



Death Penalty in Indonesia: Between Criminal Law and Islamic Law Perspectives

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Article	Abstract
<p>Keywords: Death Penalty; Indonesia Criminal Law; Islamic Law.</p> <p>Article History Received: Jan 29, 2024; Reviewed: Feb 13, 2024; Accepted: Mar 11, 2024; Published: Mar 12, 2024;</p>	<p><i>This study seeks to discuss the implication of the regulation of the death penalty following the promulgation of Law Number 1 of 2023 concerning the Penal Code which has changed the standing of the death penalty from basic punishment to special punishment seen from the perspectives of positive law and Islamic law. This study employed socio-legal methods, presenting two primary issues of the reconstruction of the regulation concerning the death penalty in Indonesia and how Islamic law reinforces the reconstruction of the regulation of the death penalty in Indonesia. This study has brought to the following two conclusions: notwithstanding its application of the death penalty in the country, Indonesia is attempting to restrict its application. The reformed Criminal Law, particularly after the promulgation of Law Number 1 of 2023 concerning Criminal Law, adjourns the death penalty, while the defendant on a death row is given a chance to fix his/her attitude for a particular period (10 years). When the defendant demonstrates a good attitude within this time frame, the imposed death penalty is superseded by imprisonment. This policy is intended to serve as the last resort when the defendant cannot be corrected and as the middle way of balancing between the pros and cons of the death penalty in Indonesia. Moreover, Islamic values as the source of law are also behind these pros and cons, reinforcing the existence of the death penalty in Indonesia, considering that the death penalty from the Islamic view remains recognized as one of the applicable punishment practices.</i></p>



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INTRODUCTION

Debates over the death penalty in Indonesia have been around for long, sparking two diverging views of those refusing the death sentence practice and those going for it (Girelli, 2021; Sahetapy, 2009). The grounds for standing against this practice involve the following:

- a. The death penalty is not a criminal sentence simply because it fails to meet the criteria set forth for criminals. Modderman argues that the death sentence does not fairly represent the guilt of a defendant, recalling that ending a

person's life will not give any chance for the person to be corrected (Nopriandi & Ardiansyah, 2020). However, what judges have decided remains correct, relevant, and fair, considering that it is normal for judges, as other human beings, to make inappropriate decisions, while the death penalty may contribute to negative tendencies for the rest of the nation.

- b. Taking someone's life through a death sentence is something serious that no single authority should necessarily perform (Jouet, 2022).
- c. When a death sentence is given to deter others alive, the clemency principle is questioned (Pascoe & Manikis, 2020).

Those standing for the death penalty base their notion on the following rationales:

- a. The death penalty completely restricts the independence of the convict, ensuring that other members of the public will no longer feel threatened (Fardiansyah, 2021; Hartanto & Ningrum Amin, 2021).
- b. The death penalty is given as a strong repressor for the government, guaranteeing public interest, peace, and public order (Chan et al., 2018).
- c. The death penalty serves as an instrument of prevention, making a person think twice before committing any crimes (Donald et al., 2023; Esam Al-Atras, 2023).

Issues on the death penalty in Indonesia re-emerge, with those involved in drug dealing being mostly sentenced to death. The executions of the first batch dated 18 January 2015 (*Detikcom*, 2015) raised public outcries both at the national and international levels for several reasons. First, a death sentence is considered inhumane and violates human rights. Second, the deterring effect resulting from the death penalty is not entirely true. Not a few are questioning the effectiveness of the death penalty. Narcotic cases are growing as the death penalty is getting more common (Girelli, 2021; Kramer & Stoicescu, 2021; Lasco & Yu, 2021; Perseil, 2020; Vignato, 2020). The first batch of executions did not stop narcotic cases from happening; these cases even happened in proximate intervals (*Detikcom*, 2015).

However, many go for the death penalty imposed on those involved in narcotics crime, considering that, first, this crime is massive and takes an unbelievable number of victims in Indonesia (Nasir Sitompul & Sitompul, 2022; Rafsanjani & Mustaffa, 2022; Tarmizi & Marbun, 2022). The National Narcotics Agency of Indonesia reported that fifty-five people were killed by drug abuse (Efendi & Handoko, 2022; Hardum, 2022); second, as specified in the Constitutional Court Decision, the death penalty is considered not to violate human rights and is in line with the Constitution (Chandra & Supot Rattanapun, 2023), while Indonesia upholds human rights.

Many studies discuss the death penalty, and some present the contrast as discussed in this research. Ade Mahmud, in his writing entitled "The Problematic Death Penalty Affecting Narcotics Criminals in the Legal System in Indonesia" (translated title) concludes that execution of such punishment has caused a problem, leading to two diverging perspectives, where the first group insists that death penalty violates human rights (Arifin et al., 2023; Moesthafa, 2022), while those agreeing with death penalty think that such punishment remains relevant in protecting people and deterring those

concerned (general prevention) (Hüseyinoğlu et al., 2022; Rohmadanti et al., 2023), as long as it is selective (Pratiwi et al., 2023). Discourses on the death penalty and its problematic execution are not something novel, but the new construction of the death penalty in Indonesia following the promulgation of Law Number 1 of 2023 concerning the Penal Code has never been researched. From this consideration, this research will study how the death penalty in Indonesia is constructed following the promulgation of Law Number 1 of 2023 and how Islam reinforces the reconstruction of the regulation regulating the death penalty in Indonesia.

METHODS

This research employed socio-legal methods (Ansari & Negara, 2023), drawing on the sources from statutes to discover whether there are breakthroughs or legal findings that uphold the living values in society therein, including religious values. This research is not solely linked to juridical texts but also to social reality. The high incidence of serious crimes in Indonesia, including the incidence of murders with more than 1000 cases on average happening annually (2017-2021) is a social reality that serves as a sociological consideration of keeping the death penalty (Maya et al., 2023). This research does not view the law from a theoretical perspective, but, apart from social context, it takes into account the nexus between the law and its citizens. In other words, this research is not intended to see the law as a regulatory system that is abstract and as an autonomous institution apart from those related to regulations, but it sees the law as an instrument that regulates people.

This research can be considered philosophical research (Al-Fatih, 2023) since it explores the values in the law, not only viewing law in its textual context but also as an idea, value, moral, and justice in its form as an ideological, philosophical, and moral concept of law.

RESULTS AND DISCUSSION

The Reconstruction of the Regulation Concerning Death Penalty in Indonesia

In a juridical purview, the effectuation of the death penalty refers to the general provisions of Article 10 letter a of the Penal Code of Indonesia, asserting that "Punishment consists of: a. Basic punishment (capital punishment, imprisonment, light imprisonment and fine); b. Additional punishment (deprivation of certain rights, forfeiture of specific property and publication of judicial verdict).

The general provisions concerning the death penalty as referred to in Article 10 of the Penal Code apply to all the regulations of criminal law (Corrin & Andika Rukman, 2024) included in or excluded from the Penal Code, as referred to in Article 103 of the Penal Code. Therefore, some regulatory provisions outside the Penal Code in the legislation also specify the death penalty. From a juridical perspective, the death penalty in Indonesia is strongly legitimated. The Constitutional Court of the Republic of Indonesia in some verdicts declares that the death penalty does not contravene the Constitution. The following are the statutes specifying the death penalty:

1. Law Number 1 of 1946 in conjunction with Law Number 73 of 1958 concerning the Penal Code in the following Articles:
 - a. Article 104 of the Penal Code concerning Treason involving the intention to kill a President and/or Vice-President;
 - b. Article 111 (2) of the Penal Code concerning the relation between a foreign country and a king or a tribe involved in triggering a movement to spark hostility or war against another country, or to cause the war to take place;
 - c. Article 340 of the Penal Code concerning premeditated murders;
 - d. Article 365 (4) of the Penal Code concerning theft accompanied by violence causing serious injury or death, committed by two or more persons or committed jointly at night in a house or an enclosed yard as part of a house, or committed by breaking or by climbing, or by using a makeshift key, under fake command, fake uniform, or fake official position.
2. Article 2 (2) of Law Number 31 of 1999 concerning Corruption Eradication in conjunction with Law Number 20 of 2001 concerning the Amendment to Law Number 31 of 1999 concerning Corruption Eradication threatening a person who commits a tort through personal gain or by enriching others or corporation, which can raise the loss of the state's finance or the state's economy and is done amidst the moment when the country is facing danger according to the current law, amidst national natural disaster, as repeated corruption crime, or during a monetary or economic crisis (Andini et al., 2023).
3. Article 6 of Government Regulation in Lieu of Law Number 1 of 2002 concerning Terrorism Eradication in conjunction with Law Number 15 of 2003 concerning the Enactment of Government Regulation in Lieu of Law Number 1 of 2002 concerning Terrorism (Prakasa et al., 2021), stating: "every person who deliberately causes violence or threat to raise violence that invokes terror or fear in people and this situation spreads massively affecting masses, or seizes the freedom or takes the life and the asset of another person, or causes damage or destruction of vital and strategic objects, environment, or public facilities, or international facilities, are punishable by death penalty or life imprisonment or the minimum four years' imprisonment or the maximum twenty years' imprisonment".
4. Article 14 of Law Number 35 of 2009 concerning Narcotics asserts:
 - (1) *Every person who has no right or who commits a tort of offering goods to be sold, selling, buying, receiving, or serving as an intermediary in the sale and purchase, exchanging, or giving the narcotics classified as Class I, is sentenced to life imprisonment or the minimum five years' imprisonment or the maximum twenty years' imprisonment or the minimum fine of Rp. 1,000,000,000 (One billion rupiahs), and the maximum fine of Rp. 10,000,000,000 (ten billion rupiahs).*

- (2) *Regarding offering goods to be sold, serving as an intermediary in sale and purchase, exchanging, giving, or receiving narcotics classified as Class I as referred to in paragraph (1) in the form of a plant with a weight exceeding 1 (one) kilogram or exceeding 5 (five) kilograms of a tree trunk or in the form of something other than plants weighing 5 (five) grams, the person is punishable by the death penalty, life imprisonment, or the minimum six years' imprisonment and the maximum twenty years' imprisonment and the maximum fine as referred to in paragraph (1) with the ancillary 1/3 (one third) punishment.*

All the information above indicates that the death penalty in Indonesia is only imposed on the most serious crime. This policy departed from the idea that the death penalty is primarily intended to prevent certain criminal offences (Hartanto & Ningrum Amin, 2021; Yanto, 2017). Up to the time this research is written, the criminal law in place in Indonesia is the legacy of the Dutch government, which was in place for the first time on 1 January 1918. This criminal law is heavily affected by classic criminal law, rendering the law in Indonesia rigid or inflexible. Since its Independence in 1964, Indonesia has come up with the bill of the National Penal Code as criminal law reform (Kurniawan, 2022).

Through Law Number 1 of 2023 passed on 2 January 2023, the bill of the New Penal Code of Indonesia was passed as a statute. Therefore, an attempt to reform the criminal law has resulted in the new law—Law Number 1 of 2023 concerning the Penal Code—as the parent criminal law in Indonesia. Law Number 1 of 2023 will not be immediately effectuated, while it takes some time up to 2 January 2026 to be in place.

Some aspects serve as the basis of the reconstruction or criminal law reform in Indonesia. First, in terms of the political aspect, implementing national criminal law of its own is the pride of Indonesia, and this implementation is based on Pancasila as the source of all legal sources in Indonesia. It is acceptable for Indonesia to have its own Penal Code that is nationally accepted along with its position as a state free from colonialists. Second, in terms of the sociological aspect, there is a demand that criminal law be based on the values of living in society. Third, in terms of practical reasons, criminal law should be easily understood by the members of the public (Reksodiputro et al., 1994; Sudarto, 2007). Departing from these aspects, therefore, within the construction of new criminal law in Indonesia, the death penalty is positioned as a special punishment, not as a basic punishment as referred to in the Penal Code currently in place. With its status as a special punishment, the death penalty in the reformed Penal Code is no longer rigid, where it is formulated as a suspended penal death under certain circumstances (Miao, 2016). To give a picture of the death penalty in the concept of criminal law reform in Indonesia, the following is the formulation of the death penalty in Law Number 1 of 2023 concerning the Penal Code as the new parent criminal law in Indonesia.

In general, the provision of the death penalty is placed under Chapter III Book I of Law Number 1 of 2023 concerning Penal Code under Subtitle: criminalisation, criminal, conduct. The regulation of special crime in the system of criminal law in

Indonesia is regulated under the provision of Article 64 of Law Number 1 of 2023 concerning Penal Code:

Article 64

Punishment consists of:

1. Basic punishment;
2. Additional punishment; dan
3. Special punishment for particular criminal offences specified in the statute.

Furthermore, under the provision of Article 67 of Law Number 1 of 2023 concerning the penal Code states that special punishment as referred to in Article 64 letter c is the death penalty imposed as an alternative. As a result, the death penalty in the criminalisation system in Indonesia following the promulgation of Law Number 1 of 2023 concerning the Penal Code is categorised as special punishment instead of basic punishment. In line with the provision of Article 98 of Law Number 1 of 2023 concerning the Penal Code, the death penalty is given as the last resort with the aim to prevent criminal offences and protect people.

Law Number 1 of 2023 concerning the Penal Code regulates the suspension of the death penalty under Article 100, in which the death penalty is imposed as conditional punishment with 10-year probation (suspended penal death). That is, the death penalty execution will take place after the ten-year probation. If a defendant shows a good attitude during this probation period, the death penalty can turn into life imprisonment. The provision of Article 100 of Law Number 1 of 2023 concerning the Penal Code specifies the following details:

1. Judges examine two factors when imposing the death penalty with ten-year probation: the defendant's regret and desire to improve their behavior, and the defendant's role in the criminal offense;
2. A court ruling must indicate the death penalty in conjunction with the probation.
3. The ten-year probation period begins on the first day of the court ruling becoming permanent.
4. If the defendant exhibits a good attitude during the probation period, the death penalty may be reduced to life imprisonment under the Presidential Decree, subject to Supreme Court review.
5. Following the Presidential Decree, life imprisonment is imposed.
6. If the defendant fails to demonstrate a decent attitude during probation and there is no possibility of improving the defendant's attitude, the death sentence may be imposed at the discretion of the Attorney General.

The policy regarding suspended penal death as in Law Number 1 of 2023 concerning the Penal Code is principally the solution to endless debates over the death penalty in Indonesia. Under this policy, the death penalty still has its own space to function accordingly as prevention, last resort, and protection of the people, as in line with the expectation of those that go for the death penalty, while not overlooking the

restriction of the death penalty as what commonly happens worldwide, as in line with the expectation of those going against the death penalty.

The reconstruction of the regulation of the death penalty in Indonesia according to Law Number 1 of 2023 concerning the Penal Code is given as follows:

First, Article 64 of Law Number 1 of 2023 concerning the Penal Code implies that the death penalty is no longer taken as a basic punishment but more as a special punishment. Theoretically, the shift from basic to special punishment in the law concerned can be linked with criminal theory and concept. When it comes to the concept of criminal law as *ultimum remedium*, the death penalty specified in Law Number 1 of 2023 is inextricably linked to the principle that criminal law is primarily used as a last resort when all other techniques fail to provide maximum outcomes. Furthermore, the phrasing of such a punishment is unique, as it is tied to another sentence. That is, the death penalty takes place only when other sentencing approaches such as imprisonment, fines, and community service are no longer effective to prevent the crimes concerned. From this view, the death penalty as a special punishment specified in Law Number 1 of 2023 concerning the Penal Code serves as *ultimum remedium*—the last resort, as opposed to *primum remedium*—the primary measure. Viewed from the theoretical perspective of sentencing, the death penalty as a special punishment in the law principally serves as the balancing point between retribution on the one hand and goal theory on the other hand. These two theories have been dominant in discourse concerning sentencing (Kuzmin, 2023). Retaliation theory is more backward-looking, looking more at the crime that took place as the rationale of sentencing. On the contrary, the goal theory is more forward-looking. This theory focuses more on the impact of sentencing on the perpetrators or the people in general as the rationale of sentencing. That is, theoretically, establishing the death penalty as special sentencing is seen as the “compromising” outcome of two big theories in sentencing, namely retribution theory which leaves the sentencing as punishment and the goal theory which leaves the sentencing with its further benefits for convicts.

Second, Article 100 of Law Number 1 of 2023 concerning the Penal Code implies that the death penalty is designed as a conditional punishment, in which the death penalty can be replaced by life imprisonment if the convicts demonstrate good behavior within 10 (ten) years. The death sentence is defined in this Article as suspended penal death under particular conditions, which are expounded on above. The provision concerning the death penalty as in Law Number 1 of 2023 concerning the Penal Code which is designed for special sentencing and only for certain serious offences under selective and strict rules is considered appropriate, considering that this death penalty is the most severe punishment of all other types of punishment. This idea is consistent with the Islamic paradigm (Siboy et al., 2024), in which *qishaash* is administered when there are no other sentencing options available in the form of pardons capable of resolving the crimes punished by this sentence.

This teaching shows that the concept of *qisbaash* in Islam carries the dimension/priority of the interests of offenders as specified in Law Number 1 of 2023 concerning the Penal Code regarding the case of the modified death penalty (conditional death penalty) (Saputro et al., 2023).

Death Penalty from the Perspective of Islamic Law and its Contribution to Reinforcing the Existence of Death Penalty in Indonesia

Discussing the death penalty from the perspective of Islamic Law in Indonesia holds its urgency arising from the following grounds. First, although not mentioned in the Constitution as an Islamic state, (Assyaukanie, 2011; Salim, 2017; SOEMADININGRAT & Susanto, 2004) and, therefore, is not officially declared as an Islamic state (Doris C. Chu and Graeme R. Newman, 2011), Indonesia is known for its biggest Muslim population in the world regardless of inadequate intellectual sophistication of the most of the population in understanding Islamic teachings because of either historical or cultural factors (Hasani, 2009; Maarif, 2009; Maarif & Abdurrahman, 2003). Second, although it does not self-declare as an Islamic state, Indonesia declares itself as a state that adheres to the principle of God Almighty. Hazairin, as quoted by Jimly Asshiddiqie argues that Indonesia should comply with religious principles (Asshiddiqie, 1995), and all the religions in this country hold equal rights to participate in shaping legal systems, including criminal law according to the principles of Pancasila (Asshiddiqie, 1995; H. & Rahman, 1967). In its connection to Islamic teachings, the Islamic values (Sadiani et al., 2023)—either those sourced from the Quran and Hadiths, socio-historical experiences or empirical experiences related to the application of *fiqh* law along the history of Islam, or local sources of the people of Indonesia—bring colour to the reform of the national law (H. & Rahman, 1967). Third, in essence, the law did not merely exist, but it was rather derived from particular socio-cultural communities (Kamaludin & Iskandar, 2022; Rahardjo, 2008). Law represents the values living in society (Rahardjo, 2009), the expectations, and the will of the people. Law is a reflection of the ideas of certain society, (Rahardjo, 2009; Scally, 2020) and law losing its social context will exist as a burden for its society (Bernard L. Tanya, 2006).

Referring to the aspect of religious demography on the one hand, and the constitutional mandate on the other hand, the discussion on the death penalty in the context of the Islamic perspective is considered urgent in Indonesia. Therefore, it is quite reasonable to elaborate on how Islam positions the death penalty as one of the ways to prevent crime. This research presents, among other Islamic sources, including those related to the death penalty, the textual context of the Quran. Some verses of the Quran underlie the application of the death penalty as follows:

1. Al Qur'an surah Al Maidah verse 45:

“And We wrote for them in it: a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and equal wound for a wound. But whoever forgives It in charity, it will serve as atonement for him. Those who do not rule according to what God revealed are the evil doers (QS Al Maidah: 45).

2. Al Qur’an surah Al Baqarah verse 178:

“O you who believe! Retaliation for the murdered is ordained upon you: the free for the free, the slave for the slave, the female for the female. But if he is forgiven by his kin, then grant any reasonable demand, and pay with good will. This is a concession from your Lord and a mercy. But whoever commits aggression after that, a painful torment awaits him (QS: Al Baqarah: 178)

The above verses indicate that they give legitimacy to the death penalty in the form of *qisbaash*—equal retaliation. It is important to remember (Bernard L. Tanya, 2006) that the concept of *qisbaash* in Islamic teachings is viewed as something unique although its kind and how it should be implemented are presented in the *nash* of the Quran. Therefore, it is qualified as the criminal offence of *hudud*, but in *qisbaash*, law enforcement heavily relies on the final attitude of the victim of a criminal offence of *qisbaash* (in this context the *qisbaash* related to torture) or the family member of the victim (in this context the *qisbaash* related to murder) (Kholiq, 2001). Therefore, whether the victim or his/her family member will criminally charge the perpetrator in the context of *qisbaash* or will absolutely forgive the perpetrator (without calling for compensation) will depend on the victim or the victim’s family (Kholiq, 2001). This concept is built on Q.S. Al Baqarah verse 178: *“fa man ‘uhiya labuu min akhiibi syaiun fattiba’un bi al ma’ruffi wa adaaun ilaihi bi ihsaan.”* (But if he is forgiven by his kin, then grant any reasonable demand, and pay with good will).

In other words, although the existence of the death penalty is recognised in Islam, its implementation will heavily rely on the victims or their kin. This point indicates that there is still another way to settle issues other than the death penalty. Islam also views that if a victim or his/her kin can release the right for *qisbaash*, it is considered an atonement for the victim. Islam does not allow only the death penalty for problem-solving solutions, but it also considers the concept of tolerance among human beings and the concept of forgiving. This is the way how Islam views something that others do not entirely understand, causing some to think that Islam is rigid and remorseless.

Conceptually, the concept of imposing the heaviest sentencing equal to what has been committed (*qisbaash*) also prevails in the Western world, known as retributive theory, (Lippman, 2009) opposing the principle *‘let the punishment fit the crime’* (Marcella Elwina, 2010; Montag & Tremewan, 2020; Nash, 1991). This theory highlights this retributive principle as something fair for what has been committed. This theory is justified simply because the criminal offence concerned has taken place, but it is often viewed as a backward-looking theory (David Boonin, 2008), meaning that it is more focused on the offence that has been committed. The retributive concept of criminalisation is intended to ensure general prevention, preventing others from committing the same offences (Bohm, 1992; Svingen, 2023; Tan & Xiao, 2018).

CONCLUSION

The following points come from the reconstruction of the death penalty provision in Indonesia in Law Number 1 of 2023 concerning the Penal Code. First, Article 64 of Law Number 1 of 2023 respecting the Penal Code states that the death sentence is no longer considered a basic punishment, but rather a particular punishment. The unique death penalty in Law Number 1 of 2023 is linked to the notion of criminal law as a last resort (*ultimum remedium*), rather than the primary measure. Second, according to the provision of Article 100 of Law Number 1 of 2023, the death penalty is constructed as a conditional punishment, in which the death penalty can be superseded by imprisonment if, within 10 (ten) years, convicts can demonstrate a good attitude when serving jail sentence. That is, Article 100 of Law Number 1 of 2023 implies that the death penalty is constructed as a suspended penal death. *Second*, Conceptually, in a *qisbaash* concept, Islam reinforces the matter and provides a way out of the death penalty in Indonesia. Although the existence of the death penalty is recognized in Islamic law, its implementation will heavily rely on the victims and their families. At this point, Islam will give another possibility other than the death penalty. In Islam, when the victims or their families can release their rights to do *qisbaash*, this measure will be taken as sin redemption. Islam is not only open to a single way in the context of the death penalty, and this punishment is normatively present. Within the sociological scope, Islam also offers the concept of tolerance among people by forgiving.

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