BETWEEN POSITIVE AND ISLAMIC LAW: AN ANALYSIS OF DEATH PENALTY SEXUAL CRIMES IN BANDUNG 2021

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Abstract: Punishment for criminals is one of the ways to achieve social benefits for the community. The practice of punishment certainly has a record of the dynamics of change, this is certainly as Michel Foucault tried to analyze the changes and shifts in punishment strategies that occurred within two centuries from the second half of the 17th century to the 19th century. Using the descriptive-analytical method, this article is based on the case of sexual violence (rape) against 13 female students in Bandung by the head of an Islamic boarding school and then became the public spotlight and invited questions related to the criminal punishment that should be received for the perpetrator of the crime. The purpose of this article is to review the practice of punishment in Indonesia against perpetrators of crimes in the perspective of positive law and Islamic law. Furthermore, this article intends to answer several questions, such as: First, Does the positive law in Indonesia conflict with Islamic law?. Second, what is the legal basis for the death penalty against the perpetrators of sexual violence (rape) of 13 students in Bandung in 2021?. The result of this paper is that in addition to Islamic law in the concept of *Maqasid al-Sharia* is the authority of humans to stay alive in the matter, namely *Hifz an-Nafs*, but every human being who commits a crime must get punishment or the consequences of his actions. Then the punishment certainly does not only provide a deterrent effect on the perpetrator through the law.

Keywords: Islamic Law; Positive Law; punishment; sexual crimes

Abstrak: Hukuman bagi pelaku tindak pidana merupakan salah satu cara untuk mencapai manfaat sosial bagi masyarakat. Praktik penghukuman tentu memiliki catatan dinamika perubahan, hal ini sebagaimana Michel Foucault mencoba menganalisis perubahan dan pergeseran strategi penghukuman yang terjadi dalam kurun waktu dua abad sejak paruh kedua abad ke-17 hingga abad ke-19. Dengan menggunakan metode deskriptif-analitis, artikel ini didasarkan pada kasus kekerasan seksual (pemerkosaan) terhadap 13 orang santriwati di Bandung yang dilakukan oleh seorang pimpinan pondok pesantren yang kemudian menjadi sorotan publik dan mengundang pertanyaan terkait hukuman pidana yang seharusnya diterima bagi pelaku kejahatan tersebut. Tujuan dari tulisan ini adalah untuk mengulas praktik pemidanaan di Indonesia terhadap pelaku tindak pidana dalam perspektif hukum positif dan hukum Islam. Lebih lanjut, artikel ini bermaksud untuk menjawab beberapa pertanyaan, yaitu: pertama, apakah hukum positif di Indonesia bertentangan dengan hukum Islam?. Kedua, apa dasar hukum hukuman mati terhadap pelaku kekerasan seksual (pemerkosaan) terhadap 13 orang siswi di Bandung pada tahun 2021?. Hasil dari penelitian ini adalah selain hukum Islam dalam konsep *Maqasid al-Syariah* adalah kewenangan manusia untuk tetap hidup dalam masalah tersebut yaitu *Hifz an-Nafs*, namun setiap manusia yang melakukan tindak pidana harus mendapatkan hukuman atau konsekuensi dari perbuatannya. Maka, hukuman tersebut tentunya tidak hanya memberikan efek jera kepada pelaku melalui hukum.

Kata Kunci: Hukum Islam; Hukum Positif; hukuman, kejahatan seksual

Introduction

The occurrence of cases of sexual violence against female students in Islamic boarding schools in Bandung, West Java has given special attention to the people in Indonesia and raised various questions and concerns, of course this is a form of sexual violence that occurs in an Islamic boarding school environment, which is an Islamic educational institution with a boarding system, where the Kyai (Leader of the Islamic Boarding School) is the central figure, the mosque is the center of the activities that animates it, and the teaching of Islam under the guidance of the kyai followed by santri (students) as the main activity. With this incident, the Indonesian people are worried and wondering, how can an educational institution that studies Islamic religious values be tainted with deviant behavior, namely sexual violence?

The 13 female students who were victims of sexual violence committed by the head of the boarding school also received special attention from the Indonesian government and Islamic institutions, such as the Indonesian Ulema Council (MUI) (Indainanto et al., 2022). Followed by the assertiveness of the Ministry of Religion which revoked the pesantren's operational license (Taufiq, 2021). The crackdown on the case of sexual violence against 13 female students was followed up by legal institutions in Indonesia, as stated by the official statement of the Indonesian Supreme Court, on the decision of the Supreme Court on December 8, 2022 with number 5642 K/PID.SUS/2022 (RI, 2022). Against the rejection of the cassation filed by the perpetrator (Herry Wirawan), the rapist of 13 female students in Bandung, by strengthening the death sentence previously imposed by the Bandung High Court.

The Court's decision to sentence sex offenders to death needs to be reviewed as well as the statement from the Chairman of the Indonesian Ulema Council (MUI) for Da'wah and Ukhuwah, Cholil Nafis. If we refer to Foucault's view that "violence or physical punishment to obtain bodily obedience is the crudest and most primitive disciplinary and pedagogical technique" (Foucault, 1995). From the perspective of power relations, action through physical violence shows that power is ineffective, so that physical punishment for mistakes or offenses becomes as evil, even more evil than the

offense itself (Nian, 2021). If Foucault's (1995) statement is one of the reasons for the incorrectness of the law set by the Indonesian Supreme Court and also the Indonesian Ulema Council, then what legal action should be given to the perpetrators of sexual crimes against 13 female students and what legal basis is used by the Indonesian Supreme Court and the Indonesian Ulema Council.

Method

This research uses a qualitative type with a case study approach, an approach that is carried out intensively, in detail and in depth about a matter under study in the form of programs, events, activities and others to obtain in-depth knowledge/information about it, which this approach seeks to reveal, study and understand phenomena and their unique contexts experienced by individuals to the level of individual beliefs concerned. The data collection method that will be used in this research is the literature study method. Data collection by searching for sources and reconstructing from various sources such as books, journals, and existing research. Primary data is sourced from Foucault's book entitled: *Discipline and Punish* (1995).

Results and Discussion

Characteristics of Common Law, Civil Law, and Islamic Law Systems

Common Law, Civil Law, and Islamic Law are three different legal systems. Rahardjo (2000) argues that in this world we do not find only one legal system, but more than one. Three legal systems are widely used by countries in the world today. The three are the Continental European legal system (Civil Law System), Anglo-American (Common Law System), and Islamic Law (Aulia & Al-Fatih, 2017). Countries in this world certainly have different legal systems. The difference is seen in the diverse legal traditions, and it includes ideology, geographical location, historical similarities, ethnicity, race, legal sources, and legal institutions (Aulia & Al-Fatih, 2017). So, what about the legal system in Indonesia? Does Indonesia adhere to the legal system of Islamic Law, Common Law, or Civil Law?

Before explaining the legal system adopted by the Indonesian state, the author tries to explain the 3 characteristics of the legal system in the world,

namely, the Continental European legal system (Civil Law System), Anglo-American (Common Law System, and Islamic Law). Discussion of law and its sources, starting from two broad categories (legal and social sources). The first is a source recognized by the law itself so that it can directly give birth or create law. The second is a source that is not formally recognized by the law, so it cannot be directly accepted as law (Rahardjo, 2000).

Law is more than a mere system, but rather, how the existence of law can carry out the functions of the law itself in the sustainable life of a pluralistic society. Because the law is rooted in a community of human life that shows the way of nations that there is no truly universal way of law in this world.

The Common Law System or Anglo-American Law has been adopted by the British state since the 16th century and is supported by geographical conditions and continuous political and social developments, so the legal system continues to develop in areas outside England, such as in the United States, Canada, America and the former British colonies (Commonwealth) (de Cruz, 1999). Although the United States and most Commonwealth countries inherited the common law tradition from the British legal system, American law tends to be unique in many respects. This is because the American legal system was cut off from the British legal system by the Revolution of independence and thereafter developed independently of the British Commonwealth legal system. Therefore, if we try to trace the development of traditional common law principles made by judges, that is, the small number of laws that have not been overturned by more recent laws, then American judicial courts will look to cases in Britain only up to the early 19th century (Aulia & Al-Fatih, 2017).

In this system, there is no standard source of law as in Civil Law. The highest source of law is only the customs of the community that are developed in court or have become court decisions (Hersi, 2009). The characteristics of the Common Law system are (Junyu, 2020): First, Jurisprudence as the main source of law. There are two reasons, firstly psychological reasons, namely that everyone who is assigned to resolve a case tends to seek justification for their decisions as much as possible by referring to pre-existing decisions, rather than taking responsibility for their own

decisions. And secondly, the practical reason for jurisprudence as the main source of law is that uniform decisions are expected because it is often expressed that the law must have certainty rather than emphasizing justice in each concrete case. And besides that, the common law system, placing the law as the main reference is a dangerous act because the rules of law are the work of theorists who are not impossible to differ from reality and are not in sync with needs (Qamar, 2010). Second, adoption of the doctrine of precedent. This doctrine substantially implies that judges are bound to follow and/or apply previous court decisions, whether made by themselves or their predecessors in similar cases (Qamar, 2010). Third, adversary system in the judicial process. In this system, the two parties to a dispute each use their own lawyers before the judge. The parties strategize and present as many arguments and evidence as possible in court. So, the parties in a case are opponents of each other led by their respective lawyers (Qamar, 2010).

The Continental European Legal System is commonly called the Romano-Germanic legal system, or also often called the Civil Law system. The Continental European legal system developed in European countries, such as France, Germany, Italy, Switzerland, Austria, Latin American countries, some Arab countries, North Africa, and Madagascar (de Cruz, 1999). Then this legal system also spread to Asia because it was brought by colonizers such as the Dutch who eventually made Indonesia embrace this legal system (Aulia & Al-Fatih, 2017).

There are several characteristics and features of the Civil Law system. First, there is a codification of the legal system. Second, the judiciary adheres to the Inquisitorial system, where in this system the judge has a large role in directing and deciding cases. Third, judges are not bound by precedent. This is the opinion of Paul Scholten who said that the purpose of organizing the Dutch state organs is about the separation between the power to make laws, the judicial power and the cassation system, and the executive power, and it is impossible for one power to interfere in state affairs (Junyu, 2020).

Islamic Law is a legal system that applies Islamic law as the formal law of the state. Countries that implement the Islamic Law system use the Quran and hadith as the main reference in the formation of positive state law (Janah, 2019). In practice, countries that use the Islamic law system usually choose a

particular school of *fiqh* as a reference in determining state law. This is because the Quran and hadith as the main reference are universal norms which in daily practice require interpretation and deepening of various other sciences as a tool to understand these sacred texts (Arib et al., 2022; Irham et al., 2023; Arib & Mokodenseho, 2023). Therefore, in resolving legal issues that are casuistic in nature, the thoughts of scholars are needed as a reference (Janah, 2019). If the two sources (the Quran and Hadith) have not been able to answer the existing problems, then several methods of legal discovery are used which can be used as a pattern or character of Islamic legal thinking.

Indonesian Positive Law and Islamic Law: Death Sentence

Basically, Indonesia adheres to the Civil law system, this is because of the historical background of Indonesia which was colonized by the Portuguese Dutch, and British, and these countries are adherents of the Civil Law system, so of course the colonizers will apply the legal system to the colonized country (Syauta, 2022). One of the proofs of how Indonesia can be noted as an adherent of the Civil Law system is that in handling cases, judges will look for appropriate references and are active in finding facts and carefully assessing evidence. In this way, it can be said that judges are not bound by precedents which then produce precedents.

However, when viewed in general in the practice of justice in Indonesia, the legal system in Indonesia does not fully utilize the Civil Law system, because several characteristics are identical to the Common Law and Islamic Law systems. Common Law System (Anglo Saxon) especially in Indonesia, its position can be traced in the sources of law in Indonesia, including jurisprudence and custom. The purpose of this jurisprudence, is a decision taken by the judge based on his consideration in deciding a case that has not been regulated in the law. Meanwhile, customs are local habits that have been recognized and live in the community, in Common Law terms called "local rules" (Noho, 2020). Then the example of family law for Muslims in Indonesia adheres to the Islamic Law system, marriage, divorce, and inheritance.

With the plurality of legal systems which are then facilitated by a national legal system based on Pancasila is unique, because there is no country in the world that has an ideology that can facilitate the life of the nation and

state and at the same time provide legal certainty based on a mixture or combination of 3 major legal systems in the world without showing a self-image as a religious state even though the population is characterized by 1 particular religion (Syauta, 2022).

Society is constantly evolving, starting from the family as the smallest unit of society then developing into increasingly complex into a modern society. The development of society is accompanied by the emergence of law to regulate and maintain the social system of life of its members. The existence of law in it is as a general rule where a person or group as a whole is determined by the limits of their rights and obligations. Every place has its own rules for living. The world of human society is divided into a number of states and nations, and each state and nation have its own laws. There are no less than 42 legal systems in the world (Aulia & Al-Fatih, 2017).

If a rule has been formed and confirmed, then anyone who violates the rule will receive punishment or sanctions. By examining the subject matter related to sexual crimes that occur at Islamic boarding schools in Bandung, then reviewing the criminal law or penalties that apply to perpetrators of sexual crimes. The issue of punishment or sanctions is central in criminal law, because it often reflects the nation's socio-cultural values. This means that criminal law contains values in a society regarding what is good and not, what is moral and not, and what is permitted and prohibited (Diyanto, 2009). In the large Indonesian dictionary, punishment is defined as "punishment and so on", or "a decision handed down by a judge" (Moeliono, 1989). This definition is close to the English definition called Punishment which means that punishment, the infliction of pain or harm on a person for wrongdoing (i.e., violation of a law or order). Punishment can take forms ranging from capital punishment, flogging, forced labor, bodily mutilation to imprisonment and fines (Faiqoh, 2022).

The terms punishment and penalty in positive law in Indonesia have the same meaning. Moeljatno (2015) said that criminal law is part of the overall law that applies in a country, which provides the basis and rules for: (1) Determining which acts should not be done, which are prohibited, accompanied by threats or sanctions in the form of certain punishments for those who violate the prohibition. (2) Determining when and in what cases

those who have violated the prohibitions can be subject to or sentenced to the punishment as threatened. (3) Determine by what means the imposition of the punishment can be carried out if there is a person who is suspected of having violated the prohibition.

Related to actions that should not be done, accompanied by threats or sanctions in the form of certain punishments for those who violate the prohibition, for brevity we call criminal acts or delicts. Strictly speaking: they are detrimental to society, in the sense that they are contrary to or hinder the implementation of a good and just social order. When examined more deeply, criminal law in Indonesia adopts criminal law from the Netherlands.

The categorization of criminal offenses in the Academic Paper of the Draft Criminal Code (RKUHP) explains that the categories of criminal offenses are qualified into 3 characters, namely: (1) acts that are considered "very light", i.e. only punishable by a single light fine (category 1 or II). The offenses grouped here are offenses that were previously punishable by imprisonment/confinement of less than 1 (one) year or a light fine or new offense which, according to the assessment of their weight, are punishable by less than 1 (one) year of imprisonment. (2) offenses that are considered "serious", i.e. offenses that basically should be punishable by imprisonment of more than 1 (one) year to 7 (seven) years. The offenses grouped here will always be alternated with a heavier fine than the first group, namely a category III or IV fine. There are also offenses in this group that carry a special minimum penalty. (3) offenses that are considered "very severe/very serious", namely offenses that are punishable by imprisonment of more than 7 (seven) years or punishable by more severe punishment (i.e. death penalty or life imprisonment). To show the serious nature, imprisonment for offenses in this group is only threatened in a single sentence or for certain offenses can be accumulated with category V fines or given a special minimum sentence (Penyusun, 2018).

If it is then concluded, the death sentence for Herry Wirawan, the perpetrator of sexual crimes against 13 female students, is categorized as a crime that is considered "very severe/very serious" which is punishable by a very severe punishment up to the death penalty. This is what later became the positive legal basis for the death penalty for the perpetrator of the rape

of 13 female students in Bandung. As in the decision letter of the Supreme Court of the Republic of Indonesia as follows:
"Sentencing the Defendant Herry Wirawan alias Heri bin Dede to "Death", with due observance of the time the Defendant is in temporary detention with the order that the Defendant remains in detention;" (RI, 2022).

Islam is more than just a religion, it encompasses faith, culture, law and social order. Islam proposes a society of truth and justice. Criminal behavior is not tolerated in an Islamic society. Criminal behavior violates the sovereignty of God, hence harsher punishments are prescribed. This paper examines *hudud* punishment in the Islamic penal system, and encourages the reform of Islamic criminal law. The main purpose of the Islamic penal system is to protect society from the dangers of crime. Society must be protected from criminal activities and criminals. Social life should be peaceful and without insecurity. The severity of the Islamic punishment system is aimed at discouraging criminal behavior. If the criminal knows the suffering and pain he will inflict on himself, he may not commit the crime. A convict who has been through the judicial process once may not want to dabble in criminality after such a painful experience. Herein lies the philosophy of deterrence in the Islamic penal system (Okon, 2014).

While it makes no sense to pity criminals or offenders at the hands of the law, there is a strong and logical argument that the Islamic penal system should be reformed to suit 21st century thinking. While fundamentalists collectively oppose any reform, progressives are pushing their case worldwide. Islam cannot operate with a medieval penal system (Okon, 2014). Islamic law is a general law that applies in every place and time. Meanwhile, humans are different in controlling themselves. So, there should be a punishment as a barrier for people who are weak in controlling themselves or their lusts so that they do not fall into heinous acts, sinful acts that lead to the enforcement of *hudud*, leaving Islam or other chaos that can afflict the entire community both outwardly (*zahir*) and inwardly (*batin*).

Jum'ah (2014) said that *hudud* is one of the rules among other Islamic rules. It is not possible to understand and apply *hudud* unless one applies other Islamic rules. Otherwise, it will not work in harmony and one will not find the wisdom of Allah in prescribing *hudud*. The scholars have a rule of "*dar'u*

al-hudud bi ash-syubhat", which means abandoning the implementation of *hudud* due to uncertainty such as lack of witnesses, it is not clear whether the perpetrator did it, or the conditions of the community at that time were not suitable for witnesses.

Problems in the application of Islamic Sharia must be understood broadly rather than just understanding it as *hudud* alone applied to criminals, because the application of Islamic Sharia has many different reviews and the application of *hudud* is only a small part of it. And it is a misunderstanding to claim that a country is not implementing Islamic Sharia because there is no application of *hudud*. Islamic Sharia is not only about *hudud* but also includes creed, worship, *muamalat*, and morals. When Islamic law must be implemented by a Muslim, then *hudud* is not understood as the dominant Islamic law or must be implemented earlier than other Islamic laws or it is used as a measure to classify a country as an Islamic state or not. This has led to the conclusion in the view of some Islamic groups that when a country does not implement *hudud* sharia, it is not considered an Islamic country and has left the bonds of Islam (Jum'ah, 2014). The Prophet Muhammad said: "*The blood of a Muslim should not be shed lawfully except in one of three (instances): a married person who commits adultery; life for life; and one who abandons his religion (Islam) and leaves the community*" (HR. Bukhari No. 6935).

In the Hadith, it provides an explanation of the law that applies to the perpetrators of crimes stipulated in Islamic law, one of which is the perpetrator of the crime of sexual (adultery). With the case of sexual crimes in Bandung against 13 female students who were victims of sexual crimes, it can be said that the death sentence against the perpetrator, Herry Wirawan, is a decision that is not against the law, including Islamic law. Likewise, in the concept of *maqasid al-sharia*. According to Abdullah bin Bayyah, the structure of Islamic law includes two aspects, namely law and wisdom (*hikmah*) (Bayyah, 2006). The wisdom in question is often expressed by the term *maqasid al-sharia* which is terminologically defined by Ibn 'Ashur as "*the meaning and wisdom considered by Shari' (the owner of the shariah authority: Allah and His Messenger) in every or most of the rulings*" (Bayyah, 2006). The purpose of determining the law as intended above is none other than the achievement of benefit, both in this world, moreover in the hereafter (Bayyah, 2012).

Basically, legal decisions are taken after going through a three-stage mechanism, namely *tasawwur* (about the problem) to recognize the nature of the problem and its context, *takyiif* (preparation of arguments) which means compiling arguments that are considered relevant to the problem being studied, and *tatbiq* (determining the law), namely, determining the law after the previous two stages have been carried out and also considering the benefits of legal consequences, and the main objectives of the law itself. That way this mechanism emphasizes how important it is to understand the reality of human life to get the essence of an existing problem and finally the law taken is the right and wise decision (Arif, 2020).

Court Decisions and the Indonesian MUI Response: The Practice of Law in Indonesia for Sexual Crimes

In the book *Islam, Law, and Equality in Indonesia* (2003) written by Bowen, he attempts to examine legal traditions and Islamic religious norms in family life. The debates and conflicts in Indonesia, the world's largest Muslim-majority country, have had a powerful influence on one of humanity's most significant debates, about how people can live together, recognizing profound differences in values and forms of life and forging ways of tolerating and accepting those differences.

The plurality that exists in Indonesia is united by the same laws and laws, namely Pancasila, the values of the norms of community life are the main requirements for welfare and justice. The occurrence of sexual crimes and the many victims of these crimes require paying laws that create justice by providing deterrent punishment to the perpetrators and providing compensation to victims. So what kind of punishment should be received by the perpetrators of the crime?

The practice of punishing criminals in the 17th and early 18th centuries in France was to display the punishment in public and it was a spectacle that was enjoyed by many (Foucault). Gradually, however, such judicial practices were no longer supported by the lower classes. Public punishment was prone to social disturbances, and on the other hand, public punishment became the center of its execution, because on the day of the execution, work was stopped, the executors were stoned, and guards and soldiers were attacked by the public. So that one of the purposes of the punishment was to frighten the

masses, but instead, it became a means of solidarity for the lower castes. Finally, the power of solidarity multiplied and exceeded the power of authority, and in the end, they (the lower castes) asked for the cruel punishment to be abolished.

The sexual crime that victimized 13 female students in one of the Islamic boarding schools in Bandung invited responses from various parties as reviewed in the previous discussion. Deputy Secretary General of the Indonesian Ulema Council (Wasekjen MUI) for *Da'wah* and *Ukhuwah*, Arif Fakhrudin, delivered messages and suggestions for the public regarding the case. The birth of Islamic boarding schools is to be a syiar and Islamic education to produce generations of people who are experts in Islam. History also records, where pesantren became the vanguard in the phase of the struggle for Indonesian independence from colonialism. So many heroes were born from the womb of the pesantren. Until the message conveyed by Fakhrudin was that the good name of the pesantren should not be eroded and contaminated by the behavior of pesantren personnel with criminal behavior that does not damage the norms of life.

The response of the Indonesian Ulema Council (MUI) to the case of sexual crimes is certainly accompanied by the MUI Fatwa on sexual crimes, which fatwa is contained in MUI Fatwa Number 57 of 2014 concerning Lesbian, Gay, Sodomy, and Molestation. The fatwa was issued on December 31, 2014 (MUI, 2022). One of the points contained in the fatwa is to give severe punishment to perpetrators of sodomy, lesbian, gay, and other deviant sexual activities such as the case that occurred to 13 female students with the perpetrator being a teacher at the pesantren.

Punishment must be able to have a deterrent effect on criminals. The theory of punishment in conventional law can be divided into at least 3 types, among others: First, Absolute Theory. This theory views punishment is retaliation for the wrong that has been committed. The punishment is given because the perpetrator must accept the sanction for his mistake. The punishment becomes a fair retribution for the harm that has been caused by the perpetrator (Sahetapy, 1982). Second, Relative Theory (Purpose Theory). This theory views punishment is not as retribution for the offender's mistake, but as a means of achieving useful goals to protect society towards its welfare.

The relative theory pivots on three main objectives of punishment, namely; preventive, protecting society by placing the perpetrator apart from society, deterrence, punishment is to cause fear of committing crimes), and reformative, the purpose of reformation is to change the evil nature of the perpetrator by conducting guidance and supervision, so that later he can resume his daily life habits as a human being under the values that exist in society (McTaggart, 1896).

The decision of the Indonesian Supreme Court by rejecting the cassation filed by the defendant in the rape of dozens of female students, Herry Wirawan. And the perpetrator was still sentenced to death. Therefore, it is certain that the basis of punishment determined by the court or the Supreme Court views the absolute theory, a theory introduced by Kent and Hegel. The theory is based on the idea that punishment does not have a practical purpose, such as correcting criminals but punishment is an absolute demand, not only something that needs to be imposed but becomes a necessity, in other words, the essence of punishment is revenge.

Conclusion

The Indonesian state is neither a Common Law (Anglo-Saxon) nor Civil Law (Continental European) state system but a Prismatic legal state, where the state is based on the ideals (ideas about law) of Indonesian law. Therefore, the existence of these two systems is a "counterweight" and their adoption are not absolute, there is still a filter process in it. Indonesia is also not a country that adheres to the Islamic legal system, although there are several legal systems in Indonesia using the Islamic legal system, such as family law for Muslims. In the case of the death penalty against the perpetrator of the rape of 13 female students in Bandung in 2021, there is a goal of imposing the death penalty on the perpetrator and then being assessed based on Islamic law, of course it is to combat criminal acts and maintain the benefit of society from all crimes that may be repeated in the future with similar incidents. Islamic law uses the principle of maintaining society absolutely and requires it to be fulfilled in every punishment prescribed for every criminal offense. Therefore, any punishment must be of a level that is sufficient to educate the offender and prevent him from repeating the crime. The punishment must also be sufficient to deter others from committing the

crime. So, we can conclude that the purpose of imposing punishment in Islamic criminal law is to improve human conditions, guard against damage, save from ignorance, demand and provide guidance from misguidance, prevent from disobedience, and stimulate obedience.

Then with the same purpose of punishment in positive law in Indonesia must be directed at the protection of society from the welfare and harmony of life in society by considering the interests of society or the state, victims and perpetrators. So, that on the basis of these objectives, the punishment must contain elements that are Humanitarian, in the sense that the punishment upholds the dignity of a person. Educative, in the sense that the punishment is able to make people fully aware of the actions committed and cause them to have a positive and constructive mental attitude for crime repetition efforts. And justice, in the sense that the punishment is perceived as fair by both the convicted person and the community. The Supreme Court, which is the highest state court in Indonesia, and is also a court of cassation tasked with fostering uniformity in the application of the law through cassation and judicial review decisions, ensures that all laws and regulations throughout the territory of Indonesia are applied fairly, precisely and correctly. So, that the determination of the death penalty against Herry Wirawan, the perpetrator of sexual crimes against 13 female students at an Islamic Boarding School in Bandung is an appropriate and fair punishment. This is also not contrary to Islamic law but the purpose of the death penalty verdict against the perpetrator is retribution for the results of his own actions and also provides education to the public about the adverse effects and punishment for the actions of criminals.

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