justice or certainty, it also aims to improve the welfare of society. This example can be seen in *jarimah qisas*, where the victim has the right to determine the punishment or compensation so that an agreement is reached.

Surah al Baqorah verse 179 states that in *qisas* there is survival. Most of the commentators provide an explanation about survival in this verse in terms of its deterrent effect on perpetrators. By providing appropriate punishment, it is hoped that society will learn a lesson so that they do not commit this crime. However, if you look at other verses related to forgiveness, as in Surah Al Isra' verse 33, then survival also means the cessation of revenge and bloodshed among society.

As in the general legal concept, public law provisions do not involve individuals, so in Islamic law this is not always the case. The exception for victims in *qisas* illustrates that in Islamic law, when looking at the general benefit we still look at the benefit of the individual. The definition of a criminal act of *qisas* or *diyat* is a criminal act that is punishable by *qisas* and *diyat*. Both are individual rights whose amount has been determined, that is, they do not have a minimum or maximum limit (Audah 2007:100).

When someone violates this by being punished with *qisas*, the victim can determine whether they should be repaid according to their actions or be forgiven and replaced with *diyat*. The judge's position is only to determine the wishes of the victim or the victim's family. The direct involvement of procedural law in the criminal justice system is an extraordinary award. Victims are not only used as objects or in an equal position to witnesses. According to Zubaida, judging from the position and rights of victims, *qisas* in Islamic law does not actually have a holistic perspective. According to Sami Zubaida *qisas* is a crime against the soul which includes murder and abuse. In a broader context, in Islam there is the term *takzir*. According to Sami, as in Iran, *takzir* has determined a crime and its punishment which includes imprisonment and a fine (Audah n.d.:245).

The Relevance of the Principle of Balance between Formal and Material Criteria with the Terms of Taxation

The balance of formal and material criteria is related to the division of legality principles in the new KHUP into formal and material legality. The problem with the previous Criminal Code was when law enforcers could not determine punishments that were not regulated by law. On the other hand, the principle of formal legality contained in the old Criminal Code feels very strong (Nurrahman et al. 2019:105). Subsequently, criticism began to emerge because this principle could not answer and fulfill the needs of society. Currently, it is considered that many of the Pancasila values that live in society cannot be accommodated by the Criminal Code. For example, acts of adultery or cohabitation are opposed by religious communities based on the Almighty God. Some countries, such as Germany, no longer use the

principle of legality and give judges the power to determine whether an act is a criminal act or not.

The relevance of the division of the principle of balance between formal and material criteria and assessment is found in the judge's broad authority in determining punishment. Formal criteria include the principle of formal legality, where the form of action and punishment must be in accordance with statutory provisions and not apply retroactively. Just as in the assessment of criminal acts and punishments can be determined by the authorities using the concept of formal legality, more broadly than that, it can be done by determining criminal acts and punishments that are in accordance with the needs of society as applied in the concept of material legality. According to Audah, *takzir* is a criminal act that is threatened with one or several *takzir* penalties. In Islam there are no specified types of punishment for the crime of *takzir*. Judges are given the freedom to determine a sentence that is appropriate to the condition of the perpetrator. Actions regulated in the Koran or hadith fall into the category of *takzir* if there are no provisions for punishment. Actions that are not determined by the Koran or hadith can still fall into the category of *takzir* based on considerations of benefit according to the authorities (Audah n.d.:245).

The judge's authority to determine punishment is very broad. The judge can forgive the perpetrator if it is not related to the victim's personal rights. If it is related to the rights of the victim, it must be resolved based on the victim's consent (Audah 2007:100–101). For example, in cases of fraud that cause loss of the victim's property rights, compensation is mandatory and cannot be forgiven by the judge. Therefore, victims can grant forgiveness

for pure personal rights. It's different when the criminal act committed is related to the public interest, then forgiving the victim cannot eliminate it except only mitigate it.

The judge can determine the severity of the punishment depending on the actions and circumstances. The judge can determine the maximum or minimum sentence and can also ask to carry out the sentence or postpone it. *Takzir* can also be included with hudud punishment as an addition or conversely, actions that are not punishable by hudud can be replaced with *takzir*. For example, in rape cases, apart from getting a limited sentence, the judge can determine additional punishment in the form of compensation to the victim or marrying the victim.

CONCLUSION

The relevance of the principle of balance in the new KHUP and Islamic Criminal Law is found in the value of the pillar of balance in Pancasila and Islamic Criminal Law. The relevance of the pillar of divinity refers to the values that live in society based on public religious values. Public value provisions in Islamic criminal law refer to hudud, namely Allah's rights which cannot be reduced or increased based on the provisions of the text. The relevance of human values refers to the protection of universal human values. The relevance of the concept of human rights to Islamic criminal law lies in the stated objectives of sharia. The stipulation of punishment in Islamic law aims to protect human rights. The relevance of values to society refers to welfare. The relevance to Islamic criminal law lies in the concept of *takzir*. The authorities have great authority in determining whether an act is prohibited or the form of punishment. The relevance of the monodualistic

principle to Islamic Criminal Law lies in the division of rights determined in the form of criminal acts and punishments. Accommodation of criminal acts and punishments outside the provisions of the Criminal Code or which exist in showing flexibility as contained in the provisions of hudud and *qisas*. The rights of Allah contained in the hudud have public value in society. *Qisas* have different provisions, the punishment really depends on the victim or family who is responsible. The concept of the idea of balancing protection of victims' interests and individualization of crimes in the new Criminal Code is reflected in the criminal and sentencing provisions. In the old Criminal Code, the victim of an act was given a place, which is different from the new Criminal Code where the provision of compensation can reduce the crime. In line with the concept of *qisas* which provides space for victims to determine appropriate compensation or retribution. The relevance of the principle of balance between formal and material criteria is contained in the assessment provisions. The relevance of the division of the principle of balance between formal and material criteria and assessment is found in the judge's broad authority in determining punishment. Formal criteria include the principle of formal legality, where the form of action and punishment must be in accordance with statutory provisions and not apply retroactively. [W]

REFERENCES

- Arief, Barda Nawawi. 2008. *Kebijakan Hukum Pidana*. Jakarta: Kencana Prenada Media Group.

- Arief, Barda Nawawi. 2014. *Perbandingan Hukum Pidana*. Jakarta: Rajawali Press.
- Arief, Barda Nawawie. 2011. *Pembaharuan Hukum Pidana Dalam Perspektif Kajian Perbandingan*. Bandung: PT: Citra Aditya Bakti.
- Arifin, Muhammad. 2020. "The Efforts of Islamic Criminal Law Integration into Indonesian Law Procedures." *Budapest International Research and Critics Institute (BIRCI-Journal): Humanities and Social Sciences* 3(2):975–84. doi: 10.33258/birci.v3i2.925.
- Audah, Abdul Qadir. 2007. *Ensiklopedi Hukum Pidana Islam*. Jakarta: PT. Rehal Publika.
- Audah, Abdul Qadir. n.d. *Tt. Al Tasyri' Al Jina'i Muqaaronan Bi Al Qanunu Al Wadl'i*. Bairut: Darul Kita al 'Arabi.
- Butt, Simon. 2018. "Religious Conservatism, Islamic Criminal Law and the Judiciary in Indonesia: A Tale of Three Courts." *The Journal of Legal Pluralism and Unofficial Law* 50(3):402–34. doi: 10.1080/07329113.2018.1532025.
- Fauzi, Ahmad etal tt. 1983. *Pancasila Ditinjau Dari Segi Sejarah-Segi Yuridis Konstitusional Dan Segi Filosofis*. Malang: Lembaga Penerbit Universitas Brawijaya.
- Fuad, Zainul, Surya Darma, and Muhibbuthabry Muhibbuthabry. 2022. "Wither Qanun Jinayat ? The Legal and Social Developments of Islamic Criminal Law in Indonesia." *Cogent Social Sciences* 8(1). doi: 10.1080/23311886.2022.2053269.
- Gunarto, Marcus Priyo. 2012. "Asas Keseimbangan Dalam Konsep Rancangan Undang-Undang Kitab Pidana." *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 24(1):82–97. doi: 10.22146/jmh.16143.
- Hannani. 2023. "Revisiting Islamic Law in Indonesia's Legal System Discourse: A Critical Analysis of the Legal and Social Implications." *International Journal of Law and Politics Studies* 5(3):13–17. doi: 10.32996/ijlps.2023.5.3.3.

- Hiariej, Eddy O. S. 2014. *Prinsip-Prinsip Hukum Pidana*. Yogyakarta: Cahaya Atma Pustaka.
- Karimullah, Suud Sarim. 2022. "Pursuing Legal Harmony: Indonesianization of Islamic Law Concept and Its Impact on National Law." *Mazahib* 21(2):213–44. doi: 10.21093/mj.v21i2.4800.
- Kehakiman, BPHN Departemen. 1980. "Laporan Simposium Pembaharuan Hukum Pidana Nasional."
- Kirchengast, Tyrone. 2006. *The Victim in Criminal Law and Justice*. New York: Palgrave Macmillan.
- Lev, Daniel S. 1990. *Hukum Kolonial Dan Asal-Usul Pembentukan Negara Indonesia, Dalam Lev, Daniel, Hukum Dan Politik Di Indonesia, Kesenambungan Dan Perubahan*. Jakarta: LP3ES.
- Marzuki, Peter Mahmud. 2016. *Penelitian Hukum, Edisi Revisi*. Jakarta: Kencana Prenada Media Group.
- Mas'ud, Muhammad Khalid. 1995. *Shatibi's Philosophy of Islamic Law*. Islamabad: Islamic Research Institute International Islamic University.
- Misrawi, Zuhairi. 2007. *Al-Quran Kitab Toleransi, Inklusivisme, Pluralisme, Dan Multikulturalisme*. Jakarta: Ftrah.
- Mudzakkir. 2011. "Kedudukan Korban Tindak Pidana Dalam Sistem Peradilan Pidana Indonesia Berdasarkan KUHP Dan KUHPA." *Jurnal Ilmu Hukum UII* 4(1).
- Muhyidin, Muhyidin. 2019. "Maqashid Al-Syari'ah (Tujuan-Tujuan Hukum Islam) Sebagai Pondasi Dasar Pengembangan Hukum." *Gema Keadilan* 6(1):13–32. doi: 10.14710/gk.2019.4948.
- Nurrahman, Adiansyah, and Eko Soponyono. 2019. "Asas Keseimbangan Dalam Rancangan Kitab Undang-Undang Hukum Pidana Sebagai Upaya Pembaharuan Hukum Pidana Yang Berkeadilan." *Pandecta* 13(2):100–106. doi: 10.15294/pandecta.v14i2.17596.
- Rahardjo, Satjipto. 2006. *Membedah Hukum Progresif*. Semarang: Kompas.

- Ridwan, Ahmad Hasan. 2016. "Epistemologi Bayani, Irfani Dan Burhani Muhammad Abed Al-Jabiri." *Afkaruna* 12(2):187-221. doi: <https://doi.org/10.18196/afkaruna.v12i2.2793>.
- Rohmah, Siti, and Azka Rasyad Alfatdi. 2022. "From Living Law to National Law: Theoretical Reconstruction of Applying Islamic Law in Indonesia." *Peradaban Journal of Law and Society* 1(1). doi: 10.59001/pjls.v1i1.19.
- Rokhmad, Abu. 2021. "Institutions and Contributions to Islamic Law in Indonesia's Legal System." *Walisono Law Review (Walrev)* 3(1):21-44.
- Saputra, Hasep, Nurma Yunita, Ainal Mardhiaturrahman, and Wina Purnamasari. 2021. "Interpretations of Verses about Islamic Criminal Law and Its Polemics in Indonesia's Positive Law." *AJIS: Academic Journal of Islamic Studies* 6(1):79. doi: 10.29240/ajis.v6i1.2612.
- Soekarno. 1964. *Di Bawah Bendera Revolusi, Jilid 1*. Jakarta: Panitya.
- Soekarno. 1990. *Bung Karno Dan Islam: Kumpulan Pidato Tentang Islam 1953-1966*. Jakarta: Cv. Haji Masagung.
- Suartha, I. Dewa Made. 2015. "Pergeseran Asas Legalitas Formal Ke Formal Dan Material Dalam Pembaruan Hukum Pidana Nasional." *Yustisia Jurnal Hukum* 4(1):235-44. doi: 10.20961/yustisia.v4i1.8640.
- Yani, Ahmad, and Megawati Barthos. 2020. "Transforming Islamic Law in Indonesia from a Legal Political Perspective." *Al-Ahkam* 30(2):159-78. doi: 10.21580/ahkam.2020.30.2.6333.
- Zuhaili, Wahbah 1989. 1989. *Al-Fiqh Al-Islami Wa Adillatuhu*. Jilid VI. Damaskus: Dar al-Fikr.

