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Unlawfulness Within the Bugo Tradition in Morotai: A Comparative Perspective of Positive Criminal Law & Islamic Criminal Law

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Abstract

The Bugo tradition in Sangowo Village, Morotai Island Regency, is the practice of taking fruit or goods from someone's garden by leaving a sign as notification to the owner. This practice raises legal issues when confronted with theft under the Criminal Code and *sariqah* in *fiqh al-jināyāt*. This study employs a legal-empirical or socio-legal method with conceptual and comparative approaches to analyse Bugo's legal status from the perspectives of positive and Islamic criminal law. The results show that although Bugo formally fulfills the elements of Article 476 of the Criminal Code, its material unlawfulness is nullified because it is a living law accepted by the community and qualifies as a reason for criminal exemption outside the law. From the *fiqh al-jināyāt* perspective, Bugo does not fulfill the elements of *khufyah* and *qaṣd al-sariqah*, while strong *shubhah* from *ʿurf* nullifies the *ḥadd* based on the rule of "*idrāʾ al-ḥudūd bi al-shubuhāt*" (*ḥudūd* are averted by doubt). Both legal systems have flexible safety valves and consider social context, yet differ in focus: positive criminal law nullifies the act's unlawful nature, whereas Islamic criminal law nullifies the *ḥadd* penalty even when the act remains *shubhah*.

Abstrak

Tradisi Bugo di Desa Sangowo, Kabupaten Pulau Morotai, adalah praktik mengambil buah atau barang dari kebun milik orang lain dengan meninggalkan tanda sebagai pemberitahuan kepada pemiliknya. Praktik ini menimbulkan problematika yuridis ketika dihadapkan pada delik pencurian dalam KUHP dan delik *sariqah* dalam fikih jinayat. Penelitian ini menggunakan metode yuridis-empiris atau *socio-legal research* dengan pendekatan konseptual serta pendekatan komparatif untuk menganalisis status hukum tradisi Bugo dalam perspektif hukum pidana positif dan hukum pidana Islam. Hasil analisis menunjukkan bahwa meskipun tradisi bugo secara formil memenuhi unsur delik Pasal 476 KUHP, sifat melawan hukum materiilnya gugur karena merupakan *living law* yang diterima masyarakat dan dapat dikualifikasikan sebagai alasan penghapus pidana di luar undang-undang. Dalam perspektif fikih jinayat, tradisi Bugo tidak memenuhi unsur *khufyah* dan *qaṣd al-sariqah*, serta menimbulkan *shubhah yang* kuat dari *ʿurf* yang menggugurkan *ḥadd* berdasarkan kaidah *"idrāʾ al-ḥudūd bi al-shubuhāt"*. Kedua sistem hukum memiliki katup pengaman yang fleksibel dan mempertimbangkan konteks sosial, namun berbeda dalam fokus: hukum pidana positif menggugurkan sifat melawan hukum perbuatan, sementara hukum pidana Islam menggugurkan sanksi *ḥadd* meskipun perbuatan masih bersifat *shubhah*.

Keywords:
Bugo tradition; Islamic criminal law; Material unlawfulness; Shubhah

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Introduction

The Sangowo Village community in Morotai Island Regency practices a long-standing customary tradition known as Bugo (Nurdin et al., 2021). Bugo involves placing a specific mark (hereafter the *Bugo marker*) on fruit or goods taken from someone else's garden in the owner's absence. This marker serves an integrated function: it signals good faith, identifies the taker's presence, and provides the required notification to the owner, thereby transforming a covert act into an open one (Griffiths, 2020). Bugo is therefore not merely a custom, but a social regulation mechanism legitimized within local customary structures, manifesting the legal pluralism recognized in Indonesia's legal system (Tamanaha, 2021; Merry, 2020). Subsequent sections refer to this mark simply as "the Bugo marker" or "the required notification" without further explanation.

From an emic perspective, Bugo's objects are limited to garden produce in backyards or open fields, including seasonal fruits such as coconuts, bananas, papayas, mangoes, and jackfruit, as well as tubers and vegetables (Nurdin et al., 2021). The Sangowo community distinguishes such produce from private belongings like money, gold, livestock, or household tools, which fall outside Bugo's scope. Quantity is governed by the unwritten norm of a "proportionate amount" enough for one or two household meals, never for trade or hoarding. Disputes over proportionality do arise. Informants recounted cases of individuals taking an entire bunch of bananas or harvesting coconuts in commercial volumes; such acts are reclassified as genuine theft, triggering graduated sanctions: neighborly admonition, summoning before the *kepala desa* or elders for *musyawarah*, obligation to return or compensate, and, for repeat offenders, reputational exclusion from the reciprocal Bugo network. This self-policing mechanism shows Bugo is not a permissive license. The practice is enabled by Sangowo's agrarian geography, where unfenced gardens lie along daily footpaths (Benda-Beckmann et al., 2009; Griffiths, 2020), producing a limited social openness bounded by community-enforced proportionality.

When this practice is placed within the framework of Indonesian criminal law, specifically Article 476 of the Criminal Code on theft, an interesting legal issue arises (Hiariej, 2016). Under the Criminal Code, any act of taking another person's property without permission may be deemed unlawful, regardless of whether social norms or indirect consent from indigenous communities exist (Moeljatno, 2015). This difference in perspective raises fundamental questions about Bugo's legal status, namely whether it should be viewed as a criminal act under the Criminal Code's definition of theft or as a customary law practice with status and protection within the framework of national legal pluralism (Benda-Beckmann et al., 2009; Hernoko et al., 2020).

Bugo also raises important questions through Islamic criminal law, particularly the concept of *sariqah* (theft) in *fiqh al-jināyāt* (Peters, 2005). Punishment for theft rests not only on taking without permission but also on intent (*qaṣd*), minimum value (*niṣāb*), and security conditions protecting the goods (*ḥirz*) (Kamali, 2019; Hallaq, 2009). *Sariqah* is thus viewed comprehensively in terms of its substantive elements, not merely the physical act of taking (Rosen, 2018). An important question arises as to whether Bugo can be classified as theft or, more appropriately, as a minor moral offence (*taʿzīr*) (Abdelkader, 2016), since it is carried out openly through the Bugo marker and accepted as a community norm. Deeper analysis is needed to determine whether it fulfils sharia requirements or falls within the bounds of social tolerance in the living customary system (Baderin, 2017; Zaman, 2018).

The urgency of this research lies in understanding Bugo as a local legal phenomenon and in testing the flexibility of modern and Islamic criminal law in responding to multicultural realities (Cao, 2020; Siems, 2018). As Indonesia reforms its criminal law toward a more contextual paradigm (as evidenced by the Living Law clause in Article 2 of Law No. 1 of 2023), the question arises whether Bugo should be codified or preserved as unwritten living

law. The author argues for the latter. Formal codification risks three pathologies: ossifying a dynamic norm whose boundaries are continuously renegotiated by the community; transferring interpretive authority from traditional leaders and *musyawarah* forums to state actors who lack emic understanding to distinguish Bugo from disguised theft; and pressuring other local practices to seek statutory recognition, thereby contradicting the very pluralism the reform embraces. Recognition through judicial doctrine Article 2, combined with material unlawfulness, better preserves living law's adaptive character (Hooker, 2008; Nelken, 2016), harmonizing customary, positive, and Islamic law without freezing any tradition (Mulyadi, 2020).

Method

This study employs a socio-legal research method, as the assessment process is not limited to legal norms but also encompasses social practices (Tamanaha, 2008). It uses a conceptual and comparative approach to examine provisions of customary law, positive criminal law, and Islamic criminal law (Husa, 2015; Glenn, 2014). The data sources include primary and secondary data: primary data was obtained through direct study of Bugo practices in Sangowo Village (Geertz, 2017), while secondary data was drawn from the Criminal Code, the Quran, Hadith, *fiqh al-jināyāt* literature, scientific articles, and previous research (Bennett, 2018). The collected data were analyzed using a qualitative-comparative method to identify similarities and differences between the legal systems studied (Siems, 2018).

Primary data were gathered using an emic approach, understanding Bugo within the Sangowo community's internal framework rather than through imposed analytical categories (Geertz, 2017; Bennett, 2018). Techniques included participatory observation in residents' gardens, in-depth interviews with three informant groups: garden owners, Bugo practitioners of various ages, and traditional and religious leaders and documentation of marker forms. This approach is crucial because the legal assessment of customary practice cannot be separated from the system of meaning that sustains it; normative classification without community interpretation risks producing formalistic conclusions detached from living legal reality (Tamanaha, 2008; Griffiths, 2020). Emic findings were then compared with Criminal Code norms and fiqh al-jināyah doctrines through informant triangulation.

The Bugo Tradition in the Perspective of Positive Criminal Law

Article 476 of the Criminal Code defines theft as “anyone who takes something that belongs wholly or partly to another person, with the intention of possessing it unlawfully, shall be punished for theft with a maximum imprisonment of five years or a maximum fine of nine hundred rupiah” (Lamintang, 2018). The elements of theft include: the act of taking (*wegnemen*), the object being goods, the goods being wholly or partly owned by another, and the intention to possess them unlawfully (*met het oogmerk om het zich wederrechtelijk toe te eigenen*) (Hiariej, 2016; Moeljatno, 2015). In Bugo practice, the element of taking is fulfilled when someone takes fruit or goods from another's garden without prior permission (Remmelink, 2003), transferring the item from the owner's possession to the perpetrator's, even though a sign is left behind as notification (Schaffmeister et al., 1995).

Examining emic aspects is necessary to understand acts that outwardly resemble theft under Article 476. First, Bugo is generally carried out individually, by a resident passing through a garden who needs immediate sustenance, rather than as an organized collective action. Collective practices occur only at specific times, such as when children or adolescents

gather to pick fruit on their way home from school; some residents classify this category of child and adolescent perpetrators as playful or non-serious, provided they leave a mark in accordance with convention. Second, historically, Bugo is understood by residents as a continuation of the tradition of mutual aid (*baku bantu*) rooted in the agrarian social structure of Morotai, where limited market access and the long interval between harvests make sharing garden produce an instrument of micro-food security (Nurdin et al., 2021; Hernoko et al., 2020). The practice has no formal starting point but is passed down orally across generations through parental teaching about when one may take, what must be left as a sign, and the consequences of violating these boundaries. This individual character and cultural interpretation distinguish Bugo from "wegnemen" as defined in the Criminal Code, which envisions the perpetrator as an outsider intent on secretly transferring another person's property to themselves.

Other objective elements are also fulfilled: the object taken is goods, namely fruits or other garden produce of economic value (Simons, 1992); the goods belong entirely to someone else, as the garden where the fruit grows is private property whose ownership rights are protected (Hamzah, 2017). The subjective element of "intention to possess" (*zich toeeigenen*) can also be identified, as the perpetrator takes the fruit to use it for their own benefit, not merely to move or damage it (Hiariej, 2016). From the standpoint of positive criminal law, the act in Bugo fulfills all the normative elements required by Article 476. Formal unlawfulness is automatically attached because it contradicts written legal norms protecting property rights, without requiring further proof of loss or feelings of loss on the owner's part (Moeljatno, 2015).

Ownership requires clarification from the Sangowo perspective. Residents emically grade an object's privacy by location and storage. Money, gold, jewellery, or securities kept in rooms, cabinets, or wallets are "stored wealth" sealed from the communal sphere; taking them is "theft," socially condemned and subject to customary action. Conversely, garden produce grown in open spaces, lacking specialized storage, and culturally positioned as shareable "providence" has lower privacy, despite remaining private property. This aligns with the doctrine of *ḥirz* in *fiqh al-jināyāt*, which requires suitable storage for taking to qualify as *sariqah* (Kamali, 2019; Hallaq, 2009). The community thus does not abolish private ownership over garden produce. However, it assigns a gradation of intensity to that ownership within communal space, so that produce on public thoroughfares is not treated as equivalent to property stored in enclosed spaces (Benda-Beckmann et al., 2009; Merry, 2020).

Indonesian criminal law doctrine recognizes formal unlawfulness, holding that an act is unlawful if it fulfills all elements specified in the law (Lamintang, 2018; Simons, 1992). Under this doctrine, no further investigation is required into whether the act actually contradicts the community's sense of justice or harms protected legal interests (Moeljatno, 2015). Applied consistently, the formal doctrine would qualify Bugo as theft because all elements of Article 476 are literally fulfilled (Hiariej, 2016). Leaving a mark does not change the fact that the taking was without permission and with the intent to possess. From a legalistic standpoint, no loophole exempts Bugo from Article 476, because the law provides no explicit exception for such practices (Remmelink, 2003).

The doctrine of substantive unlawfulness emerged as a critique of formal doctrine, which was deemed too rigid and disregardful of substantive justice (Moeljatno, 2015; Ali, 2019). It holds that an act can be criminalized only if it not only fulfills statutory provisions but also truly contradicts the legal principles existing in society or violates protected legal interests (Mulyadi, 2020; Hiariej, 2016). It has developed two functions: a negative function, allowing the removal of unlawfulness even when the act complies with statutory provisions, and a positive function, allowing punishment even when the act is not regulated by law (Schaffmeister et al., 1995). Indonesia recognizes only the negative function, as confirmed in the *Memorie van Toelichting* (MvT) of the Criminal Code, which states that judges may

consider grounds for criminal exemption outside the law based on unwritten legal principles (Lamintang, 2018; Sahetapy & Pohan, 2019).

When analyzed in terms of substantive unlawfulness, Bugo exhibits characteristics that differ from those of theft in general (Ali, 2019). For the Sangowo community, taking fruit and leaving a mark is neither reprehensible nor contrary to their values. The mark serves as social communication that the taking was done in good faith, not secretly or maliciously (Griffiths, 2020). Locally, no protected legal interests are felt to be violated, since garden owners understand and accept the practice as part of communal life (Tamanaha, 2021). Unlike theft, which betrays trust and harms the owner, Bugo rests on the communal belief that the fruits of the earth may be used by fellow community members under certain conditions, provided they are used respectfully (Merry, 2020).

Field interviews with garden owners in Sangowo Village confirm these attitudes. Owners stated that markers cut branches, stone arrangements, inscriptions on palm fronds, or combinations serve as both a notification and an acknowledgment of ownership. So long as the marker is left and the amount stays reasonable, owners do not object; some interpret it as *baku bage* (mutual sharing) maintaining neighborly relations. Two coexisting trends emerge. Continuity is evident among older generations and traditional leaders who regard Bugo as integral to village identity. Change occurs among younger families shifting toward a market economy, where commodities like copra, cloves, and nutmeg are traded as cash income; tolerance for Bugo here narrows considerably. A deeper question follows: if Bugo erodes under monetization, does village solidarity erode with it? Field observations suggest a qualified yes. Bugo is not merely resource-sharing but a ritualized signaling system through which solidarity is performatively reproduced; each marker left and accepted renews the contract of reciprocity. When commodities are fenced off, the daily enactment of *baku bantu* is lost. Informants in their sixties mourned that younger neighbors "no longer know each other's gardens." However, partial substitution occurs: village WhatsApp groups circulate surplus produce, and mosque-based *infāq* drives absorb redistributive functions. Solidarity is therefore migrating, not dying, from face-to-face custom to mediated institutional forms, preserving the value of sharing while losing the communal texture that made Bugo distinctive (Benda-Beckmann et al., 2009; Hellum & Taj, 2019; Tamanaha, 2021). Bugo thus remains a dynamic living law renegotiated alongside economic transformation.

The practice of Bugo embodies the concept of living law in society, as proposed by Eugen Ehrlich (Tamanaha, 2008; Hellum & Taj, 2019). *Living law* refers to legal principles that are alive and obeyed in society even when not written in legislation (Menski, 2006). Passed down across generations, Bugo has become integral to the Sangowo community's value system, reflecting principles of social solidarity and sharing in an agrarian community (Nurdin et al., 2021; Benda-Beckmann et al., 2009). The community holds an implicit agreement that garden fruits are not solely private property but also serve a social function, accessible to other community members through the Bugo mechanism (Griffiths, 2020). This rests on the communal belief that everyone has the right to fulfill basic needs and that owners have a moral obligation to share their blessings, provided this is done politely and without harm (Merry, 2020).

The communal trust underlying Bugo reflects the principle of reciprocity in indigenous societies, where everyone may be both a taker and an owner, with the fruits taken at different times (Tamanaha, 2021; Hernoko et al., 2020). This system creates a social balance unintelligible through the individualistic lens of modern criminal law, which treats property rights as absolute (Feinberg, 1984). For the Sangowo community, property rights are not exclusively individualistic but have a communal dimension, permitting limited access by other community members through specific mechanisms (Benda-Beckmann et al., 2009). Leaving a mark is not a mere formality but a sign of respect for the owner and recognition that the goods

still have an owner entitled to know who has used the produce of their garden (Griffiths, 2020). The Bugo mechanism thus does not eliminate property rights but rather reconstructs them within mutually agreed-upon social boundaries (Merry, 2020).

Beyond the literature, contemporary emic perspectives suggest that Bugo's reciprocity has undergone selective weakening rather than extinction. First, the transition from subsistence to semi-commercial farming has positioned export commodities like copra, cloves, and nutmeg as production capital with restricted access; owners reject Bugo's tolerance for these and install fences or stakes. Second, urbanization and youth out-migration have left oral transmission incomplete, so returnees sometimes misjudge the boundaries of propriety. Third, state legal narratives, introduced through formal education and the media, foster awareness that such acts bear a textual resemblance to theft under Article 476. Conversely, symbolic reinforcement occurs as Bugo is increasingly cited in village deliberative forums as local wisdom worth preserving. This two-way dynamic shows Bugo's reciprocity being renegotiated within contemporary legal pluralism, where customary norms interact with state law and market logic (Benda-Beckmann et al., 2009; Hellum & Taj, 2019; Griffiths, 2020). Recognizing this prevents legal analysis from settling on an idealized portrayal.

Indonesian jurisprudence has recognised the possibility of nullifying material unlawfulness under customary law or community customs (Ali, 2019). The *Hoge Raad's February 20, 1933, decision on customary theft in Bali became an important precedent affirming that acts that formally meet the elements of a crime can lose their unlawful character* if justified by local customary law (Lamintang, 2018; Sahetapy & Pohan, 2019). There, the taking of goods as customary punishment was not theft because it rested on recognized customary law authority (Hooker, 2008). The same principle applies to Bugo, where taking fruit and leaving a mark is recognized and justified by the customary law of the Sangowo community (Nurdin et al., 2021). The recognition of customary law as a reason for criminal exemption is in line with Article 18B paragraph (2) of the 1945 Constitution, which recognizes and respects the unity of customary law communities and their traditional rights as long as they are still alive and in accordance with the development of society (Hernoko et al., 2020).

The application of substantive unlawfulness to Bugo also finds justification in the doctrine of subsidiarity (*ultimum remedium*) (Arief, 2016; Husak, 2008). Criminal law should be a last resort when other legal instruments are ineffective and should not interfere with dispute-resolution mechanisms already functioning well in society (Simester & Von Hirsch, 2011). Bugo has created an effective system of social control in Sangowo society without conflict or real harm (Tamanaha, 2021). Owners feel no grievance because they understand and accept the practice, while takers fulfill their moral obligation by leaving a mark (Griffiths, 2020). Criminalizing the practice would be unjust, as it would punish socially acceptable behavior and disrupt established harmony (Pratt, 2020). Criminal law need not claim a monopoly on right and wrong but must leave space for legal pluralism that recognises normative systems beyond state law (Merry, 2020; Tamanaha, 2008).

From the perspective of protected legal interests (*rechtsgoed*), Bugo does not harm the interests protected by Article 476 (Von Hirsch & Wohlers, 2017; Husak, 2016). The aim of criminalising theft is to protect property rights from harmful interference and to ensure the security of owners (Feinberg, 1984). In Bugo these interests are not violated because owners feel no significant disturbance or loss; indeed, they recognize the practice's legitimacy (Nurdin et al., 2021). Leaving a mark, an essential element of Bugo, demonstrates transparency and accountability not found in ordinary theft (Griffiths, 2020). Thus, although Bugo formally satisfies the elements of Article 476, the act materially lacks the reprehensible character (*materiële wederrechtelijkheid*) that is the essence of criminal punishment (Moeljatno, 2015; Ali, 2019). The absence of this material reprehensible nature invalidates the basis for criminal

punishment, since criminal law should cover only acts that truly contradict society's fundamental values (Mulyadi, 2020).

It can therefore be concluded that the material unlawfulness of Bugo's actions is invalidated, since they can be classified as grounds for criminal exemption outside the law (Ali, 2019; Hiariej, 2016). Bugo meets the criteria for grounds for criminal exemption based on the laws existing within the community: *first*, the practice has been carried out for generations and is accepted as a valid norm by the local community (Tamanaha, 2021); *second*, it does not conflict with the Sangowo community's sense of justice and is even seen as a manifestation of solidarity and sharing (Griffiths, 2020); *third*, no legal interests are actually violated because owners understand and accept it (Von Hirsch & Wohlers, 2017); *fourth*, the Bugo mechanism balances individual rights and communal interests without social conflict (Merry, 2020). Recognition of Bugo as grounds for criminal exemption does not open the door to justifying theft generally; rather, it applies the doctrine of material unlawfulness contextually, accounting for legal pluralism and local wisdom within the Indonesian legal system (Mulyadi, 2020; Hernoko et al., 2020). This is in line with the spirit of criminal law reform that is responsive to the diversity of Indonesia's legal culture, without sacrificing legal certainty and the protection of human rights (Arief, 2018).

The Tradition of Bugo in the Perspective of Islamic Criminal Law

In Islamic criminal law, theft or *sariqah* is one of the ḥudūd crimes with strict and detailed sanctions in the Quran and Hadith (Peters, 2005; Kamali, 2019). To answer whether Bugo can be categorized as *sariqah*, a comprehensive analysis of the elements of *sariqah* established by the *fiqh* scholars is required (Hallaq, 2009). According to most scholars, *sariqah* is defined as secretly taking another person's property from its proper place of storage (*ḥirz*), with the property reaching a certain *niṣāb* and with no doubt about the act (Rosen, 2018; Ahmad, 2019). These elements must be cumulatively satisfied for an act to be classified as sariqah, which is punishable by amputation of the hand (Bakar, 2020). If even one is not fulfilled, the act cannot attract *ḥadd al-sariqah*, although it may still attract *taʿzīr* sanctions in accordance with the ruler's policy (Abdelkader, 2016). Analysis within the framework of *fiqh al-jināyāt* is important for determining whether this local wisdom constitutes a criminal offence or is justified under sharia principles (Saeed & Saeed, 2016).

The fuqaha have detailed the elements of *sariqah*, reflecting sharia's caution in applying ḥudūd sanctions (Kamali, 2019; Hallaq, 2009). They include: *first*, the act of taking (*akhdh*) property; *second*, the property being wholly owned by another; *third*, the taking being done secretly (*khufyah* or *ikhfāʾ*); *fourth*, taking from a proper place of storage (*ḥirz*); *fifth*, reaching the specified niṣāb; *sixth*, the absence of doubt (shubhah) regarding the act or ownership; and *seventh*, an intention to steal (*qaṣd al-sariqah*) (Peters, 2005; Rosen, 2018). These elements distinguish *sariqah* from acts that resemble theft but differ in character, such as *ghaṣb* (open seizure), *khiyānah* (betrayal of trust), or *ihtilās* (embezzlement) (Ahmad, 2019). For Bugo, an in-depth analysis of whether these elements are met determines its legal status in fiqh al-jināyah, particularly regarding *khufyah* and *qaṣd al-sariqah*, which are directly relevant to its characteristics (Bakar, 2020).

The element of concealment or *ikhfāʾ* is fundamental in distinguishing *sariqah* from other property offences in *fiqh al-jināyāt* (Kamali, 2019). Imām Mālik in al-Muwaṭṭaʾ emphasizes that *sariqah* must be carried out secretly: the perpetrator takes property without the owner's knowledge and attempts to conceal his actions (Peters, 2005). Imam al-Shāfiʿī in al-Umm likewise emphasizes that secrecy is essential, as it distinguishes *sariqah* from *ghaṣb*, which is done openly (Hallaq, 2009). The Prophet Muhammad SAW said: "The hand of a thief

shall not be cut off except for stolen property that is stored" (HR. Abū Dāwūd), indicating that theft subject to *ḥadd* is theft committed secretly from a guarded place (Rosen, 2018; Bakar, 2020). The element of *khufyah* reflects sharia's wisdom in considering not only the material aspect of taking but also the moral dimension of betraying trust and violating the sense of security to which owners are entitled (Ahmad, 2019).

In Bugo practice, the element of *khufyah* is not fulfilled at all because the taking of fruit or goods is done by leaving a mark that serves as a notification to the owner (Nurdin et al., 2021). The mark is not a formality but an essential element changing the act's character from hidden to open (Griffiths, 2020). Bugo practitioners deliberately create an identity or trace that is recognizable to the owner, so that the owner knows their fruit has been taken and by whom, or under what conditions (Tamanaha, 2021). The perpetrator does not try to hide his actions; on the contrary, he communicates them to the owner through a sign system agreed upon within the community (Merry, 2020). This openness eliminates the elements of betrayal and deception that characterize *sariqah*, as the owner is given the opportunity to learn what has happened to their property (Kamali, 2019).

The absence of concealment in Bugo can be analogized to "al-akhdh ʿalāniyan" (open theft), which, in criminal jurisprudence, does not fall under *sariqah* (Peters, 2005). Imam Ibn Qudāmah in al-Mughnī explains that taking property in the owner's presence, or in a way that makes the owner aware of the act, is not *sariqah* even without permission, but may be categorized as *ghaṣb* or another form of taking with different sanctions (Hallaq, 2009; Ahmad, 2019). The fundamental distinction lies in the absence of deception and concealment that are the essence of the prohibition of *sariqah* (Rosen, 2018). In Bugo, even though taking occurs in the owner's absence, leaving a sign indicates that the perpetrator does not intend to hide his actions; this resembles open taking in the hope of understanding and forgiveness based on prevailing custom (Nurdin et al., 2021; Baderin, 2017).

Furthermore, the element of *khufyah* in *sariqah* refers not only to physical concealment but also to the psychological dimension of intending to deceive and harm the owner without their knowledge (Kamali, 2019). Ḥanafī scholars in al-Hidāyah emphasize that *sariqah* contains an element of "*khiyānah*" (betrayal) of the trust that should exist in society (Peters, 2005). Bugo, conversely, respects the owner's rights by informing them that their property has been used (Griffiths, 2020). Bugo's sign system reflects an ethics of responsible taking in which the perpetrator admits taking what is not theirs and allows the owner to know (Tamanaha, 2021). With respect to *khufyah*, Bugo does not fulfill the characteristics of *sariqah* because it is open via a signaling mechanism, not secret as required by the *jumhūr al-fuqahāʾ* (Hallaq, 2009; Ahmad, 2019).

The element of *qaṣd al-sariqah*, the intention to steal, is a vital subjective element in determining whether an act is *sariqah* (Rosen, 2018). It is not enough to fulfill the objective element of taking another's property; there must be a specific intention to possess that property unlawfully and permanently deprive the owner of their rights (Kamali, 2019). Imām al-Kāsānī in Badāʾiʿ al-Ṣanāʾiʿ explains that intention (*qaṣd*) is the spirit of every act in Islamic law, and in *sariqah* the intention is the desire to transfer ownership from its owner to oneself without right (Peters, 2005; Hallaq, 2009). This intention must be present from the beginning of the act and continue until the taking is completed (Bakar, 2020). If the perpetrator's intention is not permanent possession but borrowing, joking, or damaging, the act does not fulfill *qaṣd al-sariqah* and cannot attract the punishment of cutting off the hand, although other sanctions may apply (Abdelkader, 2016).

Analysis of perpetrators' intentions in Bugo reveals characteristics that differ from those of the intention to steal in *sariqah* (Nurdin et al., 2021). Bugo perpetrators do not intend to take property unlawfully or permanently deprive the owner of rights (Griffiths, 2020). Rather, they intend to use the garden's produce through a community-agreed social mechanism

better understood as "asking" or "borrowing" in accordance with custom (Baderin, 2017). This intention is reflected in leaving a mark, which acknowledges the owner's rights and conveys what was done (Tamanaha, 2021). A genuine intention to steal would not bother leaving a mark that could identify the act (Merry, 2020). Leaving a mark is a manifestation of good intentions (*ḥusn al-niyyah*) aimed at maintaining social relations and respecting the owner's rights within the framework of shared communal values (Zaman, 2018).

The concept of *qaṣd al-sariqah* in fiqh al-jināyah requires the intention of "*al-tamalluk al-bāṭil*" (illegitimate ownership), the desire to take control of property unlawfully without sharia justification (Kamali, 2019; Rosen, 2018). In Bugo, taking is not based on this desire but on *ʿurf* (custom) that has become part of the community's value system (Baderin, 2017). The perpetrator believes local customs justify his actions and do not conflict with the owner's rights, since the owner himself understands and accepts the practice (Alwani, 2015). This belief shifts the character of the intention from unlawful to one based on *ʿurf ṣaḥīḥ* (good custom), a custom that does not conflict with sharia and benefits society (Opwis, 2017). In *fiqh* terminology, this is closer to "*al-akhdh bi ḥaqq al-ʿurf*" (taking based on a right arising from custom) than to "*al-akhdh bi ghayr ḥaqq*" (taking without right), the characteristic of *sariqah* (Fadel, 2019).

Scholars also distinguish between the intention to steal and other intentions accompanying the taking of property (Peters, 2005). Imām Ibn Taymiyyah in *Majmūʿ al-Fatāwā* explains that taking with the intention of borrowing and returning, or out of urgent need with the intention of paying, does not constitute *sariqah* subject to *ḥadd*, even if still unjustifiable (Hallaq, 2009; Ahmad, 2019). This is relevant to Bugo, where the perpetrator takes fruit not with the intent to steal but to utilize it within the community-agreed sharing system (Nurdin et al., 2021). Some versions of the practice even allow later compensation or repayment, further emphasizing that the intent is not permanent deprivation (Griffiths, 2020). On *qaṣd al-sariqah*, then, Bugo does not fulfil the characteristics of *sariqah* because the intention is to "ask" or "borrow" in a manner the community recognizes, not to "steal" for unlawful possession as required (Kamali, 2019; Bakar, 2020).

Even if other elements of *sariqah* were considered fulfilled, a strong dimension of shubhah would invalidate the application of *ḥadd al-sariqah* (Kamali, 2019). The concept of shubhah in *fiqh al-jināyāt* is fundamental and reflects sharia's caution in applying severe and irrevocable ḥudūd (Peters, 2005). Etymologically, *shubhah* means doubt or ambiguity; terminologically, something resembling truth but in fact false, or the converse, causing doubt about its legal status (Hallaq, 2009). Imām al-Sarakhsī, in *al-Mabsūṭ*, explains that *shubhah* may refer to an action (*shubhah fī al-fiʿl*), a perpetrator (*shubhah fī al-fāʿil*), an object (*shubhah fī al-maḥall*), or a tool (*shubhah fī al-ālah*) (Rosen, 2018). The existence of *shubhah* in any of these aspects suffices to invalidate ḥadd, since the Prophet SAW said: "Avoid ḥadd against Muslims as much as you can. If there is a way out for him, then release him. Indeed, it is better for the imam to err in forgiving than to err in punishing" (HR. al-Tirmidhī) (HR. al-Tirmidhī) (Bakar, 2020; Ahmad, 2019).

In Bugo, a very strong *shubhah fī al-fiʿl* (doubt in action) arises from the *ʿurf* established and accepted by the Sangowo community (Baderin, 2017; Zaman, 2018). *ʿUrf* in *uṣūl al-fiqh* is a custom that applies in a society, in words and deeds, recognized as a source of law after the Quran, Sunnah, and Ijmāʿ (Opwis, 2017; Fadel, 2019). The scholars formulated the principles "*al-ʿādah muḥakkamah*" (customs can be used as law) and "*al-maʿrūf ʿurfan ka al-mashrūṭ sharṭan*" (what is known in custom is like what is stipulated in an agreement) (Alwani, 2015; El Shamsy, 2020). Bugo, as an *ʿurf* passed down through generations, has fostered a community perception that the act is not theft but a legitimate means of accessing shared resources within social solidarity (Nurdin et al., 2021). Garden owners understand and accept the practice and may themselves engage in Bugo on others' gardens at different times, creating a balanced reciprocity (Griffiths, 2020; Tamanaha, 2021).

The doubt arising from this custom is strengthened because only a few do not undertake the practice but constitutes a collective agreement (*ta'āmul 'āmm*) binding all community members (Merry, 2020). In fiqh al-jināyah, the consent (*riḍā*) of the property owner is decisive in determining the existence of *sariqah* (Kamali, 2019). Imām Ibn Ḥazm in al-Muḥallā states that if the owner consents to the taking, even implicitly, there is no *sariqah* (Peters, 2005). In Bugo, this consent is implicit and built through the community's active participation in the customary system (Baderin, 2017). Owners living in Sangowo are automatically bound by Bugo *custom*, so taking fruit and leaving a mark are considered acceptable (Zaman, 2018). This implicit consent creates doubt on whether there has actually been a violation of property rights in the sense required for the application of *ḥadd al-sariqah* (Alwani, 2015).

Doubt in Bugo can also be approached from the *maqāṣid al-sharīʿah* underlying the criminalization of *sariqah* (Auda, 2008; Ramadan, 2017). The main objective of *ḥadd al-sariqah* is to protect property (*ḥifẓ al-māl*), one of the five basic objectives of sharia (*al-dharūriyyāt al-khamsah*) (Masud, 2017; Al-Dawoody, 2017). However, the protection of property in Islam does not entail absolute individualization that ignores the social dimension of ownership (Opwis, 2010). Sharia recognizes property's social function, as reflected in zakat, almsgiving, and the prohibition of hoarding (Dusuki & Bouheraoua, 2021). Bugo balances individual rights with the social function of wealth: owners retain ownership while recognizing the community's right to access a small portion of garden produce under certain conditions (Baderin, 2017). This balance raises doubt as to whether the taking truly violates the maqāṣid of *ḥifẓ al-māl* or actually creates a better balance between *ḥifẓ al-māl* and other *maqāṣid* such as protecting life (*ḥifẓ al-nafs*) by fulfilling basic needs and protecting offspring and society (*ḥifẓ al-nasl wa al-mujtamaʿ*) through social solidarity (Auda, 2008; El-Mesawi, 2020).

The principle of nullifying *ḥudūd* based on doubt rests on a fundamental *fiqh* rule: "*idrāʾu al-hudūd bi al-syubuhāt*" (ḥudūd are averted by doubt) (Kamali, 2019; Peters, 2005). Narrated through various statements of the companions and *tābiʿīn*, it is agreed by all *fiqh* schools (Hallaq, 2013). Imām al-Qarāfī, in *al-Furūq*, explains that this rule reflects caution (iḥtiyāṭ) in imposing severe and irrevocable sanctions (Rosen, 2018). The philosophy is that erring on the side of forgiveness (*khathaʾ fī al-ʿafw*) is better than erring on the side of punishment (*khathaʾ fī al-ʿuqūbah*), because an error in forgiveness only impacts this world and is correctable. In contrast, an error in punishment can result in irreparable injustice and accountability in the hereafter (Bakar, 2020). This is also in line with the Islamic criminal law principle that "*al-aṣl fī al-insān al-barāʾah*" (humans are presumed free from accusation) until guilt is proven beyond doubt (Ahmad, 2019).

Applying "*idrāʾ al-ḥudūd bi al-shubuhāt*" to Bugo is highly relevant given the strong shubhah in the practice (Kamali, 2019). Doubt arising from established custom, together with the absence of *khufyah* and a shift in *qaṣd al-sariqah*, creates very strong doubt as to whether Bugo truly fulfills *sariqah* (Baderin, 2017; Zaman, 2018). In fiqh terminology, this is *shubhah qawiyyah* (strong doubt), which undoubtedly nullifies ḥadd (Peters, 2005). Imam Ibn ʿĀbidīn in *Radd al-Muḥtār* emphasizes that *shubhah* from *ʿurf ṣaḥīḥ* is among the strongest, since *ʿurf* in many areas has legal force equivalent to naṣṣ in determining branch laws (*furūʿiyyah*) (Opwis, 2017; Fadel, 2019). Therefore, although Bugo outwardly resembles taking another's property, the surrounding *ʿurf* context creates a different legal dimension that must be considered (Alwani, 2015).

Furthermore, the application of *ḥadd* in sharia is not solely intended to punish perpetrators but to achieve higher goals such as prevention (*al-radd wa al-zajr*), protection of society (*ḥimāyat al-mujtamaʿ*), and moral education (*al-tahdhīb*) (Rosen, 2018; Hallaq, 2013). For Bugo, applying *ḥadd* would be counterproductive (Nurdin et al., 2021). *First*, regarding prevention, there is nothing to prevent because Bugo causes no disturbance or harm (Griffiths, 2020). *Second*, regarding the protection of society, applying *ḥadd* would destroy established

harmony and the well-functioning solidarity system (Tamanaha, 2021). *Third*, regarding moral education, punishing Bugo perpetrators would create the perception that Islamic law is insensitive to cultural contexts and good local values (Merry, 2020). The scholars of *uṣūl al-fiqh* emphasize that "*al-ḥukm yadūru maʿa ʿillatihi wujūdan wa ʿadaman*" (the law revolves around its ʿillah, whether present or absent) (Auda, 2008). If the ʿillah behind ḥadd *sariqah* is not realized in Bugo, applying the *ḥadd* becomes inappropriate (Al-Dawoody, 2017).

Imām Ibn Qayyim al-Jawziyyah, in *Iʿlām al-Muwaqqiʿīn*, offers important guidance on the flexibility of Islamic law in addressing diverse social realities (Ramadan, 2017). He emphasizes that changes in fatwas and laws in accordance with changes in time, place, circumstances, intentions, and customs are fundamental principles in fiqh (Masud, 2017). Bugo concretely shows how local *customs* create distinct legal contexts that require a contextual rather than purely textual *fiqh* approach (Baderin, 2017; El Shamsy, 2020). Ignoring *customs* in the establishment of law makes Islamic law lose relevance to people's lived realities (Zaman, 2018). For Bugo, "*idrāʾ al-ḥudūd bi al-shubuhāt*" thus functions not only as a technical mechanism to nullify ḥadd but also as an instrument to ensure that Islamic law remains aligned with *maqāṣid al-sharīʿah* and the interests of the people (Auda, 2008; Opwis, 2010).

Based on a comprehensive analysis of the elements of *sariqah* and the principle of *shubhah* in *fiqh al-jināyāt*, it can be conclusively stated that Bugo cannot be categorized as *sariqah* with the punishment of cutting off the hand (Kamali, 2019; Peters, 2005). This rests on several mutually reinforcing arguments. First, regarding *khufyah*, Bugo does not meet the characteristics of secret theft because the perpetrator deliberately leaves a mark that notifies the owner (Ahmad, 2019); this openness eliminates the deception and betrayal that animate the prohibition of *sariqah* (Hallaq, 2009). Second, regarding *qaṣd al-sariqah*, the perpetrator's intention is not to steal or possess unlawfully but to utilise property within a community-recognised customary mechanism, more accurately categorised as "asking" or "borrowing" (Rosen, 2018; Bakar, 2020). Third, and most crucially, very strong shubhah arises from the established *ʿurf* of Bugo, accepted by the entire community, which under "*idrāʾ al-ḥudūd bi al-shubuhāt*" nullifies the application of ḥadd *sariqah* (Baderin, 2017; Opwis, 2017).

This conclusion accords with the basic principles of Islamic criminal law, which emphasize caution in applying *ḥudūd* and allow consideration of socio-cultural context (Saeed & Saeed, 2016). Bugo represents *a valid custom* that does not contradict sharia and benefits society through mechanisms of social solidarity (Alwani, 2015; Fadel, 2019). Respect for such *ʿurf* is a manifestation of Islamic law's flexibility, recognizing cultural diversity within universal sharia principles (Zaman, 2018; El Shamsy, 2020). Practitioners of Bugo, therefore, cannot be subject to *ḥadd al-sariqah*; if sanctions are deemed necessary, they may take only the form of *ta'zīr* left to the discretion of the judge or community leader, considering local context and public interest (Abdelkader, 2016).

However, given that Bugo has functioned as an effective social control mechanism without causing real harm, applying *ta'zir* is unnecessary, provided the practice remains within community-agreed boundaries and is not abused (Kamali, 2019; Auda, 2008). This confirms that Islamic law, through the instruments of *ʿurf* and *shubhah*, can accommodate local wisdom without sacrificing the fundamental principles of property protection and justice (Ramadan, 2017; Masud, 2017).

Comparative Analysis

Analyzing Bugo from the perspectives of positive criminal law and Islamic criminal law reveals a significant fundamental point of convergence: both have a "*safety valve*" mechanism that lets the legal system refrain from rigidly applying criminal sanctions to acts

formally fulfilling the elements of a crime (Cao, 2020; Siems, 2018). In positive criminal law, this is manifested in the doctrine of material unlawfulness, which allows the removal of unlawfulness based on unwritten legal principles, including customary law and community customs (Ali, 2019; Mulyadi, 2020). In Islamic criminal law, this is manifested in the concept of *shubhah*, which nullifies the application of a hadith when there is doubt regarding the act, the perpetrator, the object, or other aspects (Kamali, 2019; Peters, 2005). These safety valves are not weaknesses but reflect the maturity and wisdom of both systems in recognizing that social reality is more complex than normative formulations alone can capture (Glenn, 2014; Husa, 2015).

Their function reflects an awareness that criminal law cannot be enforced mechanically without regard to substantive justice (Husak, 2008; Nelken, 2016). In Bugo, the safety valve works very effectively, as seen in the doctrine of material unlawfulness in positive criminal law, which allows recognition of *living law* in society as a reason for criminal exemption (Tamanaha, 2008; Hellum & Taj, 2019), while the doctrine of *shubhah* in Islamic criminal law allows the annulment of *ḥadd* based on established *ʿurf* (Baderin, 2017; Opwis, 2017). Despite different terminology and conceptual frameworks, these two mechanisms serve the same function: preventing injustice from becoming overly formalistic and from ignoring socio-cultural context (Merry, 2020; Griffiths, 2020). They bridge the tension between *legal certainty*, which demands consistency, and *substantive justice*, which considers each case's uniqueness and societal values (Simester & Von Hirsch, 2011; Von Hirsch & Wohlers, 2017).

A second, equally important, convergence is that neither legal system is rigid in its approach to diverse social realities (Siems, 2018; Cao, 2020). This flexibility allows them to remain relevant and responsive to social developments (Glenn, 2014). In positive criminal law, flexibility is evident in the recognition that unlawfulness is determined not only by written laws but also by unwritten legal principles within society's legal consciousness (Ali, 2019; Mulyadi, 2020). The doctrine of material unlawfulness empowers judges to consider whether an act, even where statutorily fulfilled, truly contradicts the values of justice and propriety embraced by society (Moeljatno, 2015; Hiariej, 2016). This allows the law to adapt to cultural diversity and local conditions without waiting for legislative change (Arief, 2018).

Islamic criminal law exhibits similar flexibility through fiqh instruments that account for context (Ramadan, 2017; Masud, 2017). The principle "*taghayyur al-fatwā bi taghayyur al-azminah wa al-amkinah wa al-aḥwāl*" (change of fatwa according to changes in time, place, and circumstances), advanced by Imām Ibn Qayyim al-Jawziyyah, became the theological basis for Islamic law's flexibility (Auda, 2008).

The concept of *ʿurf* as a source of law, the principle of shubhah that nullifies *ḥadd*, and the doctrine of *maqāṣid al-sharīʿah*, which focus on the substantive objectives of law, are all mechanisms ensuring that Islamic law does not become a rigid system detached from social realities (Opwis, 2010; Al-Dawoody, 2017). For Bugo, both systems recognise that local practices that function well in society should not be criminalised merely because they formally resemble crimes; they must be viewed in the context of their social values and functions (Baderin, 2017; Zaman, 2018).

A third fundamental similarity is the strong emphasis on social context, perpetrator intent, and the community's sense of substantive justice (Nelken, 2016; Cao, 2020). Both systems reject approaches that consider only outward aspects without surrounding dimensions (Husak, 2016). In positive criminal law, the doctrine of material unlawfulness explicitly requires consideration of societal values (*levende rechtsbewustzijn*) and the legal interests actually violated (Ali, 2019; Mulyadi, 2020). The analysis of Bugo shows that although the act formally fulfills Article 476, the surrounding social context, namely communal agreement, the system of reciprocity, and the value of solidarity, transforms its meaning from theft to a legitimate cultural practice (Nurdin et al., 2021; Griffiths, 2020). Recognizing this context is

not moral relativism but the understanding that the law's meaning cannot be separated from the social context in which it is applied (Tamanaha, 2008; Merry, 2020).

Islamic criminal law is even more explicit in placing intention (*niyyah*) as a fundamental element in determining the law of an act (Rosen, 2018; Kamali, 2019). The well-known hadith "*innamā al-aʿmāl bi al-niyyāt*" (Indeed, deeds depend on intentions) is a basic principle in fiqh al-jināyah (Peters, 2005; Hallaq, 2009). In Bugo, the difference between perpetrators who intend to "ask in accordance with custom" and thieves who intend to "take unlawfully" is highly significant (Ahmad, 2019; Bakar, 2020). Furthermore, consideration of *ʿurf* and shubhah shows that the community's substantive sense of justice carries considerable weight in establishing law (Baderin, 2017; Opwis, 2017). The fact that the Sangowo community does not consider Bugo reprehensible, and that owners accept it as part of communal life, creates shubhah that nullifies ḥadd (Alwani, 2015; Fadel, 2019). Although the systems use different terminology and conceptual frameworks, both recognize that justice cannot be achieved by applying norms while ignoring social context, the perpetrator's intentions, and the community's sense of justice (Zaman, 2018; El Shamsy, 2020). This paradigmatic similarity shows that both orient toward substantive, not merely procedural or formalistic, justice (Husak, 2008; Simester & Von Hirsch, 2011).

Despite these convergences, comparative analysis also reveals fundamental differences in how the two systems respond to Bugo (Siems, 2018; Cao, 2020). The main difference lies in focus or emphasis: positive criminal law through the doctrine of material unlawfulness focuses on nullifying the unlawfulness of the act itself (Ali, 2019), while Islamic criminal law through the doctrine of *shubhah* focuses on nullifying criminal sanctions (*ḥadd*) even though the status of the act may remain unclear. In positive criminal law, when material unlawfulness is removed by living law or community customs, the act is no longer considered a criminal offence (Moeljatno, 2015; Hiariej, 2016). Bugo is therefore not theft, because the essential element of unlawfulness has disappeared (Mulyadi, 2020). The act becomes legally neutral (*rechtmatig*) or even justified by recognized customary law (Hernoko et al., 2020; Nurdin et al., 2021).

Conversely, in Islamic criminal law, applying *shubhah* does not automatically change an act's status from *ḥarām* to *ḥalāl*, or from jarīmah to non-*jarīmah* (Peters, 2005; Hallaq, 2009). *Shubhah* operates at the level of sanctions, not at the level of the qualification of acts (Rosen, 2018). When *shubhah* is fulfilled, what is waived is the *ḥadd* (the textually fixed sanction), not the overall legal status of the act (Kamali, 2019). For Bugo, even though *shubhah* from *ʿurf* nullifies *ḥadd* of cutting off the hand, the act may theoretically remain in the gray area between halal and haram. Field interviews reveal this gray area is not merely theoretical for practitioners. Asked whether they felt moral discomfort when taking fruit, responses varied along generational and religious engagement lines. Most older practitioners reported the act as guilt-free, framing it in the *ʿurf*-based vocabulary of "asking" (*minta*) rather than "taking"; inherited legitimacy fully neutralises any moral residue. However, a significant minority—particularly younger practitioners with stronger formal religious education—reported an uneasy feeling (*perasaan tidak enak*) or the impulse to *istighfār* afterwards, especially when the owner is not personally known. Several stated they would only practice Bugo in the gardens of families they could later greet face-to-face, suggesting that moral weight is managed through subsequent social reconciliation rather than fully extinguished by custom. This emic finding aligns with the fiqh distinction between *rafʿ al-ithm* (lifting of sin) and *rafʿ al-ʿuqūbah* (lifting of sanction): *shubhah* reliably accomplishes the latter but not always the former (Baderin, 2017; Ahmad, 2019). This reflects different epistemologies: positive criminal law tends to think dichotomously (criminal or not), whereas Islamic criminal law recognizes a "gray area" (*manhiyyāt*) or a doubtful area (*shubhah*) that requires special caution (Abdelkader, 2016; Bakar, 2020).

This difference in focus has different practical implications (Glenn, 2014; Husa, 2015). In positive criminal law, when a judge decides that material unlawfulness has lapsed, the decision is absolute: the perpetrator is acquitted because the act is not a crime, and no sanctions, primary or additional, can be imposed (Ali, 2019; Hiariej, 2016). Such a decision can create jurisprudential precedent providing certainty that similar future practices will not be criminalized (Arief, 2018). The community can continue Bugo without fear of criminal law, because the actions are explicitly declared non-criminal (Mulyadi, 2020; Sahetapy & Pohan, 2019). This provides high legal certainty and strong protection for local wisdom (Tamanaha, 2021; Nurdin et al., 2021).

In Islamic criminal law, nullifying ḥadd due to shubhah does not automatically absolve perpetrators of all punishment (Kamali, 2019; Peters, 2005). Even when *ḥadd* cannot be applied, judges or authorities still have the authority to impose *ta'zir* if deemed necessary for public interest or moral education (Abdelkader, 2016). For Bugo, however, which functions well and causes no harm, *ta'zīr* is unnecessary and potentially counterproductive (Auda, 2008; Ramadan, 2017). More importantly, the *shubhah* status carries a moral message: even without worldly sanctions, perpetrators retain a moral and spiritual responsibility to ensure their actions truly arise from good intentions and do not abuse existing customary mechanisms (Rosen, 2018; Saeed & Saeed, 2016). This shows that Islamic criminal law concerns not only legal-formal aspects but also moral-spiritual aspects beyond worldly sanctions (Hallaq, 2013; Masud, 2017).

Despite these differences in focus and mechanism, the comparative analysis shows that positive criminal law and Islamic criminal law share the same orientation in responding to Bugo: both reject rigid formalism and recognize the importance of socio-cultural context (Nelken, 2016; Cao, 2020). The differences are not contradictory but complementary, as each offers perspectives that enrich the other (Siems, 2018; Glenn, 2014). Positive criminal law, with its doctrine of material unlawfulness, clarifies that Bugo is not a criminal offence because its unlawfulness has been removed (Ali, 2019; Mulyadi, 2020). Islamic criminal law, with its doctrine of *shubhah*, adds a dimension of moral prudence: even though *ḥadd* does not apply, the community must ensure that the practice is not abused and remains within agreed-upon corridors (Baderin, 2017; Opwis, 2017). This complementarity is invaluable in Indonesia, which embraces legal pluralism, in which positive law, customary law, and Islamic law coexist and influence one another (Hooker, 2008; Benda-Beckmann et al., 2009). Bugo can find full legitimacy in both systems through different lines of argument, ultimately strengthening the protection of local wisdom within a democratic and just rule-of-law state (Hernoko et al., 2020; Tamanaha, 2021).

Conclusion

Based on the preceding positive criminal law analysis, the Bugo tradition no longer has a material unlawful nature. Although the elements of Article 476 of the Criminal Code appear to be formally satisfied, the practice is not considered reprehensible or harmful in the Sangowo Village community. Social recognition, customary legitimacy, and the moral purpose behind Bugo indicate that it is part of a *living law* system. The material unlawfulness of Bugo's actions is therefore null and void because the practice does not conflict with the substantive sense of justice of the local community.

From an Islamic criminal law perspective, a similar conclusion is reached. Bugo cannot be categorised as *sariqah* because it does not meet the element of *khufyah* (secret), as the taking is done openly by leaving a mark known to the owner. The element of intent to take unlawfully is also not fulfilled because the practice is understood as a form of requesting permission

through legitimate customary procedures. Even if other elements come close to *sariqah*, the strong *shubhah*, due to the acceptance of customs and the legitimacy of perpetrator and owner, becomes a *fiqhiyyah* reason invalidating the application of *ḥadd* punishment under the *Qawa'id al-Fiqh*: *idrāʾ al-ḥudūd bi al-shubuhāt*.

Both positive criminal law and Islamic criminal law thus protect Bugo, albeit through different mechanisms: positive criminal law through the nullification of material unlawfulness; Islamic criminal law through the principle of *shubhah*, which nullifies *ḥudūd* sanctions. Both systems show flexibility and sensitivity to social context, avoiding the immediate criminalisation of traditions deeply rooted in local culture. This harmony shows that both modern and Islamic law can serve as instruments for preserving local wisdom without neglecting the principle of substantive justice in society.

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