

**Pidana Mati Bersyarat dalam KUHP Nasional: Kajian dalam Bingkai Hak Asasi Manusia dan *Maqāsid Al-Sharī'ah***

**Conditional Death Penalty in National Criminal Code: Study in Frame of Human Rights and *Maqāsid Al-Sharī'ah***

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**ABSTRACT**

*Conditional death penalty has become one of the important issues in the Indonesian criminal justice system, especially after the enactment of the national Criminal Code (KUHP). In it, the death penalty is no longer considered a primary punishment, but rather a last resort with certain conditions. This article focuses on the study of the concept of conditional death penalty in the national Criminal Code from the perspective of human rights (HAM) and maqashid as-syariah. From the perspective of human rights, the application of conditional death penalty demonstrates an effort to compromise between the protection of the right to life, which is a essential human right, and the need to provide a deterrent effect against serious criminals. Through conditional regulation, the Criminal Code (KUHP) seeks to bridge the need for law enforcement against serious crimes while still respecting humanitarian values. The probation period granted can serve as a time for introspection for the convicted. This reflects a humanistic approach, that the legal system not only punishes but also gives a second chance. Meanwhile, the application of the death penalty in Islam is very cautious, prioritizing public welfare and preventing greater harm in accordance with the objectives of Islamic law. Conditional death penalty reflects this value, as it provides the convicted person with the opportunity to repent and improve themselves, while still delivering justice to the victim and society.*

**Keywords:** *Conditional Death Penalty, Human Right, Maqāsid Al-Sharī'ah.*

**ABSTRAK**

*Pidana mati bersyarat menjadi salah satu isu penting dalam sistem hukum pidana di Indonesia, terutama setelah disahkannya Kitab Undang-Undang Hukum Pidana (KUHP) nasional. Di dalamnya pidana mati tidak lagi dijadikan sebagai pidana pokok, tetapi dijadikan pilihan terakhir dengan menyertakan suatu syarat. Artikel ini berfokus pada pembahasan mengenai konsep pidana mati bersyarat dalam KUHP nasional dari perspektif hak asasi manusia (HAM) dan maqashid as-syariah. Dari perspektif HAM, penerapan pidana mati bersyarat menunjukkan upaya kompromi antara perlindungan hak hidup yang merupakan hak asasi yang fundamental serta kebutuhan untuk memberikan efek jera terhadap pelaku kejahatan berat. Melalui pengaturan bersyarat, KUHP berupaya menjembatani kebutuhan dalam penegakkan hukum terhadap kejahatan berat dengan tetap menghormati nilai kemanusiaan. Masa percobaan yang diberikan dapat dijadikan sebagai waktu introspeksi bagi terpidana. Ini mencerminkan pendekatan humanis, manakala sistem hukum tidak hanya menghukum tetapi juga memberi kesempatan kedua. Sementara itu, penerapan pidana mati dalam Islam sangat berhati-hati, dengan prinsip mendahulukan kemaslahatan dan mencegah kerugian yang lebih besar sesuai dengan tujuan syari'at Islam. Pidana mati bersyarat mencerminkan nilai ini, karena memberikan kesempatan bagi terpidana untuk bertobat dan memperbaiki diri, serta tetap memberikan keadilan kepada korban dan masyarakat.*

**Kata Kunci:** *Pidana Mati Bersyarat, HAM, Maqāsid Al-Sharī'ah.*



## INTRODUCTION

The implementation of the death penalty has been a contentious issue in various regions across the globe for quite some time, with some people in favor and others against. Some support the idea that human dignity can be enhanced by reducing crimes punishable by death penalty, while others emphasize that human dignity is a human right that should not be violated.<sup>1</sup>

As a form of punishment that is final and cannot be corrected if an error occurs, the application of the death penalty is often questioned both in terms of its effectiveness in preventing crime, its compatibility with human rights values, and its relevance to the values of justice in Islamic law. The application of death penalty in Indonesia has long been regulated in various laws and policy such as the old Criminal Code and is still maintained in Law No. 1 of 2023 (national Criminal Code), but the approach to death penalty has been renewed with the introduction of the concept of conditional death penalty.<sup>2</sup> This provision provides an opportunity for death convicts to undergo a probation period for 10 years. If during that period the convict shows positive behavioral changes and meets certain conditions, the sentence can be changed to life imprisonment.<sup>3</sup>

This approach is considered a step forward in Indonesia's criminal law reform. From a human rights perspective, the conditional death penalty is an attempt to accommodate criticisms that consider the death penalty as a form of cruel punishment and violates the right to life, as guaranteed in Article 3 of the Universal Declaration of Human Rights (UDHR) and Article 6 of the International Covenant on Civil and Political Rights (ICCPR).<sup>4</sup> As a country that has ratified the ICCPR through Law No. 12 of 2005, Indonesia faces pressure to conform its national laws to international standards, although the challenges of maintaining security and public order remain an important consideration.

On the other hand, in the perspective of Islamic law, the death penalty is not unfamiliar. In other cases, such as murder or violent robbery, this punishment is considered part of justice being served. However, Islam also emphasizes the importance of forgiveness and giving perpetrators the opportunity to repent. This

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<sup>1</sup> Alifa Dhiya Rahadi dan Alya Devitri, "Analisis Implementasi Hukuman Mati Dalam Hukum Pidana Islam Prespektif Keadilan Dan Hak Asasi Manusia". *HUMANITIS: Jurnal Homaniora, Sosial dan Bisnis*, Vol. 2, No. 8, (Agustus, 2024), 881.

<sup>2</sup> Pasal 100, Undang-Undang No. 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana.

<sup>3</sup> Badan Pembinaan Hukum Nasional, *Penjelasan Resmi KUHP Baru*, Jakarta: BPHN, 2023, 45.

<sup>4</sup> Amnesty International, *"Death Sentences and Executions Report 2022"*, Amnesty International Publications, <https://www.amnesty.org> diakses pada tanggal 06 Januari 2025 pukul 11:07.

principle is in line with *maqashid sharia*, which is the main objective of sharia that protects basic human needs. In the perspective of *maqashid sharia*, conditional death penalty can also be understood as a form of application of Islamic law that considers justice, benefit, and protection of human life (*hifz an-nafs*).<sup>5</sup> *Maqashid sharia* as the main objective of Islamic law emphasizes the importance of protecting five basic human needs: religion (*ad-din*), soul (*an-nafs*), intellect (*al-aql*), offspring (*an-nasl*), and property (*al-maal*).<sup>6</sup> The context of the death penalty, the provision of conditions and probation reflects a flexible approach that accommodates the principles of rehabilitation and benefit, without overriding the function of punishment as a deterrent to serious crimes.

Therefore, the concept of conditional death penalty also raises various major challenges. On the one hand, this concept raises debates regarding its suitability for the most serious crimes, such as premeditated murder, terrorism, and drug trafficking. On the other hand, this approach also requires an assessment mechanism to ensure justice for victims of serious crimes, and whether the 10-year probation period is sufficient to assess changes in the behavior of convicts. In addition, the implementation of this policy requires a clear, transparent, and objective mechanism, so that the process does not raise suspicion or abuse of authority.

A more in-depth study of the conditional death penalty in the national Criminal Code is important to assess its implications for the Indonesian criminal justice system, both from the perspective of human rights and *maqashid sharia*. This study is expected to contribute in the formulation of criminal law policy that is more inclusive, fair, and contextual with the needs of modern society.

Based on this, the author has formulated two discussion topics. First, how the conditional death penalty is applied from a human rights perspective. Second, how the conditional death penalty is applied from a *maqashid sharia* perspective, considering that the main objective of *maqashid sharia* is to safeguard and protect humanity.

## **METHODS**

This research uses normative legal research methods, which rely on the study of legal norms in various sources such as legislation, doctrine, and verses of the

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<sup>5</sup> Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach*, The International Institute of Islamic Thought, 2022, 14.

<sup>6</sup> Nazifah Hanafiah, "Relevansi Maqashid Syariah dalam Kebijakan Perlindungan Perempuan dan Anak pada Hukum Keluarga di Indonesia" *Integrated Education Journal*, Vol. 1, No. 2, (2024), 113.

Qur'an. The approach used is to use a conceptual approach and a statutory approach.<sup>7</sup> This research focuses on analyzing legal norms and legal documents related to the conditional death penalty policy in Law No. 1 of 2023 (National Criminal Code). The conceptual approach applied is to understand in depth the implementation of the conditional death penalty in the national Criminal Code by considering aspects of human rights and aspects of *maqashid sharia* in Islamic law. The technique used in collecting data is library research by making statutory provisions, the Qur'an and Hadith as primary data. Secondary data is obtained from books, scientific articles and proceedings as supporting data for this research.

In analyzing the data, a critical examination of the legal texts and their implications is conducted. This includes normative analysis, evaluating how the provisions of Law No. 1 of 2023 align with established human rights principles and Islamic legal objectives. Comparative analysis is also performed, comparing the conditional death penalty framework with international legal standards to highlight potential conflicts or alignments. Contextual analysis is essential for understanding the socio-legal context in which the conditional death penalty is implemented, considering both cultural and religious perspectives. Finally, thematic analysis identifies recurring themes in the legal texts and scholarly discourse, particularly concerning ethical considerations and the impact on society. Through these analytical techniques, the research aims to provide a nuanced interpretation of the conditional death penalty policy, ensuring that it is viewed through both legal and moral lenses.

## **RESULT AND DISCUSSION**

### **Concept of Human Rights in Conditional Death Penalty**

The existence of the death penalty in Indonesia is juridically-historically regulated in the Criminal Code, as a legacy from the Netherlands under the name *Wetboek van Strafrecht (WvS)*. Juridically, the death penalty in Indonesia is contained in Article 10 of the Criminal Code, which states that death penalty is a type of main punishment and among other main punishments, this sanction is the heaviest.<sup>8</sup> Death penalty is the most severe type of punishment because it means taking someone's life, so it is only applied to certain criminals. The debate on the necessity of death penalty

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<sup>7</sup> Muhammad Ridwan Lubis dan Muhammad Yusrizal Adi Syaputra. "Kedudukan Hukuman Mati Dalam KUHP Baru Perspektif Hak Asasi Manusia", *Jurnal Ilmiah Penegakan Hukum*, Vol. 10, No. 2, (2023), 115.

<sup>8</sup> Pasal 10. Moeljatno, *Kitab Undang-Undang Hukum Pidana (KUHP)* cet. 33, Jakarta: Bumi Aksara, 2018.

for criminal offenders continues to this day. Death penalty has an exceptional character, which means that it will only be imposed by the judge if it is considered very necessary.<sup>9</sup>

In Indonesian criminal law, several crimes are subject to the death penalty as a form of punishment including treason, such as the murder of the president and vice president, establishing relations with foreign countries that result in war, premeditated murder, corruption in certain circumstances, genocide, such as acts to destroy or exterminate parts of a national, racial, ethnic, or religious group, and narcotics-related crimes, such as bidding, selling, buying, or delivering, as stated in the Narcotics Law. In addition, criminal offenses involving the exploitation of children in the illicit trafficking of narcotics, including the abuse, production or distribution of narcotics and psychotropic substances may also be punishable by the death penalty, as stipulated in the Child Protection Law.<sup>10</sup>

In practice, death penalty is not a new thing anymore, however the implementation of this legislation in Indonesia faces several challenges. Especially, it is viewed by many as deeply conflicting with human rights, particularly the right to life. The amount of criticism and pressure from various circles, especially the international world regarding its application, then with all considerations the death penalty started to be discussed and explored in order to identify alternative solutions. Therefore, in the formulation of the new Indonesian Criminal Code, there is a new idea called the 'Indonesian way', which positions the death penalty as not included in the main punishment but an alternative punishment.<sup>11</sup>

Article 64 of the national Criminal Code states that in the penal system there are basic punishments, additional punishments, and special punishments for certain criminal offenses according to the law. Article 67 states that this special punishment involves the death penalty, which is always applied as an alternative. Article 98 explains that the death penalty is intended as an effort to prevent criminal acts and protect the community. Article 99 states that death penalty can only be executed after the clemency request from the convict is rejected by the President. Article 100 stipulates that judges who impose death penalty must provide a probation period of 10

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<sup>9</sup> Dita Melati Putri, "Hukuman Pidana Mati dalam KUHP Baru dan Perspektif Abolisionalis serta Retensionis", *Eksekusi: Jurnal Ilmu Hukum dan Administrasi Negara*, Vol. 2, No. 4, (November, 2024), 4.

<sup>10</sup> *Ibid*, hlm. 2.

<sup>11</sup> Parhan Muntafa dan Ade Mahmud, "Penerapan Hukum Pidana Mati Bersyarat Dalam KUHP Baru Di Hubungkan Dengan Asas Kepastian Hukum", *Jurnal Preferensi Hukum*, Vol. 4, No. 2, (2023), 133.

years. The specificity of death penalty is shown that death penalty is threatened and imposed very selectively. In this relationship, the judge first always considers in depth the level of remorse of the defendant, the desire to improve himself, and the involvement of the defendant in the criminal offense. If the defendant demonstrates sincere remorse and a commitment to personal improvement during the probation period, the death penalty may be commuted to life imprisonment through a Presidential decree, contingent upon the Supreme Court's assessment.

Although conceptually it is no longer categorized as the main punishment and has become a special punishment, one thing is certain that both in the old Criminal Code and in the national Criminal Code there is still a death penalty sanction and remains a subject of controversy that triggers debate among the public and human rights activists. The view of people who are pro-death penalty, they consider death penalty is appropriate to be applied to high-profile criminals or serious crimes. The death penalty is considered to be in alignment with the goals of criminal law, which aim to deter crime and safeguard individual rights. In addition, The death penalty can serve as a deterrent to crime within society.

However, it also represents an exception to the fundamental right to life, a principle that remains upheld by many nations around the world. In line with this, Indonesia also explicitly limits the applicability of the right to life as regulated by the Constitution in Article 28j of the 1945 Constitution which states that "everyone must respect the human rights of others". In another, Law Number 39 of 1999 concerning Human Rights states that the limitation of one's human rights with the rights of others is for the sake of creating public order. The existence of the death penalty is a mainstay to deal with serious crimes. This sanction will only be applied to perpetrators of serious crimes or serious crimes that violate the human rights of others. In this way, respect and appreciation for human rights among fellow human beings can be created.

Opponents of the death penalty view this form of punishment as inhumane and inconsistent with the principles of fairness and civilized society outlined in Pancasila. On the one hand, they also argue that the second amendment to articles 28A and 28I Paragraph 1 of the 1945 Constitution, the assertion that every individual has the right to life and the right to defend their own life and livelihood lies at the heart of the ongoing debate surrounding the death penalty. This fundamental human right is inviolable and cannot be diminished by anyone, including governmental authorities. Furthermore, the death penalty is widely viewed as incompatible with the true purpose of punishment, which should be to deter crime rather than seek

retribution. Critics argue that while the death penalty may lead to a temporary decrease in crime rates, it fails to foster a genuinely safe and happy society. Ultimately, the most important aspect is how justice is perceived and experienced by the victims of crime.<sup>12</sup>

In Indonesia itself, death penalty is still considered as the most effective punishment in dealing with serious crime cases and explicitly limits the right to life, as indicated by article 28j of the 1945 Constitution that "everyone must respect the human rights of others" and Law No. 39 of 1999 about Human Rights states that the limitation of one's human rights is the existence of other people's rights for the sake of creating public order. This conditional death penalty formulation can be a middle ground in the debate between abolitionist and retentionist groups, as well as part of the efforts to reform the Indonesian criminal justice system.

### **Implementation of Conditional Death Penalty in Frame of *Maqāshid Al-Sharī'ah***

The definition of *maqashid sharia* itself linguistically, the term consists of two words: "*maqashid*" and "*al-sharia*". "*Maqashid*" which translates to intentionality or purpose, is derived from the root "*maqshud*" the root itself comes from the syllable "*qashada*" meaning to desire or intend. Therefore, "*maqashid*" refers to those things that are desired and intended. While *sharia* المواضع الماء إلى تحدر linguistically It signifies the route leading to the source of water, which can also be seen as a journey toward the essence of life itself. From the two meanings of the word can be drawn the understanding that *maqashid sharia* is the objectives of Islamic law contained in each rule or in other words the concept of knowing the wisdom of the values and objectives of shara' which are expressed and implied in the Qur'an and Hadith.<sup>13</sup>

*Maqashid sharia* (in Imam Syatibi's classification) consists of five main elements, specifically the protection of religion (*hifdzu al-diin*), soul (*hifdzu al-nafs*), offspring (*hifdzu al-nasb*), reason (*hifdzu al-aql*) and property (*hifdzu al-maal*). Islamic sharia was revealed to uphold these five fundamental principles.<sup>14</sup> The five main elements are the development of the concept of *masalih al-mursalah* proposed by

<sup>12</sup> Hikmah, Wardin Wardin, dan Fitriani Fitriani, "Pidana Mati Bersyarat (Conditional Capital Punishment) Sebagai Jalan Tengah Pro-Kontra Pidana Mati Di Indonesia", *Jurnal Al-Ahkam: Jurnal Hukum Pidana Islam*, Vol. 6, No. 2, (2024), 256.

<sup>13</sup> Ahmad Suganda, "Urgensi dan Tingkatan Maqashid Syari'ah dalam Kemaslahatan Masyarakat", *Jurnal At-Tadbir: Media Hukum Dan Pendidikan*, Vol. 30, No. 1 (Januari, 2020), 2.

<sup>14</sup> *Ibid*, hlm. 3.

Imam Malik. The concept of *masalih al-mursalah* is essentially the purpose of Islamic law, namely *maslahah*/kindness, because the concept of *maqashid* is the development of the concept of kindness, so that the main aspect of *maqashid sharia* is kindness.

The death penalty which is a command from God, of course cannot be dismissed or abolished just like that for any reason, even though the law itself continues to evolve. The flexibility and leniency of Islamic law cannot abolish the death penalty, but its implementation or execution may change according to the times. Here, the concept of *maqashid sharia* embodies the *maqashid daruriyyat*, which contains the most essential elements of human protection.<sup>15</sup> Therefore, sharia has the goal of the welfare of humanity, so all legal products function to realize welfare and prevent harm. The laws that are made must be based on the principle of interpreting sharia texts for the benefit of the community.<sup>16</sup>

The existence of death penalty in Islamic law as a legal sanction threatened against several *jarimah* or certain crimes. Among others, on *qisash* that is threatened on the crime of murder, *riddah* which is the act of a Muslim who leaves his religion and then commits desertion (crossing over to the enemy group of Islam so that it can threaten/endanger the existence of Islam and Muslims).<sup>17</sup> Based on this, it can be seen that according to Islamic teachings, the threat of death penalty is only intended for certain serious crimes. Such as intentional murder without a valid reason, betrayal in the life of Muslim society (*riddah*) and so forth.

Compare this provision of Islamic criminal law with the provisions of the Criminal Code such as, treason with the aim of assassinating the President and Vice President (article 104 of the Criminal Code); Conducting relations with foreign countries that cause war (article 111 paragraph (2) of the Criminal Code); Treason by informing the enemy during war (article 124 paragraph (3) of the Criminal Code); Inciting and facilitating riots (article 124 of the Criminal Code); Premeditated murder of a head of a friendly state (article 140 paragraph (3) of the Criminal Code); Premeditated murder (article 340 of the Criminal Code); Theft by gang violence resulting in serious injury or death (article 365 paragraph (4) of the Criminal Code); Piracy at sea resulting in death (article 444 of the Criminal Code); Crimes related to

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<sup>15</sup> Abdul Azis Muhammad dan Sodikin Sodikin, "Eksistensi Dan Konstitusionalitas Pidana Mati Menurut Uud 1945 Berkaitan Dengan Tujuan Hukum Islam", *Masalah-Masalah Hukum*, Vol. 53, No. 2, (Juli, 2024), 174.

<sup>16</sup> Zulhasari Mustafa, "Problematika Pemaknaan Teks Syariat dan Dinamika Maslahat Kemanusiaan", *Mazahibuna: Jurnal Perbandingan Mazhab*, Vol. 2 No. 1, (Juni, 2020), 49.

<sup>17</sup> Topo Santoso, *Membumikan Hukum Pidana Islam (penegakan syari'at dalam wacana agenda)*, Jakarta: Gema Insani, 2003, 31.

aviation and aviation facilities (article 149K paragraph (2) and article 149O paragraph (2) of the Criminal Code).<sup>18</sup>

As for the philosophical reasons and objectives underlying the imposition of death penalty according to Islam, in Surah Al-Baqarah: 179 mentions the concept of its precept as follows: *"There is security of life for you in the law of retaliation, O people of reason, so that you may become mindful of Allah."*

The verse means that the purpose of imposing the punishment of *qisash* (death penalty) against the crime of murder (for example) is so that the guarantee of human life as one of the most basic human rights can be realized. The basic logic is that if everyone is willing and able to think to understand that whoever kills will definitely result in himself being killed (through the application of *qisash* criminal sanctions), then this will certainly be an internal preventive force for potential murderers. Because anyone would want to avoid losses in the form of killing themselves due to the application of the *qisash* law. If so, then there will be no more people killing and that means the right to life / life of everyone will be more secure.

To understand how Islam provides justification for the existence of the death penalty, which is essentially the deprivation of a person's life by another person (the ruler through the executor apparatus), and how Islam also views the position of the existence of the death penalty sanction itself, it is worth examining the provisions of the Qur'an letter Al-Baqarah: 178 which is as follows: *"O believers! The law of retaliation is set for you in cases of murder—a free man for a free man, a slave for a slave, and a female for a female. But if the offender is pardoned by the victim's guardian, then blood-money should be decided fairly and payment should be made courteously. This is a concession and a mercy from your Lord. But whoever transgresses after that will suffer a painful punishment."*

Although the position of *qisash* in the view of Islam is as the main punishment, but its functionalization must be placed as the last alternative (not the main choice), because in Islam the first thing that is recommended to the victim or his family is to forgive the perpetrator of the crime either accompanied by demands for *diyat* (compensation for the victim/family) or forgive without any demands. The *diyat* itself is

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<sup>18</sup> Mutiara Adinata Garzela dan Mauliddah Fitriana. "Hukuman Mati: Mencegah Kejahatan atau Membunuh Kemanusiaan?", *Humani: Hukum Masa Kini*, Vol. 1, No. 2, (2024), 2.

divided into two types, namely *diyat mugallazah* (heavy fine) for intentional murder and *diyat mukhaffafah* (light fine) for unintentional murder.<sup>19</sup>

If in the national Criminal Code, there are certain alternatives to conditional death penalty, specifically life imprisonment or rehabilitation, which if compared to Islamic law, the alternative can be classified as *ta'zir (jarimah* whose punishment is determined by the ruler or judge).<sup>20</sup> In accordance with this, the existence of an alternative to conditional death penalty in the national Criminal Code has fulfilled the principles of *maqashid sharia*. The concrete form is that the law aims to realize human welfare which is accomplished by pursuing what is beneficial for humanity while rejecting anything that harms life, both in this world and the next. The benefit is to preserve life, soul, and mind. The last concept of *maqashid* is to protect property because the closing of this section is associated with social issues. Basically, the concept of *maqashid sharia* is closely related to other concepts in order to find *'illat, hikmah, asrar* (the secrets behind the determination of the law), so that everything that is formulated in a rule including those in the formulation of the national Criminal Code, if it aims at efforts to obtain kindness then included in part of *maqashid sharia*.

The discussion on the concrete application of the conditional death penalty in the context of Indonesian law, specifically Law Number 1 of 2023 (the Criminal Code), encompasses several important aspects that require attention. First, the conditional death penalty is regulated as an alternative punishment for perpetrators of serious crimes, subject to certain conditions, such as the defendant's remorse and hope to improve themselves, or the defendant's role in the crime. The death penalty with probation must be included in the court's decision (Law Number 1 of 2023 concerning the Criminal Code). This aims to provide the convict with an opportunity to improve themselves and reintegrate into society.

Second, in practice, the application of the conditional death penalty requires a strict oversight mechanism. The court must carefully consider all evidence and arguments before imposing this sentence. The human rights aspect is particularly relevant here, as the application of this punishment must respect human dignity and opportunities for rehabilitation, in line with the principles of restorative justice. Human rights protection in criminal law aims to create a just and humane justice system.

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<sup>19</sup> Mustofa Hasan dan Beni Ahmad Sebani, *Hukum Pidana Islam (Fiqh Jinayah)*, Bandung: Pustaka Setia, 2013, 283-283.

<sup>20</sup> Totok Sugiarto, Wawan Susilo, and Purwanto Purwanto, "Studi Komparatif Konsep Tindak Pidana dalam Hukum Pidana Indonesia dan Hukum Pidana Islam", *Al-Qanun: Jurnal Pemikiran dan Pembaharuan Hukum Islam*, Vol. 25, No. 2, (Desember, 2022), 228.

Third, challenges in implementing the conditional death penalty include resistance from the public, who may believe the sentence is too lenient for perpetrators of serious crimes. Therefore, it is important to conduct outreach and legal education to the public so they understand the purpose and mechanisms of the conditional death penalty. Public opinion in Indonesia shows that support for the death penalty is complex and conditional, and can change with more complete information.

Fourth, aspects of the *maqashid sharia* (Islamic principles) also need to be integrated into the application of the conditional death penalty. Principles such as protecting life, maintaining human dignity, and seeking justice should guide the implementation of this punishment. The application of the death penalty must be aligned with *hifz al-nafs* (protecting the soul) and other principles of public welfare.

Therefore, the concrete application of the conditional death penalty must consider the balance between legal justice, rehabilitation, and human rights protection, so that it can have a positive impact on individuals and society as a whole. Furthermore, there needs to be further regulation regarding the mechanisms and procedures for implementing the death penalty in law (Article 102 of the 2023 Criminal Code).

## **Implications of the Implementation of Conditional Death Penalty**

### **1) Legal Implication**

#### **a. Balance Between Law Enforcement and Human Rights Protection**

Conditional death penalty is a compromise solution between the demands of law enforcement against serious crimes and respect for human rights. This approach permits the death penalty to be applied with a more flexible and humane mechanism, reflecting an adaptive justice paradigm. Conditional death penalty shows how the legal system can evolve by taking into account the right to life as an inalienable human right, as stipulated in article 6 of the International Covenant on Civil and Political Rights (ICCPR).<sup>21</sup> Several studies show that the application of conditional death penalty strengthens the principle of rehabilitation in criminal law. By providing a probation period, the legal system provides an opportunity for offenders to improve themselves and show remorse, as well as reassess the fairness and proportionality of the sentence.<sup>22</sup>

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<sup>21</sup> United Nations, *International Covenant on Civil and Political Rights* (ICCPR), 1966.

<sup>22</sup> Jones, M., & MacLean, R, "Conditional Death Penalty: A Comparative Study on Rehabilitation in Capital Punishment", *Journal of Criminal Justice Studies*, Vol. 45, No. 2, (2018), 101-117.

### **b. Strengthening the Evaluation System in Criminal Justice**

Conditional death penalty requires an update in the evaluation system of the convict's behavior during the probation period. This evaluation not only includes legal aspects, but also involves the disciplines of psychology, sociology, and criminology. This provides an opportunity for convicts to demonstrate significant self-improvement and qualify for sentence reduction.<sup>23</sup> In the Indonesian context, for example, the new Criminal Code provides a 10-year probation period before execution is carried out. If during this time the convict indicates good behavior, the sentence could be commuted to life imprisonment or 20 years imprisonment. This implementation shows that the state is trying to integrate human rights principles in the criminal justice system.<sup>24</sup>

### **c. Legal Challenges in Implementation**

Despite offering many benefits, the implementation of conditional death penalty presents major challenges, especially in ensuring fairness and transparency during the evaluation process. Research by Hood and Hoyle shows that many countries face problems in determining objective criteria for evaluating the behavior of convicted offenders. This lack of clarity can lead to legal uncertainty, especially if decisions regarding sentence reduction are influenced by political pressure or public opinion.<sup>25</sup>

The success of the conditional death penalty is highly dependent on the ability of the judicial system to maintain its independence. If this system is not properly supervised, the potential for abuse of power or bias in decision-making can tarnish the principles of justice. Although the concept of conditional death penalty is a progressive step, its implementation in Indonesia faces various challenges. One of the main challenges is ensuring consistency and transparency in the implementation of probation. Determining good behavior during probation requires clear and objective standards to avoid potential discrimination or decisions based on political pressure.<sup>26</sup>

In addition, there is still debate among the public and academics as to whether the death penalty, although conditional, remains relevant to the development of modern civilization. Some consider that the death penalty, in any form, contradicts the principle of non-derogable rights in human rights. However, others argue that the

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<sup>23</sup> Garland, D, *The Culture of Control: Crime and Social Order in Contemporary Society*. London: Oxford University Press, 2012.

<sup>24</sup> Pasal 100, Undang-Undang No. 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana.

<sup>25</sup> Roger Hood dan Carolyn Hoyle, (2015). *The Death Penalty: A Worldwide Perspective*. Oxford University Press.

<sup>26</sup> Komnas HAM, "Penerapan Pidana Mati dan Hak Asasi Manusia di Indonesia", Laporan Resmi Komnas HAM, 2021, 10–12.

death penalty is still necessary to provide a preventive effect and protect society from the threat of serious crimes.

## 2) Social and Political Implications

The change in the status of death penalty in the new draft Criminal Code also has significant social and political implications domestically. At the domestic level, the issue of the death penalty often triggers fierce public debate between supporters and opponents. Supporters of the death penalty often consider it an appropriate form of justice for very serious crimes, while opponents highlight the risk of judicial error, the inhumanity of the punishment, and the lack of evidence of its effectiveness as a preventive measure.

Politically, the government's stance on the impact of the death penalty on shaping public opinion and domestic political support. The decision to amend or abolish the death penalty in the Criminal Code must take into account the views and aspirations of the community, as well as its long-term impact on social and political stability in Indonesia. Furthermore, views and policies regarding the death penalty can also affect the relationship between the government and international institutions and friendly countries that increasingly emphasize the urgency of respecting human rights in the context of sustainable global governance.<sup>27</sup>

### Comparative Empirical Discussion of the Death Penalty

Countries in the Middle East have varying rates of application of the death penalty, influenced by the legal systems in place (generally a combination of Islamic and secular law), religious interpretations, and the socio-political conditions of each country.

#### 1. Saudi Arabia

Saudi Arabia imposes the death penalty for various crimes, including murder, terrorism, drug offenses, and apostasy. Executions are often carried out in public. The Saudi government argues that the death penalty serves as an effective deterrent

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<sup>27</sup> Hendra Arjuna, Evi Wulandari, dan Basyaruddin Idris, "Kontroversi Hukuman Mati dalam KUHP Baru: Antara Penegakan Hukum dan Perlindungan Hak Asasi Manusia", *SYARIAH: Jurnal Ilmu Hukum*, Vol. 1, No. 4, (Juli, 2024), 153.

against serious crimes. However, human rights organizations criticize the lack of transparency in the judicial process and the potential for unfair executions.<sup>28</sup>

## 2. Iran

Iran is one of the countries with the highest execution rates in the world. The death penalty is imposed for a range of crimes, including murder, drug offenses, crimes against the state, and religious offenses. There are serious concerns about unfair trials, including the use of confessions obtained through torture. Minority groups and political dissidents are often targeted.<sup>29</sup>

## 3. Iraq

After a period of suspension, Iraq has resumed widespread use of the death penalty, particularly for cases related to terrorism and crimes against national security. Trials are often rushed and conducted without adequate legal standards. Political instability and armed conflict have contributed to an increase in the number of executions.<sup>30</sup>

## 4. Egypt

Egypt has also seen an increase in the number of executions, particularly following the overthrow of the Morsi government in 2013. The death penalty is often imposed in cases involving political violence and terrorism. Human rights organizations have criticized the use of military courts to try civilians and the lack of guarantees of a fair trial.<sup>31</sup>

In general, Middle Eastern countries that apply the death penalty have several things in common:

- Mixed Legal Systems: The combination of Islamic and secular law creates complexity in the application of the death penalty.
- Lack of Transparency: Judicial processes are often not transparent and do not meet international standards.
- Use for Political Crimes: The death penalty is often used to suppress political dissent and combat terrorism.
- High Execution Rates: Some Middle Eastern countries have the highest execution rates in the world.

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<sup>28</sup> Iqbal, F. M., et al. (2023). Polemik Hukuman Mati Di Arab Saudi Dalam Tinjauan Hukum Hak Asasi Manusia. *Jurnal Pemuliaan Hukum*, Vol. 6 No. 1, 54-68.

<sup>29</sup> Human Rights Watch. (2024). *World Report 2024*. New York: Human Rights Watch.

<sup>30</sup> United Nations. (2022). *Report of the Secretary-General on the promotion and protection of human rights*. New York: United Nations.

<sup>31</sup> Egyptian Initiative for Personal Rights. (2023). *The State of Executions in Egypt*. Cairo: EIPR.

However, there are also significant differences between countries. Some countries, such as Lebanon and Morocco, have a de facto moratorium on the death penalty. Public opinion and international pressure also play a role in influencing the death penalty policies of each country.

As a writer, I believe that the implementation of the conditional death penalty can be an effective solution in the Indonesian criminal justice system. First, it provides an opportunity for rehabilitation for perpetrators of serious crimes. Second, the implementation of the conditional death penalty aligns with human rights principles. In this context, respect for human dignity is fundamental. Thus, we strive to create a more just and humane justice system. Furthermore, the conditional death penalty can reduce the burden of prison overpopulation. With many cases resolved through rehabilitation, we can shift the focus of law enforcement to more serious cases. This not only reduces costs but also improves the quality of handling more complex cases. The implementation of the conditional death penalty is also consistent with moral and religious values that teach the importance of forgiveness. In an increasingly complex society, providing a second chance is not only just but also an act that inspires empathy and solidarity.

Considering these various aspects, I argue that the implementation of the conditional death penalty is not merely an option, but a step forward towards a more humane, just, and effective justice system.

## **CONCLUSION**

The implementation of the death penalty in Indonesia still raises issues, particularly related to human rights violations, especially the right to life. Conditional death penalty is a concept that seeks to bridge the gap between respecting human rights and the need for strict law enforcement. From a human rights perspective, this concept provides an opportunity for prisoners to undergo rehabilitation and fight for their right to life. However, the implementation of conditional death sentences requires strict oversight to ensure transparency, consistency, and respect for the principles of justice. Although it is more humane compared to direct capital punishment, the challenges in its implementation need to be evaluated so that the principles of human rights can still be effectively realized in law enforcement practices.

In Islam, the death penalty is prescribed for serious crimes, such as murder and treason against religion, with the aim of protecting the right to life and encouraging awareness to refrain from committing crimes. The death penalty in Islam

is considered a last resort, with an emphasis on forgiveness or acceptance of compensation, based on the principles of maqashid sharia that aim to realize maslahat and protect life, soul, and mind. The concept of maqashid sharia is closely related to the search for 'illat, hikmah, and asrar behind the determination of laws, so that all regulations, including those in the National Criminal Code Bill, must aim to achieve maslahat. Conditional death penalty has significant legal and social implications in the pursuit of justice and the protection of human rights, encouraging reforms in the criminal justice system, and strengthening the principle of rehabilitation, although challenges such as legal uncertainty and evaluative bias need to be addressed. A transparent and inclusive approach can make conditional death sentences a progressive step towards a more just and humane legal system.

The implementation of Conditional Death Penalty in the National Criminal Code needs to be thoroughly evaluated by considering the principles of Human Rights and maqashid as-syari'ah. Legislators and law enforcement officials must establish clear and strict criteria for the application of this punishment, ensuring that only qualifying cases can be sentenced, while considering mitigating factors. Education and training programs for law enforcement officials on human rights and legal ethics are very important; moreover, the judicial process must be transparent and supervised by independent institutions to ensure accountability. Consideration of more humane punishment alternatives, such as rehabilitation, should also be undertaken, accompanied by public dialogue involving the community and human rights organizations. Periodic monitoring and evaluation of the implementation of conditional death sentences will help assess their impact on social and legal justice, ensuring that the application of this punishment can be carried out fairly and in accordance with broader societal principles.

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