SEMARAK ILMU PUBLISHING

Semarak International Journal of Islamic Studies and Culture

Journal homepage:
https://semarakilmu.my/index.php/sijisc/index
ISSN: 3036-020X

Legitimate Living Fiqh Jinayah Inside the Newest Indonesian Book of Criminal Law

Taufik Hidayat[1,*], Muhammad Rafiq Mohamad[2], Ariffansuri[3], Muhammad Husnul Mubarak[1]

[1] UIN Imam Bonjol Padang, Indonesia
[2] Avicenna Academy Malaysia, Malaysia
[3] Kejaksaan Tinggi Sumatera Barat, Indonesia

ARTICLE INFO

Article history:
Received 31 July 2024
Received in revised form 29 November 2024
Accepted 17 December 2024
Available online 31 December 2024

Keywords:
Fiqh jinayah; criminal code; receptive; Wetboek van Straftrecht

ABSTRACT

On January 2, 2026, Indonesia officially adopted the newest Criminal Code, namely Law no. 1 of 2023 concerning the Criminal Code. This National Criminal Code is proof of decolonization by abandoning the WVSI (Wetboek van Straftrecht) which has been used since the Dutch colonial era. One proof of this decolonization is the recognition of the laws that exist in Indonesian society, as contained in Article 2 "The provisions referred to in article 1 paragraph 1 do not reduce the validity of the laws that exist in society which determine that a person deserves to be punished even if the act is not regulated in this Law". Initially in Indonesia, the law that lived amid of society was discovered by Lodewijk Willen Cristian Van Den Berg (d. 1927 AD) who lived and researched Indonesian society, concluding that the Indonesian people had essentially fully accepted Islamic law as their law. Realize, this theory became known as Theory of Reception in Complexu. This theory gave birth to Article... HIR is: "the law that applies to natives is based on the Islamic religion". Before finally this article was changed in the interests of the colonialists. The formulation of the research problem is how is the legitimacy of living fiqh jinayah in the Indonesian National Criminal Code? With the first research question, how is the formulation of criminal acts in living fiqh jinayah regulated in the National Criminal Code? Secondly, what is the criminal responsibility in living fiqh jinayah regulated in the National Criminal Code? Yhird, what are the criminal sanctions for violators of living fiqh jinayah regulated in the Criminal Code? National? This research is normative legal research. The conclusion from this research is that one of the living laws in Indonesian society which is legitimized by the National Criminal Code is living fiqh jinayah. Firstly, regarding criminal acts regulated by the Criminal Code in living fiqh jinayah are all criminal acts that are in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by the people of the nation. nation and strengthened by Regional Regulations. Second, criminal liability in living fiqh jinayah is different from the National Criminal Code in terms of the adult category, where in living fiqh jinayah the size of adult is puberty whereas in the National Criminal Code it is if you are 18 years old. Third, the criminal sanction for living fiqh jinayah stipulated in the National Criminal Code is a fine.

* *Corresponding author.*
E-mail address: taufiiq_hidaayah@yahoo.com

https://doi.org/10.37934/sijisc.4.1.117b

1. Introduction

On January 2, 2026, The Republic of Indonesia implemented the latest National Criminal Book of Law, namely law no. 1 of 2023 concerning of the Criminal book of Law. This National Criminal Book of Law is proof of decolonialization by abandoning the Old Criminal Book of Law which is originate from WvSI (Wetboek van Straftrecht boor Nederlandsh Indie or Criminal Book of Law for the Dutch East Indies) which has been in effect since the colonial era until January 1 2018 [21].

The new National Criminal Code is one of the efforts of the Indonesian people in the context of developing their own national law which has several missions. The first mission is "decolonialization" in the form of "recodification". This mission is stated in the first consideration "in order to realize the national criminal book of law of Unitary State of the Republic of Indonesia which is based on Pancasila and the 1945 Constitution of the Republic of Indonesia as well as general legal principles recognized by the people of nation, it is necessary to draft a new national book law to replace the old books".

The second mission is "democratization of criminal law. This mission is a transition from an authoritarian regime to a democratic political regime. This democratization can be seen in Article 2(1) "The provisions as intended in Article 1(1) will not reduce the validity of the laws that exist in society which determine that a person deserves to be punished even though the act is not regulated under this law".

The third mission is "consolidating the criminal law". This is because since Indonesia's independence, there has been very rapid development of criminal law, both within and outside of the criminal law. The development of criminal law so far has been answered by the special regulations outside the national criminal book of law, both in the form of laws and reginal regulations.

The fourth mission is the "adaptation and harmonisation" of various developments in criminal law that have occurred, both as a result of developments in the field of criminal law sciences and the development of its values, standards and norms that being recognized by the nations around the world. This is contained in the second consideration: "That the national criminal law must be adapted to legal politics, conditions and developments of social, national and state life which aims to respect and uphold human rights based on Pancasila Constitutions: belief in the Almighty God, humanity with justice and civility, Unity of Indonesia, democracy led by the wisdom in deliberation or representation, social justice for the people of Indonesia" [19].

This fourth missions has freed the Indonesia criminal law from Dutch colonial legal product. One of the most urgent matters is the development of the principle of legality as stipulated in Article 1 and Article 2 National Criminal Book of Law: Article 1(1) of the Indonesian National Criminal Book of Law reads: "No act can be subjected to criminal sanctions or action, except on the strength of criminal regulations in laws and regulations that existed before the act was committed".

Article 2(1) Indonesian Criminal Book of Law mentions: "The provisions as intended in Article 1(1) are not reducing the validity of laws existing in society which determine that a person deserves to be punished even though the act is not regulated in this law". In determining source of law or the basis for the appropriateness of an action, the concept starts from the position that the main law is statute (written law). So, starting from the principle of legality in formal sense, the National Criminal Book of Law expanding its formulation materially by emphasizing the provisions in Article 1(1) that will not reducing the "living law" in society.

Thus, in addition to written sources as the main formal criteria or benchmarks, the concepts also give place to unwritten sources of law that live in society as a basis for determining whether an act is appropriate to be punished or not. It is worth noting that the application of law exists in society is for offenses that have no appeal (similarity) or are not regulated in law. This also embodies the principle of balance between written law (positive law) and unwritten law (living law). Before Article 2 of the

Indonesian Criminal Book of Law born, the laws that existed in the society had been recognized by the Dutch East Indies Government as contained in Article 75 RR:

> *"Except for those who have declared the application or in the case of native Indonesians (Bumi Putera) and Foreign East people who have voluntarily submitted to European civil law, the judges for indigenous people use religious laws, institutins and customs of the bumiputera group, as long as it does not conflict with the principles that generally recognized of propriety and justice".*

This article was born from the research of a Dutch anthopologist named Lodewijk Willen Cristian Van Den Berg (d. 1927 AD) who lived and researched Indonesian society, concluding that the Indonesian people had essentially fully accepted Islamic Law as the law they were aware of. This theory became known with *Theorie Receptie in Complexu*. This Theory comes from C.F. Winter and Solomon Keyzer, a professor at Derlf and Van Nederlands Indie, but the developer of this theory and widely known by the law faculty students and customary law studies comes from Lodewijk Willen Cristian Van Den Berg (d. 1927 AD).

So, Ven Den Berg was a follower of the teachings of Winter and Solomon Keyzer. Their theory (receptie in complexu) formulates that Muslims in Java have accepted the inclusions of Islamic Law in an integral way, so that it is binding on the community concerned. However, it is required that Islamic Law only applies to native people as long as it cannot be proven otherwise. So, the law that applies to the bumiputera is the law of their religion because when a person joins a religion, he is considered to fully accept and submit to the laws of their religion [16].

Theory receptie in complexu is the proof that Indonesian Muslim society, even without positive laws, is regulated by religious norms. When Aisyah was asked about morals of the Prophet of Muhammad, Aisyah answered that his morals were the al-Qur'an. The al-Qur'an is not only the written text but the practce and spirit of society which is part of a living religion, living al-Qur'an and al-Hadith which are parts actually included in the scope of living fiqh. Likewise, fiqh as a practical derivative of the two main source of Islamic Law; al-Qur'an and al-Hadith, also received a similar reception ipn society. Fiqh embodies social mobility and action, functioning as a subsconscious stimulus for personal behaviour based on fiqh guidance. Iiving is a term that strengthen the concept of Islamc legal product by emphasizing the principle of localitiy [28].

Fiqh in its discussion includes many aspecs such as fiqh of worship, fiqh *mu'amalah, munakahat, mawaris, siyasah* and *jinayah*. Therefore, living fiqh *jinayah* is one of the living laws in Indonesia society that needs to be analysed more deeply to welcome the presence of the newest National Criminal Book of Law. This interpretation of the National Criminal Book of Law requires further research with the formulation of problems: First, how is the legitimacy of living fiqh *jinayah* inside the Indonesian newest Criminal Book of Law? Along with the first research question, how is he formulation of criminal acts in living fiqh *jinayah* regulated in the National Criminal Book of Law? Second, how is criminal responsibility in living fiqh *jinayah* regulated in the National Book of Criminal Law? Third, what are the criminal sanctions for violators of living fiqh *jinayah* regulated in the National Book of Criminal Law?

2. Methodology

This research is normative legal research which will provide an interpretation of Article 2 of the Indonesian National Book of Law using *Receptie In Complexu* theory as an analytical tool. The National

Criminal Book of Law legitimizes all laws that exist in Indonesian society, one of which is living *jinayah*. In order to focus on this research, the author uses a comparative approach to explain the article.

In accordance with the research method, the data source used in this research is a secondary data source. Secondary data sources in legal research include primary legal materials, secondary legal materials and tertiary legal materials [24]. The primary legal material used in this research is the Indonesian National Criminal Code. Furthermore, the secondary legal materials used are books, books that can explain the primary legal materials. Finally, tertiary legal materials are those that can explain primary legal materials and secondary legal materials in the form of language dictionaries, legal dictionaries and encyclopedias.

Data collection techniques are how researchers can obtain complete and comprehensive data. The data referred to here is secondary data. In accordance with the use of secondary data in this research, the technique for collecting data or legal materials is carried out using literature and documentation studies) [27]. This aims to obtain objective legal materials, both in terms of quality and quantity and to save time, energy and costs. 10 The first step in searching for library materials is to sort hard copy library materials and soft copy library materials. Hard copy is library material that has been printed out on paper, while soft copy is a file stored on electronic media. The data collection technique used in this research is library research. In accordance with developments, library materials are obtained from hard files and soft files. Hard files in the form of law books and articles related to research. Apart from hard files, data is also obtained from soft files, in the form of library applications such as e-books, Google Scholar, Maktabah Syamilah, e-Pusnas which are obtained through the use of electronic media.

In processing the data, normative juridical analysis techniques are used in accordance with the research method used, namely normative legal research, which includes the following stages:

i. Identify written legal materials
ii. Formulate legal definitions
iii. Establishment of legal standards
iv. Formulation of legal rules [22].

3. Results and Discussion

Article 1 (1) of the Indonesian National Criminal Law reads: "No act can be subject to criminal sanctions and/or action, except on the strength of criminal regulations in laws and regulations that existed before the act was committed."

Article 2 (1) of the Indonesian National Criminal Code reads: "The provisions as intended in article 1 paragraph 1 do not reduce the validity of laws existing in society which determine that a person deserves to be punished even though the act is not regulated in this Law." In the explanation of Article 2 (1) of the National Criminal Law, it is stated that what is meant by "law that lives in society is customary law which determines that someone who commits a certain act deserves to be punished. The law that lives in society in this article relates to unwritten law that is still applies and develops in the life of society in Indonesia. To strengthen the implementation of laws that live in society, Regional Regulations regulate the laws that exist in that community, regulations, regions regulate these customary crimes."

In determining the source of law or the basis for the appropriateness of an action, the concept starts from the position that the main law is the statute (written law). So starting from the principle of legality in a formal sense. The National Criminal Code expands its formulation materially by emphasizing that the provisions in Article 1 (1) do not reduce the "living law" in society. Thus, in

addition to written sources of law (UU) as the main formal criteria/benchmarks, the concept also still gives place to unwritten sources of law that live in society as a basis for determining whether an act is appropriate to be punished. It should be noted that the application of law that lives in society is for offenses that have no appeal (equivalence) or are not regulated in law [5].

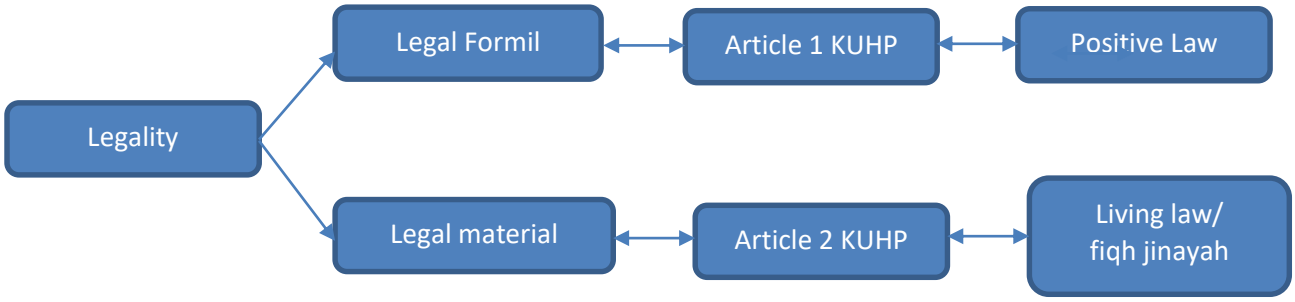

Fig. 1. 'Pengembangan Asas Legalitas'

To see the process of the birth of law that lives in Indonesian society, the author puts forward three theories, namely:

The first is the receptive theory in complexu, although this theory was introduced by C.F. Winter and Solomon Keyzer (1823-1868), but the development of this theory originates from L.W.C. Van Den Berg (1845-1927). In fact, according to Otje Salman Soemadininggrat Van Den Berg was a follower of the teachings of Winter and Solomon. 13 Their theory (Receptie in complexu) formulates that Muslims in Java have accepted the inclusion of Islamic law in an integral way so that it is binding on the community concerned. So the law that applies to Bumi Putra is the law of their religion because when a person joins a religion, he is considered to have fully accepted and submitted to the laws of the religion [16].

The receptive in complex theory was able to influence the minds of the legislators of the Dutch East Indies colonial government. So article 75 RR was born which reads:

> *Except for those who have declared the application or in the case of native Indonesians (Bumi Putera) and Foreign East people who have voluntarily submitted to European civil law, the judges for indigenous people use religious laws, institutions and customs of the bumiputera group. As long as it does not conflict with generally recognized principles of propriety and justice."*

In its development, the theory of *reception in complexu* was criticized by C. Snouck Horgronje and Van Vollenhoven. For Snouck and van Vollenhoven, the law that lives and applies to the Indonesian people is independent of the religion they adhere to, namely customary law (adat recht). This means that Islamic law penetrates into and applies as long as is desired by customary law. Thus, it can be said that, in theory, this receptie differentiates between Islamic law and customary law. Although in its course the customary law that applies is almost completely part of the Islamic law adhered to by each region [16].

The receptive in complex theory was able to influence the minds of the legislators of the Dutch East Indies colonial government. So article 75 RR was born which reads:

> *Except for those who have declared the application or in the case of native Indonesians (Bumi Putera) and Foreign East people who have voluntarily submitted to European civil law, the judges for indigenous people use religious laws, institutions and customs of the*

> *bumiputera group as long as it does not conflict with generally recognized principles of propriety and justice."*

In its development, the theory of *reception in complexu* was criticized by C. Snouck Horgronje and Van Vollenhoven. For Snouck and van Vollenhoven, the law that lives and applies to the Indonesian people is independent of the religion they adhere to, namely customary law (adot recht). This means that Islamic law penetrates and applies as long as is desired by customary law. Thus, it can be said that, in theory, this receptie differentiates between Islamic law and customary law. Although in its course the customary law that applies is almost completely part of the Islamic law adhered to by each region.

The concrete influence of this theory is realized through changes in the substance of article 75 RR to article 131 IS which reads:

> *For the European group, European law applies, the content of which is the same as the content of the law that applies in the Netherlands, while the native people and foreign eastern groups apply their respective customary laws unless the public interest and real social interests of them require otherwise.*

After Indonesia became independent on August 17, 1945, criticism came of the reception theory. It was Hazairin (1981) in his book "Seven triads of law" who firmly criticized the receptie theory. According to Hazairin, this theory is the work of those who are anti-Islamic and therefore contradicts the Koran and the Islamic faith. He proposed the theory of receptio a contrario as the antithesis of the theory developed by Snouck and Van Vollen Hoven above. This theory states that new customary law is valid as long as it does not conflict with Islamic law [16].

In accordance with developing theories, both those put forward by Van Den Berg with receptive in complexu, Snouck and van Vollenhoven with receptie theory, as well as the receptio a contrario theory developed by Hazairin, it is stated that the existence of customary law is actually related to the religion one adheres to. This confirms that religion has somehow encompassed the progress and decline and life and death of customary law [16].

In Minangkabau there is a customary philosophy which reads: *"adaik basandi syarak, syarak basandi kitabullah, syarak mangato adaik mamakai*. This means that custom is guided by Islamic Sharia, and Islamic Sharia is guided by the Qur'an, Islamic Sharia establishes law while the custom that executes it. In Aceh there is a customary philosophy which reads: *"hukom ngon adat hanjuet cree bree, lagee alat ngen sifeut"*. This means that law (Islamic law) is not separate from customary law, both are like substances (the substance of Allah) with His nature (the nature of Allah), they cannot be separated and separated. On the island of Java, Islamic law is also mentioned as the law used by the people on a daily basis, as explained in the Batavia Statute of 1642 AD that: "inheritance disputes between indigenous people who are Muslim must be resolved using Islamic law, namely the law used by the people everyday" [3].

Exploring the living fiqh-based approach is equally important in addressing the issues of textual and contextual aspects of criminal fiqh. The question is, how do the rules and principles related to the law on criminal acts according to fiqh jinayah exist within society? Taking theft as an example, fiqh jinayah stipulates the punishment of amputation for a proven guilty thief. Similarly, the punishment of floggingor stoning for those involved in adultery. The punishment for apostasy varies in interpretation and implementation across different Islamic countries. The penalties for murder, assault, and violence also vary depending on the severity of the offense. All these variations are

influenced by cultural factors, history, the legal system of each country, and the diversity of cultures within them [28].

3.1 Regulation of the Living Fiqh Jinayah Crime in the Indonesian National Criminal Code

Criminal acts, strafbaar feit, delictum in jinayah fiqh are known as *jinayah* or *jarimah*. Wahbah Az-Zuhaili defines *jarimah* as follows

تعريف الجناية: الجناية أو الجريمة: هي الذّنب او المعصيّة او كلّ ما يجنيه المرء من شرّ اكتسبه

"The definition of a criminal act, namely jinayah or jarimah, is a sin or disobedience or all the results of a crime that one desires" [29].

As for the division of criminal acts, the author will only discuss the division of criminal acts in terms of the severity of the punishment for the perpetrators of the crime. This is a special characteristic of criminal acts in fiqh jinayah which is divided into three:

1. *Hudûd Crime,*
   الجرا ئم الحدود: وهى الجرائم المعاقب عليها بحد. والحد هو العقوبة المقدرة حقا لله تعالى

"Hudúd crimes are criminal acts that are punishable by hudûd crimes. Hudûd crimes are crimes that have been determined in type and amount and are the right of Allah SWT". (Audhah, Beirut).

As explained above, what is meant by a *hudûd* crime is a crime for which the form, number and size of the punishment has been determined and is the right of Allah SWT. The meaning of Allah's right is that the crime cannot be changed or abolished, either because of forgiveness by the judge or forgiveness by the victim.This form of *hudud* crime is divided into seven types, namely:

I. Fornication.
II. *Qadzaf* (accusing someone of committing adultery),
III. Drinking liquor (khamar),
IV. Steal,
V. *Al-Hirabah* (robbing/disrupting security),
VI. Apostate
VII. *Al-Bagyu* (rebel) [1].

2. *Qisâsh crime* and *diyat*
   جرائم القصاص و الدية و هي الجرائم التي يعاقب عليها بقصاص او دية، وكل من القصاص والدية عقوبة مقدرة حقا للافراد

"Jarimah gisash and diyat are criminal acts that are punishable by qisash and diyat. Every qisash and diyat has a predetermined penalty, as an individual right." [1].

The crime of *qisäsh*, the criminal *diyat* has a certain measure, but the crime is not the right of God but the right of humans. Therefore, its implementation depends on the wishes of the victim or the victim's family. If the victim or his family wishes, the *Qisash* crime can be annulled and transferred to a substitute crime, namely *diyat* (fine).

There are five types of acts that fall into the category of *qisásh* and *diyat* crimes, namely:

I. killing *(qatl al-'amdu)*
II. Intentional Murder that resembles deliberate *(al-qatl syibhul al-'amdu)*
III. Culpable homicide *(al-qatl al-khata)*
IV. Intentional persecution *(al-jarh al-'amdu)*
V. Accidental abuse *(al-jarh al-khatá)* [1]

3. *Takzîr* crime,

جرائم التعزير: هى الجرائم التى يعا قب عليها بعقوبة او اكثر من عقوبات التعزير و معنى التعز ير التأدي

"The crime of takzir is a criminal act that is punishable by one or several takzir crimes. What is meant by takzir is education" [1].

In fiqh jinayah there are no types of punishment for each crime of *takzir*, but only mentions a group of crimes, from the lightest to the most serious, so the crime of *takzir* does not have certain limits.

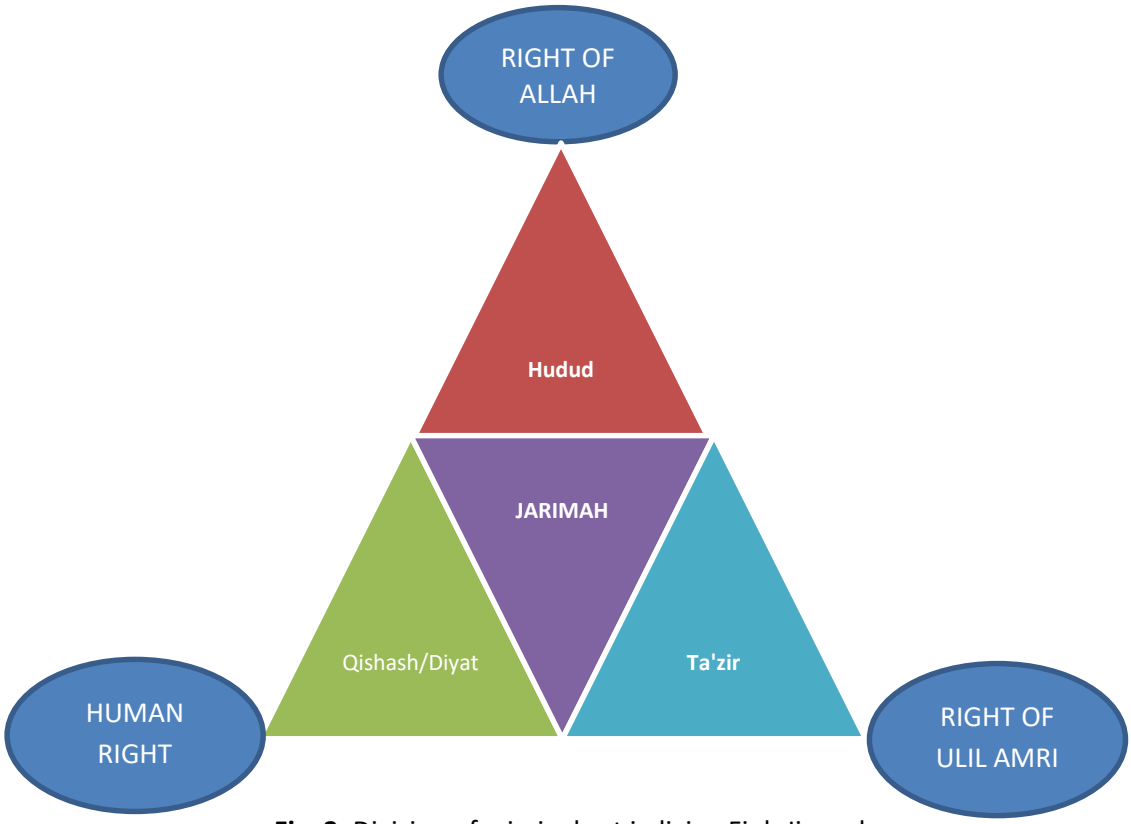

Fig. 2. Division of criminal act in living Fiqh Jinayah

Fiqh Jinayah is broader and more elastic in determining criminal acts, because the authority to criminalize or decriminalize is not only the right of the state in the form of positive law. Rather, it is

divided into, namely the rights of Allah SWT, human rights and state rights. Therefore, this law often changes according to the conditions of place and time. Like the restorative justice arrangements used in fiqh jinayah by setting aside written law and leaving it to the local community.

The Indonesian National Criminal Book of Law will not be enough for criminalizes or decriminalizes an act, there needs to be other provisions outside the Indonesian National Criminal Book of Law. This is because the existence of the plural Indonesian nation has more than 300 ethnic groups or ethnic groups, more precisely 1,340 ethnic groups in Indonesia based on the 2010 BPS census (Indonesia.go.id). It is possible that an act is considered criminal by the local community even though it is not considered a criminal offense by the state. Therefore, the state provides latitude in criminalizing people who commit criminal acts based on laws that live in society, one of which is living fiqh jinayah with the conditions contained in Article 2 (2): "that what is meant in paragraph (1) applies in that place of law lives and as long as it is not regulated in this Law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights and general legal principles recognized by the people of nations." Furthermore, Article 2 (3) states that "Provisions regarding the procedures and criteria for determining laws that live in society are regulated by Government Regulations.

The Government Regulation regarding provisions regarding procedures and criteria for determining laws that exist in society until June 28, 2024, has not yet been issued. However, there is a further explanation in the explanation of the Indonesian National Criminal Code Article 2 (1): What is meant by "law that lives in society is customary law which determines that someone who commits a certain act deserves to be punished. The law that lives in society in this article is related to "unwritten laws that are still valid and developing in community life in Indonesia. To strengthen the implementation of laws that live in society, Regional Regulations regulate these customary crimes."

Based on the explanation of this article, regional regulations can strengthen the implementation of laws that exist in society. There are several regional regulations sourced from Living Fiqh Jinayah as follows:

Bogor City Regional Regulation Number 10 of 2021 concerning Prevention and Management of Sexual Deviant Behavior, Chapter III Forms of Sexual Deviant Behavior, Article 6 namely: Forms of sexual deviant behavior include:

a. Men who like men (homosexuals),
b. Women who like women (lesbians),
c. Bisexual
d. Lover of child sex (pedophilia erotica),
e. Transgender
f. Showing off vital organs (exhibitionism),
g. Peeping tom (voyeurism),
h. Incestuous sexual relations (incest),
i. Violent sex (sadism),
j. Attraction to inanimate objects/sexual objects (sexual fetishism),
k. Lover of corpses (necrophilia),
I. Have sex with more than 1 (one) person at the same time,
m. Satisfaction when seeing a partner having sex with someone else (triolism),
n. Sex with animals (bestiality); and

any sexual behavior or activity that is religiously, culturally, socially, psychologically and/or medically declared as sexual deviant behavior.

I. Aceh Qanun Regional Regulation No.6 of 2014 concerning *Jinayat*. Part Two Scope of Article 3 (2) *Jarimah* as intended in paragraph (1) include:

a. *Khamar*,
b. *Maisir*,
c. seclusion,
d. *Ikhtilath*,
e. Fornication,
f. Sexual harassment,
g. Rape,
h. *Qadzaf*,
i. *Liwath*; And
j. *Musahaqah*.

II. North Hulu Sungai Regency Regional Regulation No. 32 of 2003 concerning Prevention and Prohibition of Activities that Desecrate the Sanctity of the Holy Month of Ramadan.
III. Banjar Baru Regency Regional Regulation No. 5 of 2006 concerning the Prohibition of Alcoholic Drinks.

Various Regional Regulations at both the Provincial and Regency or City levels contain various criminal acts that are not regulated in the Criminal Code. Crimes of LGBT, Adultery, Adultery with Animals, *Khamar, Khalwat*, Orderly Ramadhan, are made based on Living Fiqh Jinayah. Living Fiqh Jinayah has become values adhered to by the Indonesian Muslim community even though it is not a written law.

3.2 Living Fiqh Jinayah Criminal Liability Regulations in the Indonesian National Criminal Book of Law

Criminal liability cannot be separated from "criminal acts". Criminal liability is a person's responsibility for the criminal act he or she commits. Strictly speaking, what the person is responsible for is the criminal act he committed. Thus, criminal liability occurs, because there has been a criminal act committed by someone.

Criminal liability is essentially a mechanism built by criminal law to react to violations of an "agreement" to refuse a certain act [13]. The basis for the existence of a criminal act is the principle of legality, while the perpetrator can be punished is the principle of error. This means that the creator or perpetrator of a criminal act can only be punished if he or she is guilty of committing the criminal act. When can someone be said to have made a mistake? A person is guilty if he commits a criminal act, from a social perspective he can be blamed for that act.

In Islamic law, accountability is the acquittal of a person with the results (consequences) of actions (no actions) that he carried out of his own accord, where he knows the intentions and consequences of his actions [11]. Criminal liability is enforced on three things, namely:

I. There are prohibited acts,
II. He did it of his own accord.
III. The maker knows the consequences of the action [15].

If these three cases exist, then there is also criminal liability, and if not, then there is no criminal liability. With these conditions in place, we can know that only humans who can be charged with

criminal responsibility are humans who are rational, mature and of their own free will. If this is not the case, then there is no responsibility for it, because a person who does not have a rational mind is not a person who knows and is not a person who has a choice. Likewise, people who do not yet have maturity cannot be said to have perfect knowledge and choices. Therefore, there is no accountability for children, crazy people, imbeciles, people who have lost their will and people who are coerced or coerced [11].

It is further said that the finger can be blamed on the perpetrator if the perpetrator is of sound mind, old enough, and free of will. In the sense that the perpetrator is free from the element of coercion and is in a state of full awareness. The requirements for being old enough or mature are based on the hadith of the Prophet SAW:

حدثنا عثمان بن أبي شيبة حدثنا يزيد بن هارون أخبرنا حماد بن سلمة عن حماد عن إبراهيم عن الأسود عن عائشة رضي الله عنهاأن رسول الله صلى الله عليه وسلم قال رفع القلم عن ثلاثة عن النائم حتى يستيقظ وعن المبتلى حتى يبرأ وعن الصبي حتى يكبر

It means:

"Has told us Ustman bin Abu Syaibah said: has told us Yazid bin Harun said: has told us Hamad bin Salamah from Hamad from Ibrahim from al Aswad from Aisyah radhiyallahu 'anha that Rasulullah SAW said: "The pen is appointed from three groups: from a sleeping person until he wakes up, from a crazy person until he is sane, from a child until he is an adult" [2].

The Sunnah above is the basis for eliminating criminal responsibility for children as perpetrators of criminal acts. 39 Basically, Islamic law differentiates between children and adults as legal subjects. Legal subjects are people who are required by Allah SWT to act, and all their behavior has been calculated based on the demands of Allah SWT. In ushul fiqh terms, the subjects of law are called mukallaf or people who are burdened by the law or *mahkum 'alaih*, namely people to whom the law is applied [25]. In this case, what is called *mukallaf* or people who are burdened by the law or *mahkum 'alaih,* namely the people to whom the law is applied, are adults, while children are not charged by the law nor are they subject to legal sanctions.

The elimination of criminal responsibility for children as perpetrators of criminal acts means that hudud (criminal) sanctions are not imposed on them. Criminal responsibility in Islamic law consists of two main elements, namely: idrak (power of thought) and ikhtiar (choice). Therefore, sanctions for small children are different along with the different phases that humans go through from birth until the time when the power of thinking and choice is perfect. When born, humans according to their nature have weak *idrak* (power of thinking) and endeavor (choice), then both little by little begin to form until finally humans can understand up to a certain time limit until finally the growth of their minds becomes perfect [1].

Based on the stages in forming *idrak* (thinking power), the rules of criminal responsibility were created:

ففي الوقت الذي ينعدم فيه الإدراك تنعدم المسئولية الجنائية، وفي الوقت الذي يكون فيه الإدراك ضعيفاً تكون المسئولية تأديبية لا جنائية، وفي الوقت الذي يتكامل فيه الإدراك يكون الإنسان مسئولاً جنائياً

It means:

"When the power of thinking does not exist in humans, criminal responsibility also does not exist. When the power of thinking is weak, what is imposed on him is not criminal responsibility, but educational punishment. When the power of human thinking is perfect then criminal responsibility is imposed" [1].

This rule divides human classification into three forms:

1. In'adâm al-idrâk (lack of ability to think)

According to the *fuqaha'* agreement, this phase begins when humans are born and ends until the age of seven. In this phase a child is considered to not have the power to think. They are also called children who are not yet *mumayyiz*. At this time children are not given criminal responsibility because they are unable to differentiate between good and bad. Therefore, there are no sanctions that can be given to children, whether criminal sanctions or *ta'dib* sanctions.

2. Al-idrâk ad-dha'îf (weak thinking ability)

This phase starts when the child is seven years old until the child reaches puberty. The majority of jurists limit it to the age of fifteen years, but Imam Abu Hanifah and the opinion that is popular among the Maliki school of thought limit it to the age of eighteen years. In the *mumayyiz* to puberty phase, a child is not subject to criminal sanctions but is subject to *ta'dib* sanctions.

3. Al-idrâk at-tâm (perfect thinking ability)

This phase is calculated from when the child has reached the age of intelligence. The majority of fuqaha are of the opinion that it is fifteen years, while according to Imam Abu Hanifah and the popular opinion among the Maliki school of thought, it is eighteen years. At this age, children are declared to be adults and if they commit a crime, they can be sentenced to *hudud*, *qisash*, *diyat* or *ta'zir* [1].

Fiqh Jinayah has differentiated between adult humans and children, with a division into three groups similar to the Criminal Code. However, there are differences in age. Article 40 states that: Criminal liability cannot be imposed on children who at the time of committing the crime were not yet 12 (twelve) years old. Meanwhile, the age of adulthood is 18 years as stated in Article 150 that: "a child is someone who is not yet 18 (eighteen) years old.

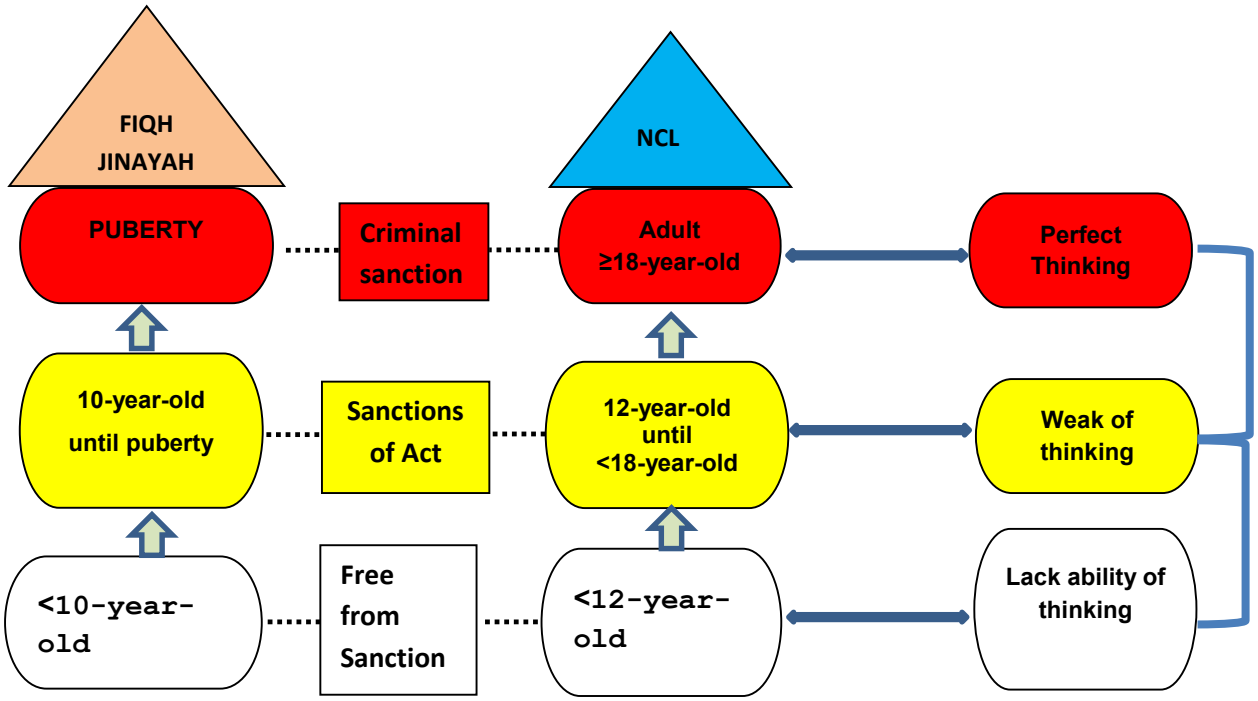

Fig. 3. Comparison of Criminal Liability in Living Fiqh Jinayah and the National Criminal Law

The provisions on the age of adulthood *(baligh)* based on living fiqh jinayah, have existed in Indonesian society. In the Big Indonesian Dictionary, a child is defined as the second descendant, apart from that, a child is also defined as a small human being [12]. The opposite of a child is an adult. The term adult refers to an organism that has matured. An adult human is a human who has become a complete man or woman [8], because he or she has grown and can give birth to children. In men who are starting to mature, the adrenal glands begin to produce hormones called androgens which work together with testosterone to stimulate growth and changes in the body with maturity. In women, the hypothalamus stimulates the ovaries to produce estrogen and stimulates menstruation [7].

As with plants and animals, differences in maturity are also determined by biological maturity. A plant is said to be mature if the plant can reproduce sexually (generatively) as indicated by the appearance of flowers. Likewise, animals are said to be adults if they can reproduce, eitherby dividing themselves (protozoa), laying eggs (oviparous). giving birth (viviparous) or laying eggs giving birth (ovoviviparous) [18].

The equation of every organism's maturity with biological maturity is found in the figurative expression of the Minang people when they want to propose to a young man in the Pariaman area: *"kami ado baladang Kacang, Sahari Badaun Sahalai, Duo Hari Badaun Duo, Tigo Hari Badaun Tigo, sekarang Kacang Alah Patuik di Agiah Junjungan "*54 Meaning: We have a bean garden, one day the bean has one leaf, two days it has two leaves, and the third day it has three leaves, then the bean has to find a place to spread its stem. The place where the bean stems spread *(junjuangan)* is usually made from a section of bamboo that has been cut, this is where the mature bean stems spread so that they can bear fruit well [4].

This figure is often used when proposing marriage, with the meaning that the daughter in the house has grown up and is worthy of marriage. According to Indonesian customary law, the age limit for being called a child is pluralistic. Being pluralistic here means that the term adult in Indonesian customary law depends on each regional language, but the meaning remains the same, namely biological maturity. For example: *akil baligh. kuat gawe, menek bajang*, *bujang* etc. Meanwhile, according to the Supreme Court jurisprudence, which is oriented towards customary law in Bali, the age limit for children is under 15 (fifteen) years, as in the Republic of Indonesia Supreme Court Decision No. 53 K/Sip/1952 dated 1 June 1955 in the case between I Wayan Ruma and Ni Ktut Kartini [17].

It can be concluded that maturity according to living law in Indonesia is the same as biological maturity and maturity is the same as maturity according to living fiqh jinayah because what is measured is the biological quality in this case after he reaches puberty. Meanwhile, the Criminal Code measures a child's maturity not based on quality but based on quantity, namely 18 years. Meanwhile, the classification of humans according to fiqh jinayah and the Criminal Code is equally divided into three types, namely adults or who have perfect thinking, teenagers or who are still weak in thinking and children or who do not yet have the ability to think.

3.3 Regulation of Living Fiqh Jinayah Sanctions in the Indonesian National Criminal Law

Criminal law sanctions are divided into two, namely criminal sanctions and action sanctions. Criminal sanctions *(straf)* are a form of retaliation in the form of suffering imposed by the authorities on a particular person who is threatened with punishment. These criminal sanctions are intended as an effort to maintain peace or security and better regulation (control) of society. In this context we also talk about the function of general and specific prevention, dispute resolution (elimination of

social tension or conflict) and confirmation of norms. Meanwhile, if we talk about the act of (*maatregel*), then here that dominating is a special preventive function [20].

Although at the practical level, the difference between criminal sanctions and action sanctions is often rather vague, at the level of basic ideas the two have fundamental differences. Both originate from different basic ideas. Criminal sanctions originate from the basic idea: "Why is punishment carried out". Meanwhile, action sanctions start from the basic idea "What is the purpose of this punishment?" In other words, criminal sanctions are actually reactive to an act, while action sanctions are more anticipatory in nature to the perpetrator of the act [23].

It is clear that criminal sanctions emphasize the element of retaliation. It is suffering that is intentionally imposed on an offender. Meanwhile, action sanctions originate from the basic idea of protecting the community and coaching or caring for the person who created it. Based on their objectives, criminal sanctions and action sanctions also originate from different basic ideas. Criminal sanctions aim to provide special suffering *(bizonder leed)* to the offender so that he feels the consequences of his actions. Apart from being aimed at suffering the perpetrator, criminal sanctions are also a form of statement condemnation of the perpetrator's actions [23].

If we observe the development of criminal law today in Indonesia, especially the Criminal Book of Law, there is a tendency to use a double track system in its sanctions system, which means that criminal sanctions and action sanctions are regulated at the same time. Apart from the two-track system (double track system), the development of Indonesian criminal law also uses a single-track system in the sense of only using action sanctions or criminal sanctions.

Of course, the Indonesian National Criminal Code regulates the form of sanctions for people who violate the law who live in a living fiqh jinayah society, namely criminal sanctions. This is contained in Article 66 in the additional criminal category as referred to in Article 64 letter b, one of which is in point f, namely: "Fulfillment of local customary obligations".

The explanation regarding sanctions for fulfilling local customary obligations is explained in Article 96 and Article 97. The text of Article 96 is:

I. Additional punishment in the form of fulfilling local customary obligations takes priority if the criminal act committed meets the provisions as intended in Article 2 paragraph (2).
II. Fulfillment of local customary obligations as intended in paragraph (1) is considered comparable to a category II fine.
III. In the event that the customary obligations as intended in paragraph (1) are not fulfilled, the fulfillment of the customary obligations is replaced with compensation whose value is equivalent to a category II fine.
IV. In the event that the compensation as intended in paragraph (3) is not met, the compensation is replaced with a supervision penalty or social work penalty.

Article 97: Additional punishment in the form of fulfilling local customary obligations can be imposed even though it is not included in the formulation of the Criminal Act, while still paying attention to the provisions of Article 2 paragraph (2).

Fulfillment of customary obligations based on the National Criminal Code is a category II fine as explained in Article 79 (1) b. Category II, Rp. 10,000,000, -.

The National Criminal Code has determined that criminal sanctions will be imposed on violators of living fiqh jinayah with criminal sanctions, fines. If we look at other regulations outside the National Criminal Code, namely Regional Regulations, then criminal sanctions for Regional Regulations are not only in the form of fines, but can be in the form of imprisonment as stated in Article 238 of Law No. 23 of 2014 concerning Regional Government, namely: "a regional regulation can contain a threat of

imprisonment for a maximum of 6 (six) months or a fine of a maximum of IDR 50,000,000 (fifty million rupiah)".

This fine sanction has been known in living fiqh jinayah in various areas where the majority are Muslim and are subject to Islamic law. Like what is called the law of “wake up” in Minangkabau society. The "wake up" punishment is another punishment found as a model of punishment practiced in Minangkabau. This "wake up" punishment has indications that it has its roots in punishment in Islam, namely the *diyat* punishment [6].

Fines are also known in Aceh, as written in Qanun Aceh No. 9 of 2008, including, advice, warning, statement of apology, *sayam*, *diyat*, fine, compensation for being ostracized by the gampong community, being expelled from the gampong, revocation, title attached, as well as other forms of sanctions in accordance with local customs [14].

The Pepadun indigenous community in the Tulang Bawang Regency area, West, Lampung embraces Islam and harmonizes customary law with Islamic law which is understood communally. The determination of *dau* at all levels of Pepadun is adjusted to the level of customary law violations, namely light, medium and serious violations. Minor violations have the consequences of customary fines and social sanctions in the form of a trial at the customary hall. Violations of customary law at a moderate level have consequences of customary fines and social sanctions in the form of exile or temporary exclusion. Serious violations have the consequences of customary fines and social sanctions in the form of expulsion or the most severe is the death penalty (this was done in ancient times) [26].

Basically, the customary criminal sanctions that originate from fiqh jinayah range from the highest such as the death penalty, to the lowest criminal sanctions, such as fines. The Dutch colonial era abolished these provisions, leaving only fines. If we refer to the original source, fiqh jinayah, the distribution of sanctions based on the type of criminal act is divided into four, namely:

I. *Hudûd* crime, namely the punishment determined for hudûd crimes.
II. *Qisash* or *diat* crime, it is the punishment determined for the crime of *qisas* and *diat*.
III. The crime of *kafarat* is the punishment determined for some of the crimes of *qisash*, *diat* and *takzir*.
IV. *Takzîr* crime, namely the punishment determined for the crime of *takzîr* [9].

Fines in fiqh jinayah are included in the *jarimah diyat* and *jarimah ta'zir*. For *jarimah diyat*, the actual fine is *'uqubah badaliyah* (substitute punishment) when someone receives forgiveness for the crime of murder or abuse. Meanwhile, these criminal acts have been regulated in the Criminal Code, so they no longer require laws that exist in society. Meanwhile, *ta'zir* can be subject to criminal sanctions.

Ta’zir is a form of punishment where the terms of punishment are not stated by the *syarak* and is the authority of the *ûlil amri* or judge. 64 They have the authority to formulate acts that can be categorized as criminal acts of *takzir*, with the provisions that they must be of the same spirit and in line with the general objectives of Islamic law. In fiqh jinayah there are no various punishments for each crime of *takzir*, but only mentions a set of punishments, from the lightest to the heaviest, so the punishment for takzir does not have certain limits.

The number of *takzîr* crimes is not determined, while the number and type of *hudud* and qisash crimes are determined. Islamic law only determines some of the criminal acts of *takzîr*, namely acts that will forever remain considered criminal acts, such as usury, betraying promises, cursing people and bribing. Some criminal acts of *takzîr* are left to the authorities to determine. However, Islamic law does not give authorities the authority to determine criminal acts at will,but must be in

accordance with the interests of society and must not be contrary to the texts and general principles of Islamic law [10].

From the description above, it can be concluded that criminal sanctions for living fiqh jinayah have been regulated in the Indonesian National Criminal Code in the form of a maximum fine of IDR 10,000,000 (ten million rupiah). Meanwhile, criminal sanctions and fines are a form of sanction that is justified in living fiqh jinayah in the category of *jarimah* and *ta'zir.*

4. Conclusion

The conclusion from this research is that one of the living laws in Indonesian society which is legitimized by the National Criminal Code is living fiqh jinayah. Firstly, regarding criminal acts regulated by the Criminal Code in living fiqh jinayah are all criminal acts that are in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by the people of the nation and strengthened by Regional Regulations. Second, criminal liability in living fiqh jinayah is different from the National Criminal Code in terms of the adult category, where in living fiqh jinayah the size of adult is puberty whereas in the National Criminal Code it is if you are 18 years old. Third, the criminal sanction for living fiqh jinayah stipulated in the National Criminal Code is a fine.

References

[1] Audah, Abdul Qadir. *Ensiklopedi Hukum Pidana Islam*. Kharisma Ilmu, 2008.
[2] Abu Dawud, S. bin A. bin I. al-S. Sunan Abu Dawud Jilid 6 (Vol. 6, p. 4688). Dar el-Ta'shil (2015).
[3] Ali, H. Zainuddin. "Hukum Pidana Islam, Sinar Grafika." (2007).
[4] Amir, Y., & Hidayat, T. Tradisi Pernikahan Antara Mamak dengan Mamak di Kabupaten Padang Pariaman (1st ed.). LPPM UIN IB (2019). https://doi.org/10.15548/turast.v6i2.36
[5] Arief, Barda Nawawi. "Kebijakan hukum pidana perkembangan penyusunan konsep KUHP baru." *Jakarta: Kencana* (2008).
[6] Arsyad, Dedi. "Hukuman Mati dalam Masyarakat Minangkabau Prakolonial: Tinjauan atas Perubahan Konsep dan Praktik." *Ijtihad* 32, no. 1 (2019). https://doi.org/10.15548/ijt.v32i1.30
[7] Bryan, K., Beatty, R., & Goldstein, N. Biology Matters (D. H.P, Rizka, & Wulandari (Trans.). PT Pakar Raya (2015).
[8] Jahja, Yudrik. *Psikologi perkembangan*. Kencana, 2011.
[9] Djazuli, Ahmad. "Kaidah-Kaidah Fikih: Kaidah-Kaidah Hukum Islam dalam Masalah-Masalah yang Praktis." *Jakarta: Kencana* (2006).
[10] Hakim, R. (2000). Fiqh Jinayah (1st ed.). Pustaka Setia.
[11] Hanafi, Ahmad. "Asas-asas hukum pidana Islam." *(No Title)* (1967).
[12] https://Kbbi.web.id. (n.d.).
[13] Chairul Huda, S. H. *Dari'Tiada Pidana Tanpa Kesalahan', Menuju'Kepada Tiada Pertanggungjawaban Pidana Tanpa Kesalahan'*. Kencana, 2015.
[14] maa.acehprov.go.id. (n.d.).
[15] Muslich, Wardi. "Ahmad, Pengantar Dan Asas Hukum Pidana Islam (Fikih Jinayah)." (2004).
[16] Mansur, Teuku Muttaqin. "Hukum adat perkembangan dan pembaharuannya di Indonesia." *Banda Aceh: Bandar Publishing* (2017).
[17] Nashriana. Perlindungan Hukum Pidana Bagi Anak Indonesia (1st ed.). PT Raja Grafindo Persada (2011).
[18] P.D., R. Pertumbuhan dan Perkembangan Manusia, Hewan dan Tumbuhan (1st ed.). CV Graha Pintama Selaras (2019).
[19] Purnama, I. K. A. Pembaharuan Sistem Peradilan Pidana Indonesia: KUHP Nasional Sebagai Karya Monumental (P. R. Aditama (Ed.); Vol. 1). (2023).
[20] Remmelink, Jan. "hukum pidana: komentar atas pasal-pasal terpenting dari KUHP belanda dan padanannya dalam KUHP Indonesia." *Jakarta: Gramedia Pustaka Utama* (2003).
[21] Santoso, Topo. *Asas-asas hukum pidana Islam*. PT RajaGrafindo, 2016.
[22] Saptomo, Ade. "Pokok-pokok Metodologi Penelitian Hukum." *Surabaya: Unesa University* (2007).
[23] Sholehuddin, Muhammad. "Sistem sanksi dalam hukum pidana: Ide dasar double track system & implementasinya." (2003).

[24] Soekanto, Soerjono. "Penelitian hukum normatif: Suatu tinjauan singkat." (2007).
[25] Syarifuddin, A. Ushul Fiqh Jil 1 (1st ed., Vol. 1). Kencana Prenada Media Group (2008).
[26] Wahyuni, Tri, Inni Inayati Istiana, and Ratna Asmarani. "Denda Adat pada Tradisi Pepadun Masyarakat Lampung dalam Perspektif Hukum Islam." *Jurnal SMART (Studi Masyarakat, Religi, dan Tradisi)* 9, no. 1 (2023): 77-90. https://doi.org/1018784
[27] Waluyo, Bambang. "Penelitian hukum dalam praktek." (2008).
[28] Wimra, Zelfeni, Yasrul Huda, Mahlil Bunaiya, and Abdul Rahim Hakimi. "The Living Fiqh: Anatomy, Philosophical Formulation, and Scope of Study." *Juris: Jurnal Ilmiah Syariah* 22, no. 1 (2023). https://doi.org/10.31958/juris.v22i1.9491
[29] Zuhaily, W. Ushul Fiqh Islami (Vol. 17). Dar el-Fikr (2006).