



Contribution of Islamic Law Concerning The Death Penalty to the Renewal of Indonesian Criminal Law

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Abstract: This paper aims to describe and analyze the contribution of Islamic law in the regulation (policy formulation) of the death penalty in the context of reforming the national criminal law. Determining the death penalty as a means to tackle crime is a policy choice because capital punishment is a pro and con issue among legal experts. Because the debate about the death penalty is related to the right to life which in international legal instruments and the 1945 Constitution is included in the category of rights that cannot be reduced under any circumstances (non-derogable rights). Islamic law recognizes the death penalty in a crime that has been determined by Allah SWT. in the Al-Qur'an. The method used is a literature study. The data used is secondary data. And data collection using literature study. The data that has been obtained is then processed by means of analysis to obtain conclusions from the discussion carried out by the author. The death penalty in Islam gives its color with the idea of balance that does not only focus on the perpetrators of the crime but also the victim. Of course, this idea of balance is following the basic values of *Pancasila*. The death penalty in Islam in the *qishahs* punishment recognizes the concept of forgiveness from the victim's family which needs to be developed in the future, especially in the draft Criminal Code which until now has not been ratified as a means for national law reform.

Keywords: Capital Punishment; Islamic Law; Qishah; Renewal

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A. Introduction

Islam highly upholds a person's right to life. In Islam, there are five (5) things that are central to the protection of both oneself and others. These five things are very basic for human life and if one or all of them is lost, then there will be chaos in human life. These five things must be protected to uphold and preserve the continuity of the life of a society. The five things are guarding religion (*hifdz al-din*), guarding the soul (*hifdz al-nafs*), guarding reason (*hifdz al-aql*), guarding property (*hifdz al-mal*), and guarding offspring (*hifdz al-nasl*)¹.

The statutes of punishment (*uqubat*) which have been explained in the Al-Qur'an require good implementation because we realize that not all Indonesians are Muslim, but only the majority. How close the relationship between religion and law, in general, is undeniable. Although religion does not only teach about law, the law plays an important role in upholding religious teachings.

The death penalty in Islam is not only treated for the loss of other people's lives, but other acts can be subject to the same punishment, including adultery *muhson*, security disturbances (In the Al-Qur'an it is said to cause damage to the earth. It is stated in Surah al -Maidah: 33-34), rebellion, and *riddah*.

Adultery is classified into two. (1) *adultery muhson* is adultery committed by people who have been married. The legal sanction is the death penalty. This is based on a hadith that is still disputed by scholars regarding the death penalty. (2) *adultery ghair al-muhshon* is adultery committed by people who have never been married. The legal sanction is lashing 100 times according to Surah al-Nur: 2. *Riddah* is a person's exit from the religion of Islam. The perpetrators are called apostates. Indeed this is based on a hadith of the Prophet who said: "Whoever changes his religion, then kill him". This hadith in a study contains a political element because of the time of the Prophet Muhammad SAW. saying this expression the position of Muslims is still small in quantity. If a Muslim leaves his or her religion without any firm sanctions from the Messenger of Allah, then of course it is very dangerous for the continuity of the Muslim community who are pioneering².

Criminal matters, especially the death penalty, are very sensitive. Considering that this issue is closely related to human dignity, it is even clear

¹ Abu Ishaq Al-Syatiby, *Al-Muwafaqat Fi Ushul Al-Ahkam* (Dar al-fkr, n.d.).

² Azizy A. Qodri, *Eklektisisme Hukum Nasional; Kompetisi Antara Hukum Islam dan Hukum Umum* (Yogyakarta: Gama Media, 2002).

that the life of someone who is about to be executed is clear. This is more so at this time when the demand for recognition and respect for human rights is very prominent as a result of the emergence of democratization and globalization. Criminal issues are becoming increasingly urgent to talk about and people are starting to see criminals as the *prima donna* in conversation.

Punishment in Islam when viewed in terms of the severity of the sanctions can be classified into three levels. First; *jarimah hudud* is an act that violates the law whose type and the threat of punishment are determined by the *nash* is the *had* punishment (the right of Allah). The *had* punishment in question does not have the lowest and highest limits and cannot be abolished by an individual (the victim or his guardian) or a representative community (*ulil amri*). Second; *jarimah qishas-diyat*, which is an act that is threatened with *qishash* and *diyat*. This punishment has a predetermined limit, there is no lower and highest limit but it is an individual right. Third; *jarimah ta'zir* that is giving lessons means a *jarimah* that is threatened with *ta'zir* law to *had* and *qishash* punishments³. By looking at the classification above, the death penalty falls into the second category; *jarimah qishash diyat* which is an individual right, not God's right.

The survival of the community must be guaranteed by a country where citizens live in an area and are the authority and duty as enforcers of law and justice. According to Barda Nawawi Arief's view in his book *Pembaharuan Hukum Pidana Dalam Perspektif Kajian Perbandingan*, the Indonesian state is one of the countries that recognize *Pancasila* as the first and main source of law containing the basic ideas of 1. religious morality (divinity), 2. humanity (humanistic), 3 nationalities, 4. democracy, and 5. social justice⁴.

Barda Nawawi Arief's view, in his book entitled *Bunga Rampai Kebijakan Hukum Pidana*, states that the policy approach in the context of criminal reform can be carried out through social policies that are directed at overcoming social problems, criminal policies aimed at protecting the community and law enforcement policies are updating the legal substance⁵. Policies that will be implemented by the state/government must be oriented

³ Makhrus Munajat, *Dekonstruksi Hukum Pidana Islam* (Yogyakarta: Logung Pustaka, 2004). For further discussion and comparison, see also Sri Endah Wahyuningsih, and Jawade Hafidz. "The Development of The Indonesian Criminal Code Derived from The Yudicial Pardon Value in Islamic Law." *Addin* 11, No. 2 (2017): 295-320; Anas Rohman, "Qishash Law and Human Rights." *TAWASUT* 7, No. 02 (2020); Zainuddin. "Restorative Justice Concept on Jarimah Qishas in Islamic Criminal Law." *Jurnal Dinamika Hukum* 17, No. 3 (2017).

⁴ Barda Nawawi Arief, *Pembaharuan Hukum Pidana Dalam Perspektif Kajian Perbandingan* (Bandung: Citra Aditya Bakti, 2005).

⁵ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana* (Bandung: Citra Aditya Bakti, 2005).

towards the benefit of the people⁶. The reform of criminal law in the value approach is an effort to review and reassess (reorient and reevaluate) socio-political, socio-philosophical, and socio-cultural values⁷ that grow and develop during Indonesian society.

According to Muladi, criminal law from a material aspect refers to the discussion of three main issues. *First*, the formulation of prohibited acts (criminalization), *secondly* criminal liability (errors), and *thirdly* the sanctions that are threatened, both criminal and action⁸.

The three main problems above are a series with each other, but the author focuses on the legal sanctions that are threatened are the death penalty. The criminal sanctions that are threatened against the perpetrators will be compared and or correlated between the Criminal Code and Islamic law. Because it has been stated above that changes or reforms in criminal law can occur through religious values that are believed and embraced by the Indonesian people.

Although there is a debate between the abolition of the death penalty and those who maintain it, the death penalty is the main crime mentioned in the Criminal Code in addition to imprisonment, confinement, and fines. As for the technical implementation of the death penalty, it is no longer by hanging on the gallows with an executioner. The implementation is by being shot dead by a group of a firing squad and not done in public. Implementation of the death penalty in Law Number 2/Pnps/1964/ regarding The Procedure for Implementing The Death Penalty is different from the implementation procedure regulated in Article 11. One of the reasons for the change in the implementation of the death penalty is so that it is more humane and civilized, there is no sadistic impression on people who will be executed. The goal is among others a sense of humanity for the victims he or she will feel. The right to life of a person with all his or her freedoms is still limited by laws and regulations to guarantee and respect the right to life and freedom of others for the sake of public order and the interests of the nation.

The application of the death penalty through an approach to religious values (Islam) requires its political policy. We all know that the relationship between law and politics is very closely related. There are three models of the relationship between the two, sometimes the law is the determinant of politics

⁶ Jalaluddin ibn Abi Bakr al Suyuthi Abdurrahman, *Al-Asybah Wa Al-Nadhaair Fii Qawaid Wa Furu' Fiqh Al-Syafiiyyah* (Lebanon-Bairut: Lebanon-Bairut; Dar al-Fikr, n.d.).

⁷ Barda Nawawi Arief, *Masalah Penegakan Hukum Dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan* (Jakarta: Kencana, 2007).

⁸ Barda Nawawi Arief.

or vice versa⁹, politics is more determined than law and both of them between law and politics are not superior because they both influence each other¹⁰. How that policy can be formulated and formulated in a state regulation is a separate study. Law (Islam) should be able to make a positive contribution to a country that is the majority religion in Indonesia. Although not a religious state, the Indonesian state recognizes the existence of a legitimate religion that must be embraced by citizens. Indonesia also does not separate religious affairs from government or state affairs. So the position of religion over the state affects each other and there is a symbiotic mutualism between the two¹¹.

Because of the relationship between religion and the state, there are three paradigms. The first Integralistic Paradigm (Unified Paradigm), such as religion and the state are united, the area of religion includes politics or the state. The state is a political as well as religious institution. The second Symbiotic Paradigm, such as religion and the state have a reciprocal relationship and need each other. The third Secularistic Paradigm, such as the separation (disparity) of religion over the state and the separation of the state from religion. Looking at these three paradigms, it seems that the Indonesian state adheres to the second paradigm, the Symbiotic Paradigm.

The inevitability that exists is that the Indonesian nation consists of various ethnic groups, races, customs, and diverse religions. This plurality needs to create a harmonious condition so as not to create disintegration and instability among Indonesian citizens. Therefore, it is not wise to apply religious values, in this, case Islam will lead to a reaction that is not positive and even excessive towards it. Indonesian Muslims themselves do not fully agree with the existence of religion being drawn into the realm of the state, it

⁹ Daniel S. Lev, *Hukum dan Politik di Indonesia; Kestinambungan Dan Perubahan* (Jakarta: LP3ES, 2018). See also Aliflanya Arisandy Maghfirah, Diny Arista Risandy, and Nurindah Hilimi. "Sulh' in Islamic Criminal Law as The Form of Restorative Justice: A New Framework in Indonesian Criminal Law." *Proceedings. Proceeding of Scientific Cooperations 2nd International Conference on Social Sciences of Istambul Turkey. 2nd-3rd of April*. 2016; Nafi Mubarak, "Pidana Qisas dalam Prespektif Penologi." *Al-Qanun: Jurnal Pemikiran dan Pembaharuan Hukum Islam* 20, No. 2 (2017): 473-487; Hasnil Basri Siregar, "Lessons learned from the implementation of Islamic shari'ah criminal law in Aceh, Indonesia." *Journal of Law and Religion* 24, No. 1 (2008): 143-176.

¹⁰ Muhammad Mahfud MD, *Membangun Politik Hukum, Menegakkan Konstitusi* (Jakarta: PT. RajaGrafindo Persada, 2012).

¹¹ Marzuki Rumadi, *Fiqh Madzhab Negara; Kritik Atas Politik Hukum Islam Indonesia* (Yogyakarta: LKiS, 2001). See also, Shira Thani and Alvi Syahrin. "Contribution of Islamic Law in The Development of Corruption Criminal Law." *PalArch's Journal of Archaeology of Egypt/Egyptology* 18, No. 1 (2021): 456-465; Ahmad Yani, and Megawati Barthos. "Transforming Islamic Law in Indonesia from a Legal Political Perspective." *Al-Ahkam* 30, No. 2 (2020): 159-178; Windi Afdal, "Islamic Law Codification: The Friction on Authority of Islamic Law Establishment". *JILS (Journal of Indonesian Legal Studies)* 1, No. 1 (2017): 35-46. <https://doi.org/10.15294/jils.v1i01.16567>.

is feared that religious teachings will occur as a means of legitimizing power or religion as a positive law of the state. The fear of a Muslim over the teachings of Islam is called *Islam Phobi*. This attitude became mainstream in the 1980s when the government itself marginalized the role of religion in government. The government often stigmatizes someone as radical, extreme, or part of efforts to establish an Islamic state in Indonesia. This became a separate problem within the internal body of Indonesian Muslims when Islamic religious values regarding the death penalty were adopted in the draft Criminal Code. There are some Muslims who want the formalization of *sharia* in Indonesia, but there are also those who reject it. Cultural Islam – such as the NU mass organization and its figure Gus Dur – puts forward the values of the substance of Islamic law rather than just the formalization of *sharia* itself.

It is not wrong if the renewal of criminal law is also through legal political policies. The next problem is that when the doctrine of Islamic religious law will be included in the draft law, some Muslims also refuse. The refusal was because religion should not enter the territory of the state which would in the end damage the sanctity of the Islamic religion.

After a brief description of the background of the death penalty in Islam, the author can formulate the problem as follows: (1) What is the essence of Islamic law? (2) What extent is the contribution of Islamic law in the regulation (formulation policy) of the death penalty in the context of reforming the national criminal law?

B. Method

This research uses a normative juridical approach. The collection of research materials was carried out based on a literature study. Data analysis was carried out by interpreting data, limited to the research problem studied based on the data collected and processed for the purposes of this study. This study was analyzed descriptively analytically, namely looking for and determining the relationship between the data obtained from the research and the existing theoretical basis used so as to provide constructive descriptions of the problems studied. In addition, qualitative analysis methods are also used with the aim of understanding the phenomena studied.

C. Result and Discussion

1. The Essence of Islamic Law: Between Divine Law and Man-Made Law

Many issues related to the construction of the epistemology of Islamic law, both related to aspects of the essence of Islamic law, sources and methods of obtaining Islamic law, and the validity of Islamic law. In the aspect of the nature of Islamic law, for example, it seems that the color of the divinity of Islamic law is still very strongly echoed by Islamic theorists. Islamic law is considered the eternal and eternal law because it originates from the word of God, which according to the dominant theological school, is first (*qadim*). It is the understanding that Islamic law originates in the *qadim* of Allah which has led Islamic jurists to conclude that the existence of Islamic law as divine law precedes the existence of society and the state. As a divine law, its existence is considered perfect, eternal, and truly is considered a real law, made, and valid throughout time with a universal character that can be applied by all mankind. Such an understanding of Islamic law has become so institutionalized and rooted and entrenched in the minds of Islamic jurists, who are then confronted with man-made law.

When the issue between man-made law is confronted with Islamic law which is divine law, it will become a serious problem, let alone be contradicted antagonistically. Contrasting between the two blindly is an unwise step because, in the end, it will narrow the realm of truth only to revelations written in the scriptures. Meanwhile, in addition to revelation, humans are endowed with reason by God because of which, humans can dig up truths from anywhere, including asking again what humans have understood about the texts in the holy book itself.

Islamic law is categorized as divine law because the existing rules are made directly by God to regulate human life in the world. Understanding like this is the understanding that is commonly understood so far. If we pay attention to the above understanding, it places Islamic law as a purely top-down entity and releases its historical-sociological nature.

Islamic law is a command of God and is therefore binding as a religious ideal that is different from man-made law and is considered a social phenomenon that is subject to human needs and values. For that reason, the law in the view of Muslim thinkers is not an independent and empirical study.

According to Muhammad 'Abid al-Jabiri said that the historical-sociological aspects of Islamic law are important to be understood well because through this aspect we will be helped in understanding the legal verses contained in the Al-Qur'an. Furthermore, he explained, Islamic law is built on three pillars, such as abolition (*nasakh*), the reasons for the

revelation of the verse (*asbâb al-nuzûl*), and the objectives of *shari'ah* (*maqâshid al-syarî'ah*). If you pay attention, these two pillars; *nasakh* and *asbâb al-nuzûl* are related to the historical-sociological aspects of Islamic law. This means that although Islamic law is understood as divine law, it does not mean that it abandons the uniqueness and specificity of the place where the holy book (Al-Qur'an) was revealed, as well as the cultural situations and conditions that must be adapted to it. Islamic law did not come down in a vacuum.

Considering this reality, from the beginning, Islamic law should have a very strong empirical-functional color. It is said to be empirical-functional because Islamic law in the form of verses of the Al-Qur'an which were direct law at that time was revealed to provide answers to various problems that arose at that time, whether it was through the request of the apostle himself or questions from friends or colleagues brought down by God's initiative. It is this sociological historical aspect that Islamic jurists seem to be trying to eliminate, no longer being a practical but theoretical study. This is further exacerbated when the methods used in Islamic legal *ijtihad* tend to support the neglected process. Mohammed Arkoun is one of the contemporary Muslim scholars who see the above trend.

According to A. Qodri Azizy¹² in his book *Eklektisisme Hukum Nasional*, the legal system influences each other in the sense of forgiving each other. It doesn't matter which legal system influences or is influenced first. Because the most important thing for legal experts is how the laws, they form can provide benefits for the better. In other words, if we relate to our previous discussion about Islamic law as divine law and man-made law or quoting A. Qodri Azizy-general law or secular law, both are not appropriate if they continue to be dichotomized as mutually hostile entities. Even, he added that Islamic law which strongly adopts local or national customs in general will very likely also be influenced by Western law in a country or region. Especially after the West, especially Europe broke away from the dark age through the Renaissance and was accompanied by rapid progress in almost all fields. Europe began to colonize the nations in the East that were not a little Muslim. Even in the case of Turkey, which was not directly colonized by Europe, when Europe began to advance, Turkey had adopted several legal provisions that were already in effect in Europe. Even the legal reforms in many countries where the majority are Muslims are also oriented towards the legal system in the West, both from the Roman Law System family and from the Common Law System family. Many examples can be shown, such as

¹² Azizy A. Qodri, *Eklektisisme Hukum Nasional; Kompetisi Antara Hukum Islam Dan Hukum Umum*.

Middle Eastern countries, Pakistan, Indonesia, Malaysia, and others. These countries when they started modernization were also inseparable from the tradition of progressing Western law. In fact, by bringing the name *siyasa syar'iyah*. It means the government's authority to carry out policies that are desired for the benefit, through rules that do not conflict with religion, even though there are no specific arguments.

From what has been described above, it seems that Qodri Aziziy is trying to resolve unnecessary tensions between Islamic law and secular law, or between divine law and man-made law. In other words, why should Muslims be afraid to compromise between Islamic law and secular law when history has proven that so far there is no problem. Of course, what is meant by compromise here is in the sense that the aspects that are compromised do not conflict with the religiously oriented nature of Islamic law. This is the most difficult, because as long as Islamic law theorists view Islamic law more as the embodiment of the eternal Word of God, as long as these processes of compromise will never occur. The views of Islamic law scholars say that Islamic law has not changed because Islamic law is idealistic and does not pay attention to the actualities and realities of society. Islamic law is more of a religious matter than a mere worldly one¹³. Therefore, there is a need for a paradigm shift (shift of paradigm) in understanding what is called Islamic law.

If we look at the understanding of the nature of Islamic law as divine law, it is seen more from the level of the source or origin of the law being formed, not from the aspect of its legal purpose (*maqashid*). This means that as long as a legal product is extracted from the Al-Qur'an and Hadith and is added to the packaging of Islamic symbols - without considering the aspect of the ultimate goal of the law - it is immediately considered Islamic law. This kind of understanding has made what is called Islamic law trapped in its ideal world. It is within this framework of thinking that al-Jabiri previously stated that the pillars of Islamic law are supported by three things, such as *naskh*, *asbâb al-nuzûl*, and *maqâshid al-syarî'ah*. This means that good Islamic law must be built on historical awareness and must be the true goal and idealism that is constantly being built.

To realize this idealism, we can take advantage of various sources of law without having to limit ourselves to the Al-Qur'an and Hadith, through what is called *ijtihad*. It is very possible, that it is true that the Al-Qur'an as the main and first source of Islamic law does not contain all legal issues, but it does provide general concepts that may be applied in realizing the law.

¹³ Fadil Nur Lubis, *Hukum Islam dalam Kerangka Teori Fikih dan Tata Hukum Indonesia* (Medan: Pustaka Wedyasarana, 1995).

Without intending to deny the existing formulation of Islamic law, “a legal product (man-made law) even though it is not labeled Islam but can help achieve the goals of sharia as mentioned above, it is essentially Islamic law as well.” This interpretation invites us to look at Islamic law from a pragmatic perspective too because our common sense is difficult to accept when a legal product that is said to be sourced from the Al-Qur’an and Hadith allows husbands to commit violence to their wives. Or restricting women’s movement in the public world for the sole reason of protecting them.

Al-Qur’an is placed as the first rank in terms of *qath’ian*, both in terms of source truth (*tsubut*) and content of meaning (*dalalah*), there is no need to doubt it. As a consequence of the *qath’i al-dilalah* attribute of the Al-Qur’an, no one is allowed to interpret, let alone deviate from the sound of the text of the Al-Qur’an. Unless the appointment is *zhanni*, it is still possible for legal experts to provide different understandings from one another.

The prohibition of interpreting or deviating from the sound of the text of the Al-Qur’an which is categorized as *qath’i al-dilalah* is questioned by Ilyas Supeno and M. Fauzi in their book *Dekonstruksi dan Rekonstruksi Hukum Islam* because it contains shortcomings and weaknesses both methodologically and historically. Methodologically, it is very difficult for someone to have a common understanding of one issue, let alone a text of the holy book (Al-Qur’an). Because a *nash* which some people think is clear in meaning (*sharih*) is not necessarily clear to others (*ghair al-sharih*). The case is almost similar to *ijma*. Problems that are considered to have been agreed upon by the scholars, turn out to be only the agreement of the scholars of the school of thought¹⁴. This condition is very likely to occur, and in fact, historically it has been proven that there has never been an agreement among *ushul* scholars in determining the *qath’i* or *zhanni* of a text. This means, that the classification of the *qath’i* and *zhanni* of a text is more subjective (from the scholars concerned), therefore the law it contains is of relative value. In other words, in determining a *nash* including *qath’i* and another including *zhanni* there is an element of inconsistency. The difference in classification can be seen from the problems categorized as *qath’i*. But in general, it can be concluded that *nash qath’i* are texts that talk about issues of *aqidah*, worship, provisions for inheritance, *kaffarah* (fines), *hudud* (criminal acts), and others.

2. *Qishahs* and The Idea of Balance

The criminal function as a way of dealing with crime has changed along with the development of society itself. One of the criminal functions in

¹⁴ M. Quraish Shihab, *Membumikan Al-Qur’an* (Bandung: Mizan, 1992).

the past was “retaliation” against the perpetrator. Then there is a shift in criminal function changes that lead to the protection of individuals from other individual disturbances and the protection of society from their disturbances. Now, this is even leading to the “guidance” of prisoners for return to society (Dirdjasworo, 1984:11). Of course, the current punishment excludes the death penalty because it is not possible to guide a person while he or she has died.

Thus, even though the meaning, nature, form, and purpose are always changing, crime as a means of eradicating crime is still needed by the community. Crime is still considered as the only last answer in eradicating crime. Even now there are still efforts to reduce crime by increasing criminal sanctions, for example by imposing the death penalty.

One of the studies conducted by the Media Group Research and Development in six big cities, such as Jakarta, Makassar, Medan, Surabaya, Yogyakarta, and Bandung with 476 respondents resulted in a conclusion that leads to the approval of the death penalty. Research and Development Media Group divides respondents into two categories, Muslim and non-Muslim with as shown on Table 1.

TABLE 1. Statement of agreement in the percentage of the death penalty against

No	Description	Muslims	Non-Muslims
1	Premeditated killer	70%	60%
2	Terrorist	80%	74%
3	Drug dealer	82%	65%
4	Big corrupt	74%	50%

Sources: Authors, 2021 (edited)

This shows that people still accept the death penalty as a form of crime prevention even though some people reject the imposition of the death penalty.

The existence of the death penalty in the concept of the Criminal Code is still maintained because the current concept of the Criminal Code is motivated by various points of view towards the *idea of balance*. According to Barda, the idea of balance includes five aspects¹⁵, are as follows:

- a. Monodualistic balance between general/public interest and individual interest.
- b. A balance between the protection/interests of the perpetrator of a crime (the idea of criminal individualization) and the victim of a crime. Balance between objective (deeds/outward) and subjective

¹⁵ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana*.

(person/inner/inner attitude) elements/factors, the idea of *daad-dader strafrecht*.

- c. The balance between formal and material criteria.
- d. The balance between legal certainty, flexibility/elasticity/flexibility, and justice.
- e. Balance of national values and global/international/universal values.

The idea of balance gave birth to a wiser and wiser attitude because they saw things from two different angles/directions, not only seeing the perpetrators but also the victims, not seeing the interests of the individual but also seeing the interests of the community. So that the purpose of punishment in the concept is directed to community protection and individual protection/development¹⁶. The interests of the community need to be protected so that there is no “judgment” action outside the court or the emergence of irrational emotions of personal/community revenge.

The interests of individuals in the death penalty also need to be considered so that the formulation policy in the Criminal Code Concept has the following provisions, are as follows:

- a. Postponement of the implementation of the death penalty or conditional death penalty is if during the probationary period (ten years) the convict shows a commendable attitude, the death penalty can be changed to life imprisonment or twenty years imprisonment (Article 86).
- b. Life imprisonment can be changed to fifteen years imprisonment if the convict has served a minimum sentence of ten years with good behavior (Article 67) so that it is possible for the convict to get conditional release.

Although the death penalty still exists in the concept of the Criminal Code, it is special (exceptional) because the death penalty is essentially not the main/basic means to regulate, discipline, and improve individuals/societies as in medicine, a doctor amputates a patient for his or her limbs because medically it is already can no longer be treated by a doctor. In other words, the death penalty is alternatively imposed as a last resort to protect the community based on monodualistic ideas¹⁷.

One of the Islamic thinkers, Imam Akbar Mahmud Shaltut former Chancellor of Al-Azhar Egypt in his statement regarding the law of *qishash* (death penalty) for the crime of intentional murder as follows:

Even though Islam stipulates the death penalty for the crime of murder, **it does not view *qishahs* as obligatory**, with a definite meaning and nothing

¹⁶ Barda Nawawi Arief.

¹⁷ Barda Nawawi Arief, *Pembaharuan Hukum Pidana Dalam Perspektif Kajian Perbandingan*.

else. It is not like that! Islam tells you to choose between *qishas* and forgiveness and is told to choose between forgiveness at all (no payment). Islam suggests forgiving feelings to the souls of people and kindles the spirit of brotherhood in their hearts. That is the source/of compassion and spaciousness. Anas bin Malik said: **“every case of *qisash* brought to the Rasullullah, he ordered to be forgiven”**. Based on that arose a famous saying among *fiqh* experts which reads: “Forgiveness is better than peace, and peace is better than *qishash*”.

Islam gives the right to demand and forgive in the hands of the guardian of the blood of the slain. *Ulil Amri* (government) is given the right to forgive (sorry) if the blood guardian continues to demand *qishash*. But besides that, Islam gives the government (judges) the right to persist in punishing the guilty, even if the blood guardian chooses the path of forgiveness, if the guilty is known as a dangerous criminal and the *imam* (judge) views, that the interests of benefit are pressing to impose the law, to avoid danger and maintain public peace....”.

Seeing the thoughts of Sheikh Mahmud Saltut who described the problem of *qishashs* can be revealed that the *qishash* crime is not the only way that must be carried out by the victim’s family. The families of the murder victims have three choices in “retaliating” for the perpetrator’s actions. He or she can take revenge killing as long as it can be approved by the judge/priest/government with deep considerations or the victim’s family can apologize by getting compensation (*diyat*). *Diyat* is to pay compensation for a predetermined amount of property for the victim’s family. In the case of murder, the *diyat* is 100 camels or the equivalent of the animal. While the last option he or she forgives the perpetrator without getting any compensation at all.

A priest/*ulil amri*/government/judge also has the same rights as the victim’s family to maintain the peace of the community it can even happen that the demands of the judge/priest/*ulil amri*/government are not the same as the rights of the family. When the victim’s family demands revenge for their life using *qishash*, then a judge can refuse it by looking at the perpetrator who should not be punished by *qishash* to kill. On the other hand, when the victim’s family only forgives the perpetrator, then a judge/priest/*ulil amri*/government can impose a death penalty on him or her when he or she sees the perpetrator may be as a very dangerous person for the community by standing on the benefit of the people. If allowed to live it will disturb the sense of security and peace of society. So killing is the only way and the last way to pacify the society. Following the rules of Islamic law if there is a clash of two dangers (*mafsadah*), then the greater danger is avoided while the

lesser danger can be done. The original text of the rule of law: *Idza ta'aradla al-mafsatani ru'iya a'dzomuhuma dlararan bi artikaabi akhoffihima*.

The *qishash* crime is now in the spotlight with global issues regarding human rights. Some say that *qishash* is a crime that does not recognize humanity, *qishash* is a crime that has passed its time, and its purpose is only to follow the hurt (revenge) of the victim's family. Such a view is getting stronger nowadays with some European countries abolishing the death penalty. There are several European and Latin American countries that have abolished the death penalty with various arguments put forward by the legal experts of each country. For example, countries that have abolished the death penalty in the Criminal Code are Venezuela in 1849, Viscusi in 1859, Columbia in 1864, the Netherlands in 1870, Costa Rica in 1880, Italy in 1890, Brazil in 1891, and Ecuador in 1895. All of them have existed since the 19th century, while the countries that abolished the death penalty in the 20th century were Norway in 1902, Sweden in 1921, Chile in 1930, Denmark in 1933, and New Zealand in 1941¹⁸. It should be remembered that the purpose of punishment is not only thinking about the perpetrators of the crime but also thinking about the victims, with the idea of balance. The death penalty, according to Hasby al-Shidiqqy, must be placed in the balance of the general benefit, not the balance of individual feelings.

Hasby al-Shiddieqy views that a death penalty is a preventive tool so that deviant social behavior does not occur which can result in the loss of a person's life. If the death penalty is abolished, then it will bring up the courage of people to act to commit murder. Likewise, he looks at the situation and condition of a country, trying to compare developed countries with developing countries or poor countries. Developed countries only use imprisonment, a perpetrator has felt torture, but what about developing/poor countries? Life in prison is sometimes more comfortable than living in a house where welfare or basic needs are not sufficient.

Even though someone has been sentenced by the death penalty court, there is still a chance or change in the process of serving his or her sentence. If he or she can change his or her attitude and behavior that shows good behavior, then the death penalty will be changed to life imprisonment or twenty (20) years in prison. It is also possible that he still has the opportunity to change his or her sentence which has become lifelong or 20 years, if he is or she is within ten years of serving a life sentence can show good behavior, then it can be changed again to 15 years as has been formulated into the Draft of The Criminal Code Year 2004. So the assumption that the death

¹⁸ Moehadi Zaenal, *Pidana Mati; Di Hapuskan Atau Dipertahankan* (Yogyakarta: Hanindita, 1984).

penalty in the perspective of a criminal objective is useless is an assumption that cannot be defended.

D. Conclusion

There needs to be an understanding of the nature of Islamic law. Whereas in Islamic law there are divine laws, there are also man-made laws both of which are different both ontologically and epistemologically. Islamic law itself although sourced from God, is very open to interpretation, especially verses or *hadiths* that are *dzanny* (nisbi/relative) in their meaning and are always open to being a space for *ijtihad*. Islamic law regarding the death penalty especially the implementation of the *qishash* punishment does not only focus on the issue of the perpetrator but also the victim. So it is necessary to develop the idea of a balance between the perpetrator and the victim as well as to develop the nature of forgiveness from the victim's family for the perpetrator as stated by Imam al-Azhar Egypt Mahmud Shaltut.

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