

Transition of Civil Law to Public Law: Integration of Modern Punishment Theory in Criminal Apostasy

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1 TRANSITION OF CIVIL LAW TO PUBLIC LAW: INTEGRATION OF MODERN PUNISHMENT THEORY IN CRIMINAL APOSTASY

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Abstrak: Artikel ini menganalisis penetapan hukuman mati dalam kasus pidana murtad dengan menggunakan pendekatan teori pemidanaan dan pertimbangan hak asasi manusia. Pendekatan ini digunakan untuk melihat secara objektif tujuan ditetapkan hukuman mati sebagai perbuatan pidana dalam konteks kebebasan beragama. Studi ini merupakan kajian konseptual, dianalisis menggunakan data kepustakaan melalui pendekatan deskriptif-analitis. Berdasarkan analisis teori pemidanaan ditemukan bahwa penetapan hukuman mati dalam pidana murtad mengambil pola perpaduan teori pemidanaan; teori *retributif*, *deterrence* dan *reformatif*. Perpaduan ketiga teori ini melahirkan integritas, tidak terfokus pada aspek *retributif* dan *deterrence*, tetapi lebih menekankan pada aspek *reformatif*, sebagai terapi pelaku kejahatan murtad agar tidak mengulangi perbuatan yang sama. Pengintegrasian ketiga teori ini terlihat sempurna manakala diiringi pendidikan moral yang dapat memberikan “pencerahan spiritual” sehingga pelaku dapat diterima kembali di masyarakat. Teori *integritas-moralitas* atau teori *integritas-plus* diharapkan dapat menetralisasi perbedaan pandangan tujuan pemidanaan Islam. Persamaan hak, keadilan, moralitas, dan pertanggungjawaban individu merupakan prinsip universal ajaran Quran menjadi inspirasi lahirnya norma hak asasi manusia.

Kata kunci: hukuman mati; hak asasi manusia; teori pemidanaan; murtad

¹ **Abstract:** This paper aims to analyze the determination of the death penalty in apostasy through Punishment Theories and human rights considerations. The approach is used to objectively view the purpose of the death penalty on a criminal act in the context of religious freedom. This study is a conceptual study using ¹ the library research and *descriptive-analytical* approach. The study indicates ¹ that the determination of the death penalty in apostasy takes a combined pattern of punishment theory ¹. The theories include retributive, deterrence, and reformative. Combining these theories leads to integration, as it does not focus only on the *retributive* and deterrence aspects. Still, it also emphasizes the reformative element as a therapy for apostate criminals so they will not repeat the same acts. The integration of the theories seems perfect when accompanied by moral education that can provide "spiritual enlightenment" so criminals can be accepted back into the community. The integrity-morality theory or pulse-integrity theory is expected to neutralize the difference in ¹ views on the purpose of punishment in Islamic criminal law. It does not align ¹ with the norms of human rights under the pretext of the sovereign system of the nation-state, where territorial areas limit citizenship status. The equality of righteousness, justice, morality, and individual accountability is a universal principle of the teachings of the Quran, which inspire the conception of human rights norms.

Keywords: death penalty; human rights; punishment theory; apostasy

Introduction

Several practitioners have widely discussed the death penalty issue in criminal law and human rights (Simanglipu, 1985: 12; Purba et al., 2020). Many studies have covered the cases of major crimes, such as drugs, rebellion (desertion), and other criminal cases that lead to the death penalty. Some academics on the death penalty and apostasy seek the relationship between the death penalty for apostates and the aspects of modern human rights violations (Almirzanah, 2007; Masum & Ahmad, 2013). The civil aspects that have an impact on the marital status of apostates according to Indonesian marriage law (Nurlaelawati, 2016) and the contextualization of the death penalty for apostates from the normative and *maqāṣid al-sharī'ah* (objectives of Islamic law) perspectives (Mujib & Hamim, 2021; Akbar & Saeed, 2020; Mutawali, 2020). However, the aspect of punishment that describes the death penalty and apostasy as a criminal act has not received much attention as a theme of scientific discussions. The death penalty can also be explained through a Punishment Theory. On the one side, the time period of the debate around death penalty is a classic issue, while on the other side this should be a serious concern to review regarding the existence of death penalty in a nation-state system. It adheres to the principle of religious freedom, wherein the state does not make religion a state ideology.

The principle of freedom of religion is an area of privacy, and the state has no right to interfere with a person's independence in determining their religious attitude. Let alone determine the death penalty, which receives a complete rejection from the community. The legislation in Indonesia still maintains the death penalty as one of the maximum punishments, especially for dangerous crimes. In this case, human rights activists view that the death penalty is a form of legacy from the past that should only be a lesson learned and not be followed and implemented thoroughly. Regardless, several countries do not consider the death penalty as an act against the right to life; yet, in practice, this is more of a premeditated form of murder against a convict on legal grounds carried out by the state (Salam, 2009: 95).

In some classical and contemporary literature by the *fuqahā* (Islamic jurists) ('Awdah, 1997; An-Na'im, 1996: 109; Al-Jabiri, 2001: 203), studies on the death penalty have been closely related to the act of apostasy as part of religious freedom. However, the studies in *fiqh*

(Islamic jurisprudence) books tend to focus on the normative aspect, especially in using "religious holy texts" as the basis for determining the punishment for apostates is similar to murder. The death penalty is a recognized punishment with a relatively strong legal basis in Islamic law (Quran, 2: 179). Yet, there is not a single verse that stipulates that the punishment for apostates is to be killed (death), instead this punishment applies to certain crimes, such as murder.

Some verses of the Quran discussing apostasy are only in the form of afterlife sanctions, such as people who die in an apostate state have the same status as disbelievers. As is known, Islam gives freedom to humans to choose a belief based on their willingness (Quran, 2: 256). The Quran's recognition of the human rights' freedom of religion does not suggest that all religious beliefs in the sight of Allah are the same (Quran, 10: 99; Quran, 2: 256). However, it does not mean that people who easily submit to and leave out Islam can be taken for granted, as Islam highly considers the honor of religion. Imam Syathibi, through the theory of *maqāṣid al-sharī'ah* formulates five aspects that must be maintained as a guarantee of human life. One crucial aspect related to the concept of apostasy is keeping religion (al-Shāṭibī, n.d.: 14).

On this basis, the *fuqahā* stipulates that the punishment for apostates is the death penalty. The death penalty is imposed on apostates since it is considered a significant crime due to false testimony against God and underestimating belief. The *fuqahā* regards the issue of faith as the basis of life as well as the spirit of one's belief in religious life (Mayer, 1999: 154). The *fuqahā*'s view refers to the Hadith narrated by Ibn Abbas, "Whoever changes his religion, kill him."

In the study of Islamic criminal law (*fiqh al-jināyāt*), the *fuqahā* uses this Hadith as legitimacy for determining the death penalty in apostasy. ¹ The determination of the death penalty for apostates is a form of legal formulation resulting from the *ijtihād* (independent reasoning) of the *fuqahā* based on the Hadith as mentioned earlier – which seems literal– in understanding the rules contained in the text of the Hadith. Nevertheless, when elaborated, the death penalty for apostates is filled with various objections as the source is still disputed among Islamic scholars. The most apparent impact of the protest is when the death penalty for apostates is compared with the human rights norms.

It is not surprising that nowadays, there are attempts to modify the law even though the interpretations are still tied to the results of the *ijtihād* of previous Islamic scholars. Still, the approaches used to comprehend the legal rules in the Quran and ḥadīth are merely focused on the linguistic aspect. As a result, the opportunity to narrow down the application of the death penalty in apostasy is limited only to understanding *ẓahīr* (apparent meaning) Hadith (Na'im, 1996). If this argument is accepted, the death penalty for apostates context in the Quran and Hadith can be synced with a complementary approach. On this basis, the death penalty for apostates not only provokes a reaction from criminal law experts but also creates a conflict with the penological principle (Arief, 2018) and the universality of human rights norms (Little & Sachedina: 75; Rahman, 1979: 4; al-Jabiri, 2003: 166–167; Zaid, 2002: 16).

It seems that the criteria for this punishment are why many believe the Islamic law is cruel, so it is considered inhumane and even contrary to human rights (Jamrozi & Lukito, 2019). However, some also believe that without paying attention to human rights norms, it will be challenging to realize a law that can accommodate new needs that contain various social, cultural, ethnic, and religious values. In addition, the Hadiths that describe the death penalty are mainly related to unavoidable circumstances, meaning they are only limited to *riddah* (apostasy) perpetrators who fight against Islam (Abduh & Ridha, n.d.: 327).

Therefore, the death penalty in apostasy needs to be re-examined, considering that the studies have been limited to the normative-doctrinal aspect, especially with regard to the sources of the basis for determining the death penalty both in the Quran and Hadith. Moreover, under certain conditions, Islamic scholars have considered it an *ijmā'* (consensus). Abid al-Jabiri states that although this opinion is the result of *ijmā'* of the *fuqahā*, it must be understood contextually (al-Jabiri, 2003: 129). Such an approach indeed yields an important meaning, especially in the socio-historical settings (Mudzhar, 1998: 105) surrounding the application of the Prophetic Hadith as the legitimacy of the death penalty.

To eliminate the violations of human rights, the studies on the death penalty in Islam have often concerned the aspect of religious freedom.

These studies analyzed other reasons for the ¹ determination of the death penalty in apostasy by using modern punishment theories. The focus is to figure out the essential nature of the death penalty applied to apostates and whether it was in line with the consideration of *maṣlahah* (benefit) when the sentence was enacted (Soekanto, 1979: 5–6). In doing so, other concerns have been found which support the basis for the determination of the death penalty and freedom of religion in Islam to be in line with modern punishment theories. At a practical level, it can add clarity between the punishment for apostates by faith and the penalty for apostates and desertion, as well as the "ideal punishment" to be applied in modern society, which tends to uphold the values of human rights.

The Legality of Death Penalty: Moral Considerations and Social Necessities

The death penalty is basically at regulating human life, both individually and collectively. Philosophically, the death penalty for apostates has been recognized and accommodated in the concept of Islamic teachings. The *fuqahā* have widely discussed the death penalty for apostates in classical *fiqh* literature. Some verses of the Quran discuss apostasy and influence the *fuqahā* thoughts in finding the intent and purpose of the texts being enforced. Likewise, the Hadith regarding stipulation of the death penalty for apostates is used as the principle of legality to protect the morals of individual Muslims. In addition, Islamic society demands the death penalty implementation for apostates as it is regarded as a threat to the stability of the government at the time.

The study used texts of the Quran and Hadith as the legality of the implementation of the death penalty in the apostasy crime was examined using a normative approach. Additionally, the social considerations of the prescribed texts on the death penalty in apostasy were obtained through a socio-historical approach to provide a complete understanding of the essential considerations of the *fuqahā* in justifying the death penalty for apostates. These two approaches aimed to investigate the considerations of benefit used by the *fuqahā* in understanding the Prophetic Hadith concerning the death penalty.

Normative Principle

The *fuqahā* used verses of the Quran, and the Hadith of the Prophet as legal bases in determining the death penalty for apostates is a must. As a devout Muslim, all the commands and prohibitions in the Quran and Hadith must be carried out without legal changes. For the adherents of the immortality of law theory (normative theory), the law contained in sacred texts is eternal, and the concept of law within does not change according to the changes in the social system of society.

The normative principle for apostasy emphasizes the moral aspect inherent within the individual. This aspect has often been mentioned in various verses of the Quran when explaining the concept of apostasy, as it is solely aimed at individuals who convert to a religion (Quran, 2: 217; Quran, 47: 25, 27; Quran, 16: 106, 109; Quran, 2:108; Quran, 3: 77, 86, 90, 177; Quran, 4:115, 137; Quran, 9: 66, 74). Changing religion is considered immoral since it is regarded as a false witness to God and, simultaneously, underestimates a belief. Although Islam gives freedom to humans to choose their beliefs, it does not mean they are free to embrace Islam and leave it to other religions. Such action is equivalent to religious coquet.

Theologically, the issue of *'aqidah* (faith) is a fundamental value that forms the basis of all the teachings of the Quran. It places an important position in a person's life. In line with this, Komaruddin Hidayat states that psychologically, belief affects a person's behavior and significantly influences how they think and act (Hidayat, 2021: 64). The forms of thinking and acting of someone who converts from Islam suggest that one has given up the Islamic identity and the lost of guarantee of safety (*'ishmah*). Therefore, the loss of *'ishmah* previously possessed causes killing the apostate to be permissible. The considerations led Quran stipulating punishment for apostates is in the form of moral punishment in the hereafter.

In addition to the verses of the Quran, most *fuqahā* took Hadith to determine the death penalty for apostates as *Ibn' Abbas narrated that the Messenger of Allah said: "He who changes his religion, kill him"* (al-Kahlani, 1960: 265).

The criteria for apostasy are contained in the Hadith above. Those are different from those for apostasy, as mentioned in the Quran. The

Hadith says that the requirements for apostasy include conversion and a threat to the Islamic government's stability. The element of threatening the strength of the Islamic government causes corporal punishment (death penalty) to be applied to apostates ('Awdah, 1997: 374). Almost all *fiqh* literature discusses the death penalty for apostates based on the above argument. It is proved evident that the *fuqahā* use ' *iṣmah* and social stability as the legal reasons for the death penalty for apostates. In this case, such a view is very reasonable since protecting religion and the social system is the benefits that shall be maintained at the time.

The normative understanding of the verses and Hadiths is applied 'as is' without considering agricultural societies' conditions and social systems. Hence, apostates shall be sentenced to death based on the literal understanding of the Hadith above. Islam stipulates the death penalty as apostasy is an act directed against Islam as a social system. Indecision in punishing the crime of apostasy will result in a weak government system.

Sociological Principle

Sociologically, the verses of the Quran and the Hadith of the Prophet used by the *fuqahā* as the basis for determining the death penalty in apostasy can be understood through the *asbāb al-nuzūl* (circumstances of revelation) and *asbāb al-wurūd* (chronological study of Hadith). Some verses of the Quran describe apostasy and the social conditions that underlie the revelation of these verses. The main focus of the study is to figure out the social setting of the causes for the emergence of the Prophetic Hadith regarding the death penalty for apostates.

From the transmission, the Hadith used as the basis for the death penalty for apostates is classified as *āḥād* Hadith. This assessment has also been expressed by al-Syawkānī in the book *Nayl al-Awṭar* (al-Shawkānī, n.d.: 193). Nevertheless, the *fuqahā* rely on their arguments on the above Hadith. Moreover, even though the Hadith is identified with *āḥād* status, Sayyid Sabiq still refers to this Hadith as the basis for the death penalty for apostates. He argues that apostates deserve to be sentenced to death because they betray the Islamic rule (Sabiq, 1996: 607).

The betrayal of the Islamic rule can cause the security of a community group to be disturbed, and this action may have an impact

on the disruption of the stability of a country's security. Such an act is not only related to the means and infrastructure of life, such as economic and agricultural businesses, but it can also extend to a dispute of an ethnic group.

In addition, historical facts served as guidelines for the *fuqahā*. For example, the caliphate of Abū Bakr al-Siddīq fought apostates as a form of concern that resulted in a threat to the stability of the Islamic region. (al-Jabiri, 2003: 130). However, this historical fact has criticized Muhammad Sa'id al-Ashmawi, saying that it had no solid evidence. Moreover, as the head of the government, the Prophet had never punished apostates with the death sentence (Čustović, 2020). The criticism given by Muhammad Sa'id al-Ashmawi is well-founded as the Prophet indeed never punished apostates to death.

Another historical fact referred to was when several apostates were sentenced to death and rebelled during the time the Prophet led the government. Quoting Bukhārī's opinion in his Sahih book, the only death penalty case for an apostate was in the condition that the apostate was a rebel (*al-baghy*) (al-Bukhārī, 1987: 540; Hajar, 2004: 172; Quran, 49: 9-10). This case happened to a group from the 'Ukul tribe who originally came to Medina. Since the climate in Medina made them uncomfortable living there, the Prophet took the initiative to move them (the 'Ukul tribe) outside Medina, to an area where many camels were reared and whose soil was very fertile. Yet, the 'Ukul tribe not only enjoyed the camel milk but also killed the camel keepers. The 'Ukul tribe's actions were known to the Prophet, and later the Prophet sent an army to kill them (Hajar, 2004: 172).

In the case where imposing the death penalty for apostates who resisted, Tarmizi M. Jakfar believes that the Prophet revealed the Hadith in his capacity as a state leader. He states that the Hadith is classified as *sunnah ghoyr-tashri'iyyah*, meaning a sunnah whose meaning is aimed at certain situations (Jakfar, 2011: 276–277).

In Muhammad Ali's judgment, the case of apostates sentenced to death, as informed by Bukhārī, limits the generality of the Hadith narrated by Ibn Abbās. He explains that the last Hadith can compromise with other Hadiths or principles in the Quran. (Ali, n.d.: 596) Muhammad Ali argues with the Hadith:

² Ibn Mas'ud reported that the Messenger of Allah said: "It is not permissible to spill the blood of a Muslim who acknowledges that there is no God but Allah and I am His messenger, except in three [instances]: a life for a life, the married person who commits adultery, and the one who forsakes his religion and separates from the community (apostasy) (Narrated by Muslim" (Al-Nawawi, 1981: 164).

In this context, the element of "separating oneself from the congregation (Muslims)" is the primary condition for imposing the death sentence for apostates. This element implies that apostates leave the Muslim group and conspire with the enemy to fight against the Muslims. This fact prompted Muhammad Ali to conclude that the condition of the Muslims at that time was in a state of war. Another evidence put forward by Muhammad Ali is based on the Hadith narrated by Bukhārī from Jābir ibn' Abdullāh RA:

A Bedouin pledged Islam to the Messenger of Allah; then, the Bedouin was stricken with the fever in Al-Madinah. So he came to the Messenger of Allah and said: "O Messenger of Allah, cancel my pledge," but he refused. Then he came to him again and said: "Cancel my pledge," but he declined. Then he came to him again and said: "Cancel my pledge," but he refused. Then the Bedouin left (Al-Madinah), and the Messenger of Allah said: "Al-Madinah is like a pair of bellows (furnace). It expels its impurities while it brightens and clears its good" (Hajr, 2004: 346).

In response to the historical evidence that apostates were not subject to the death sentence, as narrated by Bukhārī, Ali (n.d.: 597) argues that historical facts have shown that the Prophet encountered the first apostasy case. After converting to Islam, a Bedouin Arab male experienced a fever, which he thought was due to his conversion. He tried to come to the Prophet, asking to revoke his pledge to Islam and return to infidelity. Although the Prophet refused to return his oath, the man left without leaving a message. After leaving, the man's whereabouts were unknown, nor did a Hadith regarding the man who withdrew his oath being sentenced to death.

There are some limitation criteria for apostasy, which are subject to the death penalty. Bukhārī's Hadith stated that the Prophet tried to protect human rights from the arbitrariness of those who were sentenced to death for apostasy without understanding the "criteria for apostasy" who were sentenced to death. With the limitation of the general meaning of the Hadith narrated by Ibn Abbas above, it is hoped that it will realize

the life rights of apostates who change religion without revolting against the Islamic government.

Thus, based on several facts revealed above, the *fuqahā* on consensus has agreed to determine that the punishment for apostates with desertion is death (al-Qurṭubī, n.d.: 302). The consideration of *fuqahā* was for the benefit of the Muslims, to avoid the threat of the Islamic dominion. The *ijmā'* of the *fuqahā* is the punishment for apostates to be killed. Although this opinion is the *ijmā'* of the *fuqahā*, according to Abid al-Jabiri, the view of the *fuqahā* needs to be understood in accordance with the social context of society at that time. In other words, what kind of apostasy is indicated by the *fuqahā* that can be sentenced to death should be properly comprehended. M. Quraish Shihab also shares the same view (Shihab, 1999: 190).

Al-Jabiri tries to analyze the opinion of the *fuqahā* and states that the *fuqahā* relates the punishment with the law of rebels, namely people who attack the state and society with weapons. This is because apostasy in *fiqh* discourse is a type of rebellion (al-Jabiri, 2003: 129). For al-Jabiri, the war against apostates in Abu Bakr's time was a war against people who were not only traitors to the Islamic state, as they had joined the Muslims during the Prophet's time. Moreover, they organized themselves to destroy the state after being reluctant to submit to its rules (*i.e.*, their reluctance to pay zakat) (al-Jabiri, 2003: 130). These descriptions indicate that an apostate is a person who attacks and fights an Islamic state, conspires, or becomes a spy for the enemy.

Al-Jabiri's understanding shows that apostates are sentenced to death because of the element of rebellion against Islamic rule. The perpetrators of rebellion in the Quran were punished with death. The act of rebellion could threaten the stability of the Islamic government at the time. In this context, the death penalty is enacted not due to apostasy but rather to being "against" the Islamic government. Thus, it becomes the primary condition for being subject to the death penalty for every case of religious conversion. In modern life, however, the element of "opposed to" or "against" can be equated with desertion cases in military law which are also punishable by death.

Such arguments have led an-Na'im to conclude that apostasy by faith is a matter of personal freedom and a human right that the Quran

upholds. To actualize the values of the substance of Islamic teachings included in the personal area is to raise awareness of civil society. This should also be encouraged by non-governmental organizations, without having any state intervention full of interpretations among those in the legislative or executive power (An-Na'im, 2003: 165–166), which is highly likely to violate religious freedom. Here, An-Na'im cites Qur'an, 2: 256: *There is no compulsion in religion. Verily, the right path has become distinct from the wrong path.*

From Na'im's perspective, this verse is a form of human rights that the Quran highly upholds. Therefore, it is not justified to give the death penalty to apostates by faith (An-Na'im, 1996: 114). If this is the case, the punishment for apostasy is not a *ḥadd* (fixed) punishment because the above Hadith still causes disagreements among scholars, nor is it supported by Hadith *fi'lī* and historical facts. An-Na'im, however, does not give an argument about the authenticity of the *aḥād* Hadith. But instead, he refers to the arguments presented by al-Syawkānī regarding the status of the above Hadith.

Further, an-Na'im states that the application of death punishment for apostates tends to be based on mere belief, such as in the case of Thaha. According to Thahā Jābir al-'Ulwani, no history/*ḥadīth fi'lī* describes that the Prophet had killed someone solely because of apostasy (al-'Ulwani, 2005: 146). The indecisiveness of the Quran texts and Hadith regarding apostates' death sentence causes an-Na'im to disagree with the *fuqahā*, who classifies apostasy into *jarīmat al-ḥudūd* (fixed punishment), as he considers it to be classified into *jarīmat al-ta'zīr* (discretionary penalty).

Here, Syaltut emphasizes the same idea that most Islamic scholars believe that *ḥudūd* sanctions cannot be carried out based on *aḥād* Hadith. At the same time, disbelief is not the cause of the lawful killing of an apostate. The leading cause of the legal killing of apostates is their hostility and resistance toward Muslims (Syaltut, 1966: 286).

From these descriptions, it is evident that an-Na'im intends to emphasize that it is necessary to distinguish apostasy in a narrow sense, namely conversion of religion/belief, and apostasy in a broad sense, which is betrayal. Apostasy, in a limited sense, shall be subject to *ta'zīr* punishments. In contrast, apostasy in a broad sense (treason)

is subject to *hadd* punishment in the form of the death penalty, which is equal to the punishment for rebellion as it can threaten the country's stability.

Sanctions for Apostasy and Implications in Human Rights Norms

The death penalty for apostasy has received serious attention among contemporary Islamic legal thinkers. The issue is directed toward the nature and characteristics of punishment in Islamic criminal law that are not in accordance with universal human rights norms, such as death penalties (*e.g.*, stoning, killing and whipping). The clash of corporal punishment in Islamic criminal law with modern human rights is assessed based on several arguments.

First, applying Islamic criminal law as public law is related to the prevailing government system. In Islam, the death penalty originated from the Quran and Hadith, as the sources of law used as a life guide for Muslims in carrying out their governance. This can be seen by making Islam the basis for the constitution of an Islamic government. At this time, the national identity is based on one's religion or belief. As the basis of the constitution, the Quran is a positive law that applies to Islamic citizens. All legal rules in Islamic teachings based on the Quran and Hadith are automatically accepted and recognized by all citizens as a state philosophy. This includes the death penalty for apostasy. Regarding sociological considerations, the death penalty has been applied to some instances with elements opposing Islamic rule.

In a nation-state context, a person's citizenship status is no longer based on religion, as it is limited to a territorial area. The form of government of the nation-state has consequences for the legal system applied to a nation with a different philosophy of life. In other words, the Quran is no longer the basis of the constitution; instead, it functions as a source of universal teachings used as a reference in formulating legislation. Despite being a source of Islamic law, the Quran cannot be formalized as positive law unless going through human understanding and deliberation within political processes and official institutions recognized by the community.

The provisions of criminal law, including the death penalty for the crime of apostasy, in an-Na'im's view, should not be based on informal

sharia laws but are based on the rules in formal state law and obtain approval from the citizens (An-Na'im, 1996: 109, 104–105; An-Na'im, 2007: 187).

Second, the imposition of punishment can eliminate the natural rights of each individual. Natural rights are the most basic (fundamental) rights that exist and are inherent in every individual in line with human nature (Safdar et al., 2021); (Lopa, 1996: 2). This right shall be protected and not be violated ⁶ by anyone. One natural right that exists in every individual is the right to life. The imposition of the death penalty in apostasy can eliminate a person's life, which is the right of every individual that must be protected.

For the Western world, respect for the individual is prioritized as it becomes part of forming human character. So it can be harmonized with human existence itself, which is relatively influenced by socio-cultural factors (Shihab, 1998: 147). Hence, as stated by James W. Nickel, the universality of human rights is emphasized more on its function to prevent citizens from becoming objects of oppression (Nickel, 1995: 64). This particular view is called anthropocentrism (Gansmo Jakobsen, 2017). Humans are used as a measure of the symptoms of something and as the ultimate goal of implementing human rights. Therefore, the main values of Western culture, such as democracy, social institutions, and economic welfare as supporting tools for upholding human rights, are more oriented towards respect for humans.

The meaning of the human rights concept in the Western world – in Alwi Shihab's view – shows that human rights that develop in the West place humans in a separate setting from God (divided God), wherein the relationship is not mentioned at all (Shihab, 1998: 179). Human rights are valued as natural acquisitions from birth.

In contrast, in Islamic teachings, human rights are a universal gift God gives so that every individual feels responsible to God (Mayer, 1999: 72). On the one hand, the universality of human rights adheres to the teaching that all human beings created by God are equipped with capacities in the form of the potential to do something according to their will (Mayer, 1999: 78). In addition, as the servants of Allah, humans are responsible for carrying out the tasks entrusted to them as the vicegerent of Allah on earth (Maududi, 1967: 156).

The logical consequences of the above explanations suggest that humans are faced with two responsibilities: the responsibility to carry out the mandate of Allah as His servants and the responsibility to be policymakers and regulators of life. The Quran and Sunnah are, in fact, a transformation of the quality of human consciousness to direct humans to realize individual piety and social holiness following awareness and obedience to Allah. In terms of the social sciences, this view is called *theocentrism* (Fiala, 2008). Humans must live and work hard with the full awareness that they must obey God's will and recognize their rights as an obligation in obedience to God.

This perspective yields an understanding that the death penalty is not a violation of human rights but rather moral teaching that shall be applied to perpetrators of crimes that can disrupt public order. In this context, practising religious education, both in worship and moral aspects, is one of the implementations of upholding natural values while also upholding human rights.

The difference in views on natural rights is the main cause of conflict between the Western and Islamic worlds. In the Western world, the concept of human rights is stated in the articles of the Universal Declaration of Human Rights (UDHR). It was proclaimed through the UN General Assembly Resolution No. 217A (111) on December 10, 1948, along with various conventions and agreements agreed by all nations and countries in the world as the basis for the general implementation of human rights that are relevant to different rights and the substance of human rights. As a counterweight to the concept of Western human rights, Islamic countries formulated the human rights concept, which was declared in Cairo on August 5, 1990, known as the Cairo Declaration on Human Rights in Islam, held by countries that are members of the Organization of the Islamic Conference (*Organisasi Konferensi Islam/OKI*).

However, the above issue triggers crucial problems in public law (criminal law), especially regarding human rights. The difficulty lies in reconciling the relatively secular Western concept of human rights that has grown and developed in modern nation-states with the concept of Islamic human rights. Both the human rights concepts have a strong basis of legitimacy. The Western concept is based on the consensus of the world community through the United Nations UDHR, while the

Islamic concept is based on the Holy Gook and Sunnah of the Prophet. Thus, to find an adjustment to the above inequality, an-Na'im has attempted to offer an alternative solution to adjust this crucial problem to neutralize the differences in views between the West and the Islamic world.

Case Study: Apostasy and Religious Freedom

Some examples of the application of Islamic sharia which are considered in conflict with the concept of human rights include the Islamization program in 1983-1985 during the regime of President Numeiri and also *hadd* punishment drafted by Hassan Turabi in 1991 in Sudan (An-Na'im, 1990: 64; An-Na'im, 1996: 186). In this study, the aspects under focus are freedom of religion, freedom of politics, and women's rights. All of these are explained along with the articles contained in the UDHR.

When discussing the freedom of religion, it is often concerned with tolerance for religious differences and allowing people to choose any religion according to their will regardless of gender, skin color, ethnicity, and race. However, the *fuqahā* agrees that one of the goals of *maqāṣid al-sharī'ah* as the idea for the conception of the concept of human rights in Islam is the obligation to protect religion from people who want to distort, ridicule, coerce, or expel it (apostasy). The *fuqahā* have set the limits (laws and sanctions) for apostasy as part of the sharia regardless of whether the arguments used as the basics are in accordance with the principle of freedom of religion.

The *ijmā'* of the Islamic scholars asserts that the apostate shall be killed and even forced to return to Islam with all one's might, or the death penalty imposed if one still refuses to return to Islam. The consideration of the Islamic scholars is to protect the religion from violation attempts, as it means to uphold the formation and the sovereignty of the Muslim nation.

In the view of An-Na'im, the stipulation of the law to kill apostates is a form of violation of the human rights norms. Articles 18 and 19 of UDHR adheres to the freedom principle in terms of choosing one's belief and religion without any

Article 18:

Everyone has the right to freedom of thought, repentance and religion. This right includes the freedom to change one's religion or belief and the freedom to express one's religion or belief in the form of worship and to observe it, either alone or jointly with other people, either alone or separately.

9

Article 19:

Everyone has the right to freedom of opinion and expression. This includes the freedom to hold opinions without interference from others, seek, receive and impart information and opinions in any way and regardless of frontiers.

Here, An-Na'im puts forward an example of this case: the death sentence given to his teacher Mahmoud Muhamed Taha on charges of apostasy due to his ideas (Amal & Panggabean, 2004: 179). The case occurred when President Ja'far Numeiri governed the Sudanese government with his vice president Hasan Turabi. The Sudanese court, handled by Judge al-Kabasyi, executed Thaha, 79 years old at the time, without a lawsuit from the vice president.

A similar case was also experienced by a contemporary Muslim figure, Nashir Hamid Abu Zayd, who was accused and convicted of apostasy. Some even demanded a divorce from his wife on the ground of apostasy. The case that happened to Nashir Hamid Abu Zayd made his move to Europe with Mohammad Arkoun and became an advisor in the field of publishing Western Encyclopedias related to the Quran and also accepted an offer from Leiden University in the Netherlands (al-'Ulwani, 2005: 11).

These two examples of apostasy cases show that coercion in religion is equivalent to an affirmation that in Islam, there is a suppression of freedom of belief and deprivation of human rights. To strengthen his argument, al-Na'im cites several verses of the Quran that do not support freedom of religion and are contrary to human rights principles, including At-Tawbah (9: 11-12, 29, and 36). In the context of the spread of Islam, the verses offer three options: 1) converting to Islam, 2) having to pay *jizyah* (tax) (Yusuf, n.d.: 35; An-Na'im, 1994: 17) if refusing to convert to Islam, or 3) waging war, as a last resort if the previous two offers are not heeded. The second aspect of these verses contains a discriminatory treatment of non-Muslims. This does not only limit freedom of religion but also limit freedom and equal

rights as citizens which can be classified as a violation of human rights principles.

The necessity of choosing one of the three options above, in an-Na'im's view, suggests that these verses are intolerant of freedom of religion. Yet, other verses are tolerant of religion, such as Surah al-Baqarah (2:256), which reads, "*Let there be no compulsion in religion, for the truth stands out clearly from falsehood*". This verse allows freedom for people to choose whatever religion they wish to embrace, without coercion from anyone. An-Na'im believes that even though this verse was revealed in the early Medina period, it can also be viewed as part of Makkiyah verses since its content emphasizes tolerance.

Muhammad Quraish Shihab also expresses a similar view. A death sentence for apostates is closely related to the social conditions of every society. There is no indication in the Quran that imposing a death sentence on apostates is necessary. Even if Hadiths discuss such punishments, these are merely wisdom in managing society. It may be applicable in certain societies, but not in others. Muhammad Quraish Shihab remarks that even though the death sentence was originated from the policy of the Prophet, the context of the policy should also be understood, whether it is recommended in the context of being a Prophet, a *fatwā* maker, a judge who makes decisions, or a leader of a society whose policy direction will vary due to differences in the condition of one society with another (Shihab, 1999: 190).

It is in line with Abid al-Jabiri description that the legal conditions for apostates in Islamic teachings are not determined by the authority of freedom of religion but are determined by the authority of what is now called traitor of the country or waging war against society and the country (al-Jabiri, 2003: 131). Under these conditions, al-Jabiri mentions that the issues ⁶ of human rights and freedom of religion tend to be more about individual freedom of religion. They do not include the freedom to betray the country, society, and religion or to rob and seize what belongs to others. In the view of fiqh scholars, the death penalty for apostates is not solely because of violating freedom of religion (conversion of religion). The death penalty is aimed at apostates who convert a religion, commit treason against religion and the country, and conspire with the enemy.

A different experience also occurred in the province of Aceh, Indonesia, which was implementing Islamic law through formalities marked by the birth of several Qanun (Sharia Regional Regulations). One of the qanun that regulates aspects of Islamic criminality is contained in the Jinayat Qanun, (Qanun No. 6 of 2014 on Jinayat Law) as positive law in the field of Islamic crime, specifically in the Aceh region (Abubakar, 2013: 75; (Sumardi et al., 2021: 440); Din & Abubakar, 2021: 701–703). This qanun does not regulate the issue of apostasy and its punishment. It regulates other criminal aspects limited to the problem of *khamr* (intoxicating drinks), *maysir* (gambling or betting), *khalwat* (acts alone between men and women who are not married in a quiet place), *ikhtilāf* (acts making out), adultery, sexual harassment, rape, *qadhaf* (accusing someone of adultery), *liwāt* (homosexual), *musāḥabah* (lesbian) (Article 3 Paragraph 2 (Aceh Qanun No.6/2014 on Jinayat Law)).

Although the issue of apostasy is not regulated in the Qanun Jinayat, it does not mean that the issue of apostasy does not receive attention from the Aceh government. Apostasy as a criminal act is precisely regulated in Articles 18 and 19 of Aceh Qanun No.8/2015 on the Guidance and Protection of Aqidah.

Article 18:

- (1) Every Muslim who intentionally issues a statement and/or commits an act outside Islam as referred to in Article 7 paragraph (1) shall be subject to 'uqūbat al-ta'zīr in the form of lashes in public for a maximum of 60 (sixty) times and a minimum of 30 (thirty) times, or imprisonment for a maximum of 60 (sixty) months and a minimum of 30 (thirty) months, or a fine of a maximum of 600 (six hundred) grams of pure gold and a minimum of 300 (three hundred) grams of pure gold.
- (2) Any person who intentionally commits the act as referred to in Article 7 (2) to paragraph (6) shall be subject to 'uqūbat al-ta'zīr in the form of a whip in public for a maximum of 30 (thirty) times and a minimum of 15 (fifteen) times, or imprisonment for a maximum of 30 (thirty) months and a minimum of 15 (fifteen) months, or a fine of a maximum of 300 (three hundred) grams of pure gold and a minimum of 150 (one hundred and fifty) grams of pure gold.
- (3) Any person who intentionally acts on his own, as referred to in Article 8, shall be subject to 'uqūbat al-ta'zīr in the form of imprisonment for a maximum of 15 (fifteen) months and a minimum of 6 (six) months or a fine of a maximum of 150 (one hundred) months. fifty grams of pure gold and at least 60 (sixty) grams of pure gold.

Based on Article 18 of the Qanun above, it is known that acts of apostasy are also categorized as criminal acts that can disrupt the *'aqidah* of the Acehnese people. However, the punishment for apostates in this qanun is not the death penalty as stipulated by the fuqaha. However, this qanun stipulates that the punishment for apostates is optional, namely lashing or imprisonment or a fine in the form of pure gold. Even though there is a provision for the choice of punishment in article 18, in the trial process at the Syar'iyah Court (Islamic Court), the punishment aspect in the form of coaching is put forward first (Article 19, Aceh Qanun No. 8/2015 on Development and Protection of Aqidah). This development aspect in the modern criminal theory system is in line with the reformation principle or *'uqubat al-ta'zīr* in Islamic crime.

The Application of Criminal Theory in the Crime of Apostasy

In principle, the purpose of determining punishment shall refer to two: individual and social aspects. The individual aspect of a sentence is to rehabilitate the behavior of criminals. Hence, a penalty is needed to change the evil behavior, so they do not repeat the same act. The social aspect of punishment is the existence of a preventive goal for the community to avoid the crime of concern.

Concerning the crime of apostasy, the *fuqahā* considers that apostasy is a crime whose punishment is the death penalty based on the Hadith of the Prophet narrated by Ibn Abbas. This view is based on the concept of apostasy, which the fuqaha equate to "rebellion". The death penalty in cases of apostasy is retributive, i.e. retaliation for mistakes that have been made. The orientation of retaliation leads to the actions that have been committed. Therefore, the basis of this punishment theory (criminalization) reflects the past, emphasizing the actions that have been conducted (Sholehuddin, 2004: 34).

In the case of apostates subject to the death penalty, there is an element of opposition act (rebellion). This element in the criminal system is included in the term criminal sanction, which refers to any sanction that emphasizes the aspect of retaliation (retributive) (Kaushal, 2020). The terms criminal sanction and action sanction are known in the philosophy of punishment. Criminal sanction is the imposition of suffering that is imposed on the actions of the perpetrators of violations.

This sanction is reactive to an act. Action sanction is a sanction that does not prioritize retaliation but is an effort to protect the community from threats that can harm the interests of the community. This sanction is anticipatory towards the perpetrator of the act (Muladi & Arief, 1992: 4). Perpetrators of apostasy and those opposing Islamic rule are included in major crimes that can threaten the country's stability. The Islamic scholars stipulate that those who oppose the Islamic government are subject to the same punishment as death for rebels.

The aspect of deterrence (prevention) (Safdar et al., 2021: 88) of the death penalty in the crimes of apostasy and rebellion against the Islamic government aims solely to create fear of committing a crime. The purposes are divided into individual, public (social), and long-term objectives (Sholehuddin, 2004: 41). The individual purpose of the death penalty in apostasy is to deter perpetrators from committing the same act. The public (social) purpose is to make other community members afraid to commit similar crimes. The long-term purpose is to realize the security of the community's social life. On this basis, the death penalty in the crime of apostasy also considers social aspects so that the crime does not extend to other communities.

Apart from the two retributive and deterrence aspects, there are more dominant in the crime of apostasy. The reformatory aspect refers to apostasy in changing religions without conspiring with the enemy to oppose the Islamic government. The punishment for apostates who only converts to another religion is not subject to the death penalty but is subject to *ta'zīr* punishment, which contains aspects of moral lessons, such as reforming the behavior of lawbreakers and society to stay away from criminal acts (Quran, 5: 38-39; Quran, 24: 5; Quran, 25: 68-69). *Ta'zīr* punishment is another form of punishment that is reformatory or rehabilitative. *Ta'zīr* is a form of criminal development (criminal *ijtihādī*) that is not based on *ḥudūd* law, *qisās-diyat*. Included in the *ta'zīr* punishment is additional punishment through the severity of punishment, such as beatings or slapping, whipping, detention or imprisonment. In practice, the *ta'zīr* punishment changes its form according to the changes in conditions. This change has led to efficiency as well as practical and pragmatic developments so that it is possible to interpret exile as imprisonment (Ashshiddieqy, 1996: 113–114). The principle of rehabilitation is to allow mistakes or crimes to be considered

as social diseases requiring social and moral therapies so the perpetrators of crimes can integrate back into social life.

The death penalty in apostasy, as stipulated by the *fuqahā* contains retributive and deterrence aspects. The judgment of the *fuqahā* is entirely rational, considering that the apostates who act against the Islamic government can damage individual beliefs, and such "acts of resistance" can endanger society's social stability at the time. The basis of the *fuqahā* considerations in determining the death penalty for apostates is rational and contains *maṣlahah*. However, such actions are contrary to the teachings of Islam, which encourage morality.

Thus, for the Western world, which is full of human rights considerations, assessing the dominance of retributive and deterrence aspects in the death penalty is not in line with human rights, as it eliminates one's freedom of life. This view originates from different philosophies in assessing the importance of rationality in giving punishment.

In Islam, criminals who violate the law are contrary to the principles of ethical and moral teachings. It is different from the Western world, which disregards ethical and moral education. Therefore, criminal punishment is not seen from the cause of the criminal act but rather from the sentence imposed on the criminal (Sodiqin, 2021: 374). An-Na'im assesses that the death penalty for the crime of apostasy is more directed to the reformatory nature of a punishment (An-Na'im, 1996: 112). For criminologists, reformation is more synonymous with the meaning of "cure". This tendency is based on the idea that people who commit crimes are no longer appropriately viewed as "ugly people" but "sick people". The emphasis on reformation characterizes the criminal law system that applies in almost all Western countries.

Conclusion

The concept of apostasy in the Islamic criminal system has experienced elaboration and shift in meaning. Apostasy as a criminal act is not an area of one's privacy but a public domain. That is, an act of traitor to the Islamic government can always threaten the order and stability of the government. The act of treason and the consequences arise from this act are the logical reasons for the threat of the death

penalty. The determination of the death penalty in modern punishment theory is classified as a preventive action (deterrence). This principle aims to educate the community's morality, especially the desertion apostates. The death penalty in the Islamic criminal system is not merely a means of social control oriented to the aspect of retaliating against the perpetrator's crime (retributive) but rather a preventive effort to guarantee human rights and the realization of the stability of the Islamic government based on the legitimacy of the fuqaha' consensus.

The authority of the *fuqahā* in stipulating the death penalty for apostates against the Islamic rule was ideal for the conditions and situations of Arab society at the time. These social conditions that have existed and contained positive values are incorporated by the universal values of the teachings of the Quran and are then used as ideal models for the reality of modern society. The combination of old social conditions and new values is socialized and internalized into the modern criminal law system without changing the existing legal system. This combination of modern punishment theory showed a strong relationship among *retributive*, *deterrence*, and *reformative* theories. These aim to achieve the goals of a criminal system integrated with moral principles.

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