

# A Discourse of Capital Punishment in the Islamic Law and Human Rights Law

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## Abstract

Capital punishment remains a contentious issue at the intersection of Islamic law and human rights law. This paper undertakes a comprehensive examination of the discourse surrounding capital punishment within these two legal frameworks. Islamic law, rooted in the Quran and Sunnah, provides guidance on criminal justice, including provisions for the death penalty in certain cases. Human rights law, on the other hand, emphasizes the protection of individuals' inherent dignity and right to life, often challenging the legitimacy of capital punishment. Through a comparative analysis, this paper explores the philosophical, theological, and legal underpinnings of capital punishment in Islamic law and human rights law. It delves into the historical evolution of capital punishment in Islamic jurisprudence and examines contemporary interpretations and applications of hudud punishments. Additionally, it scrutinizes international human rights instruments and jurisprudence, evaluating the



compatibility of capital punishment with principles of human dignity and the right to life. Furthermore, this paper examines the practical implications of capital punishment within Islamic legal systems and its interaction with human rights norms. It considers case studies and legal precedents from various jurisdictions to illustrate the complexities and challenges inherent in reconciling Islamic legal principles with international human rights standards regarding capital punishment. By engaging in this discourse, the paper aims to foster a nuanced understanding of the tensions and harmonies between Islamic law and human rights law concerning capital punishment. It contributes to scholarly dialogue on the intersection of religion, law, and human rights.

**KEYWORDS** *Death Penalty, Capital Punishment, Islamic Law, Human Rights Law*

## Introduction

Indonesia is a country of law and this is stated in the 1945 Constitution Article 1 Paragraph (3) which means that Indonesia upholds the law in all aspects of social and state life and cannot act arbitrarily towards its citizens because all actions taken must be in accordance with applicable laws. The application of rules to this still valid law indicates that Indonesia is implementing a *civil law* legal system where this legal system is based on positive legal regulations that have been neatly arranged with one example, namely the Criminal Code or the Criminal Code.<sup>1</sup> The Criminal Code regulates two types of crimes in it, namely the main criminal and additional crimes contained in Articles 10 to 43 of the

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<sup>1</sup> Mulkan Hasanah, "Hukuman Mati, Hukum Islam, Hukum Pidana Indonesia," *Doctrinal* 4, No. 1 (2019); Pratama, Widhy Andrian. "Penegakan Hukuman Mati terhadap Pembunuhan Berencana." *SIGn Jurnal Hukum, CV. Social Politic Genius (SIGn)* 1.1 (2019): 29-41; Lon, Yohanes S. "Penerapan Hukuman Mati di Indonesia dan Implikasi Pedagogisnya." *KERTHA WICAKSANA* 14.1 (2020): 47-55.

Criminal Code. The principal crimes consist of: (a) The death penalty, (b) imprisonment, (c) imprisonment, and (d) fines; Additional criminal offences consist of: (a) Revocation of certain rights, (b) Deprivation of certain goods, (c) Announcement of a judge's judgment. Hugerms die in Indonesia itself is the main type of punishment that can be imposed on convicts. Some of the crimes that can be subject to the death penalty include being regulated in the Criminal Code, such as: treason to kill the head of state, inviting foreign countries to attack Indonesia, providing assistance to the enemy when Indonesia is in a state of war and so on. The threat of the death penalty also exists in Islamic law, known as Qishash as Sura Al-Baqarah verses 178 and 179, which translates as follows:

Verse 178: *"O people of faith, it is obligatory upon you qishash with regard to the murdered; a free man with a free man, a sahaya servant with a sahaya servant, a woman with a woman. So, whoever gets a forgiving from you is killed, should (who forgives) follow in a good way, and should (who is forgiven) pay Diyat to the one who gives forgiveness in a good way (anyway). Such is a punishment which your Lord has hinted at, while for you is to be a mercy as well. Whoever transgresses afterwards will have a poignant torment."*

Verse 179: *"In the law of Qishash there is a guarantee of survival, O people who are reasonable, that you may fear Allah."*

Qishash is a rule in Islamic law. Linguistically *qishash* is *al-musaawah wat-ta'adul* which means equation and balance. So, qishash is the same and balanced punishment as the crime committed by the criminal offender<sup>2</sup>. For example, the perpetrator will be sentenced to death because

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<sup>2</sup> Anisah, Siti. "Penerapan Hukum Qishash untuk Menegakkan Keadilan." *Journal of Islamic Law Studies* 1.2 (2018): 98-109; Rajafi, Ahmad. "Qishash dan Maqashid Al-Syariah (Analisis Pemikiran asy-Syathibi dalam Kitab Al-Muwafaqat)." *Jurnal Ilmiah Al-Syir'ah* 8.2 (2010). Qisas is synonymous with the death penalty in Islam. Qisas with the principle of the same or similar retaliation cannot be done just like that. Qisas law is not only applied to murder, but also to acts that result in disfigurement or injury. Qisas is explained in Al-Quran surah Al-Baqarah verse 178. Qisas related to the death penalty in Islam is carried out if someone is killed. The victim's family has the right to demand compensation based on the principle of life for life. The qisas requirements for the application of the death penalty in Islam are: (1) If the perpetrator is a married adulterer (muhsan) and leaves Islam. Meanwhile, victims whose families have the right to demand Qisas are those whose lives are protected, (2) The killer is a mukallaf, that is, an adult (baligh) with intelligence. If

he committed murder, will be sentenced to shoot if he shoots. However, the application of Qishash itself must comply with all the rules contained in Islamic law, one of which is that the family of the victim agrees with the application of this punishment, if there is one who disagrees / forgives the actions of the perpetrator then this punishment cannot be carried out. In Paragraph 178 it is stated that the perpetrator who is given an apology by the victim's family must pay *diyat*. *Diyat* is a fine that is agreed upon by both parties and determined by a judge.

The death penalty has received various responses from the Indonesian people, some still maintain the death penalty (pro against the death penalty) with the thought that this punishment can protect the public interest and is worth the crimes committed. There are also some who do not support the death penalty (contrary to the death penalty) because the death penalty is considered to take away a person's right to life, even though everyone has the right to life and the right to maintain his life (Article 28A Paragraph 1 of the 1945 Constitution). In human rights, it is expressly stated that the death penalty is contrary to the principles set out in the International Covenant *on Civil and Political Rights* (ICCPR). Despite the opposition, the death penalty is still one of the punishments imposed in Indonesia with one example the murder case of Sisca Yofie whose perpetrator Wawan was sentenced to death by the Supreme Court with a verdict dated November 11, 2014 with the consideration that the act committed by the defendant against the victim

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he is a child or crazy then there is no Qisas for the murder committed, (3) The degree of the perpetrator is the same as the victim in the field of religion, freedom and servitude. Both parties must be in a balanced position and power, so that they can claim compensation, and (4) The perpetrators are not the parents, father or mother, or grandparents of the victim. Parents cannot accept Qisas related to the murder committed on their child. Qisas claimants related to death penalty rules in Islam must also fulfill several conditions. If the conditions are not met, then the claimant does not get his rights. *See also* Rohman, Anas. "Qishash Law and Human Rights." *TAWASUT* 7.02 (2020); Rahman, M. Taufiq. "Relevansi Hukum Qishash dengan Hak Asasi Manusia." *Risalah* 33.2 (1995): 69-70; Kusuma, Mahendra, and Rosida Diani. "Qishash Diyat dalam Hukum Pidana Islam Lebih Mencerminkan Keadilan dari Sisi Korban." *Jurnal Dinamika* 2.2 (2022): 45-54; Yasin, Yasin. "Kontekstualisasi Teologi Keadilan dalam Hukum Qishash." *Jurnal Ilmiah Al-Syir'ah* 7.1 (2016).

in a sadistic way and will have a deterrent effect and the community will respect the right to life of others<sup>3</sup>.

Based on this description, it can be concluded that the death penalty already exists and is regulated in Indonesian laws and regulations. Several countries in the world practice the death penalty based on Islamic law, including Saudi Arabia, Egypt, Iran, Brunei Darussalam, Pakistan, and other countries in the Middle East.

This led to comparisons about the application of the death penalty adopted by Indonesia and countries that adhere to the death penalty based on Islamic punishment. According to Amnesty International, the country that applies the death penalty the most is Iran. Some of the crimes that are regulated and punishable by death in Iran are very diverse, including: Sexual crimes, alcoholics, theft crimes, and other crimes that are threatened with death. With so many regulations that could ensnare convicts with the death penalty, that's what makes Iran the country that applies the death penalty the most to convicts.

In addition to Iran, there is the State of Saudi Arabia or often known as Saudi Arabia which also applies the death penalty based on Islamic law, but uniquely Saudi Arabia does not have a codification of criminal law. The criminal law adopted by Saudi Arabia is based only on the interpretation of sharia law. Some of the crimes that can be subject to the death penalty include apostasy, adultery by married couples, atheism, armed robbery, insulting God, sexual abuse, homosexuals, lesbians, rapes and others.

Based on this background, the authors will outline several problems regarding: *first*, what is the mechanism for regulating the death penalty in

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<sup>3</sup> Amelia Arief, "Problematika Penjatuan Hukuman Pidana Mati dalam Perspektif Hak Asasi Manusia dan Hukum Pidana," *Kosmik Hukum* 19, no. 1 (2019), doi:10.30595/kosmikhukum.v19i1.4086; Wahyudi, Slamet Tri. "Problematika Penerapan Pidana Mati Dalam Konteks Penegakan Hukum Di Indonesia." *Jurnal Hukum dan Peradilan* 1.2 (2012): 207-234; Anjari, Warih. "Penjatuan Pidana Mati di Indonesia dalam Perspektif Hak Asasi Manusia." *Jurnal Widya Yustisia* 1.2 (2015): 247-255; Susanto, Mei, and Ajie Ramdan. "Kebijakan Moderasi Pidana Mati." *Jurnal Yudisial* 10.2 (2017): 193-215; Zulfa, Eva Achjani. "Menakar Kembali Keberadaan Pidana Mati (Suatu Pergeseran Paradigma Pemidanaan Di Indonesia)." *Lex Jurnalica* 4.2 (2007): 179-176.

Indonesia, *second*, how do Islamic law and human rights law view the death penalty, and *third*, how does the application of the death penalty compare in Islamic law countries with Indonesia.

This research is a normative or doctrinal legal research carried out with a method that is jurisprudence that is distinctive and different from the social sciences or natural sciences. Doctrinal research is a researcher who provides systematic explanations of the provisions governing certain areas of law, analyzes the relationship between those provisions, explains the problem, and perhaps foresees its development.

According to Soerjono Soekanto "normative legal research is defined as a system of teachings about reality, which usually includes analytical discipline and prescriptive discipline, and legal discipline usually falls into prescriptive discipline if the law is viewed as normative only", normative legal research examines a matter related to its legal aspects. Especially regarding the death penalty in terms of Islamic law and applicable human rights.

The approaches used in normative human law research are the statutory approach and the conceptual approach. The Statute approach is applied to review various laws and regulations related to the legal material concerned, including the Criminal Code, the Qur'an and Hadith (which are related to the death penalty) and so on. "This statutory approach will open up opportunities for researchers to study whether there is consistency and red lines between one law and another or between legislation and the constitution or between regulation and statute". By using a conceptual approach, it will make it easier for researchers to provide a point of view on solving problems in legal research by looking at legal concepts.

## **Death Penalty Regulatory Mechanism in Indonesia**

The implementation of the death penalty is a punishment that has a lot of opposition in society because this punishment deprives a person of life, even though the right to life is one of the rights guaranteed by the 1945 Constitution as a state constitution. The state in an effort to enforce rules or justice by using criminal sanctions must still guarantee the independence of individuals while respecting and upholding the rights of

human beings. Therefore, the imposition of a criminal judgment must have a function and aim to maintain the balance and harmony of one individual with another individual in a society in order to achieve the purpose of law enforcement which comes from justice, legal certainty, and benefit to society<sup>4</sup>.

Indonesia as a country of law, in deciding the punishment of a criminal act must be based on applicable rules or laws. The rules or laws governing the death penalty are regulated in the Criminal Code, namely:

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<sup>4</sup> Slamet Tri Wahyudi, "Problematika Penerapan Pidana Mati dalam Konteks Penegakan Hukum di Indonesia," *Jurnal Hukum Dan Peradilan* 1, no. 2 (2012): 207, doi:10.25216/jhp.1.2.2012.207-234. The application of death penalty in various cases, ranging from narcotics, terrorism, to serious crime cases also triggers various pros and cons both at the national and international levels. One of the controversies regarding the death penalty arose because of the second amendment to Articles 28A and 28I Paragraph 1 of the 1945 Constitution which states that every person has the right to live and has the right to defend his life and existence. This right is a human right that cannot be reduced under any circumstances and by anyone, including the state. In addition, the death penalty is considered incompatible with the purpose of punishment, namely, to deter people from committing crimes, and not revenge. The death penalty is considered unable to eliminate crime in society and create a happy society. *See also* Saputra, Adi, and Febrian Jadug Santoso. "Death Penalty, Right to Life, and Various Controversies in Human Rights." *Unnes Law Journal: Jurnal Hukum Universitas Negeri Semarang* 5, No. 1 (2019): 1-8; Fajrin, Yaris Adhial, et al. "Death Penalty for Corruptors in Indonesian Human Rights Perspective." *Unnes Law Journal: Jurnal Hukum Universitas Negeri Semarang* 6, No. 2 (2020): 287-404; Kurniawan, Syigit Dony. "The Capital Punishment for Narcotic Crime: Pros and Cons in Indonesian Legal System." *The Indonesian Journal of International Clinical Legal Education* 2, No. 4 (2020): 393-406; Wahyuni, Ribut Tirto. "Capital Punishment and (in) Justice." *Semarang State University Undergraduate Law and Society Review* 1, No. 2 (2021): 141-160; Lestari, Dewi Indah. "The Imposition of the Death Penalty for Drug Dealers in the Perspective of Human Rights." *Semarang State University Undergraduate Law and Society Review* 1, No. 1 (2021): 35-50; Utomo, Bernadetta Lakshita Pradipta. "Pidana Mati Terhadap Koruptor di Indonesia dalam Undang-Undang No 31 Tahun 1999 tentang Tindak Pidana Korupsi." *Ikatan Penulis Mahasiswa Hukum Indonesia Law Journal* 1, No. 1 (2021): 12-20; Wicaksono, Setiawan. "Hambatan dalam Menerapkan Pasal 6 Kovenan Internasional Tentang Hak-Hak Sipil dan Politik sebagai Dasar Penghapusan Pidana Mati di Indonesia." *Pandecta Research Law Journal* 11, No. 1 (2016): 65-79.



1. Crimes against state security (Article 104, Article 111 paragraph 2, Article 124 paragraph 3)
2. Criminal acts of crimes against friendly countries and against the heads of friendly countries and their deputies (Article 140 paragraph 3)
3. The crime of premeditated murder (Article 340)
4. The crime of violent theft resulting in serious injury (Article 365 paragraph 4)
5. The crime of violent extortion resulting in death (P368 paragraph 2)
6. The crime of piracy in the sea, coast and river resulting in death (Article 444)

Then there are other laws in Indonesia that regulate the death penalty as shown on Table 1.

**TABLE 1. Laws and Regulation concerning Death Penalty**

| No | Regulation                                | Conditions                                                                                                                                                                                                                                                                                                                                                                                                         |
|----|-------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1  | Criminal Code                             | Article 104; Article 111 verse (2); Article 124 sentences (3); Article 140; Article 340; Article 365 sentences (4); Article 444; Chapter 1368 verse (2)                                                                                                                                                                                                                                                            |
| 2  | Military Criminal Code (KUHPM)            | Chapter 64; Chapter 65; Chapter 67; Chapter 68; Articles 73 to 1, 2nd, 3rd and 4th; Articles 74 to 1 and 2; Article 76 sentences (1); Article 82; Articles 89 to 1 and 2; Articles 109 to 1 and 27; Article 114 sentences (1); Articles 133 sentences (1) and (2); Chapter 135 sentences (1) to 1 and 2, verse (2); Articles 137 sentences (1) and (2); Chapter 138 verses (1) and (2 ); and Article 142 verse (2) |
| 3  | Law Number 12/DH/1951 concerning Firearms | Chapter 1 verse (1)                                                                                                                                                                                                                                                                                                                                                                                                |



| No | Regulation                                                                                                                                                                                                                                                   | Conditions                                                                                                                                 |
|----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------|
| 4  | Presidential Decree No. 5 of 1959 concerning the Authority of the Attorney General / Attorney General in Terms of Increasing the Threat of Punishment for Criminal Acts that Endanger the Implementation of Food Clothing Equipment                          | Article 2                                                                                                                                  |
| 5  | Perppu No. 21 of 3959 concerning Increasing the Threat of Punishment for Economic Crimes                                                                                                                                                                     | Chapter 1 verse (1) and verse (2)                                                                                                          |
| 6  | Law No. 31/PNPS/1964 on Provisions for Atomic Energy Po kok                                                                                                                                                                                                  | Article 23                                                                                                                                 |
| 7  | Law Number 4 of 1976 concerning Changes and Additions to Several Articles in the Criminal Code Related to the Expansion of the Enactment of Provisions of the Criminal Provisions of Aviation Crimes and Crimes Against Aviation Facilities / Infrastructure | Article 479 letter k paragraph (2)                                                                                                         |
| 8  | Law Number 5 of 1997 concerning Psychotropics                                                                                                                                                                                                                | Chapter 59 verse (2)                                                                                                                       |
| 9  | Law Number 35 of 2009 concerning Narcotics                                                                                                                                                                                                                   | Chapter 74; Article 113 sentences (2); Article 114 sentences (2); Article 119 verse (2); Article 118 sentences (2); Article 119 verse (2); |

| No | Regulation                                                                                       | Conditions                                                                                         |
|----|--------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------|
|    |                                                                                                  | Article 121 verse (2); Article 132 sentences (3); Article 133 sentences (1); Chapter 144 verse (2) |
| 10 | Law Number 31 of 1999 concerning the Eradication of Corruption                                   | Chapter 2 verse (2)                                                                                |
| 11 | Law Number 26 of 2000 concerning Human Rights Courts                                             | Article 36; Chapter 37; Chapter 41; Chapter 42 verse (3)                                           |
| 12 | Law Number 15 of 2003 concerning the Eradication of Criminal Acts of Terrorism                   | Chapter 6; Article 8; Chapter 9; Chapter 10; Chapter 14; Chapter 15; Chapter 16                    |
| 13 | Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection | Chapter 89 verse (1)                                                                               |

*Source:* Supriyadi and Napitupuhi<sup>5</sup>

The execution of the death penalty in Indonesia is in accordance with the rules of Article 11 of the Criminal Code is to hang "the death penalty is carried out by the executor on hanging by tying the neck of the convicted person with a noose on the hanging pole and dropping the board from under his feet". Execution by hanging was replaced after the issuance of Law Number 02/PNPS/1964 concerning Procedure for the Implementation of the Death Penalty imposed by the Courts in the General and Military Courts by being shot to death and it is still valid today. According to the Act, prior to the execution of the execution within 3 x 24 hours the convicted person shall be informed of the execution of the execution against him. This notice was notified so that the convicted

<sup>5</sup> Supriyadi W. Eddyono dan Erasmus A.T. Napitupuhi, 2015, *Hukuman Mati dalam R KUHP: Jalan Tengah yang Meragukan*, Institute for Criminal Justice Reform, Jakarta, pp. 10-11.

person could take advantage of the rest of his time to be able to meet with his family members before he died.

The death penalty is still enforced in Indonesia today and has received attention from various figures in Indonesia, there are figures who support the death penalty, some disagree about the implementation of the death penalty. Bismar Siregar (former supreme court) agreed on the death penalty, according to him the death penalty is valid because there is a verse in the Qur'an that justifies the death penalty as well as in the Old Testament, the death penalty is allowed<sup>6</sup>. However, according to Todung Mulya Lubis (lawyer and human rights law academic) said that the death penalty is contrary to human rights, because there will be no recognition of the right to life when the death penalty is imposed<sup>7</sup>.

## Death According to Islamic Law & Human Rights Law

All religions must have their own rules for their people to live their lives in order to create a calm and comfortable state for their followers. Likewise, Islam has regulated all the rules regarding life contained in the Qur'an, Hadith, Ijtihad.

In Indonesia, the rules regarding death penalty are contained in the previously mentioned laws both through the Criminal Code and other laws and regulations. In Islamic law as well, the death penalty in Islamic law falls into the category of *qishash* punishment i.e. a criminal offense that is consequently sentenced or a life retaliated against with life. For example, if there is an incident of murder, then the perpetrator must also be killed even if not with the same tools and weapons<sup>8</sup>, if the perpetrator of the crime injures the victim, then the punishment is also the perpetrator must

<sup>6</sup> Besar, "HAM, Hukuman Mati, dan Pandangan Bismar Siregar" <https://business-law.binus.ac.id/2015/01/28/ham-hukum-mati-dan-pandangan-bismar-siregar/> diakses 25 November 2021

<sup>7</sup> Chusnul Chasanah, "Masih Perlukah Hukuman Mati?" <https://pshk.or.id/blog-id/masih-perlukah-hukuman-mati/> diakses 25 November 2021

<sup>8</sup> Abdul Rahman, 1992, *Tinda Pidana dalam Syariat Islam*, Rineka Cipta, Jakarta. hlm 224

be injured as well. The punishment of *qishash* is in the surah Al-Baqarah: 178-179:

يَا أَيُّهَا الَّذِينَ ءَامَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ ۖ الْحُرُّ بِالْحُرِّ وَالْعَبْدُ  
بِالْعَبْدِ وَالْأُنثَىٰ بِالْأُنثَىٰ ۖ فَمَنْ عَفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَأُتِيَ بِالْمَعْرُوفِ  
وَأَدَّاءُ إِلَيْهِ بِإِحْسَنٍ ۚ ذَٰلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ ۚ فَمَنِ اعْتَدَىٰ بَعْدَ  
ذَٰلِكَ فَلَهُ عَذَابٌ أَلِيمٌ ﴿١٧٨﴾ وَلَكُمْ فِي الْقِصَاصِ حَيَوةٌ يَتَأَوَّلِي  
الْأَلْبَابَ لَعَلَّكُمْ تَتَّقُونَ ﴿١٧٩﴾

which means:

*O believers! 'The law of' retaliation is set for you in cases of murder— a free man for a free man, a slave for a slave, and a female for a female.<sup>1</sup> But if the offender is pardoned by the victim's guardian,<sup>2</sup> then blood-money should be decided fairly and payment should be made courteously. This is a concession and a mercy from your Lord. But whoever transgresses after that will suffer a painful punishment (178). There is 'security of' life for you in 'the law of' retaliation, O people of reason, so that you may become mindful 'of Allah' (179).*

From the verse Al Baqarah above it can be understood that the punishment of *qishash* can be carried out for the perpetrators of murder with the aim of creating justice. From the paragraph it is also written that if the perpetrator gets an apology from the victim's family, then the *qishash* penalty cannot be enforced and the perpetrator is required to pay compensation (*diyat*) to the victim's family in the amount stipulated by the law *fiqh* with everything based on the judge's decision.

Human rights are rights owned by every human being and are universal, which means they do not know the boundaries of time and space. It is this universal nature that every States translate to uphold and protect the rights of humanity. The human rights possessed by every human being are *the right to life*. This right is very contrary to the death penalty because as it is known that if the death penalty is imposed then a

convicted person can no longer have the right to life and that right is deprived by the state. Whereas in the state constitution, namely the 1945 Constitution, Article 28A paragraph (1) is clearly written that "everyone has the right to maintain his life and life".

The concept of the right to live as human rights is stated in the Declaration of Human Rights and emphasized in the ICCPR as well as strengthened again by the Second Optional Protocol. It reinforces that human beings have the freedom to live and that it is recognized oleh international law. Indonesia also has strict rules in this regard which are contained in Article 28A of the 1945 Constitution and detailed in Law No. 39 of 1999 concerning Human Rights.

The pros and cons of the death penalty are something that wajar exists among the public because the differences in people's points of view vary. However, imposing the death penalty should be done for perpetrators of crimes that are very serious and have a very large impact including: (1) crossing the boundaries of humanity, (2) harming many human lives, (3) damaging generations of bangsa, (4) damaging the nation's civilization, (5) damaging the order on earth, (6) harming and destroying the country's economy.

## **Comparison of the Imposition of the Death Penalty based on Islamic & Indonesian Law**

The death penalty is the main criminal penalty applied in almost all modern countries. The death penalty in Indonesia itself still mostly uses laws originating from the Dutch East Indies, namely those sourced from the Criminal Code (KUHP) and also other laws outside the Criminal Code where the source comes from the state Constitution, this is of course different from countries that adhere to the death penalty which revolves around sharia law or Islamic law. This then caused debate and comparisons about the application of the death penalty in Indonesia with countries that adhere to the death penalty derived from Islamic law. There are some countries that apply the death penalty that is derived from Islamic law, including:

## A. Iran

Iran is one of the few countries in the Middle East, this country is a country with a majority of the population is Muslim, the country of Iran is one of the few countries that adhere to Islamic law as the law that applies in its country. Almost all aspects of his life are regulated and race against Islamic law, ranging from Civil Law, Criminal Law, and so on. In the criminal law of the Iranian state is heavily influenced by Islamic law, so all the punishments regulated in the Iranian criminal law are all guided by the sources of Islamic law, including also the rules regarding the imposition of the death penalty that can be imposed on convicts, in Iranian pidan law, there are several crimes that can be subject to the death penalty, including:

### a. *Sexual Crimes*

The Islamic Republic of Iran Law distinguishes sexual crimes in several types, including:

#### 1) Inbreeding

Inbreeding here refers more to criminal offenses in the form of obscenity and rape. There are several criteria for this type of sexual crime that can be subject to the death penalty, such as obscenity against the stepmother where the man who must be sentenced to death is the man, the obscenity committed by a non-Muslim man against a Muslim woman and the man must be subject to the death penalty, and the crime of rape where the perpetrator of rape must be sentenced to death.

#### 2) Adultery

Adultery referred to in the Law of the Islamic Republic of Iran is asexual relationship between a married woman or man and a single or married man or woman. In detail, sexual relations between married women and men who are married or who are single or between a married man and a married woman who is also married or single. The punishment for the perpetrator of this adultery is the punishment of stoning for the married. The rules regarding stoning are regulated in detail in the Law of the Islamic Republic of Iran, where stoning for a man is buried to the waist limit and for a woman to be buried to the neck limit, then the perpetrator

will be stoned until death, and the stone used must be a stone that is not too big to throw and not too small to be called a stone.

3) **Anal Sex**

Anal sex is copulation between a man and a woman with or without penetration. The penalty for anal sex offenders who use penetration is the death penalty, provided both perpetrators are adults and with self-awareness to do so. While the consent of the perpetrator who is immature, the perpetrator is whipped 74 times. Meanwhile, the punishment for anal sex offenders without penetration is a 100-time caning. This punishment can also be the death penalty after the offender has received the same sentence four times. Whereas if same-sex relationships without penetration occur between Moslem and Non-Moslem as passive partners, then the former must be killed. The sentence for lesbians is also death on the fourth count, provided the person has been convicted three times before and received 100 lashes in three instances.

4) **Accusations of Adultery and Sodomy**

The punishment for the person who commits the adultery charge, and the perpetrator of sodomy is the death penalty if he has received caning 74 times in three events.

5) **Producing Porn Videos**

The penalty for people who produce pornographic things and tell them to sexually assault performers and people who have pornographic videos and to blackmail people into having sexual intercourse is the death penalty.

*b. Alcoholics*

The death penalty will be imposed on liquor addicts if they are found to have done so a third time and did it a fourth time.

*c. Theft Crime*

For this crime of theft, the perpetrator can be sentenced to death as long as he has committed the crime of theft for the fourth time and faces the penalty before, namely the first sentence of cutting off four fingers, the second penalty of cutting off his left leg, and for the third sentence is life imprisonment.



d. *Armed and Political Offences*

The Law of the Islamic Republic of Iran provides that a person who threatens and scares someone by using a weapon and threatens one's independence will be subject to the death penalty by order of a ruling judge. In addition, the death penalty can also be imposed by perpetrators who plan to overthrow the government and plan assassinations on the leadership.

e. *Religious-Related Crimes*

People who apostate and insult Islam, prophets, and infallible imams through the media can be punished with the death penalty.

f. *Murder*

Through *Iran Qishash* the perpetrator of the murder must be killed as well, in accordance with the rules of Islamic law sourced in the Qur'an, in Surah Al-Baqarah verses 178-179.

g. *Economic Crime*

Crimes against the country's economy are considered a fairly vigorous crime in the Islamic Republic of Iran, examples of such crimes are corruption, smuggling that can disrupt the economic distribution system can be sentenced to death. This should be possible in Indonesia because crimes in the economy can not only destroy the country but also the people.

h. *Narcotics Crime*

The death penalty can be imposed for connoisseurs, dealers, and manufacturers of narcotic products, and the death penalty can also be imposed for anyone who grows marijuana and then abuses it.

i. *Other Crimes Threatened with the Death Penalty*

In addition, to some of the crimes described above, the death penalty may also be imposed on offenders who sell food and cosmetics derived from hazardous ingredients and may cause death or serious effects to users.

## B. Arab Saudi

Saudi Arabia is a country that has no codification of its criminal law, Saudi Arabia only uses interpretations derived from sources of Islamic law,

especially the Qur'an and Hadith. Saudi Arabia also imposes the death penalty for convicts who commit certain crimes, such as:

*a. Sexual Crimes*

As embraced by the Islamic Republic of Iran, Saudi Arabia can also impose the death penalty for perpetrators who commit sexually related crimes, including adultery committed by a married man or woman with a married or single woman or man, then obscenity, sodomy, homosexuality and lesbians (this is more of an act now known as LGBT), and the last one is rape.

All the crimes mentioned above are subject to the death penalty, regarding the death penalty that can be imposed for the perpetrator of adultery is the punishment of stoning, this punishment is the same arrangement as the Islamic Republic of Iran where both countries adhere to the same legal system, namely by burying to the neck limit for women and waist limit for men and then stoned to death.<sup>9</sup>

*b. Religious-Related Crimes*

Crimes related to this religion are quite broad in scope, of some crimes related to religion there are several crimes that can be subject to the death penalty for the perpetrator, namely: people who disobey religion or what is commonly called apostasy, people who are Atheists or do not have a religion, acts of insulting the religion of Islam (such as insulting God, Prophets, and Imams who are *Ma'sum*), and idolatry, all kinds of such crimes may be subject to the death penalty for the perpetrator.

*c. Criminal Act of Theft*

Similar to the arrangements made in the Islamic Republic of Iran, the crime of theft can be subject to the death penalty if the perpetrator has stolen four times and the third has previously been sentenced with details, the first penalty is to cut off 4 fingers, the second penalty is to cut off his left leg, and the third is life imprisonment. In addition, theft committed at night can also be subject to the death penalty in this country of Saudi Arabia.

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<sup>9</sup> Tiara, Ayu Eza. *Pengaturan Hukuman Mati Dibeberapa Negara (Studi Kasus Di Negara Islam dan Non-Islam)*. Thesis. UIN Syarif Hidayatullah Jakarta: Fakultas Syariah dan Hukum, 2016.

d. *Armed Crime*

Crimes related to weapons such as armed robbery and acts of terrorism can also be criminally charged for the perpetrators. Because this type of criminal act is very detrimental to the country and can also disturb the peace of life of many people.

e. *Aircraft Hijacking*

Aircraft hijacking or what is often known as aircraft pumping is the activity of taking over an aircraft that is passing by one or more people in order to control the aircraft. In the Law that Saudi Arabia adheres to this type of crime can be subject to the death penalty for the perpetrator.

f. *Drugs*

Similarly, to the Islamic Republic of Iran a person who is found to have consumed Narcotics, circulated Narcotics, and a Narcotics Manufacturer can also be subject to death, besides that similar crimes can also be subject to the morning death penalty of people who are found to grow Narcotic type plants such as opium and marijuana and abuse these types of plants can also be subject to the death penalty.

g. *Murder*

In Islamic Criminal Law terms, the term *Qishah* is known, with *Qishah* law the perpetrator can also be sentenced to death for committing murder, because the principle is that life is retaliated against with life.

h. *Incitement and Political Crimes*

Incitement is a type of crime that is taken seriously in Saudi Arabia, incitement committed to demonize a sovereign government is punishable by death. Similar crimes can also be subject to the death penalty for the perpetrators i.e., treason against the state. On the other hand, politically related crimes such as planning to overthrow the government and also the attempt to kill the leader can also be subject to the death penalty.

i. *Magic*

Magic is a type of crime that is quite serious, because magic injures and kills someone without touching, magic is very disturbing to society, so the perpetrator of magic will be subject to the death penalty. In addition to these reasons, the perpetrator of witchcraft

can also be sentenced to death because of the act of witchcraft, namely involving jinn dan this is a *musyrik* thing and forbidden for Islamic law.<sup>10</sup>

## C. Brunei Darussalam

Brunei Darussalam, situated far from the Middle East mainland, is a nation that implements Islamic law within its legal system. While Brunei initially introduced criminal laws influenced by Islamic principles, a significant shift occurred in 2014 when the country, a sultanate governed by Islamic law, fully embraced Islamic criminal law. Consequently, Brunei Darussalam has since adopted a legal framework derived from Islamic jurisprudence.

In line with this adoption of Islamic law, Brunei Darussalam maintains a capital punishment system for convicted offenders. This system has been in place both before and after the implementation of Islamic criminal law in the country. Notably, several offenses are punishable by death according to Islamic law as adopted by Brunei Darussalam.

### a. *Sexual Crimes*

The sexual crimes referred to in the law of the country of Brunei Darussalam are quite broad, this crime includes several things, namely adultery (such as the regulation in laws adopted by other Islamic countries, adultery referred to in this country also has the same meaning, both regulated in law in Iran and Saudi Arabia), furthermore sodomy or perhaps more familiar with the term LGBT, and the last one is rape.

All such crimes are punishable by death for the perpetrators, such as the application of the death penalty in other Islamic countries, in the country a Brunei Darussalam also imposes the death penalty in the form of stoning laws for perpetrators of adultery, and recently Brunei Darussalam established a law for LGBT offenders in its country, which type of relationship (towards LGBT) is widely opposed by many people because it is believed to deprive human of the human right to govern his own life, but not a few are supportive

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<sup>10</sup> Tiara, 2016.

because sodomy or LGBT is strictly prohibited by the Islamic religion and also violates the nature of being a human being who loves between men and people.<sup>11</sup>

b. *Religious-Related Crimes*

Crimes related to religion have various forms, including defiance of religion or more often with apostasy from Islam (out of Islam), blasphemy to Islamic religion, and the last is self-declaration as God, Prophet, or Apostle, all types of crimes can be subject to the death penalty for the perpetrator. As we also know that the recognition of being God is a form of blasphemy and contempt for religion because in Islam god is not the same as being, besides claiming to be a prophet or apostle is also very wrong and can also be said to be an insult or blasphemy against religion because the last prophet or rasul was the Great Prophet Muhammad SAW.<sup>12</sup>

In comparison, several crimes that can be applied to the death penalty in Indonesia have been clearly regulated in the Criminal Code, including:

1. Article 104 (treason against the president and vice president)

This article reads "*Treason with intent to kill, or deprive liberty, or negate the ability of the President or Vice President to govern, shall be punished with death or imprisonment for life or temporary imprisonment for not more than twenty years.*" From the sound of the article it can be seen that the death penalty can be imposed on a person who intends to kill and negate the ability of the President or Vice President in governing the country.

2. Article 111 paragraph 2 (persuading a foreign country to fight or to fight, if the hostilities are carried out or become war)

This article reads "*(2) If an act of hostility is committed or war occurs, it shall be punished with death or imprisonment for life or temporary imprisonment for a maximum of two years.*" It is very clear that such criminal acts can be subject to the death penalty, because

<sup>11</sup> I Gusti Agung Ayu Niti Ranjani and Made Maharta Yasa, "Menyoal Penerapan HUKuman Rajam Dan Mati Bagi Kaum Lesbian, Gay, Dan Transgender Di Brunei Darussalam," *Kertha Negara: Journal Ilmu Hukum* 8, no. 3 (2020): 1–15.

<sup>12</sup> Tiara, "Pengaturan Hukuman Mati di Beberapa Negara (Studi Kasus Di Negara Islam Dan Non-Islam)."

these crimes can not only undermine the sovereignty of the Indonesian state but will also threaten the lives of many people.

3. Article 124 verse 3 (assisting wartime enemies)

The reading of this Article is *"(3) The penalty of death or imprisonment for life or for a specified period of not more than twenty years shall be imposed if the maker: 1. notifies or delivers to the enemy, destroys or damages any place or post which is reinforced or occupied, a means of transportation, a storehouse of war supplies, or a treasury of war or the Navy, Army or any part thereof, obstructing, obstructing or thwarting any to inundate water or other works of soldiers planned or organized to fend off or attack; 2. cause or facilitate the onset of riots, rebellions or desertions among the Armed Forces."* This type of crime can be called a form of betrayal of the state, where the person should help his own country but instead help the enemy country, with this it is very appropriate for a treasonous person to be sentenced to death, this is also in line with the punishment adopted in Arab Saudi regarding a person who betrays.

4. Article 140 paragraph 3 (treason against the king or heads of friendly countries that is planned and results in death)

The article reads as follows *"(3) If treason against life is committed with a premeditated plan resulting in death, it shall be punished with death or imprisonment for life or temporary imprisonment for not more than twenty years."* This type of crime is almost the same as the evil stipulated in Article 104 whose essence is to want to eliminate the head of state, and this can be equated with to overthrow the sovereign government and carry out a plot to commit murder on the Head of State. And this is similar to that provided for in the Laws of the Islamic Republic of Iran and Saudi Arabia.

5. Article 340 (premeditated murder)

It reads Article 340 of the Penal Code *"Whoever intentionally and with a premeditated plan deprives another person of life, is threatened with premeditated murder, with a penalty or imprisonment for life or for a specified time, not more than twenty years."* This is almost the same as the *Qishash* punishment as applied in countries that adhere to Islamic law such as the Islamic Republic of Iran and

Saudi Arabia. However, here it emphasizes more on crimes in the form of premeditated murder (premeditated murder).

6. Article 365 paragraph 4 (violent theft resulting in serious injury or death)

Article 365 paragraph 4 reads as follows *"(4) Shall be punished with death or imprisonment for life or for a specified period of not more than twenty years, if the act of causing serious injury or death and is committed by two or more persons in alliance, accompanied also by any of the matters described in nos. 1 and 3."* Similarly, in Islamic countries, theft can also be subject to the death penalty, but unlike in Indonesia, theft can be subject to the death penalty if the theft results in serious injury or death to the victim while thieves in Islamic countries are all types of theft as long as the perpetrator has been found to have committed four thefts and 3 times previously has been sentenced according to applicable regulations.

7. Article 368 paragraph 2 (violent extortion resulting in wounds or death)

This article reads *"(2) The provisions of article 365 of the second, third, and fourth paragraphs apply to this offence."* As it is known first that Article 365 paragraph (4) can be subject to the death penalty for the perpetrator, and it is clearly seen in this Article that the rules of Article 365 of the second, third, and fourth paragraphs apply to this Article, it can be concluded that this type of crime can also be subject to the death penalty for the perpetrator.

8. Article 444 (piracy in the sea, coast and rivers resulting in death).

The reading of this Article is *"If the violent act described in articles 438 - 441 results in a person on the ship being attacked or someone being attacked dying then the commander or leader of the ship and those who participate in committing a violent act, shall be punished with death, imprisonment for life, or imprisonment for a specified period of not more than twenty years."*<sup>13</sup> Judging from the sound of this article, it can be seen that the regulation regarding the crime of pirated aircraft in the country of Saudi Arabia, but in contrast to Saudi Arabia, the Indonesian state regulates the policy regarding piracy carried out in



Indonesian waters, not those in the air such as the crime of hijacking aircraft in Saudi Arabia.

The regulation of the death penalty in Indonesia itself is not only regulated in the Criminal Code, but there are also other laws outside the Criminal Code that regulate the death penalty, including:

1. Article 2 of Presidential Decree Number 5 of 1959 concerning the authority of the Attorney General / Attorney General and concerning the threat of punishment for criminal acts that endanger the implementation of food clothing equipment.

This article reads *"Whoever commits any economic crimes as contemplated in Emergency Law No.7 of 1955 (Statute-Book of 1955 No.27), crimes such as those referred to in the Regulation on the Eradication of Corruption (Regulation of the Rulers of the Central War No. Prt/Peperpu/013/1958) and the crimes contained in titles I and II Buku The Second Penal Code, knowing or reasonably having to suspect, that the criminal act will hinder the implementation of the Government's program, namely: 1. Equipping the people's food in the shortest possible time; 2. Promote the security of the people and the State; 3. Continuing the struggle against economic and political imperialism (West Irian), punished with imprisonment for at least one year and a maximum of twenty years, or imprisonment for life or the death penalty."* From the third point, we can know that crimes in the form of economic crimes contained in the Emergency Law No. 7 of 1955 and crimes in chapter I and chapter II of the Second Book of the Criminal Code are punishable by death.

2. Article 2 of the Government Regulation in Lieu of Law No. 21 of 1959 concerning the threat of punishment for economic crimes.

This article reads *"(2) If the criminal offence committed is to cause chaos in the economic sphere of society, then the offender shall be punished with the penalty of death or imprisonment for life or temporary imprisonment for a period of 20 years and a fine of 30 times the amount stipulated in the Emergency Act in paragraph."* It is very clear that it is seen in the article that if the criminal act can cause chaos in the economic field then the perpetrator can be subject to the death penalty.

3. Article 1 paragraph 1 of the Emergency Law No. 12 of 1951 concerning firearms, ammunition or explosives.

The article reads as follows *"(1) Whoever, without the right of entry into Indonesia makes, receives, attempts to acquire, delivers or attempts to deliver, transport, carries, has supplies to him or has in his possession, stores, transports, hides, uses, or removes from Indonesia any firearm, ammunition or something explosive material, punishable by death or life imprisonment or a temporary prison sentence of up to twenty years."* This article emphasizes the prohibition of possessing ammunition and the restriction of firearms in Indonesia.

4. Article 23 Law no. 31 of 1964 concerning the basic provisions of atomic energy.

This article reads *"Whoever knowingly discloses the secrets referred to in article 22, shall be punished with death or imprisonment for life or temporary imprisonment for a period of fifteen years by not being dismissed or dismissed from the right to hold such office in article 35 of the Criminal Code."* This article also points to the realm of betrayal because a perpetrator opens up secrets about the information about domestic atomic energy, so this article can also be classified as a form of betrayal of the state.

5. Article 36 paragraph 4 sub b of Law no. 9 of 1976 concerning Narcotics

The reading of this Article is *"b. sentenced to death or imprisonment for life or imprisonment for a period of 20 (twenty) years and a fine of up to Rp. 50,000,000, - (fifty millions of rupiah) if the act concerns other narcotics."* to know the substance of this Article, and what kind of criminal offences may be subject to the death penalty. The crime in question is to ship and transit types of narcotics other than marijuana and cocaine types. This is similar to what is stipulated in the laws of the Islamic Republic of Iran and Saudi Arab which threaten drug offenders with the death penalty, but in Indonesia it is more emphasized on shippers and people transiting types of narcotics other than marijuana and cocaine.

6. Article 479k paragraph 2 and Article 479o paragraph 2 of Law No.4 of 1976 concerning aviation crimes and crimes against aviation facilities/infrastructure.

Article 479k subsection (2) reads *"(2) If the act results in the death of a person or the destruction of the aircraft, shall be punished with death or imprisonment for life or imprisonment for twenty years."* The acts referred to in this article are hijackings of aircraft carried out by groups with advance plans.

Article 479 paragraph 2 *"(2) If the act results in the death of a person or the destruction of the aircraft, it shall be punished with death or imprisonment for life or imprisonment for a term of twenty years."* The substance of this article is almost the same as article 479k paragraph (2) but the difference is that this article does not require that a hijacked aircraft must be damaged first.

7. Article 2 paragraph (2) of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes

This article reads *"(2) In the event that the crime of corruption referred to in paragraph (1) is committed under certain circumstances, the death penalty may be imposed."* What is meant by certain circumstances in this article is a natural disaster and the country is facing an economic (monetary) crisis. This is almost the same as that stipulated in the Islamic Republic of Iran regarding economic crimes, where one type of crime punishable by death is crime of corruption.<sup>14</sup>

The next comparison is about how the methods used by some of these countries in sentencing the death penalty for convicts. Here is a table of the differences in the methods of imposition of the death penalty from the countries as shown on Table 2.

**TABLE 2. Methods of Imposing Death Penalty from various Countries**

| No. | Country           | Methods of Imposition of the Death Penalty |         |       |      |
|-----|-------------------|--------------------------------------------|---------|-------|------|
|     |                   | Term                                       | Stoning | Shoot | Hang |
| 1   | Iran              |                                            | √       | √     | √    |
| 2   | Arab Saudi        | √                                          | √       |       |      |
| 3   | Brunei Darussalam |                                            | √       |       | √    |

<sup>14</sup> Oemar Seno Adji, "Undang-Undang Pemberantasan Tindak Pidana Korupsi," *Jurnal Hukum & Pembangunan* 13, no. 6 (1983): 475, doi:10.21143/jhp.vol13.no6.1001.

| No. | Country    | Methods of Imposition of the Death Penalty |         |       |      |
|-----|------------|--------------------------------------------|---------|-------|------|
|     |            | Term                                       | Stoning | Shoot | Hang |
| 4   | Indonesian |                                            |         | √     | √    |

Although Indonesia adheres to the death penalty, which mostly comes from the Criminal Code, which is a civil law legal system that is of course different from the Islamic legal system applied to countries such as Iran, Saudi Arabia, and Brunei Darussalam, it turns out that there are some similarities regarding the imposition of the death penalty for certain crimes, including plans to kill state leaders, betrayal of the state, plans to overthrow the government, economic crimes, and narcotics crimes. This shows that indirectly the law in negara Indonesia is only slightly assimilated from Islamic law.<sup>15</sup>

## Conclusion

In conclusion, the death penalty remains a contentious issue within Indonesian criminal law, with divergent perspectives on its validity and compatibility with human rights principles. Despite opposition from various quarters, including human rights activists and legal experts such as Todung Mulya Lubis, who argue that the death penalty violates the fundamental right to life enshrined in the 1945 Constitution, there are proponents like Bismar Siregar who justify its implementation based on religious scriptures. Islamic law, which regulates the death penalty, presents additional complexities in the discourse on human rights. While some argue for its compatibility with Islamic principles, others point to discrepancies between Islamic law and internationally recognized human rights standards, particularly concerning the right to life. The death penalty's prevalence in Islamic-majority countries like Iran, Saudi Arabia, and Brunei Darussalam underscores the multifaceted nature of this debate.

Furthermore, variations in the application of the death penalty among Islamic countries highlight the diverse interpretations and practices within Islamic legal systems. While some nations opt for methods such as stoning, hanging, or shooting, others, like Saudi Arabia, employ beheading

<sup>15</sup> Tiara, "Pengaturan Hukuman Mati di Beberapa Negara (Studi Kasus di Negara Islam dan Non-Islam)."

as a form of execution. Despite these differences, certain offenses, such as plots against the state, often warrant the death penalty across Islamic jurisdictions. In navigating this complex terrain, it becomes imperative to critically examine the intersections between religious laws, national legal systems, and universal human rights principles. By engaging in informed dialogue and promoting respect for human dignity and rights, societies can strive towards a more just and equitable approach to criminal justice that upholds both legal integrity and fundamental human values.

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### **DECLARATION OF CONFLICTING INTERESTS**

The authors state that there is no conflict of Interest in the publication of this article.

### **FUNDING INFORMATION**

None

### **ACKNOWLEDGMENT**

None

### **HISTORY OF ARTICLE**

Submitted : August 20, 2022

Revised : October 11, 2022; December 27, 2022

Accepted : January 20, 2023

Published : January 31, 2023