

ANALISIS KOMPARATIF SANKSI PIDANA MATI ANTARA HUKUM PIDANA INDONESIA DAN MALAYSIA

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Abstract

The death penalty has been abolished in many countries worldwide, while some still retain it in their legal systems but remain inactive in its implementation. Conversely, certain nations continue to actively enforce capital punishment. This study conducts a comparative legal analysis of death penalty sanctions in Indonesia and Malaysia, emphasizing their legal foundations, implementation, and policy directions. The death penalty represents the most severe criminal sanction and continues to generate debates between the principles of justice and the protection of human rights. Employing a normative juridical method and a comparative approach, this research analyzes statutory laws, legal doctrines, and criminal policy frameworks in both countries. The findings reveal that Indonesia maintains the death penalty as a principal punishment but redefines it under the 2023 Criminal Code as a conditional sentence with a ten-year probationary period before execution. In contrast, Malaysia has undertaken major legal reforms by abolishing the mandatory death penalty in 2023, granting judges the discretion to impose alternative sanctions such as life imprisonment. This comparative study highlights how both countries are moving toward more humanistic and proportionate criminal justice systems, reflecting global trends in the reform of capital punishment.

Keywords: death penalty(:)comparative law(:)Indonesia(:)Malaysia(:)criminal justice reform

Abstrak

Sanksi pidana mati pada Negara-negara di dunia sudah banyak yang menghapus pidana mati, ada juga yang masih ada dalam undang-undangnya pidana mati namun tidak aktif dalam penerapannya. Di sisi lain ada Negara yang masih aktif dalam penerapan pidana mati. Penelitian ini membahas perbandingan hukum sanksi pidana mati di Indonesia dan Malaysia dengan menitikberatkan pada dasar hukum, pelaksanaan, dan arah kebijakan masing-masing negara. Hukuman mati merupakan bentuk sanksi pidana terberat yang menimbulkan perdebatan antara kepentingan penegakan hukum dan perlindungan hak asasi manusia. Metode penelitian yang digunakan penelitian Hukum normatif dengan pendekatan perbandingan hukum (*comparative approach*), melalui analisis peraturan perundang-undangan, doktrin, serta kebijakan hukum pidana di kedua negara. Pidana mati di Indonesia masih dipertahankan sebagai pidana pokok, namun dengan konsep baru dalam KUHP 2023 berupa pidana mati bersyarat dengan masa percobaan selama sepuluh tahun sebelum eksekusi dilaksanakan. Sementara itu, Malaysia telah melakukan reformasi signifikan dengan menghapus hukuman mati wajib (*mandatory death penalty*) pada tahun 2023 dan memberikan kewenangan kepada hakim untuk menjatuhkan hukuman alternatif berupa penjara seumur hidup. Namun, perbandingan terhadap dua Negara ini menjadi menarik baik itu dalam pelaksanaan, maupun dalam aturan hukum.

Kata Kunci: perbandingan hukum(:)pidana mati(:) Indonesia(:) Malaysia.

PENDAHULUAN

Capital punishment has become one of the most controversial issues in modern

criminal law systems.¹ The debate over the existence of capital punishment reflects a clash between two fundamental values in law, namely the enforcement of justice and respect for human rights. Capital punishment is the most severe form of criminal sanction and raises fundamental debates in modern criminal law theory and practice. The debate over the legitimacy of capital punishment is rooted in the conflict between the principle of retributive justice and the protection of human rights, particularly the right to life.

In the global context, many countries have abolished the death penalty from their legal systems because it is considered contrary to the principles of humanity and the right to life as guaranteed in international legal instruments such as the International Covenant on Civil and Political Rights.² Some countries consider the death penalty necessary to deter crime and protect society from extraordinary crimes, while others consider it contrary to universal humanitarian values. Indonesia is one of the countries that still retains the death penalty in its legal system.³

This issue is relevant when viewed from a comparative law perspective, because each country interprets the values of justice and human rights in its own socio-cultural context. In the Criminal Code (KUHP), the death penalty is listed as a basic punishment that can be imposed for

certain crimes, such as premeditated murder, terrorism, and drug crimes.⁴

In the global context, there has been a significant shift in the existence of the death penalty. According to Amnesty International's 2023 report, more than two-thirds of countries in the world have abolished or no longer apply the death penalty in practice. Conversely, some countries in Asia and the Middle East still maintain this provision, either actively or symbolically. This global shift reflects the debate between the supremacy of positive law and the development of more modern humanitarian values.

"Indonesia has revised its new Criminal Code in 2023 by introducing a new concept of conditional death penalty, which allows convicted persons to obtain clemency if they show remorse and change their behavior.⁵ To date, Indonesia still stipulates the death penalty as one of the main penalties in its national legal system. In the 2023 Criminal Code, the death penalty is retained but with a new concept of conditional death penalty, which is a ten-year probation period before the execution is carried out. This law abolishes the mandatory death penalty and gives judges the discretion to impose alternative sentences of life imprisonment or long-term imprisonment.⁶ "This model marks a shift from a retributive paradigm to a rehabilitative and humanistic approach."

¹ Rohmat, R., Dewi, I. K., Riyadi, T. M., & Parhan, M. (2024). Tinjauan pelaksanaan aborsi bagi korban pelecehan seksual sedarah dalam perspektif Islam dan kenegaraan. *Pikukuh: Jurnal Hukum dan Kearifan Lokal*, 1(1), 1-19. <https://doi.org/10.62870/pkh.v1i1.22748>

² United Nations. (1966). *International Covenant on Civil and Political Rights* (ICCPR), United Nations Treaty Series, vol. 999, p. 171.

³ KUHP Indonesia 2023, Pasal 100-101

⁴ Muladi & Barda Nawawi Arief. (1992). *Teori-teori dan kebijakan pidana*. Bandung: Alumni, hlm. 45-47.

⁵ Siregar, T. (2022). Hukuman mati dan dilema hak asasi manusia di Indonesia. *Jurnal Hukum Pidana Indonesia*, 9(1), 23-41.

⁶ Karim, A., & Osman, R. (2021). Malaysia's reform on mandatory death penalty: Comparative analysis. *Journal of Southeast Asian Law*, 12(2), 45-68.

“This can be seen in Article 98 of Law Number 1 of 2023 concerning the Criminal Code,⁷ which states, “The death penalty is imposed as a last resort to prevent criminal acts and protect society.”

“In Indonesia, the sources of criminal law consist of the Criminal Code (KUHP), which is derived from Dutch criminal law, as well as various other laws and regulations that have been amended in accordance with the situation in Indonesia. “In addition, customary law and Islamic law are also used in enforcing the law in some regions.” “Ongoing legal reforms seek to improve and adapt the criminal justice system to meet the current needs of society and international standards”.⁸

“Malaysia has taken a progressive step in its death penalty policy through the enactment of the Abolition of Mandatory Death Penalty Act 2023.⁹ “Malaysia has undertaken a major legal reform through the Abolition of Mandatory Death Penalty Act 2023, which abolishes mandatory death penalties and gives judges the authority to impose life imprisonment as an alternative”.

“Countries with mixed legal systems such as Indonesia and Malaysia are interesting examples because they still retain the death penalty, but are beginning to show signs of more humanistic criminal law reform. A comparison between Indonesia and Malaysia is relevant because both countries have similar legal backgrounds,

namely the legacy of the British and Dutch colonial legal systems, but show different directions in criminal policy”.¹⁰

“Several previous studies have discussed the death penalty in the context of Indonesian and Malaysian law, but none have comprehensively compared the legal basis, policies, and direction of reform in both countries. Esti Banjarsari's research focuses more on human rights violations that occur due to provisions that restrict and violate these rights, namely the imposition of punishment.”¹¹ “Her research also discusses human rights and the application of the death penalty. The focus of the research is on various existing legal sources and literature, with the aim of gaining a deeper understanding of the relationship between human rights and the death penalty in Indonesia”.¹² “Then there is the research conducted by Yunizar Falevi et al., which focuses on the implications of imposing the death penalty on perpetrators of corruption in Indonesia and discusses the effectiveness of abolishing the death penalty in dealing with corruption in Indonesia as well as the impact of abolishing the death penalty on corruption in Indonesia.”¹³ “Lintang Sely's research provides a more in-depth analysis of the latest changes in the Indonesian criminal justice system, particularly in relation to the application of the death penalty. Her research offers a new perspective in understanding the dynamics

⁷ Pasal 98 Undang- Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana

⁸ Insani, N., Mutiara, U., & Haritsa. (2023, Januari). PENERAPAN HUKUMAN MATI DALAM PERSPEKTIF HUKUM ISLAM DAN HUKUM POSITIF DI INDONESIA. *Pagaruyuang Law Journal*, 6(2), 149-163.

⁹ Abolition of Mandatory Death Penalty Act 2023, Malaysia, hlm. 5-6

¹⁰ Muliawan, A., & Farid, H. (2020). Comparative study on capital punishment in Southeast Asia:

Human rights perspective. *Asian Journal of Legal Studies*, 5(3), 112-130.

¹¹ Estri Banjaransari, Yesika Rahman, *Kajian Terhadap Hubungan Antara Pidana Mati Dengan Hak Asasi Manusia*. *Jurnal Dinamika Hukum* Volume 24 No. 1, hlm 154

¹² Ibid, hlm 155

¹³ Yunizar Falevi, Muhammad Abyan Zain, *Implikasi Penjatuhan Hukuman Mati Terhadap Pelaku Tindak Pidana Korupsi Di Indonesia*, *Jurnal Hukum, Politik Dan Ilmu Sosial (JHPIS)* Vol. 2, hlm 106

of the death penalty policy, which was previously more static, by exploring in more detail the substantial changes that have occurred, as well as the challenges faced in its implementation”.¹⁴ This study emphasizes a normative juridical approach using a comparative legal method. The data used includes primary legal materials such as laws and court decisions, secondary legal materials such as academic literature, and tertiary legal materials such as international agency reports. The analysis was conducted qualitatively through a comparison of the criminal justice systems of Indonesia and Malaysia, focusing on the basic legal aspects, practical application, and capital punishment reform policies. “This approach is expected to provide a deeper understanding of the conceptual and implementational differences between the two legal systems.” This study shows that previous research has been descriptive in nature and has not described the relationship between legal structures, criminal policies, and human rights principles in the two countries..

“The implementation of the death penalty is greatly influenced by criminal policy and socio-political pressures within the legal systems of each country. As a result, there has been no comparative study capable of showing how the two countries balance the interests of law enforcement and the protection of human rights in a proportional manner.” “This gap is the main basis for this study. Based on this foundation, this study proposes several main research questions, such as the legal basis and implementation of the death penalty in the criminal justice systems of Indonesia and Malaysia, the direction of criminal justice

reform policies related to the death penalty in both countries, and the implications of these comparisons for the protection of human rights and the renewal of national criminal justice in the future”.

“These questions form the analytical framework for assessing the extent to which both countries are able to integrate the values of justice, humanity, and legal certainty into their modern penal systems. The answers to these questions are expected to enrich the international discourse on the relationship between national criminal law and global human rights standards”.

“Theoretically, this study is based on retributive and utilitarian theories of punishment. Retributive theory emphasizes punishment as a fitting response to crime, while utilitarian theory views punishment as a means of prevention and social rehabilitation. The debate between these two theories is important in understanding the moral and philosophical basis for the application of the death penalty. In addition, the theory of human rights protection provides an additional conceptual framework for assessing whether the death penalty policies in both countries are in line with the principle of the right to life. The research method used is normative with a comparative approach, through analysis of legislation, doctrine, and criminal law policies in both countries.

“Considering the theoretical framework, legal context, and socio-political dynamics, this study aims to conduct an in-depth analysis of the comparison between Indonesia and Malaysia's capital punishment sanctions in terms of legal basis, implementation, and policy. The objective of this study is to

¹⁴ Lintang Sely Puspita Angraini, *Dinamika Pidana Mati Dalam Kuhp Baru: Pembaruan Hukum Pidana*

dan Tantangan Implementasi, Jurnal Ilmiah Advokasi Vol. 13, No. 02, July, 2025, hlm, 514

provide a comprehensive understanding of the differences and similarities in capital punishment policies between Indonesia and Malaysia, as well as to offer conceptual recommendations for the reform of national criminal law to be more in line with the principles of justice and human rights. It also aims to provide academic recommendations on the direction of criminal law reform in both countries so that it is more in line with humanitarian values and developments in international law. Thus, this study is expected to contribute not only to the development of comparative criminal law, but also to the formulation of legal policies that are more just, civilized, and respectful of human rights.”.

“The novelty of this research lies in its comparative-legal approach, which emphasizes analysis of the balance between the principle of retributive justice and respect for the right to life in two different legal systems in Southeast Asia. Thus, this study seeks to fill the gap in previous studies and offer a new perspective in understanding the dynamics of the abolition or reform of the death penalty in the region.”.

PROBLEM FORMULATION

1. What are the legal basis and philosophy behind the application of the death penalty in Indonesia and Malaysia?
2. How is the death penalty applied from an Islamic legal perspective, and what are its implications for the protection of human rights?

RESEARCH METHODOLOGY

This study uses a normative legal research method with a comparative approach. The normative legal method is used because the focus of this study lies in the examination of positive legal norms,

legal principles, and criminal policies applicable in Indonesia and Malaysia. The comparative approach is applied to analyze the similarities and differences between the legal systems of the two countries, particularly in terms of legal basis, implementation, and policy direction regarding the death penalty.

The research data was obtained through library research covering primary, secondary, and tertiary legal materials.

Data collection techniques were carried out through document studies and literature analysis, while the data analysis technique used was descriptive qualitative analysis. The data was then analyzed by interpreting the positive legal provisions in each country, then comparing them to find similarities, differences, and trends in the direction of the death penalty policy in the future. The results of the analysis are expected to provide a comprehensive understanding of the relationship between the death penalty policy, law enforcement, and the protection of human rights in the context of Indonesian and Malaysian law.

RESEARCH RESULTS AND DISCUSSION

Legal Basis and Philosophy of the Application of the Death Penalty in Indonesia and Malaysia

"Criminal law, as part of the national legal system, has the primary function of maintaining public order and protecting the interests of society by imposing sanctions on criminals. One of the most severe forms of criminal punishment in the world today is the death penalty. The death penalty is in a dilemma in modern law because, on the one hand, it is considered an effective means of deterrence and protecting the public interest, but on the other hand, it is seen as contrary to the right to life guaranteed by

international law. In the context of Indonesia and Malaysia, the debate on the death penalty is not only related to moral or humanitarian aspects, but also to the question of how countries place the death penalty within their positive legal systems and to what extent its application is still relevant to the principles of modern criminal law.”.

“In the Indonesian criminal justice system, the death penalty has long been recognized and regulated in various laws and regulations. The Dutch colonial-era Criminal Code (*Wetboek van Strafrecht*, 1915), which remained in effect until the enactment of the 2023 National Criminal Code, continued to include the death penalty as one of the principal punishments. However, in the 2023 National Criminal Code, the position of the death penalty has undergone significant changes with the introduction of the concept of “conditional death penalty.” Based on Article 100 of the 2023 Criminal Code, the death penalty is no longer placed as the main sanction that must be carried out absolutely, but as a punishment that can be imposed with a probation period of ten years. If during the probation period the convict demonstrates good behavior and there are humanitarian reasons, the death penalty can be commuted to life imprisonment or 20 years' imprisonment. This change reflects a shift in the Indonesian criminal law paradigm from retributive to a more corrective and rehabilitative approach.”.

“Malaysia, as a country with a common law legal system, also has a long history of applying the death penalty. The Malaysian criminal justice system is regulated by the Penal Code (*Kanun Keseksaan*) and several specific laws such as the Dangerous Drugs Act 1952, the Firearms (Increased Penalties) Act 1971, and the

Kidnapping Act 1961. Prior to 2023, Malaysia was known as one of the countries in Southeast Asia that still imposed the mandatory death penalty for a number of serious crimes, including premeditated murder and drug-related crimes. However, through the Abolition of Mandatory Death Penalty Act 2023 (Act A1667), Malaysia officially abolished the mandatory death penalty and gave judges the authority to impose alternative sentences of life imprisonment. This legal reform marks an important change in Malaysia's criminal justice system, as previously judges had no discretion to impose sentences other than the death penalty for certain types of crimes.

Indonesia and Malaysia are two countries with different systems. This difference is due to the fact that Indonesia was once ruled by the Netherlands, while Malaysia was ruled by the United Kingdom. Because of this, the legal systems of the two countries are also different.

“The Indonesian legal system originated in Europe, specifically Continental Europe, and is known as Civil Law. This is due to the influence of the Dutch who occupied Indonesia. The Civil Law system originated from Roman law, which was codified during the reign of Emperor Justinian in the fourth century. In this system, the applicable law is written law, such as legislation. Therefore, court decisions are only applicable to the parties involved in the case (*Res Ajudicata Doctrine*”).

“The Malaysian legal system adheres to Anglo-Saxon law, commonly known as Common Law. Common Law first developed in England in the 11th century and is often referred to as “unwritten law.” In this system, the main source of law is court decisions. Through these decisions, legal rules are created and become generally

applicable to everyone. In addition, Common Law also recognizes customs, written statutes, and government administrative regulations.”.

Tabel 1. Comparison of Death Penalty Legal Norms in Indonesia and Malaysia

Comparative Aspect	Indonesia	Malaysia
Primary Legal Base	2023 Criminal Penal Code, and Code (Articles 100 and 101),	Abolition of Mandatory Death Penalty Act 2023
Normal Character	Conditional death penalty is not with a 10-year probationary period.	The death penalty is not mandatory; the judge may choose an alternative sentence
Type of Crime	Premeditated murder, terrorism, narcotics, and certain serious offenses.	Murder, Drug Trafficking, firearms trafficking, and treason against the Yang di-Pertuan Agong.
Execution	Decided by the President after the legal process is final; the appeal is postponed during the probationary period.	Executed upon the order of the High Court after appeal process is complete
Direction of Reform	Towards conditional death penalty and humanization of criminal law.	Elimination of mandatory death penalty and expansion of judicial discretion.

Comparative Aspect	Indonesia	Malaysia
	judicial discretion.	

From the table above, it can be concluded that normatively, both countries show a tendency toward restricting the application of the death penalty. Indonesia has chosen an internal transformation approach by changing the status of the death penalty to a conditional punishment, while Malaysia has taken a more explicit legislative step by abolishing the mandatory nature of the death penalty. Both approaches demonstrate the evolution of criminal law thinking that is oriented towards respect for the right to life without completely abolishing the death penalty from the national legal system.

From the perspective of criminal law theory, the difference in approach can be explained through the concept of theories of punishment. Indonesia, with its civil law system, has adopted a mixed theory that combines retributive and preventive elements, while Malaysia is more influenced by utilitarian theory, which emphasizes the social function of punishment as a deterrent. In practice, these differences in legal systems affect the flexibility of the application of the death penalty.

In addition, the judicial systems in both countries also play an important role in determining how the death penalty is carried out. In Indonesia, the implementation of the death penalty is subject to various legal mechanisms, including extraordinary legal remedies such as clemency and case review (PK). In this case, the President has the authority to postpone or even change the execution of the death penalty. Meanwhile, in Malaysia, the role of the judiciary is more

dominant because the final decision rests with the Federal Court after going through an appeal process.

An analysis of court decisions in both countries shows that the application of the death penalty is often influenced by non-legal factors such as political pressure, public opinion, and diplomatic relations. However, from a normative legal perspective, the death penalty remains the ultimum remedium that can only be imposed for the most serious crimes.¹⁵

In terms of legislative policy, both countries show a similar direction of reform, namely prioritizing the principles of prudence and humanity in the implementation of the death penalty. Indonesia, through the 2023 Criminal Code, has introduced a conditional death penalty system, while Malaysia provides room for judges to consider humanitarian factors and the circumstances of the perpetrator. This reform is a form of adaptation to the global trend of limiting the application of the death penalty without having to abolish it completely.

From a comparative analysis of norms, it can be concluded that the main difference between Indonesia and Malaysia lies in the structure of norms and the implementation of the death penalty. Indonesia continues to maintain the death penalty in its positive legal system, but provides room for humanity through the concept of conditional punishment. Malaysia, on the other hand, has taken the path of abolishing the mandatory death penalty as a form of respect for the principle

of substantive justice. Thus, both countries are moving towards restricting and humanizing the application of the death penalty.¹⁶

In terms of effectiveness, the death penalty in both countries is still a matter of debate. Several studies show that there is no strong empirical evidence that the death penalty has a greater deterrent effect than life imprisonment. However, from a juridical perspective, the existence of the death penalty is still maintained as part of national legal sovereignty and an instrument for maintaining public order.

The direction of criminal law policy in both countries shows a convergence of modern criminal law values. Indonesia emphasizes a balance between legal certainty and justice, while Malaysia highlights aspects of progressive legal policy that allow room for judicial interpretation. From a comparative law perspective, this shows that the death penalty is no longer seen as an instrument of state revenge, but rather as a limited and controlled legal means

Ultimately, a comparison of the death penalty in Indonesia and Malaysia illustrates a paradigm shift in contemporary criminal law. Both countries have taken different paths of reform, but they share a similar goal: to position criminal law as a rational instrument that is in line with the principles of humanity and the rule of law. This shows that the norm of the death penalty, although it still exists, is now more oriented towards its symbolic function as a

¹⁵ Ekawati, D. (2023). Model of the Indonesian legal system. *Jurnal Kewarganegaraan*, 7(2).
Fuady, M. (2010). *Perbandingan ilmu hukum*. Bandung: Refika Aditama.

¹⁶ Rizqiqa, L. D., Wulandari, W., & Putri, N. S.

(2024). Implikasi Pengaturan Pelanggaran Ham Berat Dalam Kuhp 2023 Terhadap Keberlakuan Asas-Asas Khususnya: Penguatan Atau Pelemahan?. *LITIGASI*, 25(1), 21-60.

moral warning to society rather than as an absolute repressive tool.

The application of the death penalty in the perspective of Islamic law and its implications for the protection of human rights.

2.1 The application of the death penalty in the perspective of Islamic law

“Islamic law is a legal system derived from the rules of Allah SWT given to humans in order to achieve happiness in this world and the hereafter. Islamic law covers various aspects of human life, including criminal law. In Islamic criminal law, various types of criminal acts and their punishments are regulated by specific provisions derived from the Quran and hadith. Criminal acts in Islamic law are referred to as Jarimah.” “In Islamic criminal law, the scope covers several categories with specific provisions and conditions, including Jarimah Qishash, Jarimah Hudud, and Jarimah Ta'zir. In this context, Jarimah Qishash means retribution, which in Islamic criminal law means punishment given to perpetrators of criminal acts. The concept of Qishash is a form of punishment appropriate for the intentional killing of an innocent or sinless person”.¹⁷

“According to Abdul Qadir Awdah, acts that fall under Jarimah Qishash include intentional murder, murder that resembles intentional murder, murder due to negligence, intentional abuse, and unintentional abuse, as explained below”:¹⁸

- a. Intentional murder (al-qatlu al-amdi), an act of abuse with the intention of taking someone's life.
- b. Murder resembling intentional murder (al-qatlu syibh al-amdi), an act that was not intended to kill but resulted in death.
- c. Murder due to error (al-qatlu al-khata'), an act that occurs due to an error/mistake that was not intended to kill.
- d. Intentional assault (al-jarh al-amdi), an act of assault committed intentionally.
- e. Unintentional injury (al-jarhu ghair al-'amdi aw al-khata'), injury caused to someone without the intention to harm them.

From the above explanation, it can be concluded that qishash is a punishment given for crimes involving the loss of life, such as murder, or causing bodily harm, such as injury, whether committed intentionally or unintentionally. However, qishash punishment does not always have to be applied, unless all the conditions requiring qishash have been met, including:

1. “The perpetrator is a muallaf (has reached puberty), so that a child, a mad person, and a person who is impatient are not subject to qishash”.
2. “The murder was carried out intentionally”
3. “There is no doubt about the element of intent.”

¹⁷ Munadi, *Qisās dan Hudūd serta Relevansinya dengan Hak Asasi Manusia*, TAHQIQA, Vol. 7, No. 1, Januari 2013, hlm. 47.

¹⁸ Z. Darussamin, *Qisas Dalam Islam Dan Relevansinya Dengan Masa Kini, Asy-Syir'ah*:

Jurnal Ilmu Syari'ah dan Hukum, Vol. 48, No. 1, 2014, hlm. 111.

4. “There was no coercion from others to the perpetrator when committing the murder.”

The provisions regarding capital punishment in Islam are stated in Q.S Al-Baqarah verse 178:

يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالْأُنْثَىٰ بِالْأُنْثَىٰ فَمَنْ عُفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتِّبَاعٌ بِالْمَعْرُوفِ وَأَدَاءٌ إِلَيْهِ بِإِحْسَانٍ ۚ ذَٰلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ فَمَنِ اعْتَدَىٰ ۚ ذَٰلِكَ فَلَهُ عَذَابٌ

Meaning :

“O you who believe, retribution for murder is prescribed for you: a free man for a free man, a slave for a slave, and a female slave for a female slave and a payment to him in a fair manner. That is a relief from your Lord and a mercy. So whoever transgresses that will have a punishment.”

“The purpose of applying the death penalty in Islamic law is basically to carry out amar ma'ruf nahi munkar, which prioritizes the principle of protecting individuals and society from crimes that endanger life so that the welfare and safety of the people can be achieved. Thus, as a country with a Muslim majority, Indonesia still imposes the death penalty for perpetrators of extraordinary crimes that disturb public security and order and threaten the stability of the state.

The majority of scholars argue that the death penalty can be used as the highest form of punishment and can replace all other types of punishment, especially if the crime is purely a violation of Allah's rights. However, if the crime committed relates to the violation of Allah's rights and human

rights, then in its fulfillment, human rights must be prioritized.

Through verse 178 of Surah Al-Baqarah, it is explained that the implementation of qishash must take into consideration the equality between the perpetrator and the victim, namely: between a free person and a free person, a slave and a slave, and a woman and a woman. Furthermore, in the process of determining punishment in Islamic law, the victim's family must be involved. The victim's family not only has the right to demand the death penalty, but they also have the right to forgive the perpetrator in exchange for compensation or diyat. If the perpetrator is not sentenced to qishash because the victim's family has forgiven them, it does not mean that the perpetrator is simply free from punishment. They will still receive takzir, which aims to uphold the existing law and indirectly protect society. This is because the crime was committed based on the perpetrator's interest in the victim, which has the potential to cause public outrage. It should be noted that the principle of forgiveness or pardon is only held by the victim and the victim's family, so if the victim has no family, the government has the right to intervene to provide other legal measures in the form of takzir.⁸

2.2 Implications for the Protection of Human Rights

Universal Declaration of Human Rights (UDHR) Article 3 (right to life)

Article 3 of the UDHR states that everyone has the right to life, liberty, and security of person. The death penalty is the highest sanction imposed by the court on individuals who have committed extraordinary crimes, as stipulated in legal provisions and enshrined in law. From a general perspective, the purpose of imposing the death penalty is to raise awareness of the wrongdoing of the perpetrator, prevent the recurrence of

serious crimes, and maintain order in society. However, from a human rights perspective, particularly based on the Universal Declaration of Human Rights (UDHR), the death penalty is considered inappropriate and explicitly contrary to the basic principle of protection of the right to life. This declaration affirms that the right to life is an absolute (non-derogable) right and cannot be reduced even in emergency conditions.⁹

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International Covenant on Civil and Political Rights (ICCPR) Article 6

The abolition of the death penalty has been discussed by many parties, one of which is the International Covenant on Civil and Political Rights (ICCPR). The ICCPR itself recognizes that everyone has the right to life that cannot be taken away, as stated in

Article 6 paragraph (1) of the ICCPR. The International Covenant on Civil and Political Rights (ICCPR), which was created in 1966 and has been ratified by Indonesia, states that the right to life is a fundamental right that cannot be violated under any circumstances. However, the ICCPR provides certain reasons for the death penalty as stipulated in several articles. For example, although Article 6 paragraph (1) does not prohibit the death penalty, Article 6 paragraph (2) and Article 6 paragraph (6) provide several restrictions on its application. There are five specific restrictions related to the death penalty that can be seen in Article 6 paragraph (2) and Article 6 paragraph (6), namely:

- a) The first restriction is that the death penalty can only be imposed for very serious crimes and in accordance with the death penalty rules in force at the time the crime was committed. So, even though Article 6 of the ICCPR does not eliminate the death penalty, it limits its application only to crimes that have very serious consequences.
- b) The second restriction is that the death penalty in Article 6 of the ICCPR must follow the rules in the convention. In other words, even though severe punishment may not be considered criminal, the method of execution must avoid torture or cruel, inhuman, or degrading punishment. The third restriction states that the death penalty may only be carried out if there is a final decision from the competent court.
- c) The fourth restriction stipulates that every person sentenced to death has the right to seek clemency, commutation of sentence, or legal protection.
- d) The fifth restriction states that the death penalty shall not be imposed on persons under the age of 18 and shall not be carried out on pregnant women.

The Conflict Between the Death Penalty and Human Rights Principles

Human rights in Indonesia are explicitly regulated in Article 1 paragraph (1) of Law - Law Number 39 of 1999 concerning Human Rights, "Human rights are a set of rights inherent in the nature of human beings as creatures of God Almighty and are His gifts that must be respected, upheld, and protected by the state, the law, the government, and every person for the sake of honor and protection of human dignity."

"The death penalty is still a subject of debate in the fields of law and humanity. The debate arises because some parties consider the death penalty to be a violation of human rights, while others consider it a form of justice appropriate for perpetrators of serious crimes. The death penalty is considered incompatible with the principles of human rights, particularly the right to life, which is the most fundamental human right that cannot be diminished under any circumstances. In fact, the 1945 Constitution clearly states that the right to life is a fundamental right that cannot be revoked by anyone, including the state".¹⁹

"According to Sandra Moniaga, Commissioner of the Indonesian National Human Rights Commission (KOMNAS HAM RI), the 2016 plenary session established a position rejecting the death penalty because it is closely related to the violation of two aspects of human rights, namely the right to life and the right to be free from torture, and is not in accordance with the principles of human rights, humanity, and Pancasila. The right to life

and the right not to be tortured are fundamental rights that cannot be reduced under any circumstances (non-derogable rights) and are constitutional rights in accordance with Article 28I of the 1945 Constitution. "Violations of human rights principles in capital punishment take the form of the right to life guaranteed by the constitution, specifically in Article 28A paragraph (1) of the 1945 Constitution. Even so, capital punishment is still regulated in Law Number 1 of 2023 concerning the Criminal Code (KUHP)." "Article 98 of Law Number 1 of 2023 explains that the death penalty can be imposed as a last resort to prevent serious crimes and provide protection for the wider community. This is an effort by the state to make the death penalty a last resort in maintaining order in the country".

The controversy surrounding the death penalty has sparked various reactions among the public, academics, and legal experts. Some support the application of the death penalty as a form of justice for victims, hoping that it will have a deterrent effect on perpetrators of serious crimes. Others believe that the death penalty is inhumane and contrary to human values. These differences of opinion show that the application of the death penalty is not only related to positive law, but also concerns morals, society, and ethics in the life of the nation and state.

"Prof. Jimly Asshidiqie argues that the death penalty can still be carried out, but it must go through strict and careful procedures. "He emphasized that the application of the death penalty must not contradict the principles of justice and must

¹⁹ Kiansantang, K., & Subroto, M. (2024). Penerapan Hukuman Mati Terhadap Pelaku Tindak Pidana Ditinjau Dari Hak Asasi Manusia.

Journal of Management: Small and Medium Enterprises (SMEs), 17(1-May), 369-378.

continue to respect human rights values.” In practice, law enforcement must balance efforts to maintain public order and guarantee the protection of human rights. Thus, the death penalty should not be imposed arbitrarily without considering moral and humanitarian aspects. Some argue that the death penalty can reduce the rate of serious crime. However, as quoted from Jeffrey Pagan, a professor of law and public health at Columbia University, “there is no scientific evidence strong enough to prove that the death penalty is effective in deterring perpetrators of serious crimes.”

CONCLUSION

1. The application of the death penalty in Indonesia and Malaysia is based on the characteristics of each country's legal system, which differ in terms of normative structure, criminalization philosophy, and criminal law policy direction. In Indonesia, the death penalty is maintained as one of the main types of punishment as stipulated in Article 10 of the Criminal Code (KUHP) and reinforced in the new Criminal Code of 2023. Malaysia has shown a direction of criminal law reform by removing the mandatory nature of the death penalty through the Abolition of Mandatory Death Penalty Act 2023. This change gives judges the authority to impose alternative penalties in the form of life imprisonment or a fixed term of imprisonment in accordance with the level of the offender's guilt. This reform is a form of transformation of the value of justice in the Malaysian legal system that is more in line with universal human rights principles and modern legal practices that prioritize restorative justice.
2. Comparing the death penalty from the perspective of Islamic law and human rights principles, it can be concluded that Islamic law allows the death penalty under certain conditions as a form of justice and crime prevention, while human rights principles reject the death penalty because it is considered incompatible with the principles of human rights, particularly the right to life, which is the most basic human right that cannot be diminished under any circumstances. Therefore, Indonesia, as a religious country that upholds human rights principles, applies the death penalty cautiously, proportionally, and with protection of human values in order to create a balance between law enforcement, justice, and respect for human rights.

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