



Controversial Issues in the Enforcement of Human Rights

Isa Ansori

IAIN Jurai Siwo Metro
ansoriok@gmail.com

Fauzan

Universitas Islam Negeri Raden Intan Lampung
fauzan@radenintan.ac.id

Abstract : *Controversy about human rights between Islam and the West has not found a common understanding until now. Some of the issues that are often debated include Qisās, Hudūd, and women's rights. This article focuses on discussing the controversy that occurred between Muslim and Western activists in upholding human rights, especially regarding the issues above. This article is a literature study and uses a qualitative descriptive method. The results of the research show that according to Western human rights activists, the enforcement of Islamic law on these three issues is contrary to universally recognized human rights values. Meanwhile, in addressing this issue, Muslim rights activists are divided into two groups. The first is the textual group that views the need to apply Islamic law exactly as stated in the texts of the Qur'an and Hadith. Second, moderate groups see the need to reinterpret the texts of the Qur'an and Hadith so that they are more in line with the development of civilization. However, both groups of human rights activists in Islam agree that Islamic law respects protects, and upholds human rights.*

Keywords : *Human Rights, Qishas, Hudud, Women, Islam*

Abstrak : *Kontroversi tentang hak asasi manusia antara Islam dan Barat belum menemukan kesamaan pemahaman hingga saat ini. Beberapa isu yang sering diperdebatkan antara lain adalah Qisās, Hudūd, dan hak-hak perempuan. Artikel ini fokus membahas kontroversi yang terjadi antara aktivis Muslim dan Barat dalam penegakan hak asasi khususnya terkait isu-isu di atas. Artikel ini merupakan penelitian pustaka dan menggunakan*

metode deskriptif kualitatif. Hasil penelitian menunjukkan bahwa menurut para penggiat hak asasi manusia Barat, penegakan hukum Islam pada ketiga isu tersebut bertentangan dengan nilai-nilai hak asasi manusia yang diakui secara universal. Sementara itu, dalam menyikapi masalah ini para aktivis hak asasi Muslim terbagi dua kelompok. Pertama adalah kelompok tekstual yang memandang perlunya menerapkan hukum Islam persis seperti yang tertuang dalam teks al-Qur'an dan Hadits. Kedua, kelompok moderat yang melihat perlunya menafsirkan kembali teks Alquran dan Hadis agar lebih sejalan dengan perkembangan peradaban. Namun, kedua kelompok aktivis hak asasi dalam Islam ini sepakat bahwa hukum Islam menghormati, melindungi, dan menjunjung tinggi hak asasi manusia.

Kata Kunci : Islam, Hak Asasi Manusia, Qisas, Hudud, Perempuan

A. Introduction

Human Rights become a prominent issue that was heavily promoted by many countries after the United Nations declared *the Universal Declaration of Human Rights* (UDHR) on 10 December 1948. The experience of war that devastated Humanitarian values during the first and second world wars, as well as the ongoing practices of injustice in many parts of the world, encourage the world community to appreciate universal human values such as freedom, justice, and equality among all human beings regardless race, ethnicity, gender, skin color, religion, national and state origin, political opinion, ownership, and equality before the law and equal opportunities.

Although the agreement to enforce human rights has been going on for a long time, the agreement on how to exercise human rights values is still being debated. There are different views of human rights values that can be applied between Muslim and Western human rights enforcers. This difference stems from the foundation of human rights values. Islamic human rights values are derived from the Qur'an and Sunnah, while Western human rights are based on humanitarian values.

Islamic human rights activists cannot fully accept the human rights values stated in the UDHR. Some of the principles are considered inconsistent with Islamic law. The formulation of the UDHR at the UN did not involve third-world countries and Islamic countries, because at that time many third worlds and Islam countries were still colonized. UDHR is

considered a representation of a secular interpretation of the *Judeo-Christian* tradition that was resisted by Muslims.¹ Islamic human rights activists formulate a human rights model that is considered aligned with Sharia. There are two human rights concepts have been formulated and offered to the international community, namely the *Universal Islamic Declaration of Human Rights* (UIDHR), 1981, and the *Cairo Declaration on Human Rights in Islam* (CDHRI), 1990.

At present, at least there are four different contentions of human rights activists in responding to human rights controversies. *First*, some Muslim human rights activists desiderate a separate interpretation of the implementation of human rights to conform to Islamic law provisions. According to this group, Islam has a strong guarantee and cannot be changed or canceled because they come from the Sharia provisions. Ahmad Saeed, for example, explained that Islamic human rights are deeper, more universal, and more secure than UDHR because the rights in the UHDR do not have strong moral guarantees. Human rights in Islam cannot be changed or canceled by the state or the government. Every ulama (Islamic scholar) and people have their interpretation of human rights. Furthermore, according to Saeed, UDHR is a re-voicing of the rights that Islam has presented fourteen hundred years ago. It means that the human rights formulated by the United Nations are not new but this is a revision of what Islam has provided in the form of the sunnah of the Prophet Muhammad.²

Second, some Islamic human rights activists intend to adjust Islamic human rights with Western human rights by adjusting Sharia provisions with the current development. This group comprehended that Islamic law should be reinterpreted to adapt to the needs and developments of the era. Nasr Hamid Abu Zayd, for instance, addressed that the provisions of hudud (category of crimes and punishments) were

¹ Abdul Azeez Maruf Olayemi, Abdul Hamzah Alabi, and Ahmad Hidayah Buang, "Islamic Human Rights Law: A Critical Evaluation of UIDHR & CDHRI in Context of UDHR," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2015), <https://papers.ssrn.com/abstract=2690355>.

² Riaz Ahmad Saeed, "Human Rights in Islam and West: (The Last Sermon of the Prophet and UDHR)," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2013), <https://papers.ssrn.com/abstract=3609723>.

not initiated by Islam but partly from Roman law and adopted from the Jewish tradition, partly from older traditions. In a modern age that values human rights and respects the integrity of the human body, the execution of chopping the human body cannot be considered a divinely sanctioned religious punishment. Likewise, other aspects of Sharia, such as the rights of religious minorities, women's rights, and human rights in general, also need to be revised and reconsidered. It is necessary to contextualize the provisions of the Qur'an by examining its linguistic and stylistic structures to reveal the meaning of these provisions and reconcile these meanings in various social contexts.³

Third, some Western human rights activists reject the understanding of human rights based on culture or religion. This group views that relying on human rights on culture and religion is unacceptable. Human rights should be seen as the center of an "overlapping consensus" cross-culture about the basic normative standards of multicultural societies. This standpoint is supported by Heiner Bielefeldt. He explained that historically, human rights have always been a political issue, not the natural result of any "organic" development based on certain cultural genes. Therefore, any essentialist occupation of culture, such as the "*Occidentalization*" or "*Islamization*" of human rights, must be rejected. This rejection does not imply that cultural aspects are not important at all. Culture and religion can, and do often, be powerful motives for practical commitment in the name of human rights, motives that deserve to be recognized historically and be respected politically.⁴

Fourth, some Western human rights activists are more pragmatic by accepting human rights based on culture or religion to realize the benefits of human rights that are believed by people who adhere to certain religions. This group is more pragmatic by choosing to give respect to human rights based on culture and religion because it is seen as beneficial by the community. Malin Delling in his thesis argued that respect and recognition of other cultures may be needed so that other people find their

³ Naṣr Ḥāmid Abū-Zaid, *Reformation of Islamic Thought: A Critical Historical Analysis*, WRR Verkenningen 10 (Amsterdam: Amsterdam Univ. Press, 2006).95.

⁴ Heiner Bielefeldt, "'Western' versus 'Islamic' Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights," *Political Theory* 28, no. 1 (2000): 90–121.

own way to justify human rights, therefore, it can have an impact on people at the grassroots level. It is also very important to acknowledge the power of religion in most parts of the world. He added that we should not underestimate the basic problems for implementing and motivating universal human rights, because religious values, as we have seen examples in Islam, do not always suit them. Therefore, regardless of whether we consider "our" universal human rights to be an appropriate minimum standard to set for individual protection, we must accommodate other perspectives to solve practical problems surrounding human rights issues in many third-world countries.⁵

Responding to the different views between Islamic and Western human rights activists in addressing the implementation of human rights in the Islamic world, this paper aims to explain what underlies human rights activists from among Muslims who argue that human rights in Islam are a belief that cannot be changed, and the views of other Muslim human rights activists who stated that human rights should be able to adapt to the changes and current developments. The discussion employs two approaches, namely Islamic law and human rights. As a discussion material to obtain a clear picture of the reasons or arguments used by the two different opinions, this paper focuses on the issue of the implementation of *qiṣās*, hudud, and women's rights in Muslim countries. The paper tries to explain how jurisprudence experts understand fiqh and the views of human rights activists to understand this formula. The response of Western human rights activists to the implementation of *qiṣās*, hudud, and women's rights in Muslim countries is also explained.

Punishment of *qisas* and hudud in Islamic Law by textual Islam is believed to be a divine command that must be enforced against the offenders. Muslim textualist human rights experts consider this punishment to follow the essence of human rights values. On the other hand, Western human rights figures view the enforcement of this punishment as an act that violates human rights. Meanwhile, some Muslim scholars who are more moderate and even liberal have tried to remove the space between the understanding of Islamic human

⁵ Malin Delling, "Islam and Human Rights," 2004, <https://gupea.ub.gu.se/handle/2077/1978>.

rights which seems rigid and contrary to conventional secular human rights values by formulating alternative methods of understanding in understanding the Qur'anic text to produce an understanding model that is considered more compatible with the development of the times. Shahrur, through his hudud theory, tries to provide an alternative to a more modest understanding of the laws of fiqh. He said that Allah has set a limitation (*hudud*) in every legal provision between the maximum and minimum limits (*istiqamah*). Humans conduct between these two limits (called *al-hanifiyyah*).⁶

This research uses the library research method. The data collected were analyzed using the inductive analysis method, namely departing from specific facts and then drawing general conclusions.

B. Definition and Principles of Islamic and Western Human Rights

The pages of United for Human Rights are one of the not-for-profit organization pages that are dedicated to the implementation of *the Universal Declaration of Human Rights* (UDHR) at the local, regional, national, and international. The phrase "*Human Rights*" consists of two words, namely "*Human*" and "*Rights*". "*Human*" is a noun that means "*a member of the Homo sapiens species; a man, woman or child; a person*";⁷ and the word "*Rights*" is a noun that means "*things to which you are entitled or allowed; freedoms that are guaranteed*"⁸ Thus the phrase "*Human Rights*" means "*The rights you have simply because you are human*".⁹

The United for Human Rights page further explains that "*Human rights are based on the principle of respect for the individual. Their fundamental assumption is that each person is a moral and rational being who deserves to be treated with dignity. They are called human rights because they are universal. Whereas nations or specialized groups enjoy specific rights that apply*

⁶ Muhammad Syahrur, *Al-Kitāb wa al-Qur'ān: Qirā'ah Mu'āsira*, (Damasqus: Maktabah Wahbab, 1997).

⁷ "Definition of Human Rights Video | What Are Human Rights?," United for Human Rights, accessed February 17, 2021, <https://www.humanrights.com/what-are-human-rights/>.

⁸ *Ibid.*

⁹ *Ibid.*

only to them, human rights are the rights to which everyone is entitled — no matter who they are or where they live — simply because they are alive”.¹⁰

Meanwhile, Muhammad Ali al-Taskhīrī explained the definition of human rights which in Arabic is called *Huqūq al-Insāni* from the perspective of Islamic human rights. In his book *Huqūq al-Insān baina al-'Alānayn al-Islāmī wa al-'Alamī*, He asserted that the word *al-Haq* as *al-thubūt al-ladhī lā yaqbalu al-taghyīr hiyna al-isti'māli 'ala al-aqali* (a provision that does not accept change when it used a little). It is stated that Allah SWT is *al-Haq*, therefore, it is impossible to imagine a change in the nature of *Jalla* (almighty) and *'Alla* (Most High). It means that rights are permanent and attached to those who have rights.¹¹

Furthermore, al-Taskhīrī explained that the rights related to society (*huqūq al-ijtimā'iyah*) contain two elements: *First*, they arise in a realistic circumstance (arranged, formatted, benefited); *Second*, agreement and consider *syara'* or 'urf in order to organize community life.¹² Thus, rights related to society are rights that must be arranged for a real benefit and take into account the provisions of sharia and 'urf to organize community life.

Moreover, while explaining the meaning of *al-Insān*, al-Taskhīrī admitted that he was unable to see him, as the presence of material was solely formed by nature and the social environment and everything in it.¹³ In this case, he had difficulty defining a creature named human, because of the complexity of the various elements that make up his body and soul.

Thus, it can be explained that human rights in the view of al-Taskhīrī are rights that are permanent and arranged in a realistic benefit by considering the provisions of *syara'* and 'urf to organize community life and owned by humans as creatures formed from various complex elements.

¹⁰ *Ibid.*

¹¹ Muḥammad 'Alī al-Taskhīrī, *Huqūq al-Insān Bayna al-'Alānayn al-Islāmī Wa-al-'ālamī* (Ṭīhrān: Rābiṭat al-Thaqāfah wa-al-'Alaqāt al-Islāmīyah, 1997). 15

¹² *Ibid.*, 16

¹³ *Ibid.*, 16

C. Basic Principles of Human Rights in Islam

Human rights activists among Muslims believe that the concept of respect and enforcement of human rights in Islam has been declared in the Qur'an thousands of years ago before the *Universal Declaration of Human Rights* was declared by United Nations. Humans have a noble position in Islam. This status is based on the belief that regardless of gender, color, race, or social status, a human being is an honorable being. This honor has been guaranteed by Allah Almighty, thus distinguishing humans from all His creatures.¹⁴

The high appreciation of God to man (as stated in Surah al-Isra' verse 70) put human beings as the most precious among all creatures of God that others - require respect and appreciation for humans to use noble ways. The recognition of this position was beyond the power of human thought at that time. This is an extraordinary recognition form that Mohammad Abid al-Jabiri calls "*thinkable*". He added that human rights scholars at that time have thought about this in a way that can be said to be thinkable or absurd when viewed in the same way as if they were seeing the same thing at the present.¹⁵ This is the highest respect of Islam for the principles of human rights, which are the basis for upholding human rights in all aspects of human life.

Placing humans in the noblest positions is a form of great appreciation from Allah for humans who are expected to be able to realize the essential objective of human creation, namely to carry out the main duties and functions as caliph, mandate, and worship. The function as a caliph is in surah al-Baqarah verse 30, the mandate function in al-Ahzab verse 72, and the function of worship is in al-Zāriyat verse 56. As a caliph, humans are representatives of Allah in realizing justice, peace, prosperity, and happiness in life from this world to the hereafter. The mandate function requires humans to be trustworthy and responsible in carrying out all of Allah's commands and avoiding all His prohibitions to realize the

¹⁴ Suleiman Abdul Rahman Al-Hageel, *Human Rights in Islam and Refutation of the Misconceived Allegations Associated with These Rights* (Riyadh, Saudi Arabia: publisher not identified, 2004). 37

¹⁵ Muḥammad Ābid al-Jābirī, *Democracy, Human Rights and Law in Islamic Thought*, Contemporary Arab Scholarship in the Social Sciences 1 (London: Tauris [u.a.], 2009). 212.

function of the caliph. Meanwhile, the function of worship is meant that the entire processes of the function of the caliph and mandate are a form of submission and human devotion to Allah SWT to achieve His blessing.

The sources of human rights in Islam are the Qur'an, Sunnah, Ijma, and Qiyas.¹⁶ Through these sources, Muslim scholars formulated the principles of human rights in Islam. Majid Khadduri described the five most important principles of human rights in Islam: (1) Dignity and brotherhood; (2) Equality among members of society, regardless of race, color, or class; (3) Respect, reputation, and family of each individual; (4) The right of every individual to be presumed innocent until proven guilty; and (5) Individual freedom.¹⁷

Sulieman Abdul Rahman al-Hageel summarized the human rights principles contained in the Cairo Declaration on Human Rights initiated by the Islamic Conference Organization, as follows:¹⁸

- a. All human beings form one family whose members are united by their subordination to Allah and descent from Adam by the provisions of the Qur'an: "*and indeed We have dignified the children of Adam*" (Al-Isra: 70).
- b. There is no discrimination based on origin, race, and property in the domain of dignity and fundamental rights between a person and another, according to the teachings of the Prophet SAW: "*Arabs are no more important than Ajam people (non-Arabs), and the Ajam is no more important than the Arabs. It is not nobler for a black person over a red person, and no nobler for a person with red skin over a black person, except because of piety*" and also his words: "*Verily, women are partners of men*" (HR. Tirmidhi).
- c. All human beings are Allah's subjects, and the most loved by Him are those who are most beneficial to His subjects, as the Prophet SAW

¹⁶ Al-Hageel, *Human Rights in Islam and Refutation of the Misconceived Allegations Associated with These Rights*. 41-46.

¹⁷ Donna E. Arzt, "The Application of International Human Rights Law in Islamic States," *Human Rights Quarterly* 12, no. 2 (1990): 202-30.

¹⁸ Al-Hageel, *Human Rights in Islam and Refutation of the Misconceived Allegations Associated with These Rights*. 57-59.

said: *"All humans are servants of Allah and the most loved by Allah among them is the most beneficial for them"*.

- d. The call for cooperation, unity, and provision of all kinds of property is for all human beings regardless of nationality and religion, as stipulated in the Qur'an: *"O people, indeed We created you from a male and a female, and made you into peoples and tribes so that you may get to know one another. Surely the noblest of you in the sight of Allah is the most righteous among you"* (Al-Hujurat: 13). And the word of Allah: *"Allah does not forbid you dealing kindly and fairly with those who have neither fought nor driven you out of your home. Indeed, Allah loves those who are fair"*. (Al-Mumtahanah: 8).
- e. Every human being has the right to embrace any belief and he is not subject to coercion. This is in line with the word of Allah: *"Let there be no compulsion in religion ..."* (Al-Baqarah: 256). Also, the word of Allah: *"And if your Lord so willed, surely all people on the earth would have certainly believed, every single one of them! Would you then force people to become believers?"* (Yunus: 99).
- f. Inviolable human life and possessions, according to the words of the Prophet Muhammad during the *haj wada'* (the last pilgrimage): *"Behold, your blood, and property are inviolable"*.
- g. An inviolable place to live for protection and freedom, according to the word of Allah: *"O believers, do not enter any house other than your own until you have asked for permission and greeted its occupants. This is best for you, so perhaps you will be mindful"*. (Al-Nur: 27).
- h. The need for solidarity among individuals in order to obtain a life with dignity for everyone and to fight poverty through the contribution of a certain portion of the property to be conferred with the obligation, according to the divine command: *"and who give the rightful share of their wealth [24] to the beggar and the poor [25]"*. (Al-Ma'arij: 24-25).
- i. Education is an obligatory duty for every Muslim to strive against ignorance and illiteracy, according to the words of the Prophet SAW: *"Seeking knowledge is an obligation for every Muslim"*. (Narrated by Ibn Majah). The Qur'an also encourages mankind to consider the signs of the universe for science: *"O assembly of the jinn and humans, if you can*

penetrate beyond the realms of heaven and earth, then do so, you cannot do that without authority". (Al-Rahman: 33).

- j. People who refuse education should be punished. This principle does not exist in other non-Muslim countries. The Prophet is reported to have said: *"Everyone must be taught by his neighbors and everyone must teach their neighbors otherwise I will quickly bring punishment against them"*.
- k. Quarantine was established to localize epidemic diseases. The Prophet said: *"If you hear of an epidemic attacking a certain area, do not enter that area, and if the disease attacks your territory, you must not leave that area to flee from it"*. (HR. Ahmad)

Apart from these principles, human rights in Islam also have the following characteristics: (1) Human rights in Islam originate from Islamic belief (faith). According to this belief, human beings are dignified creatures who are respected. (2) Human rights in Islam are divine gratification. Therefore, it is not a gift from one person to another, which can be given or revoked according to the will of man, but is provided by Allah the Almighty. (3) Human rights in Islam are comprehensive in nature. This includes political, economic, social, and cultural rights. Human rights are common in nature, that is, they are reserved for all subjects of the Islamic system, regardless of color, gender, and language. (4) Human rights in Islam are irrevocable and permanent because they are an indispensable part of Islamic law; (5) Human rights in Islam are not absolute but are limited to conformity with the sharia to protect the rights and interests of society.¹⁹

D. Basic Principles of Conventional Secular Human Rights

Prinsip dasar HAM konvensional sekuler termaktub di dalam The Universal Declaration of Human Rights (UDHR) yang dikeluarkan oleh Perserikatan Bangsa-Bangsa (PBB) pada tanggal 10 Desember 1948. Selain itu juga termaktub di dalam International Convention on Civil and Political Rights (ICCPR) dan International Convention on Economic, Social and Cultural Rights (ICESCR).

¹⁹ Al-Hageel. 60

The fundamental principles of conventional secular human rights are contained in The Universal Declaration of Human Rights (UDHR) issued by the United Nations (UN) on December 10, 1948. Besides, it is also contained in the International Convention on Civil and Political Rights (ICCPR) and International Convention on Economic, Social, and Cultural Rights (ICESC).

Community and individual rights as stipulated in the UDHR, ICCPR, and ICESC are as follows:

- a. All people have the right to self-determination and freedom to give up their lust for wealth.
- b. Right to live
- c. The right to equality, without discrimination based on race, nationality, or color.
- d. Freedom of personal safety, prohibition of unlawful detention or arbitrary detention.
- e. Right to justice.
- f. Freedom to have teaching, conscience, and conviction.
- g. Freedom to go and travel.
- h. Prohibition of illegal deportation.
- i. The right to humane treatment for prisoners.
- j. Prohibition of torture, ill-treatment, cruel or inhuman punishment, or degrading treatment.
- k. Prohibition of slavery and making slaves.
- l. The right of the child to obtain citizenship and legal protection.
- m. The right to work and get social security.
- n. The right to participate in social life.
- o. Minority's right to legal protection.
- p. The right to work and fair employment conditions.
- q. The right to social security.
- r. The right to care and protection from the family.
- s. The right of women to get special care before and after childbirth.
- t. The right of the child to receive appropriate protection.

- u. The right to an appropriate standard of living.
- v. The right to health care.
- w. The right to education and culture.

Among the countries of the world, there are four schools in responding to The Universal Declaration of Human Rights, namely: First, the school that believed that the UDHR is legally binding to all UN member states, as a continuation of the UN charter formation. *Second*, the school of the former Soviet Union, believes that UDHR is against the principle of "State Sovereignty". Proponents of this school also believe that the UDHR contradicts Article 2 (7) of the UN charter which is still being questioned concerning the internal affairs of the state jurisdiction of the United Nations. *Third*, this school believes that issues relating to human rights and fundamental freedoms are not problems of the internal affairs of a country. Because things like this have international significance, therefore, the national law promulgated by a country must be aligned with human rights norms and member states must obey that objective. *Fourth*, this school believes that UDHR is a mere declaration adopted by the UN because it is not legally binding.²⁰

E. Controversial Issues of Human Rights between Islam and the West

At the implementation level, the difference between Islamic human rights principles and conventional secular has resulted in sharp contradictions. Each party claims to be the truest and deserves to be followed. Meanwhile, among Muslim countries themselves, there are also different patterns of the application of Islamic human rights. Some follow the Westernized model, while others apply the Islamic system, or try to find their own model. As implementation of Islamic human rights causes a lot of controversies, especially regarding human rights issues relating to the enforcement of Sharia (particularly the Islamic criminal law) in Muslim countries.

²⁰ Al-Hageel. 82-83

Among the majority of Muslim countries, the application of Islamic law varies considerably, particularly in the area of criminal law.²¹ Some countries, such as Pakistan, operate essentially under the Westernized system of law only employing sharia under certain circumstances.²² Meanwhile, in other countries such as Saudi Arabia, Sharia is the sole basis of the legal system with the Qur'an and Sunnah as the national constitution.²³ Likewise, some Gulf countries and Iran have classical sharia systems with sharia forming the foundation of national law.²⁴ Furthermore, not all nation-states adopt Sharia uniformly; in Nigeria, for example, different countries have different criminal law systems, some apply Sharia some others do not.²⁵ However, not every majority Muslim country integrates Sharia into its legal system, Turkey is an example of a country like this, having Sharia law that was abolished by Ataturk's reforms in 1924.²⁶

Efforts to bring the understanding of Muslim thinkers closer to conventional secular human rights are being made. However, the obstacles hindering this endeavor continue to exist. This is admitted by Ann Elizabeth Mayer in her book *Islam and Human Rights: Tradition and Politics*, she stated that there are several reasons why it is not appropriate to apply international human rights law to Muslim countries, the most pivotal reason is that these countries have agreed to be bound by the same principles they currently seek to circumvent (international human rights). Moreover, the usual references to the international human rights

²¹ Michael Kelly, "Islam & International Criminal Law: A Brief (In) Compatibility Study," *Pace International Law Review Online Companion*, March 1, 2010, <https://digitalcommons.pace.edu/pilronline/8>.

²² Kelly.

²³ M. Raquibuz Zaman, "Economic Justice in Islam, Ideals and Reality: The Cases of Malaysia, Pakistan, and Saudi Arabia", dalam Nimat Hafez Barazangi, M. Raquibuz Zaman, and Omar Afzal, *Islamic identity and the struggle for justice* (Gainesville: University Press of Florida, 1996), <http://www.aspresolver.com/aspresolver.asp?TCR2;2295334>.

²⁴ Jan Michiel Otto, *Sharia and National Law in Muslim Countries. Tensions and Opportunities for Dutch and EU Foreign Policy* (Leiden University Press, 2008).

²⁵ Hauwa Ibrahim and Princeton N. Lyman, "Reflections on the New Shari a Law in Nigeria," accessed February 17, 2021, <https://silo.tips/download/reflections-on-the-new-shari-a-law-in-nigeria>.

²⁶ Ioannis N. Grigoriadis, *Instilling Religion in Greek and Turkish Nationalism* (New York: Palgrave Macmillan US, 2013), <https://doi.org/10.1057/9781137301208>.

concept even by Muslims who disagree with it, indicate that this concept has become part of the terminology used in Muslim societies in legal and policy debates. Leading political figures in the Middle East routinely refer to human rights in their speeches, enforcing them (Islamic human rights) as is given in the modern international system. Since 1980, Muslims have produced a large amount of literature comparing Islamic law, including the applicable Islamic law in their country, and international human rights law.²⁷

Following are some examples of the implementation of Islamic human rights which often lead to the controversy between Islamic human rights and conventional secular human rights. This controversy occurs not only between Islamic and secular human rights thinkers but often also between Islamic human rights thinkers themselves. Some of them desire to apply Islamic human rights with a textual tendency, while others try to understand the existing problems with a contextual approach. Each party issues arguments that support their respective views.

1. *Qisas* and *Hudud*

Qisas is a punishment for the offender of murder, “eye for eye” or retributive justice, a punishment analogous to the crime. Whereas *hudud* is punishment according to the provisions stipulated by *syara'* as the right of Allah which is obliged for the general benefit (*maslahah*), namely rejecting damage to humans and efforts to preserve and save them. This punishment is imposed on seven crimes, namely: adultery, charges of adultery, drinking intoxicating drinks, theft, *al-hirābah* (robbery), apostasy, and prostitution.²⁸

Qisas and *had* are two forms of punishment contained in Islamic criminal law. These are often seen by supporters of conventional secular human rights as a form of punishment that is against human rights values, especially article 5 of the UDHR which states “*No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment*”.

²⁷ Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics*, 5th ed (Boulder, Colo: Westview Press, 2013). 5.

²⁸ Wahba al-Zuhaili, *Al-Fiqh al-Islāmī wa-Adillatuhū* (Bairūt: Dār al-fikr, 2002). 490.

Critics called these an ancient legal model. Robson, for instance, said that the provisions regarding civil and criminal cases in the Qur'an are based on the customs and practices of ancient Arabs or foreigners.²⁹ Likewise, Schacht has the same view by saying that: "Muhammad took for granted that the eye for an eye of Arab paganism ... was a divine ordinance".³⁰ Schacht's understanding is groundless because the Prophet Muhammad abolished the law of avenging blood which was a custom commonly practiced by pre-Islamic pagan Arabs and was carried out with inhuman reasons and methods, even though the Qur'an itself as in surah al-Maidah verse 45 explained that that law is part of Jew law.

By those who reject Islamic criminal law, the application of Islamic criminal law which includes *had*, and *qiṣāṣ*, is considered to have deviated from the penology principles and modern human rights norms, because according to them the basic character of Islamic criminal punishment seems sadistic and cruel, in addition to the discriminatory nature in certain procedural rules, women, and non-Muslims are treated lower.³¹ Meanwhile, the jurists (*fuqaha*) considered this view to be inappropriate because they only saw the birth of the law without seeing the purpose. Sharia is the strictest law, not weakness and softness. Therefore, light, weak, and soft laws are taken lightly by the perpetrators.³²

In response to the imposition of the punishment *had* and *qiṣāṣ* which are considered cruel, some Islamic scholars have tried to deconstruct the provisions of the Islamic criminal law. This effort, for example, was carried out by An-Na'im who suggested that sharia be reformed by still using an Islamic point of view, not on a secular basis.³³ He

²⁹ Walter F. Dodd, "Civilization and the Growth of Law. By William A. Robson. (New York: The Macmillan Company. 1935. Pp. Xv, 354.)," *American Political Science Review* 29, no. 6 (December 1935): 1048–49, <https://doi.org/10.2307/1947319>.

³⁰ J Schacht, "Qiṣāṣ," in *The Encyclopedia of Islam* (Leiden: Brill, 2004).

³¹ See Ann Elizabeth Mayer, "Ambiguitas Al-Naim dan hukuman pidana Islam", in Abdullah Ahmed Na'im and Mohammed Arkoun Dkk, *Dekonstruksi Syari'ah (II): Kritik Konsep, Penjelajahan Lain* (Yogyakarta: LKiS Pelangi Aksara, 2012).

³² Ahmad Wardi Muslich, *Pengantar Dan Asas Hukum Pidana Islam: Fikih Jinayah* (Jakarta: Sinar Grafika, 2006). 149.

³³ 'Abd Allāh Aḥmad Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, Contemporary Issues in the Middle East (Syracuse, N.Y: Syracuse University Press, 1990). 10.

views that Sharia as a product of history. It is relative and not entirely revealed by God. Therefore, Sharia is very likely to be renewed to remain relevant to the needs of contemporary society. Sharia reform is necessary because if not, Muslims only have two options: namely, to continue implementing Sharia even though it is not sufficient, or leave it to support secular law.³⁴

Muhammad Syahrur, another Muslim thinker, in his book *Al-Kitab wa Al-Qur'an* offers the theory of *naḍariyyat al-hudūd* or the theory of limits. He declared hudud was a harsh and cruel punishment. Therefore, hudud should be limited to the types of offenses specifically mentioned in the Qur'an. Such as theft (*sariqah*) which is one of the hudud violations. In understanding the crime of theft, he uses the maximum limit theory. According to Syahrur, the punishment for theft in surah Al-Maidah verse: 38 in the form of cutting off a hand is the highest limit, meaning that a thief should not be punished for more than cutting off his hand.³⁵ A judge does not have to impose a sentence at the highest legal limit but may impose a sentence below that limit, for example by cutting off the hand in a non-physical sense, namely eliminating the ability of the thief's hand by entering the thief. into custody or jail.

2. Women's Rights

Women are physically weaker creatures than men. In relationships between men and women in the household, or social structures and relations in society, women are often in a subordinate position to men. Men have more prominent rights than women in almost all elements of life. This condition encourages gender and human rights activists to strive for women to obtain rights that should be inherent in women as human rights presented to them by Allah, the Creator.

Women with all human rights should have also become the sharp subject of debate between Islamic and conventional secular human rights activists. This difference arises about how much freedom women get in exercising their human rights. Article 2 of the UDHR states that "everyone is entitled to all the rights freedoms outlined in this statement without any

³⁴ Na'im.

³⁵ Ridwan and M. Mukhsin Jamil, *Limitasi Hukum Pidana Islam* (Semarang: Walisongo Press, 2008). 58.

exception whatsoever, such as race, color, sex, language, religion, political or different, the origin of nationality or social, rights property, birth or other position. Besides, it is prohibited to make differences based on the political, legal, and international position of the country or region from which a person comes, whether from an independent country, guardianship, colony, or those under other sovereign boundaries".

Moreover, the UN also published the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) in 1993. Article 5 of this convention states that "States must take all appropriate steps: (a) To modify the social and cultural patterns of conduct of men and women, to achieve the elimination of prejudice and customary and all other practices based on the idea of inferiority or superiority of either of the sexes or stereotyped roles for men and women."³⁶

The freedom of women listed in article 2 of the UDHR and which is affirmed by CEDAW is absolute in all aspects of life. This is dissimilar from the concept of women's freedom which is also recognized in Islam which suggests several disparities in treatment between men and women. Because of this, harsh criticism is often addressed Islamic human rights as human rights that discriminate against women. Article 4 of CEDAW urged that the country "does not have to ask for consideration of culture, tradition or religion anything to avoid the state obligations concerning its elimination". As a result, many Muslim countries refused to endorse this convention, or sign it under intense pressure from Western human rights NGOs.³⁷

The general tendency in Islamic religious texts, the Qur'an and Hadith, is towards equality between men and women, with particular consideration for women as mothers. Hadith says "Heaven is under the palm of the mother's food". A woman is burdened with the same task as a man unless is the woman does not deserve to do the job as *jihad* (*war in God's ways*) which is not the task of women. Many references in the Qur'an

³⁶ Bharathi Venkatraman, "Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible," *American University Law Review* 44, no. 5 (January 1, 1995), <https://digitalcommons.wcl.american.edu/aclr/vol44/iss5/17>.

³⁷ Glenn L Roberts, *Islamic Human Rights and International Law* (Boca Raton, Fla.: Dissertation.com, 2007). 62.

mention "for men and women", "Muslim men and Muslims women", and "men believers and women believers" in the context of the similarities between the two.³⁸

True, certain secondary powers recognize a degree of difference between men and women, especially in the case of testimony and inheritance. The Qur'an determined two women in witnessing and one man in witnessing rather than one woman, this is justified because there is a greater tendency to be exposed to forgetfulness and error, as Allah says: "And call in to witness with two witnesses among your men. In case the two are not two men, then (it is permissible) one man and two women from among the witnesses you are satisfied with, so that one of the two women should err, then either of the two should remind the other" (Al-Baqarah: 282). Mistakes and omissions do not naturally pertain to women to the exclusion of men but simply to the social circumstances of that time.³⁹

Whereas, regarding the share of women in inheritance which gets half of the share of men, Allah said: "Allah enjoins you concerning your children: to the male the like of the portion of two females" (An-Nisa': 11). There are several explanations given by Islamic human rights experts regarding this issue. One of them is Mohamed Abed al-Jabri who asserted that this was a practice in some tribes during the Jahiliyah (the dark ages) era, while some other tribes prohibited women from inheriting all their possessions. The inheritance issue finds its rationality in the tribal community conditions that depend on scarce land resources and pastoralists who make inheritance for women is a source of strife and conflict between tribes. If that is, oftentimes, a woman will be married by the other tribe, and if she inherits, it means that his tribe would inherit the wealth of the woman's family tribe and it will cause a long-drawn conflict. Thus, the Qur'an proposes a middle-ground solution; it does not prohibit a woman from inheriting absolutely but to deliver her half the share of the man and make the man responsible for the welfare of the woman whether she is a wife or a widowed mother. This established his part as compensation. As a result, equality between men and women is the original principle, and the Qur'an and Hadith textually define this

³⁸ Al-Jabiri, *Democracy, Human Rights and Law in Islamic Thought*. 235.

³⁹ Al-Jabiri.

principle. The equality between them is in all areas from the category "tribes" to what is "considered" for the public to use sharia in entire countries.⁴⁰

Another expert, Hazairin, from Indonesia, conveyed a different explanation and solution. He offered the concept of bilateral inheritance law in understanding women's inheritance verse presented in 1957. In this theory, he questioned the truth of inheritance law adhered to by patrilineal Sunnis. With his expertise in customary law and social anthropology, he studied verses on marriage and inheritance. According to him, the Qur'an only wishes for a bilateral social system, therefore, the character of inheritance law is also bilateral not patrilineal as it is commonly known. He has provided a new comprehensive understanding of inheritance law in Islam with the basic assumptions of the bilateral system desired by the Qur'an. Regardless of the pros and cons opinion, He added a new insight as an attempt to answer charges of injustice against women in the Islamic inheritance system.

Another controversial issue related to women is polygamy. It was a dominant phenomenon in pre-Islamic Arab and has been recognized by the Qur'an but with a strong inclination towards prohibition, as demanded by the Qur'an justice and honesty between wives with all due respect as an immense duty. But the question of polygamy as mentioned in the Qur'an opens more than one question. The Qur'an connects polygamy with the orphan's property. The command for the guardian of the orphan to be fair in handling the property. The pre-Islamic Arab man could marry many widows, which could be more than 10 because he craved the possessions of the orphans. The Qur'an prohibits this practice and limits the number of wives to a maximum of 4, the husband provides justice for all, in every material and moral aspect.⁴¹

At present, most Islamic countries implement modified Sharia laws within the jurisdiction of the family, which differ from country to country. Saudi Arabia practices a limited variant, Wahabism, giving husbands authority- and legal obligations for up to four wives. Tunisia and Turkey have banned polygamy through laws and passed personal status

⁴⁰ Al-Jabiri.

⁴¹ Al-Jabiri. 236.

laws that present women with more positive rights than Sharia recognize.⁴² Other Muslim countries fall between those two extremes position.

Furthermore, what often receives criticism from conventional secular human rights activists is that there are still many understandings and implementations of classical jurisprudence (fiqh) which assumes that the appropriate role for women is to marry, raise children, and without explicitly prohibiting women from frequently visiting public places, socially, mingled with a man who was not her mahram. As was the case in Western common law until the 19th century. Wives under Sharia law, under common Arabic law, are obliged to obey and serve their husbands and look after the house and children. The Qur'an grants the husband the right to punish the wife who opposes him until she obeys. The husband on the other hand is obliged to espouse his wife as long as she fulfills her duties.⁴³

Some human Islamic rights activists were also given a negative response to conventional secular human rights who always deliver negative views on Islamic human rights. One of them was Sultan Ḥusayn Tābandah. He conveyed an affirmation that Islam is against the idea of equality for men and women. His openness to this point is perhaps the result of his lack of political experience. He admitted: "I have never taken part in politics, and do not know any of the political aspects or implications of the UDHR declaration. This is a religious viewpoint, particularly concerning the Islamic theology and belief of Shia, which is the issue I discuss".⁴⁴ He suggested that when Islamic law contradicts UDHR, the UDHR should be rewritten so that it is compatible with Islam. He admits that his idea is similar to article 16 of the UDHR "Men and women of full age are entitled to equal rights and dissolution".⁴⁵

F. Conclusion

⁴² Lois A. Aroian and Richard P. Mitchell, *The Modern Middle East and North Africa* (New York : London: Macmillan ; Collier Macmillan, 1984).

⁴³ Roberts, *Islamic Human Rights and International Law*. 63-64.

⁴⁴ Sulṭān Ḥusayn Tābandah, *A Muslim Commentary on the Universal Declaration of Human Rights* (Guildford: F. J. Goulding, 1970). 105-116.

⁴⁵ Mayer, *Islam and Human Rights*. 40

To conclude, according to secular human rights activists, the enforcement of Islamic law in *Qīṣās*, *ḥudūd*, and women's rights is contrary to the values of universal human rights. Meanwhile, Muslim human rights activists regarding these issues are divided into two groups. First is the textual group. This group views that the enforcement of Islamic law in *Qīṣās*, *Ḥudūd*, and women's rights does not contradict Islamic law but is considered a means of upholding justice and honoring human dignity. They argue that this enforcement provided a sense of justice for victims and their families and encourage others not to commit crimes. It is seen as one of the ways to avoid the more formidable punishment in the Hereafter. Second, groups that are more moderate and even liberal see the need to reinterpret the text of the Qur'an and Hadith to make it more compatible with the development of human civilization. They argue that the application of Islamic law in *Qīṣās*, *Ḥudūd*, and women's rights is textually incompatible with the current situation and conditions. Sharia needs to be understood in accordance with current conditions so that it can be implemented by modern society. However, these two groups agree that Islamic law respects protects, and upholds human rights. [.]

References

- Abū-Zaid, Nasr Hāmid. *Reformation of Islamic Thought: A Critical Historical Analysis*. WRR Verkenningen 10. Amsterdam: Amsterdam Univ. Press, 2006.
- al-Hageel, Suleiman Abdul Rahman. *Human Rights in Islam and Refutation of the Misconceived Allegations Associated with These Rights*. Riyadh, Saudi Arabia: publisher not identified, 2004.
- al-Jabiri, Muḥammad 'Ābid al-. *Democracy, Human Rights and Law in Islamic Thought*. Contemporary Arab Scholarship in the Social Sciences 1. London: Tauris [u.a.], 2009.
- Aroian, Lois A., and Richard P. Mitchell. *The Modern Middle East and North Africa*. New York : London: Macmillan ; Collier Macmillan, 1984.
- al-Zuhaili, Wahbah. *al-Fiqh al-islāmī wa-adillatuhū* Bairūt: Dār al-fikr, 2002.

- Arzt, Donna E. "The Application of International Human Rights Law in Islamic States." *Human Rights Quarterly* 12, no. 2 (1990): 202–30. <https://doi.org/10.2307/762377>.
- Barazangi, Nimat Hafez, M. Raquibuz Zaman, and Omar Afzal. *Islamic identity and the struggle for justice*. Gainesville: University Press of Florida, 1996. <http://www.aspresolver.com/aspresolver.asp?TCR2;2295334>.
- Bielefeldt, Heiner. "'Western' versus 'Islamic' Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights." *Political Theory* 28, no. 1 (2000): 90–121.
- United for Human Rights. "Definition of Human Rights Video What Are Human Rights?" Accessed February 17, 2021. <https://www.humanrights.com/what-are-human-rights/>.
- Delling, Malin. "Islam and Human Rights," 2004. <https://gupea.ub.gu.se/handle/2077/1978>.
- Dodd, Walter F. "Civilization and the Growth of Law. By William A. Robson. (New York: The Macmillan Company. 1935. Pp. Xv, 354)." *American Political Science Review* 29, no. 6 (December 1935): 1048–49. <https://doi.org/10.2307/1947319>.
- Grigoriadis, Ioannis N. *Instilling Religion in Greek and Turkish Nationalism*. New York: Palgrave Macmillan US, 2013.
- Ibrahim, Hauwa, and Princeton N. Lyman. "Reflections on the New Shari a Law in Nigeria." Accessed February 17, 2021. <https://silo.tips/download/reflections-on-the-new-shari-a-law-in-nigeria>.
- Kelly, Michael. "Islam & International Criminal Law: A Brief (In) Compatibility Study." *Pace International Law Review Online Companion*, March 1, 2010.
- Mayer, Ann Elizabeth. *Islam and Human Rights: Tradition and Politics*. 5th ed. Boulder, Colo: Westview Press, 2013.
- Muslich, Ahmad Wardi. *Pengantar Dan Asas Hukum Pidana Islam: Fikih Jinayah*. Jakarta: Sinar Grafika, 2006.

- Na'im, 'Abd Allāh Aḥmad. *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*. Contemporary Issues in the Middle East. Syracuse, N.Y: Syracuse University Press, 1990.
- Na'im, Abdullahi Ahmed, and Mohammed Arkoun Dkk. *Dekonstruksi Syari'ah (II): Kritik Konsep, Penjelajahan Lain*. Lkis Pelangi Aksara, 2012.
- Olayemi, Abdul Azeez Maruf, Abdul Hamzah Alabi, and Ahmad Hidayah Buang. "Islamic Human Rights Law: A Critical Evaluation of UIDHR & CDHRI in Context of UDHR." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 2015.
- Otto, Jan Michiel. *Sharia and National Law in Muslim Countries. Tensions and Opportunities for Dutch and EU Foreign Policy*. Leiden University Press, 2008.
- Ridwan, and M. Mukhsin Jamil. *Limitasi Hukum Pidana Islam*. Semarang: Walisongo Press, 2008.
- Roberts, Glenn L. *Islamic Human Rights and International Law*. Boca Raton, Fla.: Dissertation.com, 2007.
- Saeed, Riaz Ahmad. "Human Rights in Islam and West: (The Last Sermon of the Prophet and UDHR)." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 2013.
- Sahrūr, Muḥammad, *Al-Kitāb wa al-Qur'ān: Qirā'ah Mu'āsirah*. Damascus: Maktabah Wahbab, 1997.
- Schacht, J. "Qiṣāṣ." In *The Encyclopedia of Islam*, 1. Leiden: Brill, 2004.
- Tābandah, Sulṭān Ḥusayn. *A Muslim Commentary on the Universal Declaration of Human Rights*. Guildford: F. J. Goulding, 1970.
- Taskhīrī, Muḥammad 'Alī. *Ḥuqūq Al-Insān Bayna al-I'lānāy al-Islāmī Wa-al-'ālamī*. Ṭihrān: Rābiṭat al-Thaqāfah wa-al-'Alaqāt al-Islāmīyah, 1997.
- Venkatraman, Bharathi. "Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible." *American University Law Review* 44, no. 5 (January 1, 1995).