



# Contradictions in The Implementation of The Death Crime in Indonesia: Fiqhi Jinayah's Perspective And Legal Renewal Policy National Crime

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## ABSTRACT

*This study aims to scrutinize the contradictions inherent in the application of the death penalty from two distinct perspectives: the perspective of Islamic criminal law (jinayah) and the ongoing reforms in Indonesian criminal law. In Islamic criminal law, the purpose of the death penalty lies in safeguarding religion, the soul, the mind, lineage, and property. The study utilizes a qualitative approach to analyze legal sources and relevant literature, aiming to provide a comprehensive understanding of the contentious nature of the death penalty in Indonesia. The findings highlight the ongoing complexity and controversy surrounding the death penalty in Indonesia, encompassing various legal, ethical, and human rights perspectives. The text underscores the multifaceted nature of the debate, emphasizing the need for careful consideration of international standards, societal norms, and legal frameworks in shaping policies related to capital punishment. The findings contribute to the broader discourse*



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*on human rights, legal reform, and the ethical considerations surrounding the death penalty.*

## 1. Introduction

The execution of the death penalty is often a point of debate in society, with some people supporting it and others opposing it. (Rukman, 2016) Those who support the opinion that the death penalty can have a deterrent effect and reduce crime rates, while those who oppose argue that death execution is a violation of human rights, this is considered an inalienable right (basic right). (Izad, 2019)

In Indonesia, the death penalty is still valid and is included in several laws and regulations such as Article 10 of the Criminal Code, the Law on Narcotics, the Law on the Eradication of Corruption Crimes, the Law on Terrorism Crimes and several other provisions. This occurs despite pressure from the international community to abolish the death penalty. (Insani et al., 2023)

The Indonesian Ulema Council (MUI) has released a fatwa regarding the application of the death penalty for several types of crimes. The fatwa emphasized that Islam accepts the death penalty because of its function as a *dzawajir* (barrier) for world interests and *dzawabir* (penance) for perpetrators in the afterlife (Efendi, 2017). This punishment is considered balanced and has a deterrent effect, and can be an effective lesson for others to avoid similar actions. Thus, the state has the right to impose the death penalty on perpetrators of certain crimes. However, this must be seen as a last resort (*ultimum remedium*) that can be applied to perpetrators of certain criminal acts that are classified as serious or grave crimes. (Mulkan, 2019)

The death penalty in Islamic law has an important purpose, namely educating humans to respect and protect human life itself. In this way, human life will be maintained and protected. However, it should be emphasized that the death penalty is only applied to perpetrators of serious or grave crimes.

The following are several examples where individuals were sentenced to death based on court decisions that have permanent legal force (*Inkracht Van Gewijsde*): First, the case involving Amrozi bin Nurhasyim and his colleagues who were found guilty in the Bali Bombing incident that occurred in 2002. In August 2003, they received the death sentence and were executed in Nusa Kambangan on November 9 2008. Second, Freddy Budiman, who was a narcotics criminal who was sentenced to death on July 15 2013 by the West Jakarta Court. He was executed on July 29, 2016 after a three-year appeal period and an ungranted request for clemency. This execution aims to strengthen the effectiveness of law enforcement. (Anwar, 2016)

The establishment of the death penalty as the main sanction in the Indonesian criminal law framework has been the subject of debate in Indonesia. This controversy stems from the fact that the Criminal Code (KUHP) currently in force in Indonesia is a derivative of the Dutch *Wetboek van Strafrecht* (WvS), which was implemented in January 1918 and still includes the death penalty as a sanction. Ironically, since 1870 the Netherlands has abolished the threat of the death penalty for "ordinary crimes" and has completely abolished the threat of the death penalty for all types of crimes since 1982. (Robyanugrah & Raja Desril, 2021)

The debate regarding the death penalty is often related to the fact that after an execution, it is impossible for a person who has been executed to be brought back to life, even if a novum (new evidence) is found that proves that person is innocent.

The application of the death penalty as a way to deal with crime is often a point of debate, because views on the death penalty are greatly influenced by the culture and worldview of a country. The issue of the death penalty is closely related to the social structure, political situation and cultural norms in that society (Sahetapy, 2007). In Indonesia, the existence of the death penalty is a very complex issue, involving cultural, religious and political aspects.

Although in Islamic law it is permissible to apply the death penalty as an effort to prevent greater wrongdoing and to protect and respect human life itself, its implementation must be carried out for the right reasons as stated in the Al-Qur'an, Surah Al-Isra verse (33).

In Indonesia it self, several legal reforms have been carried out, including those related to the implementation of the death penalty. The death penalty, which was previously regulated in Article 10 of the Criminal Code as the main sanction, has been changed in the new Criminal Code (National Criminal Code) to become a special sanction that can be given alternatively. The death penalty can be imposed by the court on the defendant through a probation period of 10 years. Providing probation is intended to give convicts the opportunity to change their behavior and life and show remorse. In this way, the execution of the death penalty can be avoided and replaced or converted to life imprisonment (Robyanugrah & Raja Desril, 2021)

The transfer of the position of the death penalty from a primary sanction to a secondary sanction is based on the idea that the main purpose of administering punishment is not to make it the main instrument in controlling and reforming individuals or society. The death penalty is seen as a last resort and exception to protect society. The drafting of the Criminal Code apparently took into account not only the current conditions of society but also international issues and movements. Ideally, criminal law reform in Indonesia must be in line with the vision and ideals of the nation's law (*ius constituendum*), not just a legacy of colonial rule. This law should be in harmony with national insight and the ideology of Pancasila, then harmonized with international legal instruments.

With this way, Based on the research issues as described in the previous paragraph, the focus of the research is on the implementation of the death penalty in Indonesia from the perspective of Islamic criminal law (*jinayah*) as well as criminal law reform as part of the ideals of the Indonesian people in developing their own national legal system (*Jus Constituendum*).

## **2. Research Method**

This study was carried out using normative legal research methods. The focus of this type of research lies in literature review, utilizing secondary data which includes primary legal sources such as statutory regulations for primary sources, and supplemented with secondary legal sources such as books, legal journals, expert opinions, and mass media. All collected materials will be arranged comprehensively and systematically for more in-depth analysis. This research applies a qualitative descriptive analysis method with a deductive approach; starting from legal principles then developing to contemporary issues or problems to enrich the discussion in this writing.

### 3. Results and Discussion

#### a. Contradictions in the Implementation of the Death Penalty in Indonesia

The death penalty has been a topic of debate for a long time and still sparks controversy. (Prasetio et al., 2023) This debate is not only taking place in Indonesia, but is occurring in various other parts of the world. Several legal experts and human rights activists have expressed their views logically and rationally regarding this issue. (A. Arief, 2019) Those who support the implementation of the death penalty usually provide the conventional argument that the death penalty is still needed to eliminate individuals who are considered to endanger the interests of the public and the state and are impossible to rehabilitate. (Izad, 2019) Opponents, on the other hand, argue that the death penalty clashes with human rights principles. (Asnawi, 2012)

According to Cesare Lambroso, a world-renowned criminologist, the death penalty is an important tool in society to eliminate individuals or criminals who cannot be rehabilitated. (Ebury & Ebury, 2021) A similar opinion was also expressed by Hazewinkel-Suringa, an international criminal law expert, who argued that the death penalty is very necessary in certain situations, especially during rapid transitions of power. (Santoso, 2016) In Indonesia, Barda Nawawi Arief, an expert in the field of criminal law and activist in national criminal law reform, openly wrote in a book stating that it is necessary to maintain the death penalty within the framework of reforming the National Criminal Code as a protective for society. (B. N. Arief, 2013)

On the other hand, figures and experts who oppose the death penalty also have their own scientific arguments. Beccaria, who is a world classical figure known for his outspoken views, believes that the implementation of the death penalty is very bad, such as the example of a case where a person accused of killing his child turned out to be innocent after the execution was carried out. (Bessler, 2009) Ferri, a figure from Italy, also opposes the death penalty. (Tavilla, 2016) According to him, people with a criminal predisposition can simply be sentenced to life imprisonment without needing to be sentenced to death.

In Indonesia, the death penalty still applies for certain types of crimes such as narcotics. Even though the Narcotics Law has been submitted to the Constitutional Court (MK) for judicial review, the MK's decision reveals that the death penalty does not violate the constitution. (Anwar, 2016) However, in this decision, there were four Constitutional Justices who had dissenting opinions (different views). The four judges opposed the death penalty on the grounds that the right to life should not be limited to the point of eliminating the right to life itself even though this is a component of other human rights that needs to be respected. (Rukman, 2016) Restrictions on the right to life can be carried out as an effort to restore the balance disturbed by violations by limiting the mobility of perpetrators with specific placements and undergoing certain development programs.

The debate over the death penalty is a complex issue and cannot be reduced to a view that is the same for everyone. Some people support the death penalty for drug offenders, while others support it for criminals. (Hatta, 2012) There was also a recent controversial case, namely the case of premeditated murder by the former Head of the National Police Propam, Ferdi Sambo, who was sentenced to death in the District Court and the decision was upheld in the High Court. However, on appeal, the

death sentence was revoked and replaced with life imprisonment. (Borgeous et al., 2023)

If we look closely at the UDHR (Universal Declaration of Human Rights), there are a number of articles prohibiting the execution of the death penalty, including Article 3 which confirms that each individual has the right to life, liberty and personal protection. The death penalty which results in loss of life is a clear violation of a person's right to life, so it can be concluded that the death penalty is contrary to Article 3 of the UDHR. (A. Arief, 2019)

Apart from that, based on the International Covenant on Civil and Political Rights (ICCPR), Article 6 paragraph (1) emphasizes that each individual has the human right to life which must be protected by law. No one should be deprived of their life arbitrarily. If this is correlated with the implementation of the death penalty, then of course this is contrary to Article 3 of the UDHR and ICCPR in Article 6 paragraph (1). (Wicaksono, 2016)

Even though there are several countries, including Indonesia, that have not abolished the death penalty, based on the ICCPR in Article 6 paragraph (2) it is stipulated that "Countries that have not abolished the death penalty can only impose this sentence for the most serious crimes, in accordance with the law. (Anjari, 2015) the laws in force at the time the crime was committed and without violating the provisions of this covenant." Furthermore, Article 6 paragraph (4) in the same regulation confirms that "an individual who has been sentenced to death must have the right to request pardon or reduction of sentence such as amnesty, pardon or reduction of the death sentence."

In Indonesia, the death penalty is still included as a type of sanction for criminals in the latest Criminal Code (Article 100 of Law No. 1 of 2023). This punishment is not abolished or declared invalid even though international rules and developments in social norms make it possible to no longer apply the death penalty. Premeditated murder (Article 459 of the National Criminal Code), which was previously regulated in Article 340 of the old Criminal Code, is one of the crimes subject to the death penalty in the National Criminal Code. The reason for this implementation is because death row inmates are clearly human rights violators because they first take away other people's right to life in a planned manner. In other words, the implementation of the death penalty for convicts of premeditated murder is a consequence of their own actions; he has given up the right to his own life. (Pratama, 2019)

The application of the death penalty in Indonesia remains a topic of debate and gives rise to various views. There are opinions that the death penalty is still part of the Indonesian criminal justice system, while there are also opinions that it is contrary to human rights. The controversy surrounding the application of the death penalty is an important issue in a country's criminal justice system and also reflects state policy or *staatsbeleid*.

#### ***b. Death Penalty from the Viewpoint of Jinayah Fiqhi and Reform of Indonesian Criminal Law***

The provision of law in Arabic is termed 'uqubah', which means torture or punishment. This refers to sanctions given for violations of sharia rules aimed at the

welfare of society. According to Shaykh Wahbah Zuhaili, there are two types of punishment in Islam: the first is punishment in the afterlife, namely the will of Allah SWT which is a just and correct punishment, which can be in the form of torture or forgiveness from Him. The second is world punishment, which is also divided into two types, namely hudud and ta'zir. (Yahya, 2013)

In the context of Islamic criminal law, the most severe sanction that can be imposed on perpetrators of crimes is the death penalty. The main aim is to protect the rights of individuals and society against crimes that damage basic human values (Abd al-Wahab al-khalaf, 1992). There are three types of death penalties in Islamic criminal law, including: qishash, hudud, and ta'zir. Qishash is applied to perpetrators of planned or deliberate murder (Abd al-Qadir Audah, 1992). Hudud is used for people who commit zina muhsan, riddah, al-baghyu, and hirabah. Meanwhile, ta'zir is intended for perpetrators of crimes other than qishash or hudud who are considered by the authorities or the state to be a serious threat to the life and welfare of the nation and state.

Crimes such as drugs, terrorism and corruption can be sentenced to death in the form of ta'zir which is also interpreted as al-gatlu al-siyasi; This is a type of death penalty that is not specified in the Koran and Sunnah but is provided by state regulations. This punishment can be applied by the state if it is deemed good for enforcing the rules and the welfare of society (Khaeron Sirin, 2008).

According to Barda Nawawi Arief, the aim of implementing the death penalty in Islam is not to be the main means of control or protection but rather as a final step in law enforcement - similar to medical amputation which is not the main treatment but is the last option. Therefore, in Islam there are certain conditions that must be met before a person can be sentenced to death (Barda Nawawi Arief, 1996).

Hudoud are types of sanctions that have been specifically determined by sharia based on clear religious texts. According to the Hanafi School, there are five types of hudûd: zina (adultery), qadzif (accusing another person of adultery without evidence), theft, drinking liquor (khamr), and drunkenness. Meanwhile, according to the majority of scholars other than Hanafi, there are seven types, namely: zina (adultery), qadzif (accusing another person of adultery without evidence), theft, depriving another person of their rights by force (hirâbah), drunkenness, qishâsh (equitable retribution for a murder), and riddah (apostasy). (Nairazi, 2016)

Ta'zir is a type of punishment that is not specifically regulated by sharia, but the form and conditions are given to the ruler or state to determine, taking into account changes in time or location. The death penalty is one of the sanctions options that can be imposed on perpetrators of hudud crimes. However, the death penalty can only be applied to 4 types of hudud perpetrators, including: Zina Muhsan (individuals who are married but commit adultery) (Khalisa et al., 2023), intentional murder, robbery (al-hirabah), and apostasy (riddah).

The death penalty for certain crimes, in accordance with Islamic Law, still applies upon changes to the Indonesian criminal law. This is stated in the National Criminal Code which was just passed on December 6 2022, replacing the Dutch East Indies era Criminal Code which has been in use for approximately 104 years.

In this reform of Indonesian criminal law, there are significant changes regarding the death penalty. Previously, based on Article 10 of the old Criminal Code, the death penalty was the main type of sanction with the heaviest weight. However, in the new Indonesian Criminal Code, the concept of "conditional death penalty" is recognized, as explained in Article 67 of the Criminal Code Law: "The special crime as intended in Article 64 letter c is the death penalty which is always threatened as an alternative".

This alternative to the death penalty provides two choices of sanctions for the convict: "death penalty" or "conditional death penalty". In this context, the death penalty is no longer the main sanction except based on Article 99 paragraph (1) of the new Criminal Code where the death penalty can be executed after the convict's request for clemency is rejected by the state government. On the other hand, the "conditional death penalty" can be imposed after a 10-year probationary period subject to good behavior. Therefore, Article 100 paragraph (1) of the National Criminal Code states that the panel of judges can give the death penalty through a 10 year probation period, if the defendant shows remorse and has an intention to improve himself or if his role in the crime was not dominant. (Parhan Muntafa, 2023)

During the probation period, the convict's progress in the correctional institution will be observed, namely whether the convict admits and regrets his actions and shows hope to change for the better. This will be a consideration in the decision to grant a conditional death sentence, taking into account the Presidential Decree after receiving input from the Supreme Court. As stated in Article 100 paragraph (4) of the Criminal Code Law, "If the convict during the probation period shows good behavior and actions, the death sentence can be changed to life imprisonment based on a Presidential Decree after receiving consideration from the Supreme Court."

Based on these provisions, the provision of conditional death penalty sanctions is based more on non-juridical reasons than on juridical reasons which should be the main consideration in the decision to change the sentence. Of course, this has a big impact on the state and society if the sanctions are lightened for these non-juridical reasons, because it can have a negative impact on the integrity of the law itself.

Therefore, conditional criminal sanctions can only be given if all conditions of punishment have been fulfilled. In this context, the death penalty is no longer the main crime in the National Criminal Code, so consideration and strong conviction are needed to impose the death penalty or lighter sanctions.

#### **4. Conclusion**

Even though Indonesia has formulated a new Criminal Code (KUHP), there are still discrepancies in the application of the death penalty. The revised Criminal Code still maintains the inclusion of the death penalty for certain types of crimes, although with more careful consideration and limitations set by law. It is hoped that these restrictions will be able to create a balance between perspectives that oppose and support the death penalty in Indonesia.

The purpose of the death penalty in Islamic criminal law is to protect five main aspects: religion, life, reason, heredity and wealth. Islamic jurisprudence recognizes the death penalty in the form of ta'zir for especially dangerous crimes that threaten the welfare of society. If there are dangerous criminal acts that are not contained in the Koran and

Sunnah, then the state is responsible for determining the execution procedures. In keeping with this approach, recent modifications in Indonesian legal reform - also known as the national criminal code - continue to provide the option of the death penalty for perpetrators of certain crimes. But now it functions as an alternative option rather than as a primary sanctioning measure.

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