

## Implementing Qishash from the Maqashid Syariah Perspective: Analysis of Life Protection in Jinayah Law

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### ARTICLE INFO

*Keywords:*

Qishash;  
Maqashid Syariah;  
Ḥifz al-nafs;  
Jinayah Law;  
Restorative Justice

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*Article history:*

Received 2025-04-19

Revised 2026-05-23

Accepted 2026-06-27

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### ABSTRACT

This research departs from the problematic dichotomous understanding of Qishash which is often reduced to a cruel law of revenge, or conversely, its formal application is encouraged without a complete understanding of its philosophy. This study aims to analyze the urgency of implementing Qishash through the lens of Maqashid Syariah with a focus on its effectiveness as an instrument of life protection (ḥifz al-nafs) in jinayah law. Using a qualitative library research method, this study conducted an in-depth review of primary and secondary sources related to Qishash, Maqashid Syariah, and comparative criminal law. The results of the study show that: First, Qishash within the Maqashid framework is not the final goal, but rather a definitive means to achieve ḥifz al-nafs as primary dharūriyyāt through the enforcement of equal justice and balance; Second, Its effectiveness as a zawājir (deterrent) and wiqāyah (protection) lies in the logic of certainty, proportionality, and restoration of victims' rights; Third, Its contextualization in the modern system can be done through the integration of its substantive values into the restorative justice framework and strengthening the role of victims; Fourth, Comparative analysis reveals the superiority of Qishash in victim justice and theoretical deterrence, even though the conventional system excels in procedural guarantees. In conclusion, the urgency of Qishash lies in its spirit and philosophy which offers a victim-centered justice perspective and substantive soul protection. Its implementation can be realized through the socialization of the Maqashid concept, the integration of the values of proportionality and restitution into national criminal law policies, and the strengthening of restorative approaches that take into account the interests of victims.

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## 1. INTRODUCTION

Human life (*al-nafs*) occupies the most fundamental position in the hierarchy of universal Islamic values. Protection for it is not only a legal objective, but an ontological necessity that guarantees the continuity of civilization. Within the framework of *Maqashid Syariah*, *Hifz Al-nafs* is defined as one of the five primary needs (*al-dharuriyyat al-khams*) that serve as the pillars of all well-being on earth (Jasser, 2022). Therefore, any threat to life is not merely a personal crime but an attack on the social order itself. The legal system, as an instrument of social regulation, is faced with the serious challenge of formulating a just, proportionate and effective response to this most serious crime, namely intentional homicide.

In modern criminal law debates, punishment for murder is often caught in a dichotomy between retribution and rehabilitation. The system in force in many countries, including Indonesia with its colonial legacy Criminal Code (KUHP), generally relies on prison sentences of varying lengths. However, various criminological studies show that the effectiveness of prisons as a means of specific and general deterrence for serious crimes such as murder is often questioned, and they also create new problems such as overcrowding, high socio-economic costs, and a lack of justice for victims (Mulyadi, 2021). Victims' families often feel neglected, becoming mere witnesses in a judicial process that centers on the state versus the perpetrator, without the inner satisfaction of upholding equal justice.

This is where Islamic criminal law offers a unique and provocative concept: *Qisas*. Literally, *Qisas* means "following," which in a legal context means punishing the perpetrator of intentional murder with a punishment equal to the crime, namely, a life for a life. In public discourse, this concept is often simplified and reduced to merely "the law of retaliation" or "the law of the jungle," which is considered contrary to human rights values and modern civilization. This narrative ignores the profound philosophical framework behind its implementation, which is rooted in the objectives of *sharia* (*Maqasid al-shari'ah*) which is noble. *Qishash* does not stand alone as a legalized form of violence, but is part of a comprehensive legal system with very strict evidentiary mechanisms (such as direct testimony by two fair male witnesses or voluntary confession) and alternative resolution through peace with *diyat* (blood ransom) (Fathoni, 2023).

The issue of the urgency of implementing *Qishash*, or at least a deep understanding of its philosophy, is very relevant to study. On the one hand, there are demands from some groups in society to formally implement Islamic law, including *Qisas*. On the other hand, there is strong resistance from those who see it as a cruel form of punishment that is not in line with current developments. These two poles of view often clash without a sufficient basis for academic discussion regarding the essence of *Qisas* within the framework of the objectives of *Sharia*. This research starts from the assumption that to assess the urgency of a legal norm, we must first understand its position and function in achieving the larger objectives of the law. Therefore, the fundamental question that arises is: Where does *Qisas* fit into the map of achieving *Maqasid Sharia*, particularly in relation to the protection of life (*Hifz al-nafs*)?

The urgency of this study is reinforced by the increasing number of violence and murders in various parts of the world, which questions the effectiveness of conventional legal systems in creating a maximum deterrent effect. Several previous studies have discussed *Qisas* from the perspective of normative *fiqh* or comparative law in general, but not many have specifically and in-depth dissected it through the lens of *Maqasid Sharia*, focusing on analyzing how the *Qisas* mechanism operationally works to protect lives, both preventively and restoratively (Al-Maqdisi, 2020). The *Maqasid* approach offers a teleological (goal-oriented) perspective that can bridge normative textual understanding with the contemporary context, and examine whether the values that are the goal of *Qisas* can still be achieved through other legal instruments in the modern system.

Through this research, it is hoped that a clear and argumentative mapping of the position of *Qishash* can be produced within the framework of life protection according to *Maqashid Syariah*. This analysis is not only important for enriching the treasury of Islamic legal knowledge, but can also contribute ideas for the development of a more effective and just national criminal law system, particularly in formulating sanctions that have a high deterrent effect and can restore a sense of justice for victims and the wider

community. This study is relevant in efforts to find a common ground between universal religious values and the demands of a modern legal system that respects human dignity.

The position of Qishash in contemporary legal discourse is often caught in two erroneous and contradictory understandings. On the one hand, there is a reduction in the meaning that understands Qisas solely as a harsh and uncivilized law of revenge, thus considered contrary to the principles of modern human rights. On the other hand, there are demands for a formalistic application of Qisas without a complete understanding of the underlying philosophy and objectives of sharia (Maqasid). This dichotomy obscures the essence of Qisas as a legal instrument that, from the perspective of Maqasid Shariah, has a noble purpose: to guarantee and protect the right to life (Hifzh. al-nafs) as a primary human need. The core problem is the lack of a comprehensive analysis that maps Qisas in its entirety within the teleological framework of Maqashid Syariah, particularly in evaluating its effectiveness as a mechanism for protecting the soul that goes beyond mere retribution, and how its substantive values can dialogue with the challenges of the modern legal system.

This research has high urgency, both academically and socially. Academically, there is a gap between the normative jinayah fiqh study of Qishash and the Maqashid -based philosophical-legal approach which emphasizes achieving goals and benefits. This research urgently needs to be carried out to bridge this gap by analyzing Qishash not as a static legal ritual, but as a dynamic means to achieve Hifzh. al-nafs. Socially, amidst public anxiety regarding the effectiveness of the conventional criminal system (especially imprisonment) in preventing serious crimes such as murder, Qishash offers a unique perspective on proportional justice, legal certainty, and restitution for victims. Therefore, understanding the urgency of implementing Qishash values (both substantively and philosophically) is crucial for offering constructive criticism and alternative thinking in designing a criminal law system that is more effective in creating deterrence, while being fairer and more restorative for victims and society.

This research generally aims to analyze the urgency of implementing Qishash through the lens of Maqashid Syariah with a focus on how this mechanism functions as an instrument for protecting the soul (Hifzh. al-nafs) in jinayah law. Specifically, the research objectives are detailed as follows: First, to map the concept and position of Qishash in the hierarchy of Maqashid Syariah, especially within the framework of protecting the five basic needs (al-dharuriyyat al-khams). Second, to analyze the effectiveness of Qishash as an instrument of prevention (zawajir) and protection (wiqayah) of the soul, both theoretically and in dialogue with the concept of deterrence in modern criminology. Third, to examine the potential for contextualization and integration of the substantive values of Qishash (such as equal justice, victim participation, and alternative diyat) in the modern criminal law system, including its intersection with the principle of restorative justice. Fourth, to conduct a critical comparative analysis between the philosophy of protection of the soul in Qishash and conventional criminal sanctions, in order to identify the paradigmatic strengths and weaknesses of each.

## 2. METHODS

This research uses a qualitative research method with a library research approach or literature study. This type of research was chosen because the object of study is philosophical-normative and conceptual, which places more emphasis on in-depth exploration and analysis of texts, doctrines, and arguments of experts contained in various written sources. Library research allows researchers to explore and construct a comprehensive understanding of the concepts of Qishash, Maqashid Syariah, and Jinayah Law by placing various literature as primary data sources in building arguments (Sugiyono, 2021). This approach is considered appropriate because the focus of the research is not on empirical phenomena in the field, but rather on efforts to dissect and re-arrange theoretical ideas to produce a deep and systematic analysis of the urgency of Qishash from an Islamic teleological-legal perspective.

The data sources in this study are divided into two main categories: primary and secondary. Primary sources refer to authoritative works that directly discuss the concepts of Qisas, Diyat, and classical and contemporary Jinayah law, as well as recent books and scholarly works that specifically discuss Maqasid Syariah as a discipline. This category includes primary reference books written by Islamic scholars and

legal thinkers. Meanwhile, secondary sources consist of materials that support and enrich the analysis of primary data, such as indexed national and international scientific journal articles, research reports, seminar proceedings, and supporting books discussing modern criminal law theory, criminology, restorative justice, and human rights (Salleh, 2023). The selection of data sources prioritized recent publications (within the last 5-10 years) to ensure freshness of discourse, while not neglecting classic fundamental works that serve as primary references in their fields.

Data collection techniques were carried out systematically through a series of documentation activities on relevant written sources. The first step was planning the search by determining strategic keywords such as " Qishash," "Qisas," " Maqashid al-Shariah," and " Hifzh " (Islamic Law). al-nafs ", " Islamic Criminal Law ", " Jinayah ", " Deterrence Theory ", and " Restorative Justice ". The search was conducted through digital library catalogs, trusted online journal databases, and institutional repositories. After the documents were collected, a selection and inventory process was carried out by creating complete bibliographic records. The next technique was to conduct an in-depth study (close reading) of the selected texts, accompanied by making direct and indirect quotations, as well as summaries and paraphrases of the key ideas found (Creswell & Poth, 2022). All collected materials were then organized based on research themes and sub-themes to facilitate the subsequent analysis process.

The data analysis techniques applied are qualitative content analysis and conceptual analysis. Content analysis is used to extract meaning, themes, and argument patterns from written data sources. The process begins with data reduction, namely filtering and focusing on data that is truly related to the research question. The reduced data is then displayed or presented in the form of a matrix or narrative description to see the relationship between concepts. The core stage is drawing conclusions and verifying, where researchers interpret the presented data to answer the problem formulation. Meanwhile, conceptual analysis is used more specifically to dissect and map central terms such as "urgency," " Qishash," and " Hifzh." al-nafs " within the framework of Maqashid Syariah. This technique involves distinguishing meanings, tracing the development of concepts, and establishing logical relationships between concepts to build a coherent framework of thought (Sugiyono, 2021). The analysis was carried out interactively and repeatedly, starting from data collection, reduction, presentation, to drawing conclusions, to ensure the depth and accuracy of the findings.

To ensure the validity of the data and research findings, testing techniques were applied which included the criteria of credibility, dependability, confirmability, and transferability as is common in qualitative research. Credibility is maintained through source triangulation, which involves comparing and verifying information from various data sources (books, journals, and reports) to build a comprehensive and consistent understanding. Research dependability is achieved by conducting an audit trail, which involves documenting the entire research process in detail and systematically, from design and data collection to analysis, so that the process can be traced and tested by other researchers. Confirmability (objectivity) is enhanced by reflecting and maintaining a neutral stance, as well as conducting peer reviews or discussions with experts and colleagues to verify the accuracy of interpretations. Finally, the transferability of findings is not intended for statistical generalization, but rather by providing detailed contextual and methodological descriptions so readers can assess the relevance of the research findings to other similar contexts (Creswell & Poth, 2022). Thus, all stages of the research are designed to produce an analysis that is not only in-depth but also academically sound.

### 3. FINDINGS AND DISCUSSION

#### 3.1 *Mapping the Concept of Qishash in the Framework of Maqashid Syari'ah*

This study found that the position of Qishash in the hierarchy of Maqashid Syari'ah is not as the final goal, but rather as a very strong and definitive means (wasilah) to achieve the highest goal of Sharia, namely the protection of the soul (Hifzh). al-nafs). In the framework of the classic Maqashid of Al-Ghazali and Asy-Syatibi, Hifzh Al-nafs is a primary need which is a pillar of human life. Qishash functions as an active and firm guardian instrument (hafizh) for these pillars. More than just revenge, the essence of Qishash from the Maqashid perspective is to uphold the principles of balance (al-muwazanah) and

restorative justice (al-'adalah). The balance in question is placing life as an entity that has equal and irreplaceable value, so that violations of it require a proportional response to restore the disturbed cosmic and social balance. Thus, Qisas fulfills the principle of commutative justice, which is the foundation for creating distributive justice in society at large (Audah, 2020). Its strict and fair application actually aims to protect collective life by maximizing deterrence, which in turn protects the five basic objectives of sharia (al-dharuriyyat al-khams) as a whole, as social stability born of a sense of security is a prerequisite for protecting religion, reason, lineage, and property (Kamali, 2021).

Mapping the concept of Qishash within the framework of Maqashid Syari'ah reveals that the essence of this sanction goes far beyond its narrow understanding as a primitive form of retribution. This analysis places Qishash not as the final goal of sharia, but rather as the most definitive and powerful instrumental means (wasilah) to realize the highest goal of sharia, namely the protection of the soul (ḥifz al-nafs). In the hierarchical structure of Maqashid, ḥifz Al-nafs is a primary need that is the absolute foundation for the survival of individuals and collectives; without the security of the soul, all other objectives of sharia become meaningless (Alwani, 2021). Qishash serves as an active guardian (ḥāfiẓ) of these foundations, a legal mechanism that is automatically activated when these foundations are violated, with the primary goal of restoring and re-establishing them.

Maqashid literature shows that Qishash is intrinsically connected to the principles of balance (al-muwāzanah) and restorative justice (al-'adālah al-islāhiyyah) in the Shari'a. Justice from the Maqashid perspective is not an abstract concept, but rather a social condition in which the rights and obligations of each individual are in an equal and protected position. The act of murder is the most fatal violation of this balance, because it robs us of the irreversible and irreplaceable right to life (Al-Mubarak, 2020). Qishash, with the principle of "a life for a life", operates as a corrective tool aimed at restoring the damaged cosmic-social balance. He emphasized the principle of absolute equality of human life before the law, where the life of a noble is not higher than the life of a commoner, and the life of the perpetrator is not more valuable than the life of the victim.

Therefore, Qishash in this framework strictly fulfills the principle of commutative justice (al-'adālah al-mu'āwaḍiyyah), namely justice that demands equal exchange. Fulfilling commutative justice is not the end in itself, but rather a necessary foundation for achieving broader distributive justice (al-'adālah al-tawzī'iyyah) in society. A society will not experience distributive justice if commutative justice for victims of serious crimes is neglected (Kamali, 2022). By upholding equal justice for victims and their families, Qisāsh serves to extinguish the flames of hatred and personal revenge that can spread and damage the broader social order.

A more in-depth analysis of the Maqashid reveals that Qisāsh operates within the logic of maximum preventive protection. This sanction is designed with very specific characteristics: certainty (al-yaqīn), equality (al-musāwāh), and personalization (al-shakṣiyyah). These characteristics distinguish it from imprisonment and create a supposedly stronger deterrent effect. The certain and equal consequences create a very clear mental image in the collective consciousness of the ultimate "price" of murder. In Maqashid terminology, this is the most stringent practical application of the sadd al-dzarā'i' (closing the gap of damage) method, where the law seeks to tightly close the door that leads to the destruction of the soul by placing a very real and frightening barrier (Ramadan, 2023). Thus, Qisas is not merely a response to crimes that have occurred (reactive), but rather a legal investment to prevent crimes that may occur in the future.

This mapping also answers criticism that sees Qishash as contrary to the spirit of mercy (rahmah) in Islam. In the teleological perspective of Maqashid, mercy must be understood holistically. The mercy for the victims and their families is the realization of justice. The blessing for society is the creation of a stable sense of security. In fact, in a broad framework, Qishash can be seen as a potential form of mercy for the perpetrator himself, because with clear consequences in the world, he is encouraged to sincerely repent to Allah, while preventing him from possibly committing similar crimes in the future which will increase his sin (Hasan, 2024). Rahmat in Maqashid is always seen in the framework of comprehensive benefit (jalb

al-masālih wa dar' al-mafāsīd), and Qishash is placed as the main instrument to achieve the greatest benefit in the form of security of life and reject the greatest mafsadah in the form of murder.

This conceptual mapping confirms that Qishash cannot be separated from the five pillars of dharūriyyāt. When ḥifẓ Al-nafs is successfully maintained through the effectiveness of Qishash, it directly creates conditions conducive to the protection of the other four pillars. Stability and security of the soul are prerequisites for humans to be able to embrace religion in peace (ḥifẓ al-dīn), use their reason to think productively (ḥifẓ al-'aql), build a harmonious family (ḥifẓ al-nasl), and manage wealth well (ḥifẓ al-nasl). al-māl) (Abdullah, 2022). In other words, Qisas serves as the cornerstone in the defense structure of Maqasid Shari'ah. It is a legal instrument that, although it appears harsh on the surface, has a very noble philosophical purpose and is a testament to the consistency of Shari'a in protecting human life in the most firm and just manner. Its very careful application, accompanied by almost impenetrable evidentiary requirements and the existence of alternative diyat, further strengthens its position as a wise legal policy (ḥikmah) within the framework of divine goals.

### 3.2 *Analysis of the Effectiveness of Qishash as an Instrument of Prevention (Zawajir) and Protection*

Theoretically, the effectiveness of Qishash as an instrument of prevention (zajr) and protection (wiqayah) is based on two strong psychological-sociological aspects: specific deterrence (zajr al-khash) and general deterrence (zajr al-'am). Specific deterrence works on the perpetrator (if not executed) and his family, while general deterrence targets the wider community. Research into various criminal law literature shows that the zawajir mechanism is considered superior to a purely prison-based deterrence system because Qisas presents definite, equal, and personal consequences. These consequences create a strong mental image of the "price" that must be paid for murder, namely one's own life, which is believed to more fundamentally sever criminal intent (al-Zuhayli, 2020). In terms of protection, Qisas provides the most fundamental guarantee of immaterial restitution to the victim's family. It is not merely material compensation (diyat), but also a state recognition of their suffering and an elimination of injustice by upholding the equality of life. The rigorous investigative process (tahqiq) in Islamic criminal law, with its stringent evidentiary requirements, such as direct testimony or confession, serves as an additional protection mechanism that prevents arbitrary action and judicial error (Ibrahim, 2022). Thus, Qisas operates within a dual paradigm: preventing new crimes while simultaneously protecting the rights of existing victims.

A thorough analysis of the literature on criminal law confirms that the effectiveness of Qishash as an instrument of prevention and protection is rooted in a psychological-sociological mechanism known as zawājir (barrier or deterrent). The theory of zawājir in criminal law operates on two mutually reinforcing levels: specific deterrence (zajr al-khāṣṣ) and general deterrence (zajr al-'āmm). Specific deterrence works directly on the perpetrator of the crime; the threat of equal and final punishment (life for life) serves to radically extinguish or minimize the perpetrator's intention and potential to repeat similar crimes in the future, especially if the perpetrator has the opportunity to repent and consider the consequences (Al-Dawoody, 2021). Meanwhile, general deterrence targets the wider community, where public knowledge of the certainty and equality of Qisash sanctions creates a strong mental barrier that prevents others from committing murder.

The deterrent effectiveness of Qishash compared to conventional prison sentencing systems lies in three key aspects: certainty (yaqīn), equality (musāwāh), and finality (nihā'iyah). In many modern legal systems, prison sentences are often fraught with uncertainty, ranging from lengthy judicial processes, the possibility of clemency or remission, to disparity in sentencing. This uncertainty can actually reduce the law's deterrent effect. On the other hand, Qishash in its ideal conception offers a definite and clear legal formula, a guarantee that is directly proportional and psychologically stronger in shaping people's behavior to stay away from crime (Nordin, 2023). The principle of absolute equality in Qishash also eliminates discrimination based on social, economic, or power status, so that its message of deterrence is universal and just.

On the protection side (*wiqāyah*), Qishash functions as the most fundamental mechanism for restitution and restoration of victims' rights in the Islamic legal system. Qisas recognizes that the crime of murder has caused immeasurable immaterial harm to the victim's family, in the form of psychological suffering, profound loss, and a sense of acute injustice. By granting the victim's family the right to demand equal punishment, Islamic law makes them central subjects in the judicial process, not mere objects or witnesses. This process has high therapeutic value, as it provides a legitimate and honorable outlet for their emotional outbursts and demands for justice, thus preventing the cycle of personal revenge (*tha'r*) that can trigger serial violence in society (Rahman, 2022).

The protection mechanism in Qishash is also strengthened by a very strict and conservative system of evidence (*bayyinah*). The Qishash penalty can only be imposed based on a full and voluntary confession from the perpetrator without any coercion, or direct testimony by two fair male witnesses (*'adl*) who witnessed the murder incident directly. This very high standard of proof, which even exceeds the standard beyond reasonable doubt in common law, serves as a *sadd al-dharā'i'* (closing the path of harm) to minimize the risk of fatal judicial errors (*khata' al-qaḍā'*) (Khan, 2024). Thus, Islamic law builds a solid procedural barrier to protect the lives of innocent individuals from potential wrongful execution, a very rational and careful form of protection.

Furthermore, the existence of an alternative *diyat* (blood ransom) that can replace the execution of Qishash with the agreement of the victim's family, shows the flexibility and deep restorative dimension of this instrument. The *diyat* option shifts the legal paradigm from pure retribution to a solution that restores social relations and provides economic compensation to the bereaved family. In practice, this acknowledges that restoring social balance can be achieved through various means, and peace mechanisms are often preferred. This system effectively protects the material interests of the victim's family while offering an opportunity for reconciliation (*ṣulḥ*), ultimately contributing to community stability and cohesion (Saeed, 2020).

From a sociological perspective, Qisas also serves as a tool of collective protection by reinforcing absolute social norms about the value of life. By establishing equal punishments for violations of life, society collectively internalizes the message that human life is sacred and inviolable. This internalization of norms creates a legal culture that respects life, which in turn serves as an informal deterrent system that is more powerful than formal legal sanctions alone. The socialization of these values is crucial in shaping societal behavior and organically reducing crime rates (Ismail, 2023).

However, the analysis must also acknowledge that the theoretical effectiveness of Qishash as a means of redress and redress depends heavily on the prerequisites of an ideal judicial system: impartial justice, a perfect system of evidence, and political leadership that truly enforces the law fairly. The challenge in the context of a modern state is to create conditions that allow these prerequisites to be met, so that the ideal values of Qishash are not distorted in their implementation. Despite these challenges, this analysis shows that Qishash, as a legal construct, is designed with a highly sophisticated, coherent logic of prevention and protection, and is oriented towards restoring balance at the individual, familial, and social levels (Bakar, 2024).

### 3.3 Contextualization of Qishash in the Modern Criminal Law System

Contextualizing Qishash in the modern legal system faces complex challenges, ranging from the principle of the sovereignty of state law, universal human rights, to judicial technicalities. However, this study observes that the universal values of Qishash, particularly proportional justice, legal certainty, and victim protection, can be in dialogue with contemporary criminal law developments. The principle of *nullum crimen, nulla poena sine lege* (no crime without law) aligns with the nature of Qishash, which has been clearly established in the texts, thus offering high legal certainty. The greatest challenge lies in reconciling final corporal punishment with the evolving concept of the right to life and freedom from torture or cruel treatment. Several contemporary thinkers offer contextual readings, in which the spirit of Qishash (enforcing equal justice and protecting the soul) can be realized through other mechanisms within a comprehensive positive legal system, as long as they achieve the same goals of *zawajir* and

wiqayah (Hasan, 2023). Furthermore, this study finds potential integration between the philosophy of Qishash and the restorative justice approach. Although different in form, both share common ground: considering the impact of the crime on the victim/family and society, and seeking a solution that restores balance. Diyat (blood ransom) as an alternative to Qishash with the agreement of the victim's family, is an early form of restorative justice in the Islamic tradition, which emphasizes reconciliation and restoration of social relations (Abdullah, 2021).

Contextualizing Qisas in the modern criminal justice system is a complex dialectical endeavor, in which timeless principles of Islamic law are tested and rearticulated within the framework of institutions, norms, and challenges of contemporary civilization. This process is not intended as a literal and mechanistic application of classical texts to the modern legal system, but rather as an *ijtihadi* effort to extract substantive values (*al-maqāṣid*) from Qisas and seek a *modus vivendi* that allows it to contribute meaningfully to the current criminal justice system. The most fundamental challenge lies in reconciling the final physical form of Qisas with the global consensus on human rights, particularly the right to life and freedom from torture or cruel, inhuman, or degrading treatment, as guaranteed in various international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) (An-Na'im, 2023).

However, this study found that common ground between Qisāsh and the modern legal system can be established through a *maqāṣidi* approach that focuses on substance and purpose, not merely its formal legal form. The fundamental principles underlying Qisāsh, such as legal certainty, proportionality, and equality before the law, are also principles upheld in modern criminal law theory. In this context, the debate is no longer focused on the question of "should the death penalty be carried out?" but shifts to "how can the values of substantive justice, maximum deterrence, and restoration of victims' rights, which are the goals of Qisāsh, be realized in a justice system that is fair, accountable, and respects human dignity?" (Freamon, 2021).

Qishash values into a restorative justice framework. The concept of diyat, as an alternative to Qishash agreed upon by the victim's heirs, is essentially a very old prototype of restorative justice. Diyat serves not only as financial compensation but also as a symbolic medium for recognition (acknowledgment of wrongdoing), responsibility (responsibility of the perpetrator), and reparation (repair) for the victim's family and the damaged social order. Modern legal systems can adopt and institutionalize this mechanism more broadly, for example by requiring professionally facilitated victim-offender mediation programs before the trial process, with the resulting agreement including compensation, community service, and an admission of wrongdoing that is legally binding and can influence the verdict (Hasan, 2022).

Furthermore, contextualization can also be done at the philosophical level of punishment. Qishash offers a model of punishment that strongly emphasizes victim-oriented justice, which is often neglected in modern, state-centered criminal justice systems. In the modern system, the state acts as a representative of the public to punish the perpetrator, while the victim only becomes a witness. Qishash, through the mechanism of the victim's family's right to forgive or request execution, restores the victim to the position of legal subject. Modern systems can contextualize this by strengthening the victim's role in the judicial process, for example through the right to submit a victim impact statement that is substantially taken into account in determining the sentence, or by granting the victim veto power over clemency requests for perpetrators of certain very serious crimes (Al-Hakim, 2024).

From a procedural law perspective, the almost impenetrable Qishash standard of proof requiring repeated voluntary confessions or the testimony of two fair male eyewitnesses can be an inspiration for strengthening the evidentiary system in serious criminal cases where the threat of punishment is final, such as the death penalty. The contextualization is by setting the standard of proof "beyond all possible doubt" as an absolute requirement for imposing the death penalty, which is higher than the standard "beyond reasonable doubt". This also includes strengthening the appeals and review mechanisms rigorously, as well as utilizing the latest forensic technology to minimize the risk of judicial errors, which is in line with the spirit of caution (*iḥtiyāt*) in *fiqh jinayah* (Khalil, 2023).

Another contextualization challenge is legal and religious pluralism in modern, secular or multi-religious nation-states. Formally applying Qisas (retribution) only to Muslim citizens would create a discriminatory legal system that contradicts the principle of equality among citizens. Therefore, the most realistic contextualization is through "translating values" into a religion-neutral national legal language. For example, the principle of perfect proportionality in Qisas could be adopted by formulating very severe and mandatory penalties for premeditated murder, but remaining within the constitutionally recognized penal code, while still leaving ample room for reconciliation and restitution to the victim's family as mitigating factors (Mulia, 2020).

Thus, the contextualization of Qishash is not a project of implementing Islamic law politically, but rather an intellectual and legal project to enrich the modern criminal justice system with the wisdom contained in Islamic tradition. Qishash's universal values of equal justice, effective deterrence, and restoration of victims' rights are a valuable contribution to global efforts to reform a penal system that is often considered to have failed to create a sense of justice and prevent crime. Thus, Qishash in modern discourse no longer appears as a relic of a cruel past, but rather as a rich source of inspiration for building a more just, effective, and humane legal system for all (Rane, 2024).

### ***3.4 Qishash and Protection of Life: A Comparative Analysis with Conventional Criminal Sanctions***

A comparative analysis reveals a fundamental paradigmatic difference between Qisah and conventional criminal sanctions (particularly imprisonment) in their approach to protecting life. Conventional systems tend to focus protection on the perpetrator (through rehabilitation) and the community (through isolation), while the rights of victims are often marginalized, becoming mere witnesses in state legal proceedings. In contrast, Qisah places victims and their families at the center, whose right to equal justice is legally recognized. In terms of prevention effectiveness, statistical data from various countries with different systems do not provide absolute conclusions. However, the theory of deterrence in Qishash is built on the certainty and direct proportionality of punishment, a principle recognized in criminology but difficult to fully realize in a modern justice system rife with legal disparities and negotiations (Bessler, 2021). The advantage of Qishash lies in its ability to provide deep psychological satisfaction and symbolic justice for the victim's family, which in conventional systems is often not fulfilled, potentially giving rise to a cycle of personal revenge. However, a potential weakness of Qishash in the modern context is its rigidity and the risk of irreversibility in the event of a judicial error, something that conventional systems have attempted to address with tiered appeals mechanisms and the abolition of the death penalty in many jurisdictions (Mulia, 2022). Therefore, this comparative analysis is not intended to conclude the absolute superiority of either system, but rather to demonstrate that Qishash offers a unique perspective on victim-centered retributive-protective justice, which can be a constructive critical ingredient for the development of any criminal law system that aims to protect life in its truest sense.

A comparative analysis between Qishash and conventional criminal sanctions, especially long-term imprisonment and the death penalty in modern systems, reveals profound paradigmatic differences in interpreting and operationalizing the concept of "protection of the soul" (*ḥifẓ al-nafs*). Conventional systems, which developed from Western legal traditions, generally frame the protection of life within three main frameworks: the neutralization of the perpetrator through isolation in prison, rehabilitation to prevent recurrence of crimes, and in the case of the death penalty, deterrence and moral retribution on behalf of society. In this model, the state acts as the sole representative of the public and victim interests, so the legal process tends to be bipolar: state versus perpetrator, where the rights and psychological needs of victims and their families are often reduced to mere secondary interests in the prosecution (Garland, 2021). Qishash, in contrast, establishes a radically different paradigm, in which the protection of life is a goal achieved through an ecology of justice that places the victim, perpetrator, and society in an interconnected triadic relationship, with a primary emphasis on restoring a restorative-retributive balance of rights.

The most substantive differences lie in the orientation of justice and the mechanisms of redress. Conventional prison sentences, while intended to protect society by isolating offenders, often create new problems such as dehumanization, learning criminality in prison (school of crime), and the severance of offenders' social ties, which ultimately hinders reintegration. From the perspective of victims, prison is often perceived as an abstract and unsatisfying form of justice, as there is no direct connection between their suffering and the "suffering" of offenders who are imprisoned in a different location; no sense of "balance" is restored (Zedner, 2023). Qishash addresses this concern by offering the absolute proportionality of life for life, which in the victim's psychology creates a profound and final sense of symbolic justice. This mechanism recognizes that the crime of murder creates deep social wounds, and these wounds can only be healed by equal and definitive acts of justice, not by the temporary isolation of the perpetrator who may one day be free again.

In terms of deterrence effectiveness, scholarly debate suggests that uncertainties in modern justice systems, ranging from low reporting and clearance rates, plea bargaining, to the possibility of parole and remission, significantly weaken the deterrent effect of imprisonment. Even the death penalty in conventional systems has failed to consistently demonstrate statistically superior deterrence compared to life imprisonment without parole, in part due to its lengthy process and the rarity of executions (Hood & Seemungal, 2022). Qishash deterrence theory is built on a different foundation: the threat is personal, certain, and immediate. This certainty stems not only from the sanction, but also from a religious belief system that internalizes the consequences of this world and the afterlife, and from a cohesive community social structure where monitoring and enforcement of norms are more direct. While modern social conditions have eroded some of these elements, their underlying logic highlights the fundamental weakness of conventional systems: weak deterrence due to legal uncertainty.

Another aspect of protection that is a point of difference is the concept of restitution and restoration. Conventional systems strictly separate criminal law (state demands) from civil law (victims' compensation claims). Victims must undergo two tedious and expensive processes to obtain justice and compensation. In Qishash, the concept of restoration is organically integrated. *Diyat* is not merely additional civil compensation, but rather an intrinsic and alternative to the criminal sanction itself. This option recognizes that justice can take many forms and gives the victim's family the authority to choose the form of settlement they deem most restorative, whether it be the symbolic execution of justice (Qishash) or material compensation that allows their lives to continue (Abdullahi, 2024). Conventional systems that have begun to adopt the mechanism of criminal restitution still position it as a complement to the verdict, rather than as the core of the philosophy of punishment.

However, this comparative analysis must also honestly acknowledge the superiority of the conventional system in terms of modern procedural safeguards mechanisms. A tiered appeals system, strict judicial review, continuously refined standards of proof, and independent oversight are elements developed to address the greatest weakness of any criminal justice system, namely the risk of miscarriage of justice. Although Islamic jurisprudence (*fiqh jinayah*) has very strict requirements for proof, its implementation in the context of pre-modern states is vulnerable to abuse of power and social pressure. Modern justice systems, ideally, offer a more complex and transparent structure of checks and balances to protect the rights of the accused, a principle that must be integrated into any discourse on the contextualization of *Qisāsh* (Lippman, 2023).

At the philosophical level, the biggest differences lie in the sources of legitimacy and ultimate goals. The legitimacy of conventional sanctions is secular-anthropocentric, derived from the social contract and aimed at maintaining social order and public security. While the legitimacy of Qishash is theocentric, derived from revelation and aimed at upholding the divine will, restoring cosmic balance (*mizān*), and upholding justice as a divine value. Protection of life in *Qisas* is a religious obligation (*haqq Allah* mixed with *haqq al-'abd*), whereas in the conventional system it is a secular legal obligation of the state to its citizens (Rahman, 2024). These differences in sources of legitimacy result in differences in the tone, spirit, and manner in which the law is experienced by society.

The conclusion of this comparative analysis is not a claim of absolute superiority of one system or another, but rather an acknowledgement that each brings valuable insights and has its own intrinsic weaknesses. The conventional system offers significant advances in procedural protection and respect for the rights of the accused in due process, while Qisāsh offers philosophical depth in restoring justice for victims and theoretical clarity in creating deterrence. The challenge for contemporary legal thinkers is to devise a creative synthesis of a criminal justice model that can draw on the principles of certainty, proportionality, and victim reparation from Qisāsh, while embedding them within a legal framework that guarantees procedural fairness, non-discrimination, and respect for human dignity as developed in modern criminal law (Baz, 2024). Thus, the protection of life can be approached not as a dichotomous choice between "Islamic law" and "Western law," but as a shared search for the most effective and humane mechanism of justice.

#### 4. CONCLUSION

This study concludes that Qishash in the perspective of Maqashid Syari'ah is not a legal institution that stands alone with a spirit of revenge, but rather a very strong and integral instrumental means to realize the highest goal of sharia, namely the protection of the soul (Hifzh al-nafs). Its essence lies in upholding the principles of balance and restorative justice, where life is placed at an equal and irreplaceable value. As an instrument of prevention (zawajir) and protection (wiqayah), Qishash operates within a unique dual paradigm: creating a profound deterrent effect through its legal certainty and proportionality, while simultaneously providing genuine recognition and restitution of justice for the victim's family, which is often neglected in conventional systems. Although its implementation within a modern legal framework faces serious challenges, particularly related to human rights and the finality of punishment, this study finds that the universal values it contains such as proportional justice, legal certainty, and victim protection as well as its alternative mechanisms (such as diyat) have room for constructive dialogue with contemporary criminal law developments, including the restorative justice approach. Comparative analysis shows that Qishash offers a victim - centered perspective of justice as the subject, in contrast to conventional systems that tend to focus on the state and the perpetrator. Therefore, the urgency of Qishash does not lie in its literal application in all contexts, but rather in its spirit and philosophy which can be used as material for criticism and improvement for any criminal law system that aims to protect human life in a substantive and just manner.

Based on the research findings, several strategic steps can be implemented. First, in the academic and social spheres, it is necessary to develop a legal education module that maps the concept of Qishash comprehensively within the framework of Maqashid sharia to be introduced in universities and Islamic boarding schools, in order to shift public understanding from the narrative of revenge to the narrative of life protection and restorative justice. Second, in the realm of criminal law policy reform, the Ministry of Law and Human Rights and the Judicial Commission can consider integrating the philosophical values of Qishash, such as the principle of proportionality of punishment that is equal to the victim's losses and strengthening the rights and participation of victims/families in the judicial process, into the revision of the Criminal Code or the preparation of its implementing regulations. Third, for judicial practitioners, the findings on the effectiveness of prevention and protection mechanisms in Qishash can be used as a consideration to further strengthen the aspect of justice for victims in criminal decisions, as well as encourage the use of alternative solutions that are restorative and mediation that accommodate the interests of victims. Fourth, for legislators and policy makers in regions that have regulations based on Islamic values, this research can serve as a reference to avoid getting caught up in the textual formalization of Qishash law, but rather to adopt its spirit and objectives in regional regulations that emphasize crime prevention, victim protection, and the creation of a sense of security for the wider community.

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