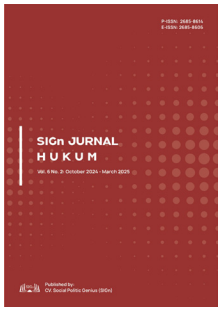

SIGn Jurnal Hukum

E-ISSN: 2685 – 8606 || P-ISSN: 2685 – 8614
https://jurnal.penerbitsign.com/index.php/sjh/article/view/v7n1-26

Vol. 7 No. 1: April - September 2025 Published Online: September 10, 2025

Article Title

The Crime of Kidnapping with Aggravation According to Islamic Criminal Law

Author(s)

Tika Afrianti*
Universitas Islam Negeri Sumatera Utara Medan, Indonesia || tika0205212060@uinsu.ac.id
**Corresponding Author*

Syaddan Dintara Lubis
Universitas Islam Negeri Sumatera Utara Medan, Indonesia || syaddandintaralbs@uinsu.ac.id

How to cite:

Afrianti, T., & Lubis, S. D. (2025). The Crime of Kidnapping with Aggravation According to Islamic Criminal Law. *SIGn Jurnal Hukum, 7*(1), 454-470. https://doi.org/10.37276/sjh.v7i1.492

ABSTRACT

The fragmentation of regulations on the crime of kidnapping within the Indonesian legal system—scattered across the Penal Code and sectoral laws—creates normative inconsistencies that risk injuring legal certainty. This condition necessitates a more coherent penal framework that is substantively just. On the other hand, Islamic criminal law (fiqh jinayah) categorizes kidnapping (ikhtithaf) as a ta'zir offense, which offers a flexible sanctioning mechanism based on the principles of maqashid syariah. This research offers a comparative analysis to bridge these normative inconsistencies by introducing the sanction aggravation framework of fiqh jinayah as a critical evaluative lens. Using a normative juridical method with statutory, conceptual, and comparative law approaches, this study analyzes primary and secondary legal materials from both legal traditions. The findings reveal a fundamental philosophical difference: positive law applies a rigid, procedurally-oriented system of sanction gradation, whereas fiqh jinayah provides a holistic and adaptive framework for punishment aggravation based on substantive justice. This penal model in fiqh jinayah is dynamically determined by the degree of violation against the protection of life (hifz al-nafs), lineage (hifz al-nasl), and property (hifz al-mal), while comprehensively considering victim characteristics, the modus operandi, and the consequences inflicted.

Keywords: *Fiqh Jinayah; Kidnapping; Maqashid Syariah; Positive Law; Sanction Aggravation.*

INTRODUCTION

The crime of kidnapping constitutes a grave offense against personal liberty. This crime not only infringes upon the most fundamental human rights but also has a destructive impact on social stability and causes profound psychological trauma to victims and their families (Nasrullah, 2023). As a juridical phenomenon, the complexity of kidnapping necessitates a penal system that is not merely repressive but also proportional and capable of reflecting the public's sense of justice. The issue, however, is that the existing legal framework often fails to comprehensively address this challenge, both in the substance of its norms and the consistency of its enforcement (Sriwidodo, 2023).

The primary juridical problem within Indonesia's positive legal system is the fragmentation and regulatory overlap governing the crime of kidnapping (Saputri et al., 2023). The scattered regulations—between the general provisions in Article 328 and Article 330 of the Penal Code and the specific provisions in Article 83 juncto Article 76F of Law Number 35 of 2014—have created normative inconsistency. This fragmentation, as analyzed by legal scholars, potentially weakens the effectiveness of law enforcement by causing normative confusion and disparity in verdicts at the practical level (Rasjidi & Putra, 2003). Consequently, legal certainty, a cornerstone of the criminal justice system, is undermined.

Simultaneously, the perspective of Islamic criminal law (*fiqh jinayah*) views kidnapping (*ikhtithaf*) as a reprehensible act classified under the category of *ta'zir* offenses (Rahmawati, 2023). Unlike *hudud* or *qisas* crimes, for which sanctions are

prescribed explicitly by the *nash* (sacred texts), the punishment for *ta'zir* offenses is left to the *ijtihad* (legal discretion) of the judge or the competent authority (*ulil amri*) (Annisa, 2023). This flexibility, however, does not imply arbitrariness; rather, it is a mechanism to ensure that the imposed sanction aligns with the principles of justice and public welfare (*maslahah mursalah*). It is executed while firmly adhering to the Sharia's commitment to protecting human life, property, and honor (Zahrah, 1997).

The urgency of examining this issue is underscored by empirical realities within society. Two prominent cases represent the spectrum of this crime. *First*, the kidnapping of a 6-year-old child, Malika, by a recidivist in Jakarta, which highlighted the vulnerability of children as victims and the complexity of addressing attendant sexual crimes (Pusiknas, 2023). *Second*, the kidnapping of a businessman, Hendra Halim, with motives of extortion and a ransom demand. This case demonstrates the dimension of organized crime and the threat to property security (Alawi & Ika, 2021). Both cases clearly illustrate that the mechanism for the aggravation of sanctions is a crucial factor requiring in-depth study.

Several prior studies have examined the issue of kidnapping from various perspectives. Nasution (2019) focused on the relevance of *ta'zir* sanctions without delving into the aspect of aggravation due to fatal consequences. Meanwhile, Raharja et al. (2020) explored the legal protection of children in the context of parental kidnapping. Zaenal (2017) analyzed the issue from a criminological-empirical perspective, focusing on causal factors and prevention. From this literature review, a significant research gap is identified. There has been no comprehensive study that specifically and dialogically analyzes and compares the mechanisms for the aggravation of sanctions for the crime of kidnapping between Indonesian positive law and *fiqh jinayah*.

To fill this void, the novelty of this research lies in its application of the theory of *maqashid syariah*. This theory serves not merely as a philosophical foundation for Islamic law but as a critical evaluative framework to deconstruct and offer solutions for the normative inconsistencies within Indonesian positive law. This approach transcends conventional doctrinal analysis by presenting an interdisciplinary lens for the problem of criminal law harmonization. This research does not merely describe the two legal systems separately; instead, it conceptually juxtaposes them to identify points of convergence and fundamental differences in their penal logic.

Thus, this research is projected to make a significant scholarly contribution. Theoretically, it contributes to the development of a penal model for the crime of kidnapping that is more adaptive, holistic, and substantively just by integrating the wisdom of the Islamic legal tradition. Practically, its findings can serve as a conceptual foundation for legislators in the reform agenda of the Penal Code. Furthermore, these

findings can benefit law enforcement officials (judges, prosecutors, and advocates) in interpreting and applying the law in a more proportional and victim-oriented manner.

Based on the background, research gap, and the novelty offered, this study has two primary objectives. *First*, to analyze the provisions for kidnapping with aggravation in Indonesian positive law to map its normative problems. *Second*, to reconstruct the concept of sanction aggravation from the perspective of *fiqh jinayah*, grounded in *maqashid syariah*. The benefit of this research is to provide a comprehensive academic reference for academics, legal practitioners, and policymakers in the endeavor for a more responsive and just national criminal law reform.

METHOD

This study is a normative legal research, also known as doctrinal research (Qamar & Rezah, 2020). Its focus is on the analysis of authoritative texts within two distinct legal traditions. To address the comparative objectives of the research, several approaches are employed simultaneously. *First*, a statute approach is applied to systematically dissect and analyze the norms contained within the Penal Code and Law Number 23 of 2002[1]. This approach is relevant to the first research objective. *Second*, a conceptual approach is used to identify, reconstruct, and analyze key doctrines and concepts within *fiqh jinayah* related to *ikhtithaf* and the aggravation of sanctions, which is relevant to the second research objective. Both approaches are unified by a comparative law approach, which serves as the primary framework for juxtaposing and engaging the findings from both legal systems in a dialogue.

The data sources used in this study consist of legal materials classified hierarchically (Sampara & Husen, 2016). Primary legal materials include legally binding statutory regulations: the Penal Code and Law Number 23 of 2002. Additionally, the authentic sources of Islamic law—namely, the *nash* of the Qur'an and Hadith—are also included. Secondary legal materials comprise literature that provides analytical explanations of the primary materials, such as textbooks, legal journals, prior research findings, and the doctrines of criminal law experts and Islamic legal scholars. Finally, tertiary legal materials are used as supporting resources, including legal dictionaries, encyclopedias, and other search instruments. All these materials were collected through library research techniques, by tracing and inventorying relevant literature from various online and offline sources.

The technique for analyzing the legal materials is qualitative, conducted through several systematic stages (Irwansyah, 2020). *First*, for the positive law materials, a systematic interpretation is performed to identify the relationships, hierarchy, and potential normative conflicts between the general provisions in the Penal Code and

[1]Law Number 23 of 2002, as amended several times, lastly by Law Number 17 of 2016.

the special provisions (*lex specialis*) in Law Number 23 of 2002. *Second*, for the Islamic legal materials, a conceptual analysis is undertaken to explore the meaning and scope of the concepts of *ikhtithaf*, *ta'zir* offenses, and the framework of *maqashid syariah* in determining sanctions. The *final stage* is a comparative synthesis, where the results of both analyses are critically compared. In this stage, the principles of *fiqh jinayah*, particularly *maqashid syariah*, are not merely described. They are also employed as an analytical lens to evaluate the effectiveness and weaknesses within the positive law's system of sanction aggravation. By doing so, a comprehensive legal argument that fully addresses the research objectives can be formulated.

RESULTS AND DISCUSSION

A. Theoretical Foundation: Legal Certainty and *Maqashid Syariah* as an Analytical Tool

To conduct an in-depth and substantive comparative analysis, this research is grounded on two primary theoretical pillars, which will function as both a framework and an analytical instrument. The selection of this theoretical foundation is not intended as mere academic ornamentation; rather, it serves as a sharp "analytical tool" to dissect the normative problems in positive law and to reconstruct the philosophy of punishment in Islamic criminal law. This framework guides the process of answering the central research question concerning how both legal systems respond to the crime of kidnapping with aggravation. Furthermore, it directs the exploration of how these systems can offer constructive perspectives to one another.

The first pillar is the theory on the purpose of law, specifically the concept of legal certainty. In the modern philosophy of law tradition, Radbruch (1932) positioned legal certainty as one of the three fundamental values of law (*rechtsidee*), alongside justice and utility. Legal certainty demands that norms be clearly formulated, predictable, and consistently applied. This concept was enriched by Otto (2009), who defined it as a condition wherein individuals can anticipate the legal consequences of their actions. In the context of this research, the theory of legal certainty serves as more than a background; it is operationalized as the primary benchmark for evaluating the fundamental weaknesses in Indonesia's positive legal system—namely, the problems of fragmentation and normative inconsistency identified in the introduction. This theory will help diagnose the extent to which regulatory overlap undermines the predictability of law enforcement against the crime of kidnapping.

Serving as a counterbalance and an evaluative framework, the second theoretical pillar is *maqashid syariah*. This concept is the heart of Islamic legal

philosophy (*ushul al-fiqh*), referring to the higher objectives behind every Sharia ruling. As systematically formulated by Imam Al-Ghazali (1993), the primary objective of the Sharia is to preserve five essential interests (*al-kulliyyat al-khams*): the protection of religion (*hifz al-din*), life (*hifz al-nafs*), intellect (*hifz al-'aql*), lineage (*hifz al-nasl*), and property (*hifz al-mal*). In this study, *maqashid syariah* is employed as an analytical framework to deconstruct the logic behind the flexible system of sanction aggravation in *fiqh jinayah*, particularly for *ta'zir* offenses like kidnapping.

More specifically, the crime of kidnapping in its various aggravated forms directly threatens at least three of these five pillars. The threat of physical violence up to and including murder is a clear violation of *hifz al-nafs* (Bawono et al., 2025). The kidnapping of children and women disrupts family stability and the continuity of generations, which is the essence of *hifz al-nasl* (Muthoifin et al., 2024). Meanwhile, motives of extortion or ransom demands are a direct assault on *hifz al-mal* (Andaluzi & Badrudin, 2024). Thus, as asserted by Ibn Asyur (1978), the *maqashid* approach allows for an analysis that transcends formal legal texts to delve into the substance of justice it seeks to achieve. This framework will be the lens through which to understand why and how *fiqh jinayah* imposes varying sanctions based on the level of harm inflicted upon these pillars of common good.

Subsequently, this research builds an analytical bridge between these two theoretical pillars. The theory of legal certainty, which tends to emphasize procedural justice, is placed in dialogue with *maqashid syariah*, which is oriented toward substantive justice. Procedural justice implies clear and consistent rules, whereas substantive justice is the attainment of benefit and the repulsion of harm. This dialogue is the core of the adopted comparative approach. The problem of fragmentation in positive law will be analyzed as a failure to realize legal certainty, while the flexibility of *ta'zir* sanctions in *fiqh jinayah* will be reconstructed as an effort to achieve substantive justice guided by the *maqashid*.

Consequently, this dualistic framework enables the research to move beyond a mere descriptive comparison between articles in the Penal Code and doctrines in books of jurisprudence (*fiqh*). Instead, it will conduct a critical evaluation of the philosophies underlying both penal systems. Although Islamic criminal law also recognizes a principle of formal legality through the maxim *la jurma wa la 'uqubah illa bi nash* (Audah, 1963), this principle, in the context of *ta'zir*, is interpreted dynamically. It provides space for judges to exercise *ijtihad* (reasoned discretion) for the sake of the greater good. It is this analytical bridge that will guide the discussion in the subsequent sub-chapters to produce a synthesis beneficial for the agenda of criminal law reform in Indonesia.

B. Normative Problems: Fragmentation and the Gradation of Sanctions for Kidnapping in Indonesian Positive Law

An analysis of Indonesia's positive legal system reveals a complex and multi-layered regulatory landscape for the crime of kidnapping. Legislative developments from the colonial era to the post-reform period show a continuous effort to respond to this crime, particularly in targeting vulnerable groups such as children. However, this evolution has not been linear or integrated; instead, it has produced a fragmented legal structure. Using the technique of systematic interpretation, this sub-chapter will dissect three primary legal instruments: Article 328 of the Penal Code, Article 330 of the Penal Code, and Law Number 23 of 2002. The objective is to critically identify the normative problems arising from the existing overlap and inconsistencies.

As a starting point, Article 328 of the Penal Code functions as the general provision (*lex generalis*) or the parent provision, regulating the offense of kidnapping in its most basic form. The formulation of this offense requires the fulfillment of an objective element—the act of "carrying away" a person from their place of residence—and a subjective element, which is the "intent" to place the victim under the perpetrator's power unlawfully or in a state of misery (Soesilo, 1995). The prescribed penalty of a maximum of twelve years imprisonment indicates that the legislator has, from the outset, categorized this act as a serious crime (*ernstige delicten*).

Nevertheless, a deeper analysis of Article 328 of the Penal Code reveals conceptual limitations. The phrase "to place him in a state of misery" is an exceedingly broad and elastic formulation. The absence of a precise definition grants vast discretionary space to law enforcement officials. On one hand, this can be beneficial for encompassing various modi operandi; on the other, it risks causing disparities in interpretation and application. According to legal experts, the element of "intent" in this article is also classified as intent with a specific purpose (*opzet als oogmerk*), for which the evidentiary burden in court is relatively more difficult compared to general intent (Lamintang & Lamintang, 2012; Moeljatno, 2015).

Recognizing the need for special protection, the legislator formulated Article 330 of the Penal Code, which specifically targets the kidnapping of minors. This article uses the terminology of "withdrawing" an underage person from lawful authority, a term that can be interpreted more broadly than mere physical coercion to include persuasion or deceit (Chazawi, 2001). The lower penalty of seven years imprisonment in Article 330 section (1) of the Penal Code demonstrates an initial

gradation, meaning this offense is viewed differently from the general kidnapping regulated in Article 328 of the Penal Code.

The mechanism for sanction aggravation is explicitly regulated in Article 330 section (2) of the Penal Code. In this section, the penalty can be increased to nine years imprisonment if the act is committed with "deceit, violence, or threats of violence," or if the victim is "under the age of twelve." This gradation system represents the embryo of a penal policy oriented toward victim protection. However, this system remains rigid and limited, as the aggravation is based only on the modus operandi and a particular age limit, without considering other factors such as the psychological impact on the victim, economic motives, or the involvement of criminal syndicates. Furthermore, the definition of "underage," which refers to classical civil law doctrine (not yet 21 years old and unmarried) (Prodjodikoro, 2012), creates ambiguity when confronted with international standards and modern legislation that set the age of a child at 18 years (Nosita & Zuhdi, 2022).

The culmination of the legislative evolution occurred with Law Number 35 of 2014. The provisions in Article 76F juncto Article 83 of this law, radically changed the penal paradigm. Article 76F expands the scope of prohibited acts beyond just "committing" kidnapping to include "placing, allowing, ordering, or participating in" the act, which effectively broadens criminal liability (Gultom, 2014).

The most significant change lies in the philosophy of sanctions in Article 83 of Law Number 35 of 2014. Unlike the Penal Code, which only regulates maximum penalties, this law introduces a special minimum penalty of "at least 3 (three) years," alongside a maximum of 15 years. This policy aims to limit sentencing disparities and ensure that perpetrators of crimes against children receive commensurate punishment (Setiawan et al., 2022). Furthermore, the imposition of a cumulative (rather than subsidiary) fine with a substantial nominal value, from IDR 60 million to IDR 300 million, indicates a shift in penal orientation that is not only aimed at the deprivation of the perpetrator's liberty but also at restitution for damages.

The existence of Law Number 23 of 2002 as a special law (*lex specialis*) certainly provides a stronger and more progressive legal instrument. In accordance with the legal principle that a special law supersedes a general law (*lex specialis derogat legi generali*), this provision should be prioritized in handling child kidnapping cases (Arief, 2017). However, the existence of these three legal instruments operating in parallel ultimately creates the problem of juridical fragmentation. Law enforcement officials are faced with a choice of overlapping norms, which can create loopholes for inconsistency in the prosecution and sentencing processes.

For instance, in a case involving the kidnapping of a 13-year-old child with violence, a prosecutor could theoretically choose between Article 330 section (2) of the Penal Code or Article 83 of Law Number 35 of 2014. The penal threat for the former is a maximum of 9 years, whereas for the latter, it is a minimum of 3 years and a maximum of 15 years. Although the *lex specialis* principle directs toward the second option, the absence of an integrated codification can lead to hesitation and non-uniform practices across different jurisdictions.

This inconsistency directly injures the principle of legal certainty that forms the basis of this research's analysis. The overlap in regulations makes the legal consequences of an act less predictable. The system of sanction gradation, regulated partially in each respective instrument without any synchronization, results in a legal mosaic that is complex and potentially unjust. It is this normative problem that serves as the primary justification for seeking an alternative perspective from another legal tradition to find a more coherent, integrated, and comprehensive penal model.

C. Reconstructing the Concept of Sanction Aggravation in *Fiqh Jinayah*: A *Maqashid Syariah* Perspective

In diametrical opposition to the approach of positive law, which is based on rigid and codified rules, *fiqh jinayah* offers a penal framework grounded in principles and objectives. To address the second research objective, this sub-chapter will reconstruct the concept of sanction aggravation for the offense of kidnapping (*ikhtithaf*). This reconstruction will be conducted using conceptual analysis to demonstrate how the philosophy of *maqashid syariah* provides a dynamic and holistic penal model that is inherently oriented toward achieving substantive justice. It stands in contrast to the rigid system of sanction gradation found in positive law.

The first step in this reconstruction is to understand the juridical definition and categorization of *ikhtithaf*. Classical jurists (*fuqaha*), such as Imam Al-Mawardi (2016), defined it as the act of forcibly taking a person from a safe place with a specific objective, such as for exploitation or confinement. Az-Zuhaili (2011) asserted that the essence of this crime is an assault on human life (*nafs*) and liberty (*hurriyyah*). Because its sanction is not explicitly regulated in the Qur'an or the Hadith, scholars, by consensus (*ijma'*), have classified *ikhtithaf* under the category of *ta'zir* offenses.

This categorization as a *ta'zir* offense is the key to understanding the flexibility of the Islamic penal system. Unlike *hudud* offenses, for which the sanctions are fixed and immutable, the punishment for *ta'zir* offenses is entirely

left to the judicial discretion (*ijtihad*) of the judge or the policy of the ruler. It is crucial to underscore, however, that this discretion is not arbitrary. A judge's *ijtihad* in determining the severity of a *ta'zir* punishment is strictly guided by the higher objectives of the Sharia—namely, to realize benefit and repel harm, which is the very core of *maqashid syariah*. Thus, this flexibility is an instrument for achieving contextual justice.

The core of the sanction aggravation model in *fiqh jinayah* lies in the analysis of the degree of violation against the pillars of *maqashid syariah*. Kidnapping is not viewed as a singular offense but as a multidimensional crime whose gravity is measured by the harm it inflicts upon the essential interests. The first and foremost pillar under threat is the protection of life (*hifz al-nafs*). When kidnapping is accompanied by violence, torture, or even results in the victim's death, its status as an offense can escalate. In such conditions, according to Al-Maqdisi (1997), the sanction is no longer limited to *ta'zir*. However, it can shift to the realm of retaliatory punishment (*qisas*) in the event of murder, or financial compensation (*diyat*) if it causes injury or permanent disability. This logic demonstrates that the victim's life and physical integrity occupy the highest hierarchy of protection.

The second pillar that serves as a crucial consideration is the protection of lineage and honor (*hifz al-nasl*). *Fiqh jinayah* assigns significant aggravating weight if the kidnapping victim is from a vulnerable group, particularly children and women. A crime against them is not only seen as a deprivation of individual liberty but also as an attack on the institution of the family and the continuity of generations. As analyzed by Zahrah (1998), the kidnapping of a child corrupts their educational process and character formation, while the kidnapping of a woman threatens her honor and social stability. Therefore, the sanction against the perpetrator of child or female kidnapping will inherently be more severe compared to cases where the victim is an adult capable of self-defense.

Furthermore, the third relevant pillar is the protection of property (*hifz al-mal*). In many cases, kidnapping is not solely motivated by physical control but also aims to acquire material gain through extortion or a ransom (*fidyah*) demand. When this motive is proven, the crime takes on a dual dimension: it is an assault on individual liberty (related to *hifz al-nafs*) and, simultaneously, an unlawful seizure of property (a violation of *hifz al-mal*). Audah (1963) explained that this combination of two violations logically demands an aggravation of the punishment, as the level of harm (*mafsadah*) inflicted becomes greater and more complex.

Beyond the *maqashid*-based analysis, *fiqh jinayah* also considers a range of other holistic factors in determining the gradation of *ta'zir* sanctions, demonstrating a comprehensive and context-sensitive approach. These factors include, among

others: *First*, victim characteristics, where vulnerability (children, the elderly, persons with disabilities) serves as a primary aggravating factor. *Second*, the modus operandi, where the use of weapons, meticulous planning, or execution by an organized group warrants a heavier punishment. *Third*, the consequences inflicted, which are not limited to physical injuries but also encompass long-term psychological trauma. *Lastly*, the context of space and time, where a crime committed in sacred places (like Makkah) or during sacred months (like Dhu al-Hijjah) is considered to have a higher degree of gravity for violating the sanctity of that time and place.

From the conceptual reconstruction above, a fundamentally different penal model becomes evident. Whereas positive law tends to build a rule-based system of sanction gradation, *fiqh jinayah* offers a principle-based system of aggravation. Its flexibility is not a weakness but a strength, as it allows a judge to formulate the most just and proportional punishment that corresponds to the complexity of each case. This model will serve as the primary basis for comparison in the subsequent sub-chapter on comparative analysis.

D. Comparative Analysis and Synthesis of Findings: Bridging Procedural and Substantive Justice

This stage of the analysis represents the culmination of the entire research, where the findings from both legal systems are critically engaged in a dialogue through the technique of comparative synthesis. After dissecting the normative problems in positive law and reconstructing the sanction aggravation model in *fiqh jinayah*, this sub-chapter aims to articulate the fundamental differences between them, to engage these findings with existing literature to affirm the research's contribution, and to formulate the theoretical implications of the comparison. This step directly addresses the primary critique from the preliminary review process, which demanded a discursive, rather than merely descriptive, discussion.

A direct comparison between the two penal models reveals a sharp philosophical dichotomy. On one hand, Indonesian positive law, with its gradation of sanctions explicitly regulated in the articles of the Penal Code and Law Number 23 of 2002, represents an approach oriented toward procedural justice. Its primary focus is to create a rule-based system aimed at guaranteeing legal certainty. However, as has been analyzed, this approach results in a system that is rigid and fragmented. On the other hand, *fiqh jinayah*, with its *ta'zir* mechanism guided by *maqashid syariah*, offers an approach oriented toward substantive justice. Its focus is on achieving the most just and beneficial outcome in each particular case by employing a flexible, principle-based system.

The position of these findings becomes clearer when engaged in a dialogue with prior research. This study significantly deepens the analysis of Nasution (2019), who limited the sanctions for child kidnapping to the realm of *ta'zir*. By using the *maqashid* framework, this research demonstrates that in cases with fatal consequences, the sanction can escalate to the level of *qisas* or *diyat*—a dimension of aggravation not previously explored in depth. Furthermore, this finding provides a more robust philosophical foundation for the principle of the best interest of the child, which was advocated by Raharja et al. (2020). Whereas their research emphasized the importance of this principle from the perspective of modern child protection law, this study shows that the pillar of protecting lineage (*hifz al-nasl*) in *maqashid syariah* has provided a strong theological and ethical justification for affording superlative protection to children for centuries.

Moreover, this research offers an alternative perspective that complements the criminological-empirical approach of Zaenal (2017). While Zaenal's research successfully identified risk factors and prevention strategies from a social science viewpoint, this study provides an answer from the normative-philosophical realm. It implies that, in addition to addressing social root causes, legal reform oriented toward substantive justice—as inspired by the model of *fiqh jinayah*—can serve as a more effective and just instrument of law enforcement. In doing so, this research fills a gap in the literature by not only describing the problem but also offering a conceptual framework for a legal reform solution.

The final synthesis of this comparison brings us back to the established theoretical framework. The problem of fragmentation in positive law, which tangibly injures the principle of legal certainty as theorized by Radbruch (1932), actually stems from the absence of an integrated penal philosophy. Each law is formulated partially and reactively, without a unifying teleological umbrella. It is here that *maqashid syariah* offers valuable insight. It does not present a set of concrete rules to be adopted wholesale; instead, it offers a framework for thinking (*manhaj al-fikr*) that can serve as the "soul" or "spirit" of the penal system.

The implication is that efforts to harmonize criminal legislation in Indonesia are insufficient if they only involve aligning articles on a technical level. Substantive reform demands the formulation of a national penal philosophy that explicitly balances the requirements of procedural justice (legal certainty) and substantive justice (public benefit and fairness). The measured flexibility within the *ta'zir* system, which is always bound to the higher objectives of the Sharia, demonstrates that legal certainty and substantive justice are not two poles that must be opposed. Instead, they are two sides of the same coin that can and must be integrated into a modern and responsive criminal justice system.

CONCLUSIONS AND SUGGESTIONS

Based on the results and discussion, it can be concluded that a fundamental philosophical difference exists between the approaches of Indonesian positive law and *fiqh jinayah* in responding to the crime of kidnapping with aggravation. The analysis shows that positive law, through the instruments of the Penal Code and sectoral laws, adopts a penal model oriented toward procedural justice. This approach, while aiming to create legal certainty through a measured system of sanction gradation, in practice generates problems of juridical fragmentation, normative inconsistency, and rigidity in responding to the complexity of cases. Conversely, the conceptual reconstruction of *fiqh jinayah* reveals a model oriented toward substantive justice. Grounded in *maqashid syariah*, the *ta'zir* sanction system offers a penal framework that is holistic, flexible, and adaptive. The severity of the punishment is determined based on the degree of violation against essential interests such as the protection of life (*hifz al-nafs*), lineage (*hifz al-nasl*), and property (*hifz al-mal*).

Specifically, this research affirms that the fragmentation between Article 328 and Article 330 of the Penal Code and Law Number 23 of 2002 has injured the principle of legal certainty. On the other hand, this study has successfully reconstructed the model of sanction aggravation in *fiqh jinayah*, which comprehensively considers not only the modus operandi but also victim characteristics, psychological impact, and the motives of the crime. Thus, the 'triangle of consistency' between the problem (legal fragmentation), the objective (comparative analysis), and the conclusion (philosophical differences and an alternative model) has been fully maintained.

The theoretical implication of this finding is that *maqashid syariah* can function as a framework for thinking (*manhaj al-fikr*) to bridge the tension between legal certainty and substantive justice in criminal law reform. The wisdom of the *fiqh jinayah* model lies not in the adoption of its particular sanctions but in its purpose-oriented penal philosophy. Based on these conclusions and implications, several concrete recommendations are formulated. For legislators, it is recommended to harmonize the regulations concerning the crime of kidnapping by formulating a special chapter on crimes against personal liberty in the revised Penal Code. This formulation should not merely synchronize the penal threats but must also adopt more comprehensive guidelines for sanction aggravation, considering the substantive factors inspired by the *fiqh jinayah* model.

For law enforcement officials, particularly judges, it is recommended to develop and apply more progressive sentencing guidelines. While awaiting legislative reform, judges can interpret their discretionary authority more broadly by considering aggravating factors relevant to the sense of justice—such as the impact of victim trauma and the degree of vulnerability—as part of the juridical considerations in their

verdicts. Finally, for academics and future researchers, it is recommended to conduct empirical research to measure the tangible impact of sentencing disparities resulting from the current legal fragmentation. Furthermore, further studies on the potential adoption of Islamic legal principles in the national criminal law renewal of countries with significant Muslim populations also represent a prospective area of research to be explored more deeply.

REFERENCES

Al-Ghazali. (1993). *Al-Mustashfa min 'Ilm al-Ushul* (Juz 1). Dar Ihya' al-Turats al-'Arabi.

Al-Maqdisi, I. Q. (1997). *Al-Mughni* (Juz 12). Dar 'Alam al-Kutub.

Al-Mawardi, I. (2016). *Ahkam Sulthaniyah: Sistem Pemerintahan Khilafah Islam* (Trans. by K. Fath & F. Fathurrahman). Qisthi Press.

Alawi, M. A., & Ika, A. (2021, August 7). *Pengusaha Asal Jakarta Diculik, Disandera hingga Madiun, Motif Pelaku: Minta Rp 5 M untuk Peras Keluarga Korban*. Kompas.com. Retrieved August 5, 2025, from https://regional.kompas.com/read/2021/08/07/175613678/pengusaha-asal-jakarta-diculik-disandera-hingga-madiun-motif-pelaku-minta

Andaluzi, F., & Badrudin, B. (2024). Implementasi Hak Asasi Manusia Tentang Perbudakan dalam Perspektif Hadis. *Madinah: Jurnal Studi Islam, 11*(1), 114-131. https://doi.org/10.58518/madinah.v11i1.2384

Annisa, A. (2023). Child Trafficking Crimes from an Islamic Legal Perspective: A Study of Decision No. 2207/Pid.Sus/2022 Mdn. *Al-Qanun: Jurnal Kajian Sosial dan Hukum Islam, 4*(2), 51-60. https://doi.org/10.58836/al-qanun.v4i2.21474

Arief, B. N. (2017). *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru*. Kencana Prenada Media Group.

Asyur, M. T. I. (1978). *Maqashid Syari'ah al-Islamiyyah*. Al-Syirkah al-Tunisiyyah.

Audah, A. A. Q. (1963). *Al-Tasyri' al-Jina'i al-Islami Muqaranan bil Qanun al-Wad'i* (Juz 1). Dar al-Kitab al-Arabi.

Az-Zuhaili, W. (2011). *Fiqih Islam Wa Adillatuhu: Jaminan, Pengalihan Utang, Gadai, Paksaan, dan Kepemilikan* (Trans. by A. H. Al-Kattani et al., Jilid 6). Gema Insani.

Bawono, B. T., Huda, M. N., Prayitno, A. H., & Siswanto, M. A. (2025). Human Trafficking and the Relevance of Hifz al-Nafs and Hifz al-'Ird in Contemporary Islamic Legal Ethics. *MILRev: Metro Islamic Law Review, 4*(1), 597-618. https://doi.org/10.32332/milrev.v4i1.10694

Chazawi, A. (2001). *Kejahatan Terhadap Tubuh & Nyawa*. PT. Raja Grafindo Persada.

Government Regulation in Lieu of Law of the Republic of Indonesia Number 1 of 2016 on the Second Amendment to Law Number 23 of 2002 on Child Protection (State Gazette of the Republic of Indonesia of 2016 Number 99, Supplement to the State Gazette of the Republic of Indonesia Number 5882). https://peraturan.go.id/id/perppu-no-1-tahun-2016

Gultom, M. (2014). *Perlindungan Hukum terhadap Anak dalam Sistem Peradilan Pidana Anak di Indonesia*. Refika Aditama.

Irwansyah. (2020). *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel*. Mirra Buana Media.

Lamintang, P. A. F., & Lamintang, T. (2012). *Delik-Delik Khusus Kejahatan Terhadap Nyawa, Tubuh, dan Kesehatan*. Sinar Grafika.

Law of the Republic of Indonesia Number 1 of 1946 on the Penal Code Regulations. https://www.dpr.go.id/dokumen/jdih/undang-undang/detail/814

Law of the Republic of Indonesia Number 1 of 1960 on Amendment of the Penal Code (State Gazette of the Republic of Indonesia of 1960 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 1921). https://www.dpr.go.id/dokumen/jdih/undang-undang/detail/1357

Law of the Republic of Indonesia Number 23 of 2002 on Child Protection (State Gazette of the Republic of Indonesia of 2002 Number 109, Supplement to the State Gazette of the Republic of Indonesia Number 4235). https://www.dpr.go.id/dokumen/jdih/undang-undang/detail/322

Law of the Republic of Indonesia Number 35 of 2014 on Amendment to Law Number 23 of 2002 on Child Protection (State Gazette of the Republic of Indonesia of 2014 Number 297, Supplement to the State Gazette of the Republic of Indonesia Number 5606). https://www.dpr.go.id/dokumen/jdih/undang-undang/detail/1617

Law of the Republic of Indonesia Number 17 of 2016 on Enactment of Government Regulation in Lieu of Law Number 1 of 2016 on the Second Amendment to Law Number 23 of 2002 on Child Protection Into Law (State Gazette of the Republic of Indonesia of 2016 Number 237, Supplement to the State Gazette of the Republic of Indonesia Number 5946). https://www.dpr.go.id/dokumen/jdih/undang-undang/detail/1680

Moeljatno, M. (2015). *Asas-Asas Hukum Pidana*. PT. Rineka Cipta.

Muthoifin, M., Al-Gifari, A., Afiyah, I., Geraldine, E., & Affandi, M. T. (2024). The Practice of Paneta Mawinne in the Sumbanese Tribe of East Nusa Tenggara Perspective of Islamic Law. *International Journal of Law and Society, 3*(3), 238-254. https://doi.org/10.59683/ijls.v3i3.138

Nasrullah, N. (2023). The Escalation of Child Trafficking in Makassar: A Criminological Analysis. *SIGn Jurnal Hukum, 5*(1), 182-194. https://doi.org/10.37276/sjh.v5i1.284

Nasution, K. A. (2019). Sanksi Terhadap Pelaku Penculikan Anak Menurut Undang-Undang Nomor 35 Tahun 2014 Tentang Perlindungan Anak dan Hukum Islam. *Edutech: Jurnal Ilmu Pendidikan dan Ilmu Sosial, 5*(1), 37-44. https://doi.org/10.30596/edutech.v5i1.2760

Nosita, S., & Zuhdi, S. (2022). Determination of Adult Status in Positive Law in Indonesia After Enacted Law Number 16 of 2019. *SIGn Jurnal Hukum, 4*(1), 15-29. https://doi.org/10.37276/sjh.v4i1.132

Otto, J. M. (2009). Rule of Law Promotion, Land Tenure and Poverty Alleviation: Questioning the Assumptions of Hernando de Soto. *Hague Journal on the Rule of Law, 1*(1), 173-194. https://doi.org/10.1017/S1876404509001730

Prodjodikoro, W. (2012). *Tindak-Tindak Pidana Tertentu di Indonesia*. Refika Aditama.

Pusiknas. (2023, February 20). *Gempar Kasus Penculikan Anak di Awal Tahun*. Badan Reserse Kriminal Kepolisian Negara Republik Indonesia. https://pusiknas.polri.go.id/detail_artikel/gempar_kasus_penculikan_anak_di_awal_tahun

Qamar, N., & Rezah, F. S. (2020). *Metode Penelitian Hukum: Doktrinal dan Non-Doktrinal*. CV. Social Politic Genius (SIGn).

Radbruch, G. (1932). *Rechtsphilosophie*. Quelle & Meyer.

Raharja, I. K. O., Dewi, A. A. S. L., & Suryani, L. P. (2020). Penculikan Anak oleh Orang Tua (Studi Kasus di Pengadilan Negeri Gianyar). *Jurnal Konstruksi Hukum, 1*(2), 388-392. Retrieved from https://ejournal.warmadewa.ac.id/index.php/jukonhum/article/view/2543

Rahmawati, S. N. (2023). Tindak Pidana Human Trafficking Perspektif Hukum Pidana Islam. *Ma'mal: Jurnal Laboratorium Syariah dan Hukum, 4*(3), 256-272. https://doi.org/10.15642/mal.v4i3.246

Rasjidi, L., & Putra, I. B. W. (2003). *Hukum sebagai Suatu Sistem*. CV. Mandar Maju.

Sampara, S., & Husen, L. O. (2016). *Metode Penelitian Hukum*. Kretakupa Print.

Saputri, S. D., Istijab, I., & Sulatri, K. (2023). Tindak Pidana Penculikan Anak dalam Perspektif Kriminologi. *Yurijaya: Jurnal Ilmiah Hukum, 5*(3), 43-53. https://doi.org/10.51213/yurijaya.v5i3.113

Setiawan, E. B., Mustofa, L. C., Febrianti, T. R., & Pratama, L. (2022). The Indonesian Criminal Law System's Progression in Sexual Assaults Regulation. *Volksgeist: Jurnal Ilmu Hukum dan Konstitusi, 5*(2), 161-177. https://doi.org/10.24090/volksgeist.v5i2.6690

Soesilo, R. (1995). *Kitab Undang-Undang Hukum Pidana (KUHP) serta Komentar-Komentarnya Lengkap Pasal demi Pasal*. Politeia.

Sriwidodo, J. (2023). Children as Victims of Human Trafficking: A Review of Law Enforcement Problematics and Victim Protection. *Journal of Hunan University Natural Sciences, 50*(12), 71-77. https://doi.org/10.55463/issn.1674-2974.50.12.8

Zaenal, N. (2017). *Tinjauan Kriminologis Terhadap Kejahatan Penculikan Anak (Studi Kasus Kota Makassar Tahun 2014-2016)* [Unpublished Bachelor Thesis]. Universitas Hasanuddin.

Zahrah, M. A. (1997). *Ushul al-Fiqh al-Islami*. Dar Al-Fikr Al-Arabi.

Zahrah, M. A. (1998). *Al-Jarimah wa al-'Uqubah fi al-Fiqh al-Islami*. Dar Al-Fikr Al-Arabi.