
Death Penalty for Apostasy: The Perspective of Hadith and Positive Law

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Abstract

This article analyses the death penalty for apostasy. Islam as moral and religious teaching recognizes the existence of such punishment. This can be traced from a number of verses from the Qur'an and the hadith of the Prophet which explain the concept of the death penalty aimed at certain criminal acts (*jarimah*) such as apostasy. However, is this the true understanding of the hadith to kill apostates? is still relevant to be applied in the present context, especially when the death penalty has received a very harsh response from human rights activists, both at national and international level? As a response to these questions, the writing analyzes the issue using a descriptive analysis method by making the hadith originating from Ibn Abbas as the research object and by using the theory of sunnah tasyri and ghairu tasyri' by Mahmud Syaltut. The comparison with positive law in Indonesia is also made at the end. In summary, the death penalty for apostasy is no longer relevant in the contemporary context. However, there is an exception when an apostate also commits rebellion (*bughat*) against the state.

Keywords: Social Apostasy, Death Penalty, Hadith, Positive Law.

INTRODUCTION

The study of the death penalty¹ has been widely discussed by a number of academics and practitioners concerned with criminal laws. However, the focus of such study is limited only to major crime cases such as drug crimes, rebellion (desertion), Indonesian Migrant Workers (TKI) in Saudi Arabia, and various other cases that resulted in the imposition of the death penalty. The debates revolving around the death penalty from one side are classical problem, but, on the other hand, with regards to contemporary era, it is a serious concern to be reviewed. It is a significant matter when the penalty wants to be applied in a nation state system that adheres to the principle of religious freedom. Furthermore, many states do not make religion the state ideology.

¹ The death penalty is a sentence or punishment decided by a court (or without a judiciary) as a form of maximum punishment given to a person for his/her actions. Andi Hamzah and Simanglipu, *Pidana Mati di Indonesia: di Masa Lalu, Kini, dan Masa Depan*, 2nd edition, (Jakarta: Ghalia Indonesia, 1985), p. 12.

The freedom of religion is concerned with privacy and the state has no right to intervene in a person's freedom in determining his religious attitude, let alone stipulating the death penalty which is rejected by communities. In the laws and regulations in Indonesia, death penalty is still maintained as a maximum punishment for dangerous crimes. Meanwhile, human rights activists think that the death penalty is a form of legacy from the past that is only good to learn from and not necessary to follow and be implemented. Although there are certain few countries that consider and preserve the death penalty implementation, in practice it is more of a form of premeditated murder against convicted persons on legal grounds by the state.²

Islam as a moral and religious teaching recognizes the existence of death penalty. This can be traced from a number of verses from the Qur'an and the hadith of the Prophet which explain the concept of capital punishment aimed at certain criminal acts (*jarimah*).³ Considering the broad extent of the scope of the death penalty, this study is limited to apostasy. Theoretically, studies on the crime of apostasy can be found in a number of classical and contemporary literature.⁴ In general, the discussion of apostasy in fiqh books tends to only touch on normative aspects, especially in the use of religious sacred texts as the basis for determining the punishment for apostates. As for the death penalty, there is not a single verse that explicitly states the order to kill for apostates.

Apostasy must be given death penalty because it is considered a major crime. An apostate has false testimony against God and belittles belief. Faith is the foundation of life as well as the spirit of religious life.⁵ In fuqaha' perspective, the punishment is referring to the narration of Ibn Abbas "*Whoever changes his religion, he should be killed.*" In the study of Islamic crime (*fiqh jinayat*), the jurists' made this hadith the legitimacy of the punishment in the crime of apostasy. The determination of the death penalty for apostates is a form of legal formulation produced from *ijtihad* of fuqaha based on the hadith above, although it looks very literal.

²Abdul Jalil Salam, *Polemik Hukuman Mati di Indonesia: Perspektif Islam, HAM dan Demokratisasi Hukum*, (Jakarta: Dissertation of UIN Syarif Hidayatullah Postgraduate School, 2009), p. 95.

³ The existence of the death penalty has a strong legal basis in Islam, as mentioned in Q.S al-Baqarah: 179 and Ibn Abbas's hadith regarding the death penalty for apostates. Such penalty is applied if the perpetrator fulfills the elements of the criminal act (*jarimah*) legally and convincingly. Criminal acts punishable by the death penalty in Islam are such as murder, *muhsan* adultery, and *hiraabah* (robbery), *qazaf* (accusing of committing adultery), *murtad* (converting religion), and *bughah* (rebellion).

⁴ Syafi'i: 1987, 121; Malik: 79 ; Muhammad Abid al-Jabiri, *Agama, Negara, dan Penerapan Syari'ah*, translated by Mujiburrahman, (Yogyakarta: Fajar Baru Pustaka, 2001), p. 203; Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation Civil Liberties, Human Right, and International Law*, (Syracuse: University Press, 1996), p. 109.

⁵ Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics*, (t.tp: Westview Press, 1999), p. 154.

At the stage of its elaboration, the death penalty for apostasy is laden with various objections, because the source of its extraction is still disputed among the ulema. The most obvious impact of this objection is when the death penalty for apostates is reflected on the norms of human rights, namely the right to freedom of religion. It is not surprising that at present, there are attempts to modify the law even though the interpretations made are still tied to the results of previous ulema's *ijtihad*. In the end, the approach used to understand the rules in the Qur'an and al-Hadith is fixated on the linguistic aspect. Hence, the opportunity to narrow the application of the death penalty in the punishment of apostasy is limited to understanding of the *zahir* of hadith.⁶

If this argument is accepted, it is not excessive that the conceptualization of apostasy in the Qur'an and Hadith can be met with a complementary approach.⁷ The possible problem is the view that the punishments required in the Islamic criminal law are very cruel and ignore human rights norms.⁸ It seems that the criteria for this type of retaliation are the cause of the verdict that Islamic law is cruel, so that it is considered inhumane and even contradicts human rights norms.⁹ However, according to some groups, without paying attention to human rights norms, it will be difficult to create a law that can accommodate new needs that have a variety of values, including social, cultural, ethnic, and religious values. In addition, the hadith that explain the death penalty is related to certain situations and the meaning is limited to the *riddah* perpetrators who fight Islam.¹⁰

Therefore, the death penalty in the crime of apostasy needs to be reexamined, considering that so far studies have been limited to normative aspects, especially with regard to hadith as a source of legal taking for apostates. Moreover, under certain conditions, this punishment has been considered *ijma'* (consensus) of the scholars. In fact, as Abid al-Jabiri said, although this opinion is the result of *ijma* of the fuqaha', it must be understood in accordance with the context.¹¹ Such an approach certainly gives

⁶ Ann Elizabeth Mayer "Ambiguitas An-Na'im dan Hukum Pidana Islam" dalam Tore Lindholm dan Kari Vogt (ed.), *Deconstruction Syari'ah (II): Kritik Konsep, Penjajahan Lain*, translated by. Farid Wajidi, Yogyakarta: LKIS, 1996, pp. 46-47.

⁷ Alvin Noor Sahab. "The Urgency Discourse of Matan and Sanad Criticism on Hadith." *Quran and Hadith Studies* 7.2 (2018): pp. 131.

⁸ Fazlur Rahman, *Islam and Modernity Transformation of an Intellectual Tradition*, (Oxford: Oxford Press, 1979), p. 2; Muhammad Abid al-Jabiri, *Syura. Tradisi Partikularitas Universalitas*, translated by. Mujiburrahman, (Yogyakarta: Fajar Baru Pustaka, 2003), pp. 166-167. Nashr Hamid Abu Zaid, *Tekstualitas al-Qur'an: Kritik Terhadap Uhumul Qur'an*, terj. Khoiron Nahdliyyin, 2nd edition, (Yogyakarta: LKIS, 2002), p. 1

⁹ Al-Yasa' Abubakar "Hukum Pidana Islam dan Upaya Penerapannya di Indonesia" on Bukhori Yusuf and Imam Santoso, *Penerapan Syari'at Islam di Indonesia: Antara Peluang dan Tantangan*, (Jakarta: Globalmedia Cipta Publishing, 2004), p. 136.

¹⁰ Muhammad 'Abduh dan M.Rasyid Rida, *Tafsir al-Manar*, vol. V, (Kairo: Dar al-Kutub al-'Arabiyah, t.th), p. 327

¹¹ Muhammad Abid al-Jabiri, *Syura. Tradisi...* p. 129.

birth to an important meaning, especially to see the socio-historical¹² setting surrounding the application of the Prophet's hadith as legitimacy for the death penalty. In addition, among scholars, the use of *ahad hadith* as a legal determination in the field of apostasy is still a difference in understanding. In order to get rid of violations of human rights, the concept of *riddah law* and all its civil and criminal consequences must be abolished. Meanwhile, the authority of the sunnah which shows a tendency towards criminal consequences and other consequences for apostates can be used as a transitional law.¹³

The description above leads this study to critically examine the considerations of jurists is considering Ibn Abbas hadith as the basis for determining the death penalty for apostates. The aim is to gain a fuqaha understanding of Ibn Abbas' hadith in accordance with the social conditions at the time the hadith emerged. The study is directed at efforts to criticize sanad and hadith observations through the approach of *fiqh al-hadith* which includes socio-historical approach. It can provide a complete understanding of the basic considerations of jurists justifying the death penalty for apostates. The purpose of these two approaches is to see the benefit considerations used by the fuqaha' in understanding the Prophet's hadith regarding the death penalty for apostates.

The hadith of Ibn Abbas will be used as a material object in analyzing the death penalty for apostates using the theory of *sunnah tasyri'* and *ghairu tasyri'* proposed by Mahmud Syaltut.¹⁴ According to Syaltut, *sunnah ghairu tasyri'* is the Prophet's behavior which is not a *sharia* or a source of *sharia* which demands to be done or abandoned. In other words, this is just the Prophet's behavior like an ordinary human such as eating, drinking, walking, lengthening or shortening clothes, and so on. On the other hand, *sunnah tasyri'* is divided into two, namely *tasyri' 'am* and *khas*. *Tasyri' 'am* is the Prophet's behavior as a source of *sharia* and it generally applies to anyone until the Day of Resurrection. It also has implications for obligation or prohibition in doing something. *Tasyri' khas* is also a source of *sharia* but specific. It is not permissible for someone to carry out what they want just by arguing that the Prophet did it. Taking at the socio-historical or psychological condition of the Prophet at his time plays an important role.¹⁵

¹² Muhammad Atho' Mudzhar, *Membaca Gelombang Ijtihad; Antara Tradisi dan Liberasi*, (Yogyakarta: Titian Ilahi Press, 1998), p. 105

¹³ Abdullahi Ahmed An-Na'im, *Toward an Islamic...*p. 109

¹⁴ Mahmud Syaltut is the 41st former Rector of Al-Azhar University, Egypt

¹⁵ Mahmud Syaltut, *Al-Islam 'Aqidah wa al-Sayri'ah*, pp. 499-502

RESULTS AND DISCUSSION

The Validity of the Hadiths on the Death Penalty for Apostates

Apostasy is conversion from Islam to disbelief, either with intentions and actions that lead to infidelity or by speech.¹⁶ The same definition is also put forward by 'Abd al-Qadir Awdah, namely conversion out of Islam or breaking out from Islam.¹⁷ Meanwhile, Sayyid Sabiq defines it as the break of a Muslim who has grown and has a sound mind out of Islam to disbelief on his own accord without coercion from others.¹⁸

From the definitions, it can be understood that an apostate is a person who leaves Islam and returns to disbelief. 'Abd al-Qadir Awdah emphasized that someone committing apostasy is out of Islam either by words, deeds or by belief. Words can lead to apostasy when a person; for example, is reluctant to pay zakat, do fasting or hajj because s/he considers these obligations optional. Believing that Muhammad was a liar has the same effect. The hadiths often used as the basis for the legitimacy of the death penalty for apostates are:

حَدَّثَنَا أَبُو النُّعْمَانِ مُحَمَّدُ بْنُ الْفَضْلِ، حَدَّثَنَا حَمَّادُ بْنُ زَيْدٍ، عَنْ أَيُّوبَ، عَنْ عِكْرِمَةَ، قَالَ: أَنِّي عَلِيٌّ رَضِيَ اللَّهُ عَنْهُ، بِرَنَادِقَةٍ فَأَحْرَقَهُمْ، فَبَلَغَ ذَلِكَ ابْنَ عَبَّاسٍ، فَقَالَ: لَوْ كُنْتُ أَنَا لَمْ أُحْرِقْهُمْ، لِنَهْيِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «لَا تُعَذِّبُوا بِعَذَابِ اللَّهِ» وَلَقَتَلْتُهُمْ، لِقَوْلِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «مَنْ بَدَّلَ دِينَهُ فَاقْتُلُوهُ»

"(Bukhori said) Abu Nu'man Muhammad bin Fadhli told us, (he said): Hammad Ibn Zaid told us from Ayyub of Ikrimah he said: Some Zindiq disbelievers were brought before Ali bin Abi Talib RA, then Ali (took decision to execute them by) burning them. News of this incident reached Ibn Abbas, then he commented: If I (who gave the punishment), really I would not burn them, because Rasulullah PBUH prohibits (punishment by burning like) that. Rasulullah PBUH. said: Do not punish anyone with the law of Allah (fire), I will definitely kill them according to the killing procedure of the Prophet. Word of the Prophet: Anyone who apostates from Islam, kill him/her. "
(Narrated by Bukhori).

The hadith above was narrated by Bukhori through two sanad routes. The first sanad is mentioned in the chapter of *Hukmi al-Murtad wa al-Murtaddah wa Titabatihim* number 6922.¹⁹ The second line of sanad is in the chapter of *La Yu'azzabu bi A'zaabillah* and it is the hadith number 3017.²⁰ The same hadith is also narrated by Abu

¹⁶ Wahbah al-Zuhayli, *Al-Fiqh al-Islami Wa Abdillatuh*, 4th edition, vol. VII, (Dimasyq: Dar al-Fikr al-Mu'asir, 2002), p. 183

¹⁷ 'Abd al-Qadir 'Awdah, *Al-Tasyri' al-Jina'iy al-Islami: Muqaranah bi al-Qanun al-Wad'iy*, vol. I, (Beirut: Muassasat al-Risalah, 1997), p. 706

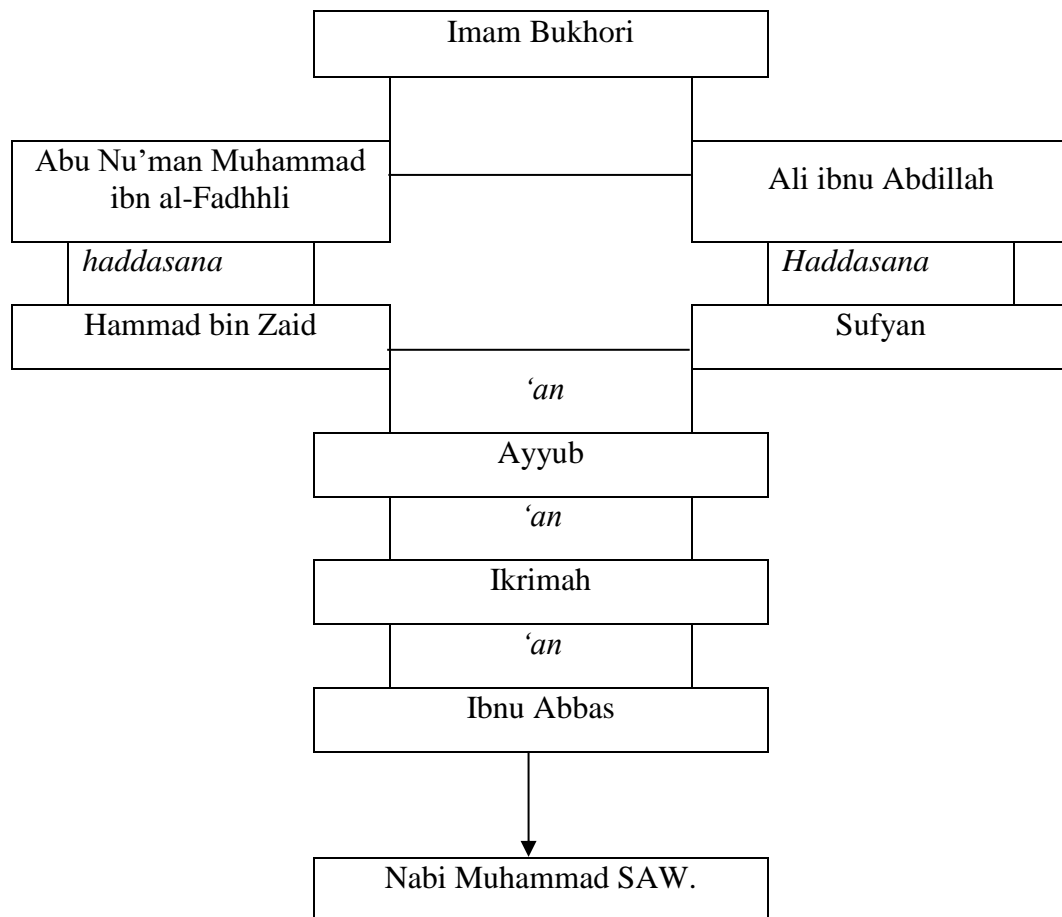
¹⁸ Al-Sayyid Sabiq, *Fiqh al-Sunnah*, vol. II, (Kairo: Dar al-Fath Li l'lam al-'Arabi, 1996), p. 599

¹⁹ Muhammad bin Isma'il al-Bukhari, *Sahih al-Bukhari*, vol. 9, p. 15

²⁰ Muhammad bin Isma'il al-Bukhari, *Sahih al-Bukhari*, vol. 4, p. 61

Dawud in the book of Sunan Abi Dawud *chapter al-hukmi fi man irtadda* and it is the hadith number 4351.²¹ Furthermore, the Tirmizi chapter is contained in *chapter Ma Jaa fi Al-Murtad*; the hadith number 1458.²² The history is widely available in Sunan Nasa'i through six sanad lines. These six lines are found in the chapter *Al-Hukmu fi al-Murtad* which begins with hadith number 3522, 3523, 3524, 3525, 3526, 3527.²³ In Sunan Ibn Majah, the hadith is found at hadith number 2535.²⁴ In Ahmad's Musnad, the hadith is in number 1871²⁵, 2551, 2552,²⁶ 2968.²⁷

The hadith narrated by Bukhori above states the route of sanad passage through Ali ibn Abdillah and Abu Nu'man Muhammad ibn al-Fadhli as shown in the following chart:



²¹ Abu Dawud Sulaiman, *Sunan Abi Dawud*, vol. 4, p. 126

²² Muhammad bin 'Isa al-Tirmidzi, *Sunan al-Tirmidzi*, vol. 3, p. 111

²³ Abu 'Abdurrahman Ahmad al-Nasa'i, *Sunan al-Nasa'i*, vol. 7, pp. 104-105

²⁴ Abu 'Abdillah Muhammad bin Majah, *Sunan ibn Majah*, vol. 2, p. 848

²⁵ Abu 'Abdillah Ahmad ibn Hanbal, *Musnad Ahmad bin Hanbal*, vol. 2, p. 434

²⁶ Abu 'Abdillah Ahmad ibn Hanbal, *Musnad Ahmad bin Hanbal*, vol. 3, p. 155

²⁷ Abu 'Abdillah Ahmad ibn Hanbal, *Musnad Ahmad bin Hanbal*, vol. 3, p. 303

All the lines of the hadith above are connected chains, although at the level of the companions, there is only one narrator, that is Ibn Abbas. On this basis, Muhammad ibn 'Ali al-Syaukani in his book *Nayl al-Awtar*²⁸ argues that this hadith is *ahad*. However, through the Suyuthi takhrij in the book *Al-Jami' al-Shaghir*, even though there is only one companion of the Prophet who narrated this hadith, he evaluates this hadith as belonging to the right hadith.²⁹ The study of punishment for apostasy cannot only be seen from one of the above hadiths because there are other hadiths talking about the punishment for apostates. This hadith is found in the book *Shahih Muslim* in the chapter *Ma Yubahu bihi Dam al-Muslim* and it is hadith number 1676.

حدَّثنا أبو بكر بن أبي شيبة، حدَّثنا حفص من غياث، وأبو معاوية، ووكيع، عن الأعمش، عن عبدالله من مرة، عن مسروق، عن عبدالله، قال: قال رسول الله صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: "لا يَحِلُّ دم امرئ مسلمٍ، يشهد أن لا إله إلا الله وأني رسول الله، إلا بإحدى ثلاث: الثَّيِّب الزَّانِي، والنَّفْس بالنَّفْس، والتَّارِك لدينه الفارق للجماعة

"(Muslim said) Abu Bakr ibn Abi Shaybah narrated to us, (he replied) Hafas Ibn Ghiyats, Abu Mu'awiyah, Waqi 'narrated to us from A'masy from Abdillah ibn Murrah from Masruq from Abdillah he said: Rasulullah PBUH said: The blood of a Muslim who acknowledges that there is no God but Allah and I am His messenger is not halal, except for three reasons; killing people intentionally, adultery by men / women who are muhshan, people who abandon their religion and separate from the congregation. " (Narrated by Muslim).³⁰

In the book of Sunan Abu Dawud, this hadith is discussed in the chapter *Al-Hukmi fi Man Irtadda* and it is hadith number 4352.³¹ This is similar with hadith in Sunan Tirmidzi (number 1402) in the chapter *Ma Ja'a La Yahillu Damumriin Muslim illa bi Ihda Tsalats*³² and in Musnad Ahmad hadith (number 3621³³, 4065³⁴ and 4245³⁵). This hadith belongs to the hadith of *Hasan Sahih* in the assessment of Abu 'Isa al-Tirmidhi³⁶ and the hadith *Sahih* according to Albani in *Tuhfah al-Ahwadzi*.³⁷

If you look at the authoritative books commenting on Sahih Bukhari (*syarh*) such as *Fath al-Bari*³⁸, *Syarh Sahih al-Bukhari li ibn Batthal*,³⁹ *Umdat al-Qari*,⁴⁰ *Irsyad*

²⁸ Muhammad ibn 'Ali al-Syaukaniy, *Nayl al-Awtar*..., vol. VII, p. 193

²⁹ Al-Suyuthi, *Al-Jami' Al-Shaghir*, p. 281

³⁰ Muslim bin al-Hajjaj, *Sahih Muslim*, vol. 3, p. 1302

³¹ Abu Dawud Sulaiman, *Sunan Abi Dawud*, vol. 4, p. 126

³² Muhammad bin 'Isa al-Tirmidzi, *Sunan al-Tirmidzi*, vol. 3, p. 71

³³ Abu 'Abdillah Ahmad ibn Hanbal, *Musnad Ahmad bin Hanbal*, vol. 3, p. 515

³⁴ Abu 'Abdillah Ahmad ibn Hanbal, *Musnad Ahmad bin Hanbal*, vol. 4, p. 132

³⁵ Abu 'Abdillah Ahmad ibn Hanbal, *Musnad Ahmad bin Hanbal*, vol. 4, p. 188

³⁶ Muhammad bin 'Isa al-Tirmidzi, *Sunan al-Tirmidzi*, vol. 3, p. 71

³⁷ Muhammad Abdurrahman al-Mubarakfuri, *Tuhfat al-Ahwadzi*, vol 4, p. 547

³⁸ *Fath al-Bari Syarh Sahih al-Bukhari*, vol. 12, Chapter *Hukm al-Murtad wa al-Murtaddah*

*al-Syari li Syarh al-Sahih al-Bukhari*⁴¹ and others, it seems they all believe without a doubt the order to kill the apostate. This is guided by the *dzahir nas* without looking at the socio-historical aspects that underlie the hadith occurrence or the reality that the Prophet practiced at his time.

وقالت طائفة: لا يستتاب ويجب قتله حين يرتد في الحال، روى ذلك عن الحسن البصرى وطاوس وذكره الطحاوى عن أبى يوسف، وبه قال أهل الظاهر، واحتجوا بقوله (صلى الله عليه وسلم): (من بدل دينه فاقتلوه) قالوا: ولم يذكر فيه استتابة

"A group said: He shouldn't be asked for repentance and it is obligatory to kill him immediately when apostatizing. It is narrated from Hasan al-Basri and Tawus. While Tahawi mentioned it from Abi Yusuf. *Ahlu al-Dzahir* argued with (whoever changes his religion, then kill him) they said: request for repentance is not mentioned in it."⁴²

It is quite clear in the editorial above that some scholars think to kill apostates immediately without having to wait to be asked for their repentance. In addition, in the aforementioned books, there are quotations of differences of opinion of scholars on whether they are to be killed immediately or asked for repentance. There are also differences on how long it takes to wait for their repentance and whether the death penalty also applies to female apostates. But what is interesting here is about how long the time given for apostates to be asked for their repentance. The shortest time is at the same time with their apostasy; if they refuse to repent immediately, they are to be killed immediately too. This is said by al-Syafi'i based on the hadith of Ummi Ruman. The second opinion by al-Zuhri is that they are asked to repent three times at the same time with their apostasy. Third, they are asked for repentance for three days, as in the opinion of Malik, Abu Hanifah and Ahmad. Fourth, according to Ali ibn Abi Talib, request for repentance is for a month. The last is from al-Tsauri with the request of repentance for the rest of his life by imprisonment until repentance or death.⁴³ It is this last opinion which was later evaluated by Sayyid Sabiq as the best penalty to be applied in the contemporary context.⁴⁴

³⁹*Syarh Sahih al-Bukhari li Ibn al-Bathtal*, vol. 8, Chapter *Hukm al-Murtad wa al-Murtaddah Wastitabatuhuma*

⁴⁰ *Umdat al-Qari Syarh Sahih al-Bukhari*, vol. 14, Chapter *La Yu'adzzibu Bi 'Adzabillah*

⁴¹ *Irsyad al-Syari li Syarh al-Sahih al-Bukhari*, vol. 10, Chapter *Hukm al-Murtad wa al-Murtaddah*

⁴² Ibn Bathtal Abu al-Hasan 'Ali bin Khalaf, *Syarh Sahih al-Bukhari li ibn al-Bathtal*, vol. 8, p. 572

⁴³ Abi al-Husain Yahya bin Abi al-Khair al-Yamani, *Al-Bayan Fi Madzhab al-Imam al-Syafi'i*, Chapter *Hukm al-Murtad*, vol. 12, pp. 47-48

⁴⁴ Ahmad Ridwan, *Memahami Kontradiksi Hadis Eksekusi Hukum Mati Pelaku Murtad Dalam Paradigma Fikih Kontemporer*, p. 134

Criteria for Apostasy punishable by death

The criteria for apostasy contained in the two hadiths above are different from the criteria for apostasy mentioned in the Qur'an. The hadith mentioned that the criteria is not only limited to converting religions, but also for threatening the stability of the Islamic government. Hence, such political threat also resulted in capital punishment.⁴⁵ Almost all fiqh literature discussing the death penalty for apostates uses the above argument. From this, it can be seen that fuqaha' makes the reason for '*ishmah* and social stability in society as the legality of the death penalty for apostates. This view stands to reason that protecting religion and the social system at that time was a benefit that was sustained.

The normative basis for the crime of apostasy is more emphasized on the moral aspects inherent in the individual. This aspect has been mentioned frequently in various verses of the Qur'an when explaining the concept of apostasy as solely aimed at individuals who change religions.⁴⁶ The act of changing religions is classified as immoral, because it is considered to be falsely witnessing against God as well as underestimating the issue of belief. Although Islam gives freedom to humans to choose their beliefs based on their willingness, the ability to choose beliefs does not mean that they are free to enter and exit Islam to other religions. Such action is the same as playing with religious thought.

Theologically, the issue of faith is a fundamental value that is the basis of all the teachings of the Qur'an. It places an important position in someone's life. This assumption is in line with Komaruddin Hidayat's opinion, as psychologically, a belief affects a person's behavior and significantly influences the way he/she thinks and acts.⁴⁷ The way of thinking and actions of a person who has changed religions has given up his Islamic identity as well as his guarantee of safety (*'ismah*). Therefore, the nature of '*ishmah* which was previously possessed made it halal for the person to be killed. It is with these considerations that the Qur'an determines the punishment for apostasy in the form of moral threats that are *ukhrawi* in nature.

⁴⁵ Abd al-Qadir 'Awdah, *Al-Tasyri' al-Jina'iy...* vol. III, p. 374

⁴⁶ The verses relating to apostasy which are punishable by moral punishment are al-Baqarah (2): 217, Muhammad (25): 27, an-Nahl (16): 106, 109, al-Baqarah (2): 108, Ali Imron (3): 77, 86, 90, 177, An-Nisa (4): 115, 137, At-Taubah (9): p. 66 and p. 74.

⁴⁷ Komaruddin Hidayat, *Wahyu di Langit, Wahyu di Bumi: Doktrin dan Peradaban Islam di Panggung Sejarah*, (Jakarta: Paramadina, 2003), pp. 4-6.

Socio-Historical Foundation

Socio-historically, the hadith of the Prophet used by fuqaha' as the basis for determining the death penalty in apostasy can be understood through the *asbabul wurud* approach. Therefore, the social setting should be given consideration. The jurists, apart from seeing the hadith from Ibn Abbas, are also guided by the historical reality in which during the Caliphate of Abu Bakr al-Siddiq, he fought against apostates as a form of concern that would threaten the stability of the Islamic region at that time.⁴⁸ This historical fact has drawn criticism from Muhammad Sa'id al-Asymawi. He said that this historical fact does not have solid evidence. Even the Prophet, as the head of the Government, never sentenced apostates to death.⁴⁹

The second hadith explains another historical fact. There were cases of apostasy who were sentenced to death and at the same time, rebellion occurred when the Prophet was the head of Government. Quoting Bukhari's opinion in his Sahih, M. Jakfar informed that the only case of death penalty for apostates is when they rebelled.⁵⁰ The case happened to a group of people from the 'Ukul tribe who initially came to Medina. The climate in Medina made them uncomfortable living there. Then the Prophet took the initiative to move them outside Medina to an area where many camels were kept and whose land was very fertile. This condition is used by the 'Ukul tribe. They not only enjoyed the camel's milk, but they killed the camel keepers. The actions of the tribe of 'Ukul were discovered by the Prophet, then the Prophet sent troops to kill them.⁵¹

Regarding the conditions in the history of imposing the death penalty for apostates who fought the above, M. Jakfar is of the opinion that this hadith was revealed by the Prophet in his capacity as the leader of the state. He said that the hadith was classified as *non-tasyri'iyah sunnah* or the sunnah whose meaning was aimed at certain situations.⁵² This is what Syaltut called the *sunnah tasyri' khas*. Although it is different in definition, the essence is the same. The reading of the hadith must be contextual by

⁴⁸Muhammad Abid al-Jabiri, *Syura. Tradisi Partikularitas Universalitas*, translated by. Mujiburrahman, (Yogyakarta: LKIS, 2003), p. 130

⁴⁹ Muhammad Sa'id al-Asymawi, *Problematika dan Penerpaan Syari'at Islam dalam Undang-Undang*, translated by. Saiful Ibad, (Jakarta: Gaung Persada Press, 2005), p. 141

⁵⁰ Tarmizi M. Jakfar, *Otoritas Sunnah Non-Tasyri'iyah Menurut Yusuf Al-Qaradhawi*, (Yogyakarta: Ar-Ruz Media, 2011), p. 388. Another term for rebels is *al-Baghy*, which is a group that opposes legitimate governments using weapons. The word *al-baghy* is taken from the Qur'an text which explains that if there are two groups fighting, there is a third group that reconciles and a group that rejects peace is called *al-baghyu* (Surah al-Hujarat (49): 9-10)

⁵¹ Ibnu Hajar al-'Asqalani, *Fath al-Bari*, vol. VI, p. 172

⁵² Tarmizi M. Jakfar concludes that *the sunnah of tasyri'iyah* is in fact a sunnah that is not obligatory and not permissible according to the Shari'ah. *Sunnah non tasyri'iyah* is in the form of the actions of the Prophet containing the meaning of rational abilities (*ibahah al-aqliyyah*), not abilities based on sharia (*al-ibahah al-syar'iyah*). On the other hand, *sunnah non tasyri'iyah* is in the form of commands and prohibitions that shows the advice (*al-irsyad*). The forms of *non-tasyri'iyah sunnah* are solely related to worldly issues. M. Jakfar, *Sunnah Authority*, pp. 276-277.

looking at the condition and psychology of the Prophet at that time who was acting as the leader of the state.

The case of an apostate who is sentenced to death, as informed by Bukhari, in Muhammad Ali's judgment serves to limit the generality of Ibn Abbas' hadith. He said the last hadith can be compromised with other hadiths or principles contained in the Qur'an.⁵³ Muhammad Ali argued with the hadith narrated from Abdillah in Sahih Muslim and the narration of Ibn Mas'ud in the Sunan Tirmizi.

In connection with the death penalty for apostates, the element of "separating oneself from the congregation (Muslims)" is the main condition for imposing death penalty for apostates. This element implies that apostates leave Muslim groups and conspire with their enemies to fight against Muslims. This fact led Muhammad Ali to conclude that the condition of Muslims at that time was in a state of war. Another evidence put forward by Muhammad Ali is based on the hadith narrated by Bukhori from Jabir bin 'Abdullah:⁵⁴

ان أعرابياً بايع رسول الله صلى الله عليه وسلم على الإسلام، فأصاب الأعرابي وعك بالمدينة فجاء الأعرابي إلى رسول الله صلى الله عليه وسلم فقال: يا رسول الله أفلني بيعتي فأبى رسول الله صلى الله عليه وسلم، ثم جاءه فقال: أفلني بيعتي فأبى، فخرج الأعرابي، فقال رسول الله صلى الله عليه وسلم: إنما المدينة كالكبير تنفى خبثها (وينصح طبيها) (رواه البخارى)

"A Bedouin Arab pledged allegiance to the Prophet and declared himself a convert to Islam. He then contacted wa'k disease (a type of fever) in Medina. Then he came to see the Messenger and said, "O Messenger of Allah, return my oath". The Prophet refused, then he came back and said: "Return my oath". The Prophet still refused, then the man left. Then the Prophet said: "Medina is like a blower that removes dirt and maintains its purity."

Responding to the historical evidence that apostates are not sentenced to death, Muhammad Ali argues that the historical facts have shown that there is an apostate who first met the Prophet while converting to Islam and later he had a fever. He thought that the disease he suffered is as a result of his conversion to Islam. He tried to approach the Prophet asking to revoke his confession of Islam and return to infidelity. Although the Prophet refused to return his oath, he left without leaving a message. After leaving, the

⁵³ Muhammad Ali, *The Religion of Islam: A Comprehensive Discussion of The Sources, Principles of Practices of Islam*, (UAR: National Publication and Printing House, n.d.), p. 596. M. Jakfar, *Otoritas Sunnah....*, pp. 389-390.

⁵⁴ Ibnu Hajar al-'Asqalani, *Fath al-Bari*, vol. XII, (Kairo: Dar al-Hadits, 2004), p. 346

whereabouts of the man were unknown, not even the history of the man who took his oath was found to be sentenced to death.⁵⁵

Based on the number of facts revealed above, the fuqaha' agreed to establish *ijma'* (consensus) that the punishment for apostasy with desertion is to be killed.⁵⁶ The jurists' consideration of saying this is for the benefit of the Muslims at that time in the form of concerns about the threat to the territory of Islamic rule. The consensus (*ijma'*) fuqaha' indicates that the punishment for apostasy is murder. Although this opinion is the result of *ijma fuqaha'*, according to Abid al-Jabiri, the opinion of fuqaha' must be understood in accordance with the social context of society at that time. In other words, apostasy in this kind of context as understood by fuqaha' is to be given the death penalty. This opinion was acknowledged by Quraish Shihab.⁵⁷

Al-Jabiri argues that the fuqaha' support for the death penalty was for the rebels, that is, people who attacked the country and society with weapons. In addition, apostasy in the discourse of fiqh is one type of rebellion.⁵⁸ For al-Jabiri, the war against the apostates in the time of Abu Bakr was a war against those who not only betrayed the Islamic state, where they had joined the Muslims during the Prophet. Moreover, they organized themselves to destroy it after refusing to submit to its rules (i.e. their refusal to pay zakat).⁵⁹ The above description contains the notion that an apostate is a person who attacks and fights an Islamic state, conspires or becomes an enemy spy.

Al-Jabiri's understanding shows that apostates are sentenced to death because of the element of rebellion against Islamic rule. The death penalty is meant not merely because of his apostasy, but because the perpetrator is "against" the Islamic government as the main condition for the death penalty in every case of conversion. In relation to modern life, the element of "against" can be likened to a case of desertion in military law which is also threatened with the death penalty.⁶⁰

⁵⁵ Muhammad Ali, *The Religion of Islam...* p. 597. M. Jakfar, *Otoritas Sunnah Tasyri'iyah....*, pp. 389-390

⁵⁶ Muhammad bin Ahmad bin Rusyd al-Qurtubi, *Bidayat al-Mujtahid*, Juz II, (t.tp.: Maktabah wa Matba'ah Taha, n.d.), p. 302

⁵⁷ M. Quraish Shihab "Wawasan al-Qur'an Tentang Kebebasan Beragama" dalam Komaruddin Hidayat (ed.), *Passing Over: Melintas Batas Agama*, (Jakarta: Gramedia Pustaka Utama, 1999), p. 302

⁵⁸ Muhammad Abid al-Jabiri, *Syura: Tradisi...*, p. 129

⁵⁹ *Ibid.*, p. 130

⁶⁰ Dedy Sumardi, *Hudud dan HAM dalam Pidana Islam: Hudud yang Disyariatkan dan Hudud yang Difikhkan*, (Banda Aceh: Dinas Syariat Islam Aceh, 2011), p. 66.

Such an argument leads al-Na'im to the conclusion that apostasy by faith is a matter of personal freedom and it is a fundamental right that is highly upheld by the Qur'an.⁶¹ He quotes Surat al-Baqarah verse 256:

لَا إِكْرَاهَ فِي الدِّينِ قَدْ تَبَيَّنَ الرُّشْدُ مِنَ الْغَيِّ... ٢٥٦

"There is no compulsion to (enter) religion (Islam); In fact, the right path is clear rather than the wrong way"(al-Baqarah (2): 256).

For al-Na'im, this verse is one form of human rights that is highly respected by the Qur'an. Therefore, it is not justified to give a sentence of death for apostates in faith.⁶² An-Na'im continued, the application of the law of murder for apostates tends to be based solely on belief factors. Whereas according to Thaha Jabir al-'Ulwani, there is no riwayat or *hadith fi'li* which states that the Prophet had killed someone simply because of apostasy.⁶³ The uncertainty of the texts of the al-Qur'an and the hadiths regarding the law of killing for apostasy causes al-Na'im to disagree with fuqaha 'which classifies murtad into *Jarimah hudud*, but is classified under *Jarimah ta'zir*.

From the above description, what al-Na'im wants to emphasize is that it is necessary to distinguish between apostasy in the narrow sense, namely *murtad* to change religion or belief and *murtad* in the broad sense of treason. For apostasy in the first sense, the punishment is in the form of *ta'zir*. For apostasy in the second sense, it is subject to a *hadd* penalty in the form of a law of capital punishment which is likened to the law of rebellion because it can threaten the stability of the country.

Sanctions for Apostasy and Its Implications in Human Rights Norms and Positive Law

The application of the death penalty as a punishment for apostasy has received serious attention in contemporary Islamic law circles. The discussion is aimed at the nature and characteristics of punishment in Islamic penalties which are not in accordance with universal human rights norms such as the death penalty, stoning, and whipping. The assessment of the clash of corporal punishment in Islamic criminal law with modern human rights norms is based on several arguments.

First, the application of Islamic criminal law as public law is related to the prevailing government system. In Islam, the death penalty originates from the Qur'an

⁶¹ Abdullah Ahmed al-Na'im "Syari'at Islam Tidak Bisa Dilaksanakan Melalui Hukum Positif" on *Jurnal Tashwirul Afkar: Jurnal Refleksi Pemikiran Keagamaan dan Kebudayaan*, edition no. 14, 2003, pp. 165-166

⁶² Abdullah Ahmed An-Na'im, *Toward an Islamic Reformation...*, p. 114

⁶³ Thaha Jabir al-'Ulwani, *Tidak Ada Paksaan dalam Islam*, translated by. A Fuad Mukhlis, (Jakarta: Raja Grafindo Persada, 2005), p. 146

and hadith as a source of law which is used as a life guide for Muslims in carrying out their governance. This can be seen from the use of Islam as the basis for the constitution of Islamic governance. Citizenship identity at this time is based on one's religion or belief. As the basis of the constitution, the Qur'an functions as a positive law which acts as a state philosophy. This includes the death penalty in the crime of apostasy. With various sociological considerations, the death penalty has been applied to certain cases that contain elements against Islamic rule.

In the context of the nation state, a person's citizenship status is no longer based on religion, but is limited to territorial areas. The form of nation state government has consequences for the legal system that is applied to a nation that has different philosophies of life. In other words, the Qur'an is no longer the basis of the constitution. It functions as a source of universal teaching which is used as a reference in formulating legislation. Even though the Qur'an is the source of Islamic law, it cannot be legalized as positive law without going through human understanding and being deliberated through political processes and official institutions that are recognized by society.

Second, the imposition of punishment can eliminate the natural rights of each individual. Natural rights are the most basic rights that exist and are inherent in every individual in line with human nature.⁶⁴ This right must be protected and must not be violated by anyone. One form of natural rights that exist in every individual is the right to life. Imposing the death penalty as a punishment for apostasy can eliminate a person's life as the right of every individual that must be protected.

For the Western world, respect for the individual is prioritized where he/she is part of the process of shaping human character so that it can be harmonized with human existence itself which is relatively influenced by socio-cultural factors.⁶⁵ That is why, as stated by James W. Nickel, the universality of human rights is more emphasized on its function to prevent citizens from becoming objects of oppression.⁶⁶ This view is called

⁶⁴ Various definitions of human rights put forward by experts have the same substantial meaning. Jan Materson from the UN Human Rights Commission states that human rights are the rights that are inherent in humans, without which it is impossible for humans to live as humans. The formulation of the definition of human rights is listed in ABC, Teaching Human Rights, United Nations, p. 5 "*Human rights should be generally defined as those rights which are inherent in our nature and without which we can not live as human beings.*" According to Baharuddin Lopa the sentence "*we can not live as human beings*" is more accurately defined as "it is impossible to live as a responsible human being". The addition of the word "responsible" shows that in addition to having rights, humans can also be accountable for every action they do. Baharuddin Lopa, *Al-Qur'an dan Hak-Hak Asasi Manusia*, (Yogyakarta: Dana Bhakti Prima Yasa, 1996), p. 1.

⁶⁵ Jean Claude Vatin "Hak-hak Asasi Manusia dalam Islam" dalam Harun Nasution dan Bachtiar Effendi (ed.), *Hak Asasi Manusia...*, p. 110.

⁶⁶ James W. Nickel, *Hak Asasi Manusia: Refleksi Filosofis atas Deklarasi Universal Hak Asasi Manusia*, terj. Titis Eddy Arini, (Jakarta: Gramedia Pustaka Utama, 1995).

an *anthropocentric*⁶⁷ stream, where humans are used as a measure of the symptoms of something and as the ultimate goal of the implementation of human rights. Therefore the main values of Western culture such as democracy, social institutions, and economic welfare as supporting tools for upholding human rights are more oriented towards respect for humans.

The meaning of the concept of human rights as formulated by the Western world - in Alwi Shihab's view - shows that human rights that develop in the West simply place humans in a separate setting with God (*divided God*) where the relationship is not stated at all.⁶⁸ Human rights are considered a natural acquisition from birth. Whereas in the teachings of Islam, human rights are a gift given by God which is universal, so that each individual feels responsible to God.⁶⁹ On the one hand, the universality of this human right adheres to the teaching that all human beings were created by God with a set of capacities in the form of the potential to do something according to His will.⁷⁰ In addition, humans as servants of Allah have the burden of responsibility in carrying out the tasks that have been entrusted to him as the Caliph of Allah on earth.⁷¹

The logical consequence of the explanation above can be understood that humans are faced with two responsibilities, namely the responsibility of carrying out the mandate of Allah as His servant and responsibility for determining policies and organizing life. Even the Qur'an and Sunnah function as a transformation of the quality of human consciousness, directing humans to be able to manifest individual and social piety according to awareness and obedience to Allah. This view, in terms of the social sciences, is called *theocentric* understanding⁷²

This point of view gives birth to the view that the death penalty is not a violation of human rights, but rather as a moral teaching that must be applied to perpetrators of crimes that can disturb public order. In this context, practicing religious teachings in the form of religious and moral aspects is one of the implementations of upholding natural values as well as upholding human rights. This difference in views on natural rights is the main cause of triggering conflict between the Western world and the Muslim world.

⁶⁷ *Anthropocentric* comes from Greek 'anthropikos' of the word 'anthropos' that means human. Lorens Bagus, *Kamus Filsafat*, (Jakarta: Gramedia Pustaka Utama, 1996), pp. 60-61.

⁶⁸ Alwi Shihab, *Islam Inklusif: Menuju Sikap Terbuka dalam Beragama*, (Bandung: Mizan, 1998), p. 179.

⁶⁹ Eggi Sudjana, *HAM dalam Perspektif Islam: Mencari Universalitas HAM bagi Tatanan Modernitas yang Hakiki*, (Jakarta: Nuansa Madani, 2002), p. 4.

⁷⁰ *Ibid.*, p. 17

⁷¹ Sayyid Abu Al-A'la al-Maududi "Syariah and Human Rights" on Harun Nasution and Bachtiar Effendu (ed.), *Hak Asasi Manusia dalam Islam*, (Jakarta: Pustaka Firdaus, 1987), p. 171

⁷² *Theocentric* is a notion that adheres to the view that all human activities contain divine aspects and human life is solely only to serve Him. Eggi Sudjana, *HAM dalam Perspektif Islam: Mencari Universalitas HAM bagi Tatanan Modernitas yang Hakiki*, (Jakarta: Nuansa Madani, 2002), p. 9.

In the Western world the concept of human rights is stated in the form of articles. The Universal Declaration of Human Rights (UDHR) proclaimed through UN General Assembly Resolution No. 217A (111) on 10 December 1948 along with various conventions and agreements agreed upon by all nations and countries as the basis for the general implementation of relevant human rights with various rights and human rights substance. As a counterweight to the concept of Western human rights, the Islamic world also formulated its human rights concept which was declared in Cairo on 5 August 1990 as the Cairo Declaration (*The Cairo Declaration on Human Right in Islam*) by countries that are members of the OIC, the Organization of the Islamic Conference.

The above phenomenon gives birth to crucial problems that occur in the field of public law (criminal law), especially the issue of human rights. This difficulty lies in how to reconcile the relatively secular Western human rights concept that has grown and developed in the modern nation state with the concept of Islamic human rights. Ironically, each of these human rights concepts has a strong legitimate basis. On the West side, it is based on the consensus of the world community through the Universal Declaration of Human Rights, and on the Islamic side it is based on the holy book and sunnah of the Prophet. To find an adjustment to the above inequality, an-Na'im tries to offer an alternative solution to adjust this crucial problem so that it can neutralize the differences in views between the Western world and Islam.

CONCLUSION

From the results of the analysis of Ibn 'Abbas' Hadith on the death penalty for criminals by analyzing the socio-historical and the theory of *sunnah tasyri'* and *ghairu tasyri'i* Mahmud Syaltut, it is argued that the capital punishment is no longer relevant to apply in the contemporary context. This is due to various following reasons:

1. Hadith narrated by Ibn 'Abbas in general has been assessed by other hadiths with the editorial "*fariqun li al-Jama'ah*" as the nature of "*tarikun li dinihi*" which was later defined by the scholars as apostates who allied with the enemy to fight Islam.

2. During the life of the Prophet, the only case that was sentenced to death by the Prophet was from the group of tribes 'Ukul who apostatized but also at the same time rebelled. This should also be seen further in the context of the Prophet as head of State, who should inflict punishment on anyone who rebels and threatens the stability of the State, not just for apostates. An example of this case is what is then called Syaltut as a *tasyri' sunnah khas* which can only be performed by certain people and under certain conditions only.

3. The story of a Bedouin man who converted to Islam before the Prophet and then not long after, he returned to his faith again by asking the Prophet to revoke his oath but the Prophet refused and did not kill him is a strong evidence that the death penalty for apostates is not only based on faith.

4. In contrast to the majority fuqaha', Imam al-Tsauri said that the apostate should not be killed, but should be asked to repent by being imprisoned without limit of time until he repents or dies in prison.

5. In the past, Muslims were still few and in a state of frequent war. So if a person commits apostasy, it will actually disturb the stability of the country and it is very worrying to divulge the secrets he knows to the enemy. However, this is not the current situation where Muslims are numerous and not in a state of war.

If the reinterpretation of this hadith is compared with the positive law in Indonesia, there is no contradictory found. Both actually can be compromised. Laws in Indonesia do not impose the death penalty on apostates, but do impose the death penalty on the rebels of any person who threatens the stability of the country. Similarly, the result of the reinterpretation of hadith Ibn 'Abbas showed that only apostates who later rebelled against the country could be sentenced to death and exemplified by the Prophet PBUH. Thus, apostate offenders can be sentenced to death on the condition that they also apply to rebel against the state or threaten the stability of the state.

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