



## Qisas in the Crime of Murder: A Comparison of Islamic Criminal Law and the Criminal Code

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### Article Info

#### Article History

Received : 2026-01-13  
Revised: 2026-01-18  
Published: 2026-01-30

#### Keywords:

*Qisās; the crime of murder; Islamic Criminal Law; Indonesian Criminal Code.*

### Abstract

The crime of murder is the most serious crime because it directly deprives people of the right to life, thus demanding a penal system that not only provides legal certainty, but also substantive justice. Islamic criminal law through the concepts of qisās and diyat offers a model of punishment that balances retributive justice, humanity, and welfare, by giving a central role to the victim's family. Meanwhile, the Indonesian Criminal Code, both in its old form and through Law No. 1 of 2023, places murder as a crime against the state with a penal approach that is increasingly shifting towards corrective and rehabilitative, especially through the provision of the conditional death penalty. This study aims to analyze and compare the concept of qisās in Islamic criminal law with the regulation of the crime of murder in the Indonesian Criminal Code in order to find common points and fundamental differences in the paradigm of justice adhered to. The research method used is normative legal research with legislative, conceptual, and comparative legal approaches, through literature studies on sources of Islamic law and positive law. The results of the discussion showed that Islamic criminal law emphasizes commensurate justice and the right to forgiveness of victims as a mechanism of social control, while the Criminal Code emphasizes the dominance of the state in criminalization with limited space for the role of the victim. In conclusion, this comparison shows that the values of justice in qisās have conceptual relevance to enrich the development of a national criminal law that is more just, humane, and responsive to the interests of victims without neglecting the principle of the rule of law.

## I. INTRODUCTION

Murder is the most serious crime in any legal system because it directly attacks the fundamental human right, namely the right to life (*right to life*). In the perspective of modern law, the right to life is seen as a fundamental right that cannot be diminished under any circumstances (*Non-derogable rights*), as affirmed in various international legal instruments and further elaborated in the national legal system, including in the Indonesian Criminal Code (KUHP). Meanwhile, in Islamic criminal law, the protection of the human soul occupies a central position as part of the *maqāṣid al-syarī'ah*, especially in the purpose of preserving the soul (*hifz al-nafs*), which is the philosophical basis for determining sanctions for the crime of murder (Beny & Setiyawan, n.d.).

In Islamic criminal law, the concept *qisās* present as a criminal accountability mechanism that emphasizes the principle of proportional justice, as affirmed in the Qur'an:

*"And in that qisās there is a guarantee of life for you, O you who have understanding, so that you may be pious"* (Q.S. al-Baqarah [2]: 179). This verse not only affirms the legitimacy of qisās as a sanction for murder, but also contains the philosophical message that just justice aims to preserve the continuity of life and prevent similar crimes. Thus, qisās cannot be understood solely as physical retribution, but rather as a legal instrument that integrates justice, prevention, and social protection (Darussamin, 2014).

In contrast, the Criminal Code as a representation of conventional criminal law constructs the crime of murder through a legal-formal approach that focuses on unlawful acts and the fault of the perpetrator, as stipulated in Articles 338 to 350 of the Criminal Code. Criminal sanctions imposed in the form of imprisonment or the death penalty in certain contexts are based on the principle of legality (*nullum crimen, nulla poena sine lege*) and theories of punishment such as retribution

(*Retributive Theory*), prevention (*Deterrence Theory*), and repair of the perpetrators (*Rehabilitative Theory*) (Calvin & Azizah, 2024). However, in contrast to Islamic criminal law, the Criminal Code system does not provide direct space for victims or victims' families to determine the form of criminal settlement, because the state monopolizes the authority to prosecute and criminalize.

These fundamental differences raise interesting theoretical and practical problems to be studied comparatively. In Islamic criminal law, in addition to *qisās*, there is an alternative settlement in the form of *Düsseldorf* (ransom) and forgiveness from the victim's family, which has legal consequences for the cancellation of the *qisās* sanction. This principle is rooted in the Qur'an: "*Whoever receives forgiveness from his brother, let him follow it in a good way, and let the one who is forgiven pay diyat in a good way.*" (Q.S. al-Baqarah [2]: 178). This provision shows that Islamic criminal law is not rigid, but rather provides space for restorative justice that places the victim as the main subject in the law enforcement process (Tarigan, 2017).

On the other hand, in the Criminal Code, the role of the victim tends to be passive and limited to the position of the witness or the aggrieved party, while the state acts as the most interested party in the criminal process. This has led to criticism that conventional penal systems often fail to meet a sense of substantive justice for victims, as their focus is more on punishing perpetrators than redressing for crimes. This debate is increasingly relevant in the context of criminal law reform in Indonesia, especially with the development of restorative justice discourse as an alternative to the criminal approach (Tarigan, 2017).

Therefore, the study of *qisās* in the crime of murder through the comparative perspective between Islamic criminal law and the Criminal Code is important to reveal the differences in paradigms, the purpose of punishment, and the juridical and philosophical implications of each legal system. This research does not aim to contradict the two systems normatively, but rather to critically understand how the concepts of justice, protection of the right to life, and the role of the victim are constructed in two different legal traditions. With a comparative legal approach, it is hoped that

this study can make an academic contribution in enriching the discourse of criminal law and opening up space for reflection for the development of criminal law policies that are more equitable and oriented towards the protection of human values.

## II. RESEARCH METHODS

This research is a normative legal research that aims to examine juridically and conceptually the regulation of the crime of murder in Islamic criminal law and the Criminal Code, especially related to the concept of *qisās*. Normative legal research is used because the focus of the study is directed at the legal norms, principles, and doctrines that govern criminal liability in the two legal systems (Rizkia & Fardiansyah, 2023).

The approaches used include legislative, conceptual, and comparative legal approaches. The statutory approach is used to examine the provisions of the Criminal Code that regulate the crime of murder, while the conceptual approach is used to examine the concept of *qisās* based on the Qur'an, Hadith, and *jināyah* jurisprudence literature. The comparative approach of law is used to analyze the similarities and differences in penal principles between Islamic criminal law and the Criminal Code.

The legal materials used consist of primary legal materials in the form of the Qur'an, Hadith, and laws and regulations, as well as secondary legal materials in the form of books, journals, and the opinions of relevant experts. The collection of legal materials is carried out through literature studies, which are then analyzed qualitatively by descriptive-analytical methods to draw normative conclusions in accordance with the research objectives.

## III. RESULTS AND DISCUSSION

### A. Murder in Islamic Criminal Law

Murder in Islamic criminal law is categorized as *jarīmah* the most serious because it directly violates the protection of the human soul (*ḥifẓ al-nafs*), one of the main objectives *maqāṣid al-syarī'ah*. Therefore, Islamic sharia stipulates firm and measurable sanctions in the form of *qisās* or *Düsseldorf* against the perpetrators of murder and severe persecution. Both forms of sanctions are punishments that have been determined by the

sharia', in contrast to the punishment *São Paulo* which is entirely God's right, because *qiṣās* and *Düßeldorf* qualified as a human right (*ḥaqq al-'abd*), especially the rights of the victim or the victim's guardian (Teduh et al., 2023).

Main characteristics *qiṣās* and *Düßeldorf* lies in the flexibility of its application. Punishment *qiṣās* does not always have to be implemented, as it can turn into *Düßeldorf* if there is forgiveness from the victim's guardian. Punishment *Düßeldorf* It can even be completely killed if the victim's guardian gives an unconditional forgiveness. This mechanism shows that Islamic criminal law does not merely emphasize retribution, but rather integrates justice, humanity, and social reconciliation (Umar & Zias, 2017).

In the fiqh of jinayah, *qiṣās* and *Düßeldorf* is applied to crimes that attack the soul and limbs. *Qiṣās* is interpreted as a punishment commensurate with the perpetrator's actions, while *Düßeldorf* It is a form of compensation in the form of property that is charged to the perpetrator or his family and given to the victim or his guardian. Abdul Qadir 'Audah explained that globally there are five types of crimes that are within the scope of *qiṣās* and *Düßeldorf*, i.e. intentional murder (*Qathl al-'Amd*), semi-intentional murder (*Qathl Syibh al-'Amd*), wrongful death (*qatl al-khaṭa'*), intentional harm, and wrongful harm (Husairi, 2018).

The main normative foundation on *qiṣās* affirmed in the Qur'an Surah al-Baqarah verses 178-179 which obliges the application of *qiṣās* in the case of murder, as well as opening up space for forgiveness and payment *Düßeldorf* as a form of relief and mercy from Allah. The verse affirms that in the *qiṣās* There is a guarantee of survival for humans, so this punishment has a preventive and protective dimension to the social order. This affirmation indicates that the main objective *qiṣās* is not violence, but the prevention of crime and the protection of human lives (Arifah, n.d.).

In the perspective of Islamic criminal law, *Düßeldorf* qualified as '*Uqūbah Māliyah*, which is a punishment of property. Payment *Düßeldorf* It is not deposited to the state, but is directly given to the victim or the victim's guardian. This provision distinguishes Islamic criminal law from conventional criminal law which places the state as the sole holder of authority in punishment. Existence *Düßeldorf*

as a victim's right shows that Islam places the victim as the main subject in the settlement of criminal cases (Taufiqurrahman et al., 2023).

Setup *Düßeldorf* in the case of accidental murder is affirmed in Surah an-Nisā' verse 92, which requires payment *Düßeldorf* to the victim's family accompanied by an obligation *São Paulo*. This provision emphasizes that even if the murder occurred unintentionally, the sharia still views the existence of legal responsibilities that must be fulfilled by the perpetrator. This principle is in line with the principle of accountability in modern criminal law, although the mechanisms and orientations are different (Aksamawanti, 2016).

Based on the nature of the act and the degree of wrongdoing of the perpetrator, murder in Islamic criminal law is classified into three main categories. Intentional homicide (*Qathl al-'Amd*) is an act committed with the intention of taking the victim's life using a commonly lethal tool. Accidental homicide (*qatl al-khaṭa'*) occurs when the perpetrator commits an act that is justified, but results in the death of another person without the intent to kill. Semi-intentional murder (*Syibh al-'amd*) is somewhere between the two, i.e. acts that are done deliberately, but using tools that are generally not lethal but lead to the death of the victim (Yusuf, 2013).

*Diyāt* as a substitute punishment occupies an important position in cases of intentional homicide when *qiṣās* died because of the forgiveness of the victim's guardian. Forgiveness is seen as a more important act than the implementation of the *qiṣās*, as affirmed in the Qur'an Surah al-Baqarah verse 178. This mechanism demonstrates the superiority of the Islamic criminal law system which provides ample room for reconciliation, the elimination of revenge, and social restoration without depriving it of a sense of justice (Kusuma & Diani, 2022).

The jurists agree on the ability to forgive punishment *qiṣās*. The forgiveness must be given by the party who has the right, namely the victim's guardian who has reached puberty and is reasonable. This affirmation shows that forgiveness is a form of abortion of rights that is only valid if it is carried out by the owner of the right himself. In this context, the victim's guardian has central authority in determining whether the punishment *qiṣās* implemented,

replaced with *Düsseldorf*, or be eliminated altogether (Maulidar, 2021).

Existence *qişās* and *Düsseldorf* reflects the balance between retributive justice and restorative justice in Islamic criminal law. The death penalty through *qişās* functions as a deterrent and guarantor of social order, while *Düsseldorf* and forgiveness serves as a means of healing social wounds and preventing prolonged revenge (Kusuma & Diani, 2022). This concept shows that Islamic criminal law is not only oriented towards the perpetrator, but also on the victim, the victim's family, and the stability of society as a whole.

## B. Classification of Diyat in Islamic Criminal Law

Diyat in Islamic criminal law is a form of property sanction (*'Uqūbah Māliyah*) imposed on the perpetrators of the crime of murder and persecution during the punishment *qişās* is not implemented or is not possible. In general, diyat is divided into two major categories, namely diyat murder and diyat persecution. This division is based on the object of protection of Islamic criminal law, namely the human soul and the integrity of the limbs and their functions (Nur, 2021).

### 1. Diyat in the Crime of Murder

Diyat in the crime of murder is closely related to the degree of guilt (*Mens Rea*) and the nature of the perpetrator's actions. In jinayah fiqh, murder is classified into three main forms, namely intentional murder, semi-intentional murder, and wrongful death. Each category has different legal consequences in application *qişās* and *Düsseldorf* (Moses, 2015).

Intentional homicide (*Qathl al-'Amd*) is the act of taking someone's life by using a tool that is usually lethal and accompanied by the intention to kill the victim. This act is seen as the most severe act because it consciously and deliberately violates the human right to life protected by the sharia. The main elements of intentional murder include the existence of the victim as a living human being whose blood is protected, the existence of the perpetrator's actions that directly cause death, and the existence of a will to take the victim's life (Hifni et al., 2023).

The original law of intentional murder is the imposition of a sentence *qişās*, which is a commensurate retribution in the form of the death penalty for the perpetrator. This

provision is affirmed in the Qur'an Surah al-Mā'idah verse 45 which states the principle of "the soul is recompensed with the soul". Forgiveness from the victim's guardian led to the death of the sentence *qişās* and replaced by the obligation to pay heavy diyat (*The Mughallah Temple*) in cash from the perpetrator's property. This provision shows that Islam still guarantees justice for victims even though the death penalty is not carried out (Aksamawanti, 2016).

Semi-intentional murder (*Syibh al-'amd*) is an act that is done deliberately, but without the intention of killing and using a tool that is not lethal in general. The death of the victim in this type of murder occurs as a result of a deliberate act, even though the end result is not desired by the perpetrator. The elements of semi-intentional murder include the perpetrator's actions, intentionality in committing the act, and the occurrence of death as a direct result of the act (Taufiqurrahman et al., 2023).

Islamic criminal law does not impose *qişās* against semi-intentional murder, but requires heavy diyat payment. The majority of the fuqaha impose the diyat on *'āqilah* (family of the perpetrator) and allow the payment in stages over a period of three years. Imam Malik's view shows a variation of opinion by imposing diyat directly on the perpetrator's property, except in certain cases such as the actions of parents towards children in the context of education (Kusuma & Diani, 2022).

Wrongful Murder (*qatl al-khaṭa'*) occurred without any intention or will to kill the victim. This act is born from the negligence or mistake of the perpetrator, such as a mistake in hunting or a traffic accident due to lack of caution. The elements of wrongful killing include the existence of an act that causes death, the existence of an unintentional mistake, and the causal relationship between the act and the consequences (Fauzi, 2018).

Wrongful murder is not punishable by *qişās*. The sanction imposed is in the form of a light diyat (*diyāt mukhaffafah*) which is imposed on *'āqilah* and can be paid in stages over three years. This provision is affirmed in the Qur'an Surah an-Nisā' verse 92 which links the payment of diyat with the obligation of *kafārah*, thus showing that even without malicious intent, legal responsibility is still attached to the perpetrator.

## 2. Diyat in the Crime of Persecution

Diyat persecution is imposed on acts that result in injury, loss of limbs, or disappearance of the function of a person's limbs. The arrangement of diyat of persecution shows a high level of detail in Islamic criminal law, as each type of wound and limb damage has a different diyat value according to the degree of impact on the victim (FETUS & ALFIYAN, n.d.).

Injuries to the head are classified into several forms, such as *Düsseldorf* that reaches the bones, *Shaykh* that cause bone breakage, *Munaqqilah* which causes bones to shift, *São Paulo* that reach the membranes of the brain, and *jā'ifah* that injure the body cavity. Each of these types of wounds has a specific amount of diyat, ranging from five camels to a full third of the diyat, depending on the severity of the wound (Nikmah, 2015).

The removal of limbs is also subject to diyat with a measure that has been determined in detail. Loss of ears, eyes, nose, tongue, hands, feet, teeth, and reproductive organs each has a different diyat value, both half diyat and full diyat. This provision reflects the principle of proportionality in Islamic criminal law, where sanctions are adjusted to the degree of damage caused (Heratih, 2023).

Diyat is also imposed on acts that deprive the limb of its benefits or function, even though the limb is still physically intact. Loss of mind, hearing, vision, speech, walking, and reproductive ability are subject to full diyat. This arrangement shows that Islamic criminal law not only protects the physical aspects of human beings, but also the function and dignity of humanity as a whole (Aksamawanti, 2016).

The detailed diyat classification in Islamic criminal law shows a strong orientation to victim protection and restorative justice. This approach has relevance to the development of modern criminal law that has begun to prioritize victim recovery, although conventional criminal law generally leaves the determination of compensation to civil mechanisms or the discretion of judges.

## C. Murder in the Perspective of the Indonesian Criminal Code

### 1. The Evolution of Murder Arrangements in National Criminal Law

The regulation of the crime of murder in Indonesian criminal law shows a significant development of the criminal paradigm. Transition

from the old Criminal Code (*Criminal Code*) towards Law Number 1 of 2023 concerning the Criminal Code reflects a change in orientation from the dominant retributive punishment to a more corrective, proportionate, and humanitarian-oriented approach. This shift cannot be separated from the influence of human rights developments, the value of restorative justice, and the need for national criminal law reform in accordance with Indonesia's social context (Sinulingga & Sugiharto, 2020).

The National Criminal Code, which will take effect in January 2026, still maintains the classification of murder as known in the old Criminal Code, but with a more structured article systematics and strengthening the principle of criminal individualization (Friwarti, 2022). In the context of comparison with Islamic criminal law, this change is important because it opens up space for analysis of the fundamental philosophical differences between state justice and victim-rights-based justice.

### 2. Classification and Sanctions of Murder in the National Criminal Code

The National Criminal Code regulates the crime of murder in several forms with different sanction consequences. Ordinary murder as stipulated in Article 458 of Law No. 1 of 2023 is punishable by a maximum prison sentence of 15 years for anyone who deliberately takes the life of another person without planning. This provision is aggravated if the victim is the perpetrator's parent, partner, or child, with an addition of one-third of the maximum criminal threat, so that the penalty can reach 20 years in prison. This arrangement shows the attention of the national criminal law to personal relationships violated by the perpetrator (Santoso, 2023).

Premeditated murder remains positioned as the most serious form of crime. Article 459 of Law No. 1 of 2023 stipulates the threat of the death penalty, life imprisonment, or imprisonment for a maximum of 20 years. The planning element in this article is substantially no different from Article 340 of the old Criminal Code, but it is placed in a more flexible criminal framework and is no longer absolute.

The National Criminal Code also regulates special forms of murder, such as the murder by a mother of her own child as stipulated in Article 460. This act is understood as a criminal act committed under certain psychological conditions, so the criminal threat is lighter, which is a maximum of 7 years in prison, or a maximum

of 9 years if carried out with planning. This approach reflects psychological and social considerations in sentencing (Calvin & Azizah, 2024).

Murder at his own request as stipulated in Article 461 of the National Criminal Code, which relates to the issue of active euthanasia, is punishable by a maximum prison sentence of 9 years. This regulation confirms that Indonesia's criminal law still places the protection of human life as a fundamental value, even if there is consent from the victim.

### 3. The Death Penalty and the Paradigm Shift in Justice

One of the most fundamental reforms in the National Criminal Code lies in the death penalty. The death penalty is no longer placed as the main crime, but as a special penalty that is imposed alternatively and conditionally. Article 100 of Law No. 1 of 2023 introduces a probation period of 10 years for death row inmates, taking into account the defendant's remorse, the role of the perpetrator, and the hope of self-improvement (Calvin & Azizah, 2024).

If during the probation period the convict shows commendable attitude and behavior, the death penalty can be changed to life imprisonment through a presidential decision after obtaining the consideration of the Supreme Court. On the other hand, if the convict does not show improvement, the execution of the death penalty can be carried out on the order of the Attorney General. This model emphasizes that punishment is not solely retaliation-oriented, but also opens up space for correction and rehabilitation.

This paradigm has a philosophical meeting point with the concept of Islamic criminal law. The Qur'an in Surah Al-Baqarah verse 178 affirms the principle of *qisās* as a form of justice that is commensurate, but at the same time provides room for forgiveness from the victim's family as a more important way. This verse shows that the death penalty in Islam is not the ultimate goal, but an instrument of justice that can be replaced by forgiveness and *diyat* on the basis of the victim's willingness.

### 4. The Position of Victims and Justice in a Comparative Perspective

The fundamental difference between the Criminal Code and Islamic criminal law lies in the position of the victim and his family. In Islamic criminal law, the victim's family has the full right to determine the sustainability of the *qisās*

sentence, forgive the perpetrator, or replace it with a *diyat* given directly to them as a form of compensation. This principle places the victim as the main subject of justice, not just the object of the judicial process (Hiariej, 2024).

The Criminal Code, both in its old and new versions, still places the crime of murder as a crime against the state. Forgiveness from the victim's family is only positioned as a mitigating factor for the crime, without having the power to drop the prosecution. The criminal fines imposed also go to the state treasury, not to the victim's family. This difference shows that justice in the Criminal Code is more oriented towards public order, while Islamic criminal law emphasizes a balance between the interests of the perpetrator, the victim, and the community (Abdillah & Suryani, 2018).

Nevertheless, the concept of the death penalty probation period in the National Criminal Code shows a similarity in spirit with Islamic criminal law in terms of providing a second chance. The difference lies in the mechanism of determination. The Criminal Code leaves the assessment to the behavior of the perpetrator and the authority of the state, while Islamic criminal law leaves it to the willingness and rights of the victim's family. This comparison shows two structurally different models of justice, but both depart from the value of humanity and the protection of life.

## CONCLUSION AND SUGGESTIONS

### A. Conclusion

The regulation of the crime of murder in Islamic criminal law and the Indonesian Criminal Code shows fundamental differences in the paradigm of justice adhered to. Islamic criminal law places *qisās* as an instrument of appropriate justice, based on the principle of the protection of the soul as affirmed in the Qur'an, as well as opening up space for forgiveness and reimbursement of punishment through *diyat* on the basis of the victim's family's willingness. This concept emphasizes the balance between justice, humanity, and social welfare by giving the victim a central position as the subject of justice.

The Indonesian Criminal Code, both in its old form and through Law No. 1 of 2023, views murder as a crime against the state, so that the law enforcement process is fully within the authority of the state. Nevertheless, the National Criminal Code shows the

development of the penal paradigm through the provision of the death penalty that is special and conditional, with a probation period as a form of correction to the absolute retributive approach. This shift shows a more humane and rehabilitative approach, although it does not provide significant participation space for the victim's family as it is known in Islamic criminal law.

A comparison of the two legal systems shows that although the mechanisms and philosophical basis are different, they are both aimed at protecting the right to life and maintaining social order. The main difference lies in the determination of the authority of justice, namely the state in the Criminal Code and the victim's family in Islamic criminal law. This comparison provides a conceptual basis for the development of a national criminal law that is more oriented towards substantive justice.

## B. Suggestions

Lawmakers need to consider strengthening the role of victims and their families in the criminal justice system, particularly through mechanisms that allow pardons to have more substantive legal implications. This approach can be adopted selectively from the concept of Islamic criminal law without overriding the principle of the rule of law. Further research is suggested to examine the integration of qisās values and restorative justice in the national criminal law framework as an effort to build a penal system that is more just, humane, and responsive to the needs of the community.

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