



PUNISHMENTS FOR INTELLECTUAL ACTORS IN THE CRIME OF MURDER: COMPARATIVE STUDY OF ISLAMIC LAW AND POSITIVE LAW IN INDONESIA

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Abstract: The involvement of intellectual actors in criminal cases generally goes unpunished and does not receive much attention in academic studies. Positive law in Indonesia and Islamic law have clear provisions regarding punishment for criminal acts committed by intellectual actors, especially in cases of murder. Therefore, the article aims to understand the position of intellectual actors in murder cases in Islamic law and positive law. In Islamic law, the intellectual actor could receive the death penalty. Similarly, in the positive law, the death penalty could also be applied to the intellectual actor of murder cases. This case of murder provides an important illustration of how Islamic law is, to a certain extent, accommodated in positive law in Indonesia. By examining primary and secondary sources on the issue of these intellectual actors in Islamic law (fiqh literature) and positive law (*Kitab Undang-undang Hukum Pidana*, KUHP), this article comparatively discusses the similarities and differences between Islamic law and positive law in providing legal opinion for intellectual actors in murder cases.

Keywords: Islamic law, Criminal Code, murder, intellectual actors

A. Introduction.

The purpose of sharia in Islam is to protect five important things (*dharuriyat al khamsah*), namely religion, soul, mind, honor, and wealth (Harahap 1829). One of the five things is guarding *nafs* or souls. Islamic law regulates the punishment of the perpetrators clearly stated in the core guidelines, namely the Al-Quran and Hadith, or through general principles that the scholars deduced from the core guidelines. (Wati 2015).

Indonesia is also a constitutional state, based on Pancasila and the 1945 Constitution, which highly upholds justice. The form of justice is to give protection and treatment of the rights of all Indonesian citizens equally (Arif and Al Amin 2021). Feeling safe and free in life is an important right to protect. So all kinds of things bother or eliminate. This right has already stated the punishment for the perpetrator in the positive law that applies in Indonesia (Asshiddiqie and Pengantar, n.d.).

As a country that guards religious values, as stated in the first precept, of course, there are many similarities in the upheld values between Islamic law and positive law in Indonesia (Fuad 2012). In this case, both agreed that perpetrators of crimes that violate



human rights must be dealt with firmly (Nasution 2018). Then, if the murder is proven to involve an intellectual actor, it will be dealt with strictly according to his involvement

Intellectual actors as parties who often escape punishment are still discussed in Islamic fiqh. In *Between something similar Intellectual dader in cases of premeditated murder from the perspective of positive law and Islamic law* (Aqsa 2018), it's just this article associates discussion with the point of view of the intention of the perpetrators of murder in Islamic law. The discussion will return to the division of intentional, semi-intentional, or unintentional killings; in fact, if you look at it from the point of view of the involvement of the perpetrators, it will be more detailed if it is entered into discussion rule fiqhiyah about accountability.

In this article, we will discuss punishment for intellectual actors in murder cases according to Islamic law from the point of view of the involvement of the perpetrators. We will also be compared with the positive law in force in Indonesia. So that it will illustrate how important this case is discussed. It will also be seen that positive law in Indonesia has accommodated some Islamic law.

The discussion in this article will discuss how Islamic law views murder and the intellectual actors involved in murder, supported by a positive legal view in Indonesia regarding the punishment that might be imposed on intellectual actors in murder.

What makes this article different from others is that it explains how someone's role in a murder case under Islamic law is more than just about intent. It rarely talks about the number of people involved, their roles, and whether the murder is done directly or through others. These factors have a significant impact on the legal decisions.

B. Method

The research method used in this study is the method of comparative law research. This research aims to understand and compare the punishment for intellectual actors in criminal murder cases according to Islamic law (Sharia) and Positive Law in Indonesia. In this context, "intellectual actor" refers to individuals who plan, organize, or give orders in murder cases without directly carrying out physical actions.

This research employs a comparative law approach, involving an analysis of the comparison between the principles of Islamic law and positive law in Indonesia in the context of the punishment for intellectual actors in criminal murder cases. The research is descriptive and analytical. Data is obtained through literature research, document analysis, and detailed comparison of relevant provisions of Islamic law and positive law.

Data in this research comes from primary and secondary sources. Primary sources include Islamic legal texts such as the Quran and hadith, as well as relevant Indonesian legislation related to criminal murder. Secondary sources include books, legal journals, research reports, and the opinions of legal experts.

The findings of this research will reflect a comparison of the punishment for intellectual actors in criminal murder cases according to Islamic law and positive law in Indonesia. The research results will highlight how both legal systems handle such cases and the factors that influence the determination of punishment.

The Division of Murder in Islam

The book *Jurisprudence Islam* discusses criminal acts discussed in the chapter "*Al-Fikhi AlCriminal*," or persecution jurisprudence (A. Z. M. An Nawawi n.d.). Moreover, persecution in these books will be divided into two: first, those that lead to death and those that do not lead to death. (Az-Zuhaili 1989) Moreover, one of the discussions on

persecution that leads to death (Murder) is murder with cause or indirect murder. This category has an understanding consisting of two essential words. The first is killing, and the second is cause. The meaning of killing is a form of persecution against others who take away the life of the object persecuted (Yusuf 2013). Furthermore, the meaning of murder, according to KBBI, is an act that deliberately kills someone.

From the two meanings above, we can conclude that the first meaning is more general, whether the act was intentional or not, so long as the action takes someone's life, it is murder. While the second meaning is to deliver only to those, it was intentionally called murder.

Furthermore, the second word is reason. Because it means something that leads to something else or something that leads to a result (Umar 2008). Meanwhile, according to KBBI, it is something that causes something else to arise. So, we can define caused or indirect killing—an act committed by someone and causing death for another person, intentionally or not.

The division of the types of murder according to the Jurisprudence Scholars.

In Islamic jurisprudence, murder is also expressed in the sentence (*Al Jarimahwa Al I'tida 'Ala Nafs*) criminal action or persecution of a person's soul. In terms of jurisprudence, experts translate murder as "An act that causes the loss of a person's life either intentionally or unintentionally. (Yusuf 2013) However, the generality of the notion that generalizes intent is explained in the following discussion on the division of the types of killings.

In one of the contemporary fiqh books, shafi'i jurisprudence (A. Z. M. Y. An Nawawi n.d.) explains multiple share kills. It is seen from several points of view.

1. Judging from the intention of the perpetrator

In this first division, murder is divided into three: intentional killing, accidental killing, and semi-intentional killing.

Intentional homicide is homicide involving killing intent and using a tool that is generally capable of killing. So, to determine whether a murder was intentional or not, there must be two essential points—*one*, Confirmation of killing intent in a crime. *Second*, the tool used to kill must be a tool that can be used in general to harm the victim to death. If a killing does not meet these two conditions, then it can not be said it was intentional. (Shaifudin 2019)

Accidental killing or wrongful killing is an act of killing without intention and desire. The perpetrator in killing the victim did not even have the intention to hurt the victim. So, in this murder case, the perpetrator was not punished for the crime. However, they still asked for accountability because it has eliminated one's life that should not die. (Al Bugha and Syarbiji 1992)

Next, the third is the semi-intentional killing of an act that is between the two types of murder above. In which the perpetrator deliberately took action to abuse the victim, it is just that the perpetrator did not intend to kill him. Even if this action is not carried out with proper tools, it can lead to death. (Al Bugha and Syarbiji 1992)

According to scholars' opinion, the three killings above are entitled to be punished with revenge (sentenced to death) as a fitting punishment for an act that takes someone's life that is intentionally murder. Whereas other murders cannot be punished with *revenge* unless the punishment for other types of murder *pays* tribute to the victim's heirs. (Rokhmadi 2017)

2. Judging from the number of actors

In this second point of view, killing is divided into two. *First* is a lone murder, where the murder is committed only by a single perpetrator. Moreover, the perpetrator bears all punishment and responsibility alone.

A second is a murder committed in a congregation or by two or more perpetrators. In this type of murder, many possibilities occur. It could be that all are killers in the way that every perpetrator commits an act that causes death. Alternatively, it could also be that only some of them are the perpetrators of the murder; for example, if one of them commits an act of torture that does not lead to death and the others kill him, then it can be proven in detail then the penalty for each perpetrator different. (Al Bugha and Syarbiji 1992)

3. Judging from the involvement of the perpetrators

At this point, we are still discussing murders where the perpetrators are more than one person, and it is just that the murders at this point are reviewed from the involvement of the perpetrators. Which is one of the perpetrators as the direct perpetrator or executor and the other as an intellectual actor or as the cause of the murder in general. At the core point of the legal basis is the rule fiqhiyah, which reads: *Iza Ijtama'a Al-Mubāsyir wa Al-Mutashabih Uđifa Al-ḥukmu ilā Al-Mubāsyir*. (Az zuhaili 2006)

It means: "If the direct perpetrators and causal actors (intellectual actors) gather (in a case), legal sanctions are returned to the direct perpetrators.

Indeed, according to the text of this rule, punishment will only be imposed on the executor. However, several things cause intellectual actors to become the main suspects in the discussion.

Application of rules *Iza Ijtama'a Al-Mubāsyir wa Al-Mutasyabih Uđifa Al-ḥukmu ilā Al-Mubāsyir*.

In application accountability, the direct perpetrators and causes of Islam have emphasized their existence responsible for the answer both directly and indirectly, and each has an exemplary argument.

Accountability direct perpetrator

From 'Amru bin Shuaib, from his father from his grandfather *radhiyallahu anhum*, that The Prophet ﷺ said: "*Anyone who practices medicine and he is not a doctor then harms others, then he must be held responsible*" (HR Abu Daud 4586 and Nasai 4830)

The above hadith shows the importance of being responsible in Islam. The direct perpetrator of a crime bears accountability because no intellectual actor exists in this action.

Indirect liability

The Messenger of Allah ﷺ actually decided for the owner of the garden to look after his garden during the day and for breeders to guard their livestock at night. So if there is damage to the garden caused by livestock at night, the owner of the animals' livestock should be responsible. But if the damage occurs during the day, then this is the negligence of the garden owner (Abu Daud 541)

The decision of the Prophet Muhammad ﷺ above shows that the cause of damage, even though not with his hands still be responsible for the actions that occur. Because he was the one who caused it to happen, this becomes the argument for the most laws enforced against murder intellectual actors.

Intellectual actor legal certainty in murder cases

According to the text, the responsibility is originally that it falls on the executor, not on the cause, unless the person who is the cause does it intentionally, then the cause and executor are together in one accountability. (Khalil n.d.)

When detailed, then related to accountability, a murder consists of two killers, one the killer directly and the second being the cause of the victim's killing. According to Islamic jurisprudence, accountability is divided into three:

1. The perpetrator of the direct murder is responsible for himself.
2. The perpetrator who is the cause of death or the intellectual actor who is responsible himself.
3. The perpetrators of the murder directly and the person who caused the murder are jointly held accountable. (Khalil n.d.)

The first occurs when the share of the direct perpetrator of the murder is greater than that of the cause. That is, if the cause had no intention in his actions to kill, but his actions did utilize other parties to commit murder. For example, when someone digs a well or sharpens a knife, another party comes and pushes the victim into the well or stabs him with a sharpened knife. So the cause is not responsible for what happened because, indeed, he never intended in what he did to kill.

The second condition, accountability, only lies in the cause, not the direct actor, and occurs when the cause's share is greater than the direct actor's. An example is when someone throws a venomous snake in a crowd of people; then someone is killed because of the snake; accountability lies with the culprit even if he did not kill him directly. In other cases, when several people conspire to give false testimony against adultery someone, with a scenario that is so neat and the false evidence is so obvious, it causes the victim to be accused of adultery, stoned by the then government, and died. So when that happened, and the truth was revealed after the victim's death, accountability fell to those who gave false testimony, even though directly carrying out the killing was the government.

Finally, the third is when the cause and the perpetrator are together in accountability; then, it occurs when their contributions are both equal. When a team of criminals shares tasks, some kidnap victims, and some kill them on the spot, then the killing of the victim is the result of the act; the kidnapper and the direct perpetrator are the same as the kidnapper in the aim of killing the victim, the accountability here lies the direct agent and the cause. (Az zuhaili, Prof.Dr. Wahbab n.d.)

In this matter, Ibn Rajab gives a detailed and detailed explanation in his book *Qawaid bin Rajab*. He divided this problem into 3:

1. Those responsible for an action are those who do it, not the person who caused the action.
2. However, if the perpetrator of the direct action had no intention and criminal intention within himself to take an action that harmed the property or lives of other people, then the person who caused the act to occur would be held responsible.
3. And if indeed the perpetrator and the cause agree to act together, then the responsibility will fall on both of them. (Ibnu Rajab 1998)

Example:

1. Accountability on the perpetrators only: If there are two people, the first person digs the well, and the second person pushes another person into the well dug by the first person without agreement between the first and second person, then the person who will be responsible for the death of the victim is the second person who pushed the victim, even though the other person first hate the victim.
2. Accountability for the cause: When there is a chef cooking in the kitchen, mixing ingredients with poison, then giving it to the waiter to be served, and the waiter does not know there is poison in the dish, then the chef is the one who will responsible for the death of the person who ate the dish.
3. Accountability back to causes and perpetrators:
 - a. When someone is ordered to kill another person, then that person is responsible. The answer is both because the one who is ordered has no obligation to obey the orderer to take another person's life; even if forced, the perpetrator still has to have a responsible answer.
 - b. When two criminals agree, the first criminal kidnaps the victim to be killed by the second criminal, then both must be responsible for their actions.

So, after this explanation, all legal sanctions for the perpetrators of murder indirectly depend on the judge's determination whether he should be held responsible or not. If the judge decides that he should be held responsible, it will be considered whether what was done was intentional. Only then was a law established for the perpetrators of the murders.

Legal Consequences of Caused Murder according to the Criminal Code

Konsekuensi Hukum Pembunuhan Tersebab menurut KUHP

In the legal framework in Indonesia, all regulations outlining criminal legal consequences are consolidated in the Criminal Code (KUHP). The KUHP serves as a form of criminal legal regulation compiled in a single document or book, creating a unified set of rules commonly called codification. Within the code, various types of criminal acts are addressed, including theft, murder, rape, fraud, assault, forgery, and others. (Saputra 2015) This criminal law code is one of the legacies from the colonial era, which was also applied during that time. The Criminal Code (KUHP) position in the hierarchy of Indonesia's governance is clear and robust. This is evident in Article II of the Transitional Provisions of the 1945 Constitution (UUD), which states that all state institutions and existing regulations continue to apply until new ones are enacted according to this Constitution. (Saputra 2015) Meanwhile, the Criminal Code (KUHP) is one aspect that has been in place previously and has not undergone any changes.

In the Criminal Code (KUHP), specific articles addressing indirect or unintentional murder are not found. Consequently, there is no specific law related to this matter. However, some relevant articles can be adopted to establish legal consequences for indirect murder. Nevertheless, several points need to be noted to ensure the more accurate application of this law.

According to the Criminal Code (KUHP) Article 338, murder must be committed intentionally.

An act that causes death intentionally is not referred to as murder but rather as assault, as stipulated in KUHP Article 351.

Actions causing unintended death, whether directly or indirectly, do not constitute murder (KUHP Article 359).

Article 340 of the Criminal Code (KUHP) is a provision that regulates the criminal act of premeditated murder. This article stipulates that "Anyone who intentionally and with prior planning takes the life of another shall be charged with premeditated murder (moord), punishable by the death penalty or life imprisonment or for a specific period, up to a maximum of twenty years." (Agustini 2016)

Article 340 of the Criminal Code (KUHP) can also be applied to serial murder cases. The elements of premeditated murder outlined in Article 340 of the KUHP include the element of planning the murder and the element of the act of murder. The death penalty under Article 340 of the KUHP can only be applied to actions carried out intentionally and with coercion. It must be proven through a fair and proper judicial process.

According to Pasal 340 KUHP, the punishment for murder with premeditation is either the death penalty or life imprisonment or imprisonment for a certain period, up to a maximum of 20 years. However, the question is about the punishment for attempted murder, according to Pasal 340 KUHP. Attempted murder is punishable by a maximum basic sentence deducted by 1/3 or 2/3 of the maximum basic sentence. For crimes that are subject to the death penalty or life imprisonment, they are subject to imprisonment for a maximum of 15 years. (Dian Dwi Jayanti 2023)

The discourse on intellectual actors in Indonesia is outlined in Article 55 of the Criminal Code (KUHP), a provision within the compendium of laws governing participation in criminal acts. This particular article delineates the specifics of intellectual involvement in unlawful activities. Let's delve into the content of Article 55 of the KUHP. (Yuridis 2021)

Those who are held criminally liable encompass those who directly engage in unlawful activities and those who instruct or participate in such actions. The scope of criminal liability extends to individuals who misuse their authority or status by providing or promising something, employing force, threats, or deception. Individuals deliberately encouraging others to commit acts by offering opportunities, means, or information are also subject to prosecution.

The legal ramifications are not limited to the primary perpetrators but also extend to those who contribute, instigate, or facilitate the commission of criminal deeds through various means, such as coercion, intimidation, or exploitation of their position or influence.

Article 55 of the Criminal Code (KUHP) governs the criminal sanctions for individuals involved in criminal acts perpetrated by two or more individuals. The severity of punishment for the main perpetrator (pledger) is stipulated based on the article specifying the type of criminal act committed. Meanwhile, the potential penalties for those who assist or participate in a criminal act are determined by the article that regulates the specific type of criminal act carried out by the primary perpetrator. This legal provision establishes a framework for assigning appropriate punishments corresponding to the roles and degrees of involvement in committing criminal offenses involving multiple individuals. (ruslan muhammad, durahman 2021).

In its application, Article 55 of the Criminal Code (KUHP) is frequently employed by investigative authorities from the police or prosecutor's office to levy the threat of legal

consequences against individuals or groups involved or colluding in a criminal act. This legal provision serves as a tool to potentially deter or prosecute those found to be complicit or collaborating in criminal activities, allowing law enforcement to address not only the primary perpetrators but also those who play auxiliary roles in the commission of offenses. (ruslan muhammad, durahman 2021). Participation in a criminal act can be interpreted as someone who assists in facilitating the commission of the criminal action, either before the crime is committed or after the crime has taken place. This involvement encompasses aiding, abetting, or contributing to the criminal activity, whether in the preparatory stages or as an accomplice during or after the commission of the offense. The concept of participation in criminal acts thus encompasses a range of actions that contribute to the execution or success of the criminal conduct, emphasizing both proactive and reactive involvement in unlawful activities. (Yuridis 2021).

In criminal acts, Article 55 of the Criminal Code (KUHP) can be applied to individuals who commit, instruct, or participate in the act. Furthermore, this article applies to individuals who, by abusing their authority or status, provide or promise something using coercion, violence, threats, deception, or by offering opportunities, means, or information, intentionally encourage others to engage in the act. This provision underlines the broad scope of accountability, encompassing direct involvement in criminal actions and capturing those who manipulate their position or influence to instigate or facilitate criminal behavior in various ways. (Yuridis 2021)

First, the perpetrators of indirect and premeditated killings will be subject to a maximum prison sentence of nine years, according to Article 353 of the Criminal Code. (Article 353 (1) Premeditation is punishable by a maximum imprisonment of four years. (2)) If the deed resulted in a serious injury, the offender shall be subject to a maximum imprisonment of seven years. (3) If the deed results in guilt, death is punishable by a maximum imprisonment of nine years. Article)(Kementerian Hukum dan HAM 2013)

Second, the perpetrators of indirect killings that were carried out unintentionally will be held accountable for a maximum sentence of five years in prison or one year in prison, according to Article 359 of the Criminal Code. his forgetfulness) causes the death of another person, shall be punished by a maximum imprisonment of five years or a maximum light imprisonment of one year.)(Kementerian Hukum dan HAM 2013)

Thirdly, in conclusion, in the context of collective violence, there is a perspective suggesting that intellectual actors involved in persecution should face more severe sanctions compared to field actors. On the other hand, in cases of corruption, intellectual actors holding leadership positions among the defendants can be subjected to criminal penalties. Nevertheless, it is crucial to note that, in both situations, there is currently no information verifying that the punishments received by intellectual actors are equivalent to those imposed on field actors.

Death and Accountability

In the discussion of Islamic jurisprudence regarding indirect killings, the discussion does not discuss much about contemporary cases. Because it is adapted to the time and era in which the books were written. Which types of crime and crimes are not as bad as now. Even so, the general rules therein are very global and clear, so it is possible to apply them in the current era.

The essence of the discussion of this problem is accountability. Or it could be said that in the case of a person's death, it is sought who is responsible for it. Indeed, there are many deaths for which no one can be blamed for the deaths, but not all of the deaths were not murders, intentional or unintentional, visible or hidden. So, with this understanding, of course, this becomes the basis for an investigation of every death that is suspected of being attempted by another party. So that justice can be upheld, and accountability Can be Given to those who should be held accountable.

There is no need to look far to see several cases of death that, until now, the authorities have not investigated them firmly. Which cases should be traced to the source of the incident or the cause. So that they can be held accountable to stand up for justice and relieve the feelings of the victim's family. Examples include traffic accidents, victims who died in demonstrations, those who died in hospitals suspiciously, or even those who died because they could not get proper care. Of course, it cannot be confirmed that all of these cases are normal deaths that have no cause.

Traffic accidents, for example. From its name, this case already has the impression of being unable to do it on purpose. But who knows and can confirm that this case is whole is pure accident, which no mover who planned for it to happen. It cannot just be the driver who is suspected because of the order factor, road conditions, the condition of the vehicle submitted to other parties (workshops), or any cause that could lead to an accident that needs attention. The criminals who are not responsible are sometimes very good at hiding hand after throwing stones in the victim's direction. And this is all for nothing else: make sure accountability is the real culprit.

Next is the case of death not far from the students and activists. Several times, we had heard of the death of several activists in a demonstration. They are young people. Of course, it cannot be said that they all master what they actually echo on the streets. Youth is a spirit of fire, which is easily ignited by anyone who manages to win their hearts. We really need to be aware they are young people who are not aware of giving their enthusiasm to become vehicles ridden and directed by whoever rides it. When the vehicle broke down and even died, no one tried to blame the driver, but the case seemed to be the fault of the students themselves.

To see who is responsible for the case, one needs wide glasses. Is it only the security officers who are held accountable for this case? Or has anyone ever thought that they are just victims of the wars of the upper class who use each other whom they can control? Or maybe these cases are just considered accidents because those who moved the students said, "They moved of their own accord," while the security guard said, "We just do what is commanded to us, and we do it no more than that requested to us, the aftermath is none of our business." Is it true that this case was an accident? A question that maybe someone should have confirmed and answered.

Next is a case that is close to that party should've trusted in keeping someone's life, hospital. When someone feels that their life has begun to be disrupted or even threatened, either because of illness or because of an accident, nothing spontaneously pops up in anyone's head but a hospital. The place where they should feel safe and secure sometimes turns out to be a place even worse than the cons which they feel.

Deaths that occur in hospitals also need someone to watch and be aware of. Is it true that they died because of circumstances that can't be helped or even because they don't get help. In some cases, the early occurrence of Covid 19, which appears evenly throughout the world, causes full hospitals. We understand this, but besides that, those

who died because they did not get health care should have the same rights as those who are being treated in the hospital. Is there anyone responsible for their death? Or the case was just considered accidents that happen to some people who are not luckier than others.

C. Conclusion.

Islamic law divides the criminal act of murder into several divisions from various points of view. First, from the side of the perpetrator's intention, the murder could be categorized into three categories: intentional, semi-intentional, and unintentional. Second, in terms of the number of perpetrators, the crime of murder is distinguished between one person and more than one person. Finally, murder is also seen from the side of the perpetrator's involvement, namely the murder directly or indirectly. It will be more detailed with partiality law in every case because every murderer has a legal level depending on involvement in a murder case.

One that is given attention by Islamic law is the intellectual actor. Because even though the field actor is the perpetrator of the crime, if it is proven that there is an intellectual actor who planned the murder case, then the intellectual actor has the right to accept accountability according to the rate of involvement.

The Criminal Code, as a source of criminal law in force in Indonesia, also safeguards human rights by emphasizing legal action for every case that violates human rights. It is in harmony with what already exists and is desired by Islamic law. Among them is that both of them agreed to ensnare intellectual actors in murder cases with appropriate punishment involvement, even though there are differences in the mention or point of view of the legal determination.

From this example, it can be concluded that Islamic law is accommodated to a certain degree in positive law in Indonesia. Especially on the values that both want to keep. Both prioritize security, equal rights, and

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