Analogy in Criminal Law: Contrasting Approaches in Indonesian and Islamic Legal Frameworks

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Abstract. In Indonesian criminal law, the prohibition on using analogy to resolve cases is intended to prevent judicial arbitrariness, but may inadvertently result in certain acts going unpunished despite their criminal nature. Conversely, Islamic criminal law permits the use of analogy (*qiyas*), making it a fundamental source of law and ensuring its relevance in evolving contexts. This study aims to elucidate the contrasting approaches to analogy in Indonesian and Islamic criminal law. Using a normative legal research method with a comparative approach, all secondary data was collected through a literature review. The study concludes that in Islamic criminal law, *qiyas* is a recognised source of law that is applied through rational judgement (*ra'yu*). The application of *qiyas* requires the fulfilment of four pillars: *al-asl* (the original case); *al-far'* (the new case); *illat* (the common cause); and *hukum al-asl* (the decision of the original case). This is a key difference from Indonesian criminal law, which lacks clear boundaries or procedures for the use of analogy in legal reasoning. The study highlights the potential of analogy to contribute to the sustainable development of criminal law by addressing current and future legal needs.

Keywords: Analogy, Indonesian Criminal Law, Islamic Criminal Law.

1 Introduction

As a nation governed by the rule of law [1], Indonesia hast a duty to ensure the well-being, protection, and prosperity of its citizens [2]. However, the rapid and complex societal changes frequently leave legal norms struggling to address emerging issues adequately [3]. As the results, there may be legal voids within the community. Nevertheless, the courts are prohibited from refusing to examine, adjudicate, and decide cases based on the pretext of unclear or absent laws; instead, they are mandated to review and adjudicate all cases presented [4].

According to Utrecht, when legislation is unclear or silent on an issue, judges must use their initiative to resolve the matter. In such instances, judges play a crucial role in determining what constitutes the law, even in the absence of clear legislative guidance [5]. This judicial action is referred to as legal discovery, which can be achieved through legal interpretation, including the use of analogy.

© The Author(s) 2024
G. W. Pradana et al. (eds.), *Proceedings of the 4th International Conference on Social Sciences and Law (ICSSL 2024)*, Advances in Social Science, Education and Humanities Research 877,
https://doi.org/10.2991/978-2-38476-303-0_94

Unfortunately, Indonesian criminal law tends to prohibit the use of analogy in legal discovery due to the principle of legality. Remmelink presents four key reasons for rejecting the use of analogy in criminal law as follows [6]: *Firstly*, he argues that it promotes legal certainty; *Secondly*, it ensures that legal development is not solely the responsibility of the judiciary; *Thirdly*, it prevents emotional decisions influenced by public opinion, the media and other groups; and *Finally*, it aligns with the historical intent of Dutch legislation from 1886, which did not recognise analogy as a method of interpretation.

In contrast, Islamic law considers analogy (*qiyas*) as one of its primary legal sources, complementing the *Quran*, *Hadith*, and *Sunnah*. This inclusion allows Islamic law to adapt continuously to changing times. This fundamental difference presents an intriguing area for scientific inquiry, providing a comparative analysis between the approaches to analogy in Indonesian and Islamic criminal law.

2 Methodology

This study is a normative legal research project that examines the law from an internal perspective, focusing on legal norms as its object of study. Normative legal research is undertaken with the objective of providing arguments of a juridical nature when there is a legal vacuum, ambiguity, or conflict of norms [7].

The research is descriptive in nature, with the objective of portraying specific legal phenomena within a particular area and time frame [8]. The research employs a comparative approach, conducting a comparative legal study by comparing the laws of one country with those of another or the laws from different periods [9].

The data employed in this research are derived from a variety of legal sources, including primary, secondary, and tertiary materials. Secondary data were collected through a literature review and analysed using qualitative analysis methods. The purpose of the literature review is to provide solutions to the research problems. It provides the theoretical foundation for the research issues, ensuring that the conducted research is not a trial-and-error activity [10].

3 Result and Discussion

3.1 Analogy in Indonesian Criminal Law

Analogy in criminal law refers to the application of legal rules to a concrete event where the elements of the act were not originally covered by the criminal law when it was enacted. However, due to necessity, these new elements are deemed to fulfill the criteria for violating criminal law [11].

The prohibition of the use of analogy in criminal law is a consequence of the principle of legality in Indonesia, as stipulated in Article 1 Paragraph (1) of Law No. 1 of 2023 on the Criminal Code of Indonesia. This article states that no act shall be subject to criminal sanctions and/or actions unless there is a criminal provision in the legislation that existed prior to the act [12]. In Latin, the principle of legality is known as *nullum*

delictum sine praevia lege poenali, meaning that there is no crime without a pre-existing law [13].

The Indonesian Law No. 1 of 2023 on the Criminal Code explicitly prohibits the use of analogy in determining the existence of a criminal offence in Article 1 Paragraph (2). The analogy referred to in this article is the interpretation by applying a criminal provision to an event that is not explicitly regulated or mentioned in the law and local regulations, by equating or comparing the event with another event that is regulated in the law and local regulations [14].

Every legal norm requires interpretation, as stated by Machteld Boot [15] in Eddy O.S. Hiariej, meaning that each legal norm needs interpretation. Similarly, van Bemmelen and van Hattum [16] assert, "*Elke geschreven wetgeving behoeft interpretatie*" (Every written legislation needs interpretation). Satjipto Rahardjo [17] also opines that law cannot function without interpretation, as it requires further meaning to become fairer and more grounded.

The application of analogy is only permissible if it is considered that there is a legal void because the legislature either did not contemplate (forgot to contemplate) or could not foresee such a situation (new cases) and therefore did not formulate the law broadly enough to cover such cases [18].

Legal analogy interpretation involves seeking and establishing the meaning of the legal principles contained in the law in accordance with the intentions of the lawmakers [19]. The importance of interpretation in criminal law lies in the fact that written law cannot promptly adapt to changes; written law appears rigid and cannot easily follow societal advancements. To keep up with these developments, legal practice employs interpretation.

Criminal judges are prohibited from using analogy to include events within the scope of criminal law but are not prohibited from using extensive interpretation. Although analogy inherently expands the law's application, similar to extensive interpretation, legal scholars debate this issue. Some argue that both are the same, differing only in degree, while others distinctly differentiate between extensive interpretation and analogy. Extensive interpretation adheres to the text of the law, whereas analogy, as part of the legal discovery method, goes beyond the text to the legal event, which substantially shares the same essential elements [20].

According to the author, it is challenging to distinguish between extensive interpretation and analogy because both ultimately result in the application of a regulation to an act not previously covered by that regulation. The difference between extensive interpretation and analogy is minimal, depending on the judge's reasoning process, which is then explained in the judgment considerations.

Adjudicating a case without interpretation is impossible, as it would be challenging to connect the act as a fact with the offense formulation as a norm. Roscoe Pound stated that adjudicating a case involves three main activities: discovering the law, interpreting the chosen rules, and applying the law. Therefore, a jurist, as Scholten expressed, is required to discover the law (*rechtesganchtsvinding*) and apply the law (*rechtstoepasing*) [21].

3.2 Analogy in Islamic Criminal Law

The primary sources of *Shariah* are the *Holy Qur'an* and the *Sunnah*. Additionally, there are several other sources based on human reasoning and *ijtihad*, such as analogical reasoning (*qiyas*), juristic preferences (*istihsan*), presumption of continuity (*istishab*), and general consensus (*ijma'*). While analogy and consensus are widely accepted by the vast majority ulama, there is some disagreement among different schools and jurists regarding the validity and scope of many rational proofs that originate from *ijtihad* [22].

Ijtihad is defined as the earnest effort or *ikhtiar* exerted by a qualified legal expert to deduce legal rulings on issues not explicitly addressed in the *Qur'an* and *Sunnah*. Several methods or approaches can be employed in *ijtihad*, whether done individually or collectively [23]. These methods include: *(1) ijma'; (2) qiyas; (3) istidal; (4) al-masālih al-mursalah; (5) istihsān; (6) istishab; (7) urf; etc*.

The human reasoning that is qualified to perform *ijtihad*, which is the source of Islamic law in the literature, is called *ar-ra'yu*. [24]. Literally, ra'yu means opinion and consideration. The legal basis for using intellect or *ra'yu* in Islamic jurisprudence is derived from the *Qur'an*, Surah An-Nisa verse 59 (4:59), which obligates followers to adhere to the commands of those in authority (*ulil amri*).

Islamic criminal law recognizes four primary sources [25]: The *Holy Qur'an*; the *Sunnah* (and *Hadith*); consensus (*ijma'*); and analogy (*qiyas*). Imam Shafi'i addressed the relationship between *qiyas* and *ijtihad*, positing that they are simultaneous. This implies that if a legal ruling is implicit, it must be sought through *ijtihad*, which which can be considered as *qiyas* as well.

Imam Shafi'i provided numerous arguments for the legitimacy of *qiyas* (*hujjah*, both from *naqliyah* (textual evidence from divine revelation) and *'aqliah* (rational evidence from human reasoning) perspectives, such as: [26]

(1) Imam Shafi'i argued that for every issue, whether past or future, there exists a ruling from Allah because Islamic law is universal and not limited to a specific time or place. These rulings may be explicit in the *Qur'an* and *Hadith* or it may be implicit, discernible only by highly competent scholars, or *mujtahids*, who have the authority to conduct *ijtihad* using *qiyas.* In his work ar-Risalah [27], Imam Shafi'i stated, "Every issue faced by *Muslims* has a binding ruling or an indication pointing to that ruling. If the ruling is explicit, it must be followed. If implicit, it should be sought through ijtihad which including qiyas."
(2) The proof is derived from the sayings of the Prophet Muhammad (SAW), who states that if a judge makes a decision in a case through *ijtihad* and the result is correct, the judge will receive two rewards. However, if the judge performs *ijtihad* to decide a case and the result is incorrect, the judge will receive one reward only. This *hadith* indicates that a *mujtahid* is not required to achieve absolute truth in the result of their *ijtihad*, as ultimate truth is known only to Allah. A *mujtahid* is only required to reach an apparent truth according to their ability. To illustrate, consider a judge who imposes the death penalty based on the testimony of witnesses and corroborated by supporting evidence. In this instance, there is a possibility that the witnesses

might have been manipulated, distorted or even subjected to undue influence and misrepresentation. Nevertheless, as long as the judge has adhered to the established procedures for determining the law based on tangible evidence, the judge is not responsible for the content of the witnesses' testimonies. Whatever remains hidden within the witnesses' hearts remains within the judgment of Allah.

According to Abdul Qadir ‘Audah, *qiyas* signifies the interconnection of an issue that is not explicitly addressed by *Shariah* with one that is, based on the common underlying shared by both issues. In accordance with the definition of *qiyas*, it can be established that there are four fundamental pillars to this concept [28]. These are: (1) *Al-maqis 'alaih*, which is also referred to as *al-asl*, (2) *Al-maqis*, which is also known as *al-far'*, (3) *Hukum al-asl*, and (4) *'Illat*. A comprehensive description of the four pillars of *qiyas* is provided below: [29]

1. ***Al-asl* (the original case):** A case whose ruling is derived from the *Qur'an*, *Hadith*, or *ijma'*. For example, *khamr* (intoxicating drink) that is prohibited in the *Qur'an*.
2. ***Al-far'* (the new case):** The new case which does not have an explicit ruling in the *Qur'an, Hadith,* or *ijma'*. To illustrate, historically, whiskey was not subject to specific regulations pertaining to the consumption of whiskey or other alcoholic beverages.
3. ***'Illat* (the underlying cause/ratio legal):** It is the characteristic that justifies the ruling in the original case. In the case of *khamr* and whiskey, the *'illat* is its intoxicating nature.
4. ***Hukum al-asl* (the ruling on the original case):** This is the ruling provided by the *Qur'an, Hadith,* or *ijma'* which originally belong to *al-asl* only (the original case) but will be applied to *al-far'* (the new case) as well because of the similar *'illat* (ratio legal) between these two cases (the original and the new).

Qiyas is a method of addressing new legal issues that are not explicitly mapped in existing regulations. This method is crucial due to its capacity to integrate normative ideas (‘*illat*) with empirical realities (*furu'*). Qiyas serves to extend the applicability of any legal provisions to newfound cases based on their shared legal causes. The presence of *'illat* indicates that qiyas is not the formation of a new law that never existed previously. Rather, qiyas can be identified as a form of revelation (*mudhīr*) of the similarity between its legal causes. This is consistent with the Islamic legal concept that law is discovered, not created. This implies that humans can only uncover existing laws that were previously hidden or not explicitly stated [30].

3.3 Comparative Analysis Between Analogy in Indonesian Criminal Law and Islamic Criminal Law

The process of legal determination through *qiyas* is not about creating new laws from scratch; rather, it is about clarifying the law for cases that are not explicitly covered by

existing legislation [31]. Similarly, the use of analogy in Indonesian criminal law is not supposed to create a new regulation, but rather to determine the applicable law for actions not yet regulated under any existing legislation.

In contrass to the view that *qiyas* can be regarded as a fundamental source of criminal law, Topo Santoso [32] asserts that the argument of *qiyas* does not intend to create new crimes or new punishments but only seeks to expand the scope of existing legal provisions to accommodate new types of crimes that have not been regulated at all just simply demonstrates that *qiyas* cannot be considered a source of legal framework for crimes and punishments. It can be posited that *qiyas* is regarded as a source of interpretation that assists in determining whether a particular act falls within the scope of an existing provision. To illustrate, the act of sodomy is analogous to the crime of adultery.

Both Indonesian criminal law and Islamic criminal law are founded upon a rationale that serves as the basis for the establishment analogy. In Islamic criminal law, *'illat* is employed to facilitate *qiyas*, whereas in Indonesian criminal law, logical ratio is used to conduct analogy. These two approaches are not significantly different from one another, as they both rely on the same fundamental principles of reasoning.

Although some Indonesian criminal law experts concur on the utilisation of analogy in resolving criminal cases, the legislation in its current form explicitly prohibits it, as stated in Article 1, Paragraph (2) of the Indonesian Criminal Code. This contrasts with Islamic criminal law, which, despite differing opinions on the use of *qiyas* in specific criminal offenses, generally permits the use of human reasoning (*ra'yu*) in legal determination. This acceptance of human intellect in legal processes is the rationale behind the permissibility of the use of analogy (*qiyas*) in resolving new criminal offenses.

The process of analogy in Islamic criminal law is governed by four fundamental principles. These principles reflect the high level of caution observed in Islamic criminal law, with the aim of preventing errors or judicial arbitrariness in sentencing criminals. In contrast, Indonesian criminal law does not provide clear and defined rules for judges to follow when using analogy to resolve criminal cases. This absence of guidance may result in the delivery of biased judgments.

Even when a judge employs analogy to resolve a criminal case, the court's decision serves only as a precedent for similar future crimes. It serves as a reference for other judges but does not bind them to the same outcome. This represents a significant divergence in the status of *qiyas* and analogy. Analogy is employed as a tool for judicial interpretation in court decisions, subsequently forming precedent. In contrast, *qiyas*, which is recognised as a legal source, can result in the formation of more binding regulations.

In the event that *qiyas* is employed, it is imperative that a legal basis (*hukum al-asl*) be established prior to the application of *qiyas* against unregulated acts (*al-far'*). In the Islamic legal system, the *Quran* and *Hadith* as a reference to the main source of law explicitly cannot be changed until whenever, so it has a very high reliability aspect. In contrast, the Indonesian legal system is characterised by considerable flexibility, with the potential for change at any time. Even the Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, which serves as the constitution, is still a subject to change through an amendment. Hence, this may complicate and render uncertain towards the

application of analogy in Indonesian criminal law system. On the other hand, the prohibition of analogy may also lead to the potential emergence of various new types of crimes that are not punished because there are no rules governing them.

Historically, the use of analogy in criminal law dates back to the late 19th century. This is evidenced by the decision of the Hoge Raad of 21 November 1892, W. Nr. 6282, regarding the *Telefoonpalen Arrest*. This decision demonstrates that the Hoge Raad accepted the use of analogy, or at the very least applied a broad interpretation of the law in criminal matters. Analogys was again employed in the Hoge Raad decision of 23 May 1921, known as the *Electriciteits-arrest*. Whereas in Islamic law, *qiyas* has been used since the period of the Prophet Muhammad SAW when he preached the teachings of Islam, around the beginning of the 6th century [33].

4 Conclusion

Analogy is prohibited in Indonesian criminal law in accordance with Article 1 of its Criminal Code, which is based on the principle of legality. This serves to guarantee legal certainty and order. It is feared that the use of analogy may result in the arbitrary decisions of judges, which could have a detrimental impact on the orderly functioning of society. Consequently, judges are prohibited from using analogies in resolving cases in court.

In Islamic criminal law, the use of analogy in legal discovery efforts is permitted, provided that the process is conducted in accordance with the prescribed steps. Indeed, analogy can be employed as a source of law if no regulations are found in the Al-Quran and hadith to prevent greater crimes for the sake of legal benefits for the community.

There is a notable distinction between the utilisation of analogy in Indonesian criminal law and Islamic criminal law. The former does not employ a systematic approach to analogy, whereas the latter does. If conducted correctly, analogy has the potential to serve as an alternative means of legal discovery in the resolution of criminal cases in Indonesia.

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