

CAPITAL PUNISHMENT IN INDONESIA FROM THE PERSPECTIVE OF NATIONAL AND ISLAMIC LAW

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Abstract

This article examines the regulation of capital punishment in Indonesia from the perspectives of national criminal law and Islamic law. It analyzes recent legislative developments, constitutional interpretations, and normative debates that shape the contemporary status of the death penalty. The study finds that Indonesian law increasingly treats capital punishment as an exceptional sanction subject to strict procedural safeguards, while Islamic legal principles emphasize proportionality, mercy, and the preservation of life. The article concludes that the interaction between state law and Islamic legal thought supports a gradual movement toward the restriction of capital punishment within a framework that balances justice, legal certainty, and human rights.

Keywords: Capital Punishment, Indonesia, Islamic Law

Background

The issue of capital punishment remains one of the most controversial aspects of criminal justice in Indonesia, situated at the intersection of state sovereignty, human rights discourse, and religious–moral values. Indonesia has historically retained the death penalty as part of its criminal law system, reflecting a long-standing belief that certain crimes represent such serious threats to public order and social morality that the ultimate sanction is justified. At the same time, legal developments and scholarly debates in recent decades demonstrate a gradual shift toward limiting and regulating its application in line with evolving standards of justice, proportionality, and human dignity (Tongat, 2024).

In positive law, the regulation of capital punishment is primarily grounded in statutory instruments that have undergone significant reform. Law No. 35 of 2009 on Narcotics explicitly provides for the death penalty for large-scale drug trafficking and related offenses, reflecting the government's policy framing of narcotics crime as an extraordinary threat to national survival. More recently, Law No. 1 of 2023 on the Criminal Code (the New KUHP) introduced a fundamental conceptual change by positioning the death penalty not as an ordinary principal punishment, but as a special and exceptional sanction that may only be imposed as a last resort. This law establishes mechanisms allowing for the conditional imposition of the death penalty and the possibility of commutation after a period of good behavior, signifying an attempt to harmonize deterrence-based criminal policy with humanitarian considerations (Tongat, 2024).

Beyond statutory provisions, constitutional and judicial practice have played a critical role in shaping the Indonesian approach to capital punishment. Decisions of the Constitutional Court of the Republic of Indonesia have repeatedly addressed challenges to the death penalty, particularly in narcotics cases, generally upholding its constitutionality while emphasizing the importance of strict due process guarantees. These rulings have contributed to an evolving doctrine that frames capital punishment as permissible only under narrowly defined conditions and subject to heightened procedural safeguards (Tongat, 2024).

From the perspective of Islamic law, the debate over capital punishment occupies a nuanced and complex position. Classical Islamic criminal jurisprudence recognizes the legitimacy of capital punishment in limited circumstances, most notably under the doctrines of qisas (retaliation for intentional homicide) and in certain hudud-related offenses according to traditional schools of thought. However, Islamic legal theory simultaneously emphasizes principles of mercy, forgiveness, and the sanctity of life, allowing for mechanisms such as pardon ('afw) by the victim's family and diyah (compensation) as alternatives to execution. In the Indonesian context, where Islamic norms exert substantial moral and social influence without being formally codified as state criminal law, these principles shape

public discourse and scholarly interpretation regarding the moral legitimacy and practical limits of the death penalty (Tongat, 2024).

The international dimension further intensifies the complexity of Indonesia's death penalty regime. Indonesia is part of the global human rights system, having committed itself to international norms that increasingly favor abolition or, at minimum, strict limitation of capital punishment. International human rights instruments, including those protecting the right to life and prohibiting cruel, inhuman, or degrading treatment, have become important reference points in domestic scholarly debate and legal reasoning. Indonesian policymakers thus operate within a field of tension between global abolitionist trends and domestic policy narratives emphasizing the need for strong deterrence against serious crimes such as terrorism and large-scale narcotics trafficking (Tongat, 2024).

Social and political factors also contribute to the resilience of capital punishment within the Indonesian legal system. Public opinion surveys and political discourse frequently demonstrate strong support for the death penalty in cases involving drug trafficking and terrorism. This social backing has historically reinforced the reluctance of legislators and executives to adopt formal abolition, even while informal practices — such as extended moratoria on executions — indicate a degree of practical restraint. This duality between legal retention and operational hesitation illustrates the transitional character of Indonesia's current approach to capital punishment (Tongat, 2024).

Conceptually, the Indonesian experience reflects a broader challenge for plural legal orders: how to reconcile state-based criminal law with religious-ethical traditions and international human rights standards. The New KUHP can be interpreted as embodying a hybrid model that neither fully abandons capital punishment nor embraces it unconditionally. Instead, it seeks to situate the death penalty within a tightly regulated framework that emphasizes its exceptional character, procedural safeguards, and the possibility of eventual commutation. From an Islamic law perspective, this model resonates with interpretive traditions that view punishment not solely as retribution, but as a means of protecting societal order while preserving opportunities for repentance and moral rehabilitation (Tongat, 2024).

In this context, an academic examination of capital punishment in Indonesia from the perspective of national and Islamic law is both timely and necessary. Such a study contributes to a deeper understanding of how legal systems negotiate the boundaries between deterrence, retribution, mercy, and human rights in the face of shifting domestic and international expectations. By analyzing the evolving statutory framework, judicial interpretations, and normative debates, this research seeks to illuminate the future trajectory of the death penalty in Indonesia and its implications for comparative criminal law and legal philosophy (Tongat, 2024).

Research Methodology

This study employs a doctrinal (normative) legal research method with a qualitative analytical approach. The research examines primary legal materials, including Indonesian statutory provisions such as Law No. 1 of 2023 on the Criminal Code and Law No. 35 of 2009 on Narcotics, as well as authoritative sources of Islamic criminal jurisprudence. Secondary legal materials, including scholarly books and peer-reviewed journal articles, are analyzed to identify doctrinal developments and theoretical debates. The study also applies a comparative conceptual approach to evaluate the convergence and divergence between national criminal law and Islamic legal principles regarding capital punishment. Data are analyzed through statutory interpretation and conceptual legal analysis to formulate normative conclusions.

Discussion

1. Capital Punishment in Indonesian National Law: Doctrinal Development and Contemporary Challenges

Capital punishment in Indonesia remains formally entrenched within the national criminal justice system, despite persistent domestic and international controversy. Traditionally, the Indonesian legal framework viewed the death penalty as a principal punishment applicable to the most serious criminal acts, including premeditated murder, terrorism, and large-scale narcotics trafficking. This traditional orientation reflected a retributive and deterrent philosophy of punishment that dominated Indonesian criminal law for decades (Bassiouni, 2010).

A major transformation occurred with the enactment of Law No. 1 of 2023 concerning the Criminal Code (Kitab Undang-Undang Hukum Pidana Baru). This legislation reclassified capital punishment as a special and exceptional penalty, to be imposed only as a last resort. It introduced conditional sentencing mechanisms allowing the death

penalty to be postponed and potentially commuted after a defined probationary period if the convicted person demonstrates genuine reform and good behavior. This shift reflects an attempt to balance crime control policies with a growing emphasis on human dignity and the right to life (Bassiouni, 2010).

Despite this reform, other statutory instruments continue to retain strong punitive orientations. Law No. 35 of 2009 on Narcotics still authorizes the death penalty for serious drug-related offenses, particularly large-scale trafficking and organized distribution. The coexistence of the New Criminal Code and sectoral laws generates legal tension, especially regarding proportionality and consistency in sentencing. Prosecutors retain broad discretion in choosing applicable statutory provisions, which can result in uneven application of the ultimate punishment (Bassiouni, 2010).

Constitutional jurisprudence has played a significant role in stabilizing this tension. The Constitutional Court of the Republic of Indonesia has repeatedly reviewed the constitutionality of capital punishment, particularly in relation to narcotics crimes. While the Court has generally upheld the legality of the death penalty, it has simultaneously stressed the necessity of strict due process guarantees and the non-arbitrary application of the law. These decisions contribute to a developing constitutional doctrine that does not abolish the death penalty but confines its operation within procedural and substantive safeguards (Bassiouni, 2010).

In practice, however, Indonesia demonstrates a clear divergence between law and enforcement. Since 2016, Indonesia has effectively implemented a *de facto* moratorium on executions, even while courts continue to impose death sentences in serious cases. This disconnect reflects political, diplomatic, and humanitarian considerations rather than formal legislative change. The existence of death row inmates living under long-term uncertainty raises serious questions regarding cruel, inhuman, and degrading treatment, particularly in relation to the so-called “death row phenomenon” (Schabas, 2019).

From a doctrinal perspective, this evolving framework reflects a system in transition. Indonesian national law increasingly conceptualizes capital punishment not as an ordinary tool of criminal justice, but as a marginal and symbolic sanction whose practical application is progressively constrained by constitutional values, procedural safeguards, and executive discretion (Schabas, 2019).

2. Capital Punishment in Islamic Law and Its Relevance to the Indonesian Legal Context

Islamic criminal law occupies a complex position in the Indonesian discourse on capital punishment. Although Indonesia is not a theocratic state, Islamic legal values have historically influenced social norms, legal reasoning, and political debates. Classical Islamic jurisprudence recognizes capital punishment in limited circumstances, most notably within the doctrines of *qisas* (retaliation for intentional homicide) and specific *hudud* offenses. These doctrines are grounded in the principles of justice, moral accountability, and the protection of human life, rather than simple retribution (Peters, 2005).

At the same time, Islamic law provides significant internal mechanisms for mercy and mitigation. The concept of pardon (*‘afw*) by the victim’s family and the possibility of financial compensation (*diyah*) underscore that the ultimate objective of Islamic criminal law is not merely punishment, but social harmony and moral restoration. These principles introduce flexibility that is often overlooked in modern policy debates and provide a strong ethical foundation for limiting the actual use of capital punishment (Peters, 2005).

In the Indonesian context, Islamic perspectives are often mediated through scholarly discourse rather than direct codification. Indonesian Muslim legal scholars have increasingly emphasized *maqasid al-shariah* (the higher objectives of Islamic law), particularly the preservation of life (*hifz al-nafs*), as a guiding principle in evaluating the death penalty. From this point of view, capital punishment is regarded as legally permissible in theory, but morally and socially undesirable in practice except under extremely strict evidentiary and procedural conditions (Kamali, 2008).

This interpretive trend resonates with reforms introduced by the New Criminal Code. The notion of capital punishment as a conditional and exceptional sanction parallels Islamic legal concepts that prioritize repentance (*taubah*), forgiveness, and restoration over irreversible retribution. In this sense, the Indonesian legal model can be understood as an emerging hybrid system: formally rooted in secular statutory law, yet normatively influenced by Islamic ethical reasoning (Kamali, 2008).

However, significant tensions remain. Some Islamic legal opinions continue to support strong retributive interpretations of qisas that appear incompatible with international human rights standards, particularly the absolute protection of the right to life. These tensions reveal the need for continuous interpretive work within both legal traditions. Progressive Islamic legal thought increasingly argues that contemporary conditions of judicial fallibility, forensic uncertainty, and systemic inequality require extreme caution or effective suspension of capital punishment in order to avoid irreversible injustice (Schabas, 2019).

From a comparative legal perspective, Indonesia represents a distinctive case in which state law and Islamic legal thought do not operate in formal hierarchical conflict, but in a dialogical relationship. The death penalty is neither purely a secular policy tool nor a direct theological command. Instead, it is mediated through constitutional values, political realities, and evolving religious interpretations. This dynamic creates opportunities for further reform grounded in culturally legitimate concepts of justice, mercy, and societal protection (Peters, 2005).

Ultimately, Islamic law in the Indonesian context functions less as a rigid source of positive law and more as a moral and philosophical framework that shapes public attitudes and legal reform. Its emphasis on proportionality, strict evidentiary standards, and the preference for forgiveness provides strong normative support for a gradually restrictive approach to capital punishment. When harmonized with constitutionalism and international human rights principles, this framework offers a coherent foundation for the future evolution of Indonesia's criminal justice policy (Kamali, 2008).

Conclusion

Capital punishment in Indonesia reflects an ongoing tension between legal tradition, social morality, and contemporary human rights standards. National criminal law continues to formally retain the death penalty while progressively limiting its status through legislative and constitutional reforms that emphasize its exceptional and conditional nature. At the same time, Islamic legal principles contribute a moral framework that both recognizes the legitimacy of capital punishment in narrow circumstances and strongly promotes restraint, forgiveness, and the preservation of life. The interaction between these two legal perspectives demonstrates that the future of capital punishment in Indonesia is likely to move toward greater restriction and procedural protection rather than continued expansive use.

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