

Article

Optimization of the Death Penalty in National Criminal Law

Dino Rizka Afdhali ^{1*}, Yanto ², Slamet Tri Wahyudi ³

¹ Master of Law, Faculty of Law, Universitas Pembangunan Nasional “Veteran” Jakarta, e-mail: di-norizkaafdjali@gmail.com

² Master of Law, Faculty of Law, Universitas Pembangunan Nasional “Veteran” Jakarta, e-mail: yanto@up-nvj.ac.id

³ Master of Law, Faculty of Law, Universitas Pembangunan Nasional “Veteran” Jakarta, e-mail: slametri-wahyudi@upnvj.ac.id

* Corresponding Author : Dino Rizka Afdhali

Abstract: Under Law No. 1 of 2023 or the New Criminal Code, capital punishment is regulated as a punishment that involves the deprivation of the defendant's life for serious crimes committed, with its implementation following the procedural rules for capital punishment in Indonesia. The provisions outlined in Article 67 of the New Criminal Code specify the application of capital punishment in Indonesia, stating that it is no longer the primary punishment but rather the last resort after a ten-year probationary period. This study uses a normative legal method with legal sources such as primary legal materials, namely laws regulating capital punishment, as well as secondary legal materials, which explain and clarify the primary laws. The debate on capital punishment involves two main schools of thought, namely those who support the application of capital punishment for serious crimes and those who reject the application of capital punishment due to the human rights perspective adopted by the Indonesian state. Criticism of the death penalty includes issues of the right to life and the legal treatment that should be given by the government to defendants for extraordinary crimes, especially in cases of corruption, premeditated murder, and narcotics. In this study, it was found that (1) the optimal form of regulation of the death penalty for extraordinary crimes has actually been implemented quite well, but the execution of the death penalty is still considered weak by the author because the execution must be preceded by a waiting period of several years in prison for the condemned prisoner (2) that the death penalty is not contrary to human rights, whether viewed from a legal, religious, or international perspective. (3) The new Criminal Code can balance the retributive and rehabilitative aspects as the ideal concept for the implementation of the death penalty. However, in some provisions, it is hoped that the death penalty can be used as a Premium Remedium in certain cases.

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1. Introduction

After the end of World War II, countries, both newly independent and those that already existed before the war, sought to reform their legal systems. Sociological reasons demanded that laws should reflect the cultural values of a nation. Political reasons are based on the idea that an independent country must have its own national laws for the sake of national pride, in line with its national objectives, as is the case with Indonesia, one of the independent countries, as stated explicitly and implicitly in the 1945 Constitution of the Republic of Indonesia. Practical reasons stem from the fact that former colonies generally inherit the legal system of their former colonial powers, complete with their original terminology, whether through the principle of concordance, jurisprudence, or doctrines adopted from the colonial power. This is often not understood by the younger generation in newly independent countries. This situation arises from the desire of newly independent nations to adopt legal systems and terminology dominated by local features, resulting in the terminology of the former



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colonizers being understood only by those who experienced the colonial period themselves. [1, p. 1]

Subsequently, updates to the substance of legal products in independent countries are the result of a legal system in the form of criminal laws and cultural norms such as values and attitudes that influence the enforcement of the legal system in an independent country. [2, pp. 84-86] This law is an instrument possessed by the state to deter perpetrators of criminal acts, including those punishable by death, such as narcotics, premeditated murder, terrorism, corruption, and crimes against national security. The imposition of the death penalty cannot be arbitrary, as it is only applied to perpetrators of extraordinary crimes. The death penalty is one of the oldest forms of punishment in the world. Looking back at the history of capital punishment, this punishment has existed since ancient times. However, this type of punishment is now slowly being abandoned by countries that value humanity. Many countries around the world have decided to abolish and eliminate capital punishment as a severe punishment because it is considered a clear violation of human rights. For example, in the past, capital punishment was considered a relevant and legitimate act, carried out openly in front of the public through various methods such as beheading, burning, or torture until death. In almost all parts of the world, the death penalty was applied to a number of subversive crimes, including insulting the king or religious leaders, war crimes, rebellion, and crimes accompanied by cruelty. The power to impose the death penalty generally rested with the king, the commander of the army, religious leaders, or judges appointed by the king. The decision to carry out the death penalty was often not based on written legal provisions, but solely on the king's decree. [3, pp. 5-6]

Capital punishment has been an inevitability throughout human civilization and the history of Indonesian criminal law. Capital punishment was officially validated by the laws of King Hammurabi in Babylon in the 18th century BC. At that time, there were at least 25 types of crimes, both minor and serious, that were punishable by death. [4, pp. 44-45]

Capital punishment has been a subject of debate for centuries, and to this day, it remains an issue that attracts public attention. As a form of punishment, capital punishment has existed since humans first developed laws, and it has been a source of controversy in various judicial systems, both in countries that adhere to the common law system and in countries with civil law systems. There are two main schools of thought in the discourse on capital punishment: first, those who seek to maintain this punishment based on existing provisions, and second, those who support the abolition of capital punishment. Their arguments are based on violations of Article 28 Paragraph 1 of the 1945 Constitution, which guarantees the right to life for all citizens. Those opposed to the imposition of the death penalty base their position on the constitution, arguing that the death penalty is contrary to human rights as enshrined in Article 28 of the 1945 Constitution. [5, p. 208]

The death penalty in Indonesian law originally stemmed from the *Wetboek van Strafrecht voor Nederlandsch-Indie* (Penal Code for the Dutch East Indies), which was enacted on January 1, 1918, as the *Kitab Undang-Undang Hukum Pidana* (KUHP) or Criminal Code applicable in Indonesia. The enactment of the KUHP was based on the provisions of Article II of the Transitional Provisions of the 1945 Constitution and reinforced by Law No. I of 1946, which regulated the enactment of the *Wetboek van Strafrecht voor Nederlandsch-Indie* (WvS-NI) as the KUHP. At that time, the Indonesian Criminal Code contained two articles that imposed the death penalty, namely Article 104 on crimes against state security and Article 340 on premeditated murder. [6]

The death penalty had been carried out by the authorities in Indonesia since its inception. This practice occurred during the physical revolution of 1945-1949, at least in the case of two political figures at that time, who were executed without trial. Both executions were carried out by the military on the grounds of a state of war. In reality, in subsequent periods, executions with or without trial continued in Indonesia, even though there was no state of war. [7, p. 89]

The existence of capital punishment today has become a central issue that attracts the attention of criminal law experts and all other parties who believe that capital punishment is contrary to human rights. Over the past fifty years, there has been a global trend toward the abolition of capital punishment. According to data from the European Union, there are currently 133 countries worldwide that have abolished capital punishment from their criminal legal systems. [8, pp. 5-6]

One of the main reasons for opposing the death penalty is the possibility of unfair trials, which can lead to errors in the judicial process and dissatisfaction with the workings of law enforcement agencies and institutions that adopt a "law and order" approach as a strategy to

suppress crime. Dissatisfaction with this “law and order” approach has been the backdrop for the establishment of a more comprehensive criminal justice system. From a different perspective, the rising crime rate during that period was seen as an indication of the failure of the “law and order” approach, which, in practice, failed to reduce crime rates in the United States. [9, p. 27]

The emergence of controversy surrounding the death penalty is a result of amendments to the 1945 Constitution of the Republic of Indonesia, specifically Articles 28A and 28I(1), which essentially state that every person has the right to life and the right to defend their life and livelihood. This is part of the fundamental rights that cannot be altered by anyone or anything, including the state itself. Although the death penalty remains in effect, some individuals or groups continue to reject it, assuming that the state has deprived individuals of their right to life. Based on this consideration, capital punishment is deemed to violate human rights. Not only that, the general public who oppose the death penalty also believe that capital punishment is inconsistent with the purpose of punishment, which is to deter citizens from committing criminal acts. Additionally, capital punishment is said to be ineffective in reducing crime rates in society. [9]

Discussions about human rights in the context of democracy in Indonesia are increasingly dominating public attention, although public understanding of this issue is still far from adequate. Various concepts of human rights, which are inherent and universal, are still understood differently by different segments of society, ranging from individuals with no legal background to those who have a deeper awareness of human rights issues. Basically, human rights require that every individual, both individually and in groups, as well as the government, respect and protect these rights. The Indonesian public's awareness of values related to the death penalty has undergone dynamic development. This phenomenon has given rise to various pro and con opinions regarding the application of the death penalty. On the one hand, there are groups that support the implementation of the death penalty, while on the other hand, there are those who call for its abolition. The arguments put forward by each side are diverse, ranging from emotional to more rational arguments. [9]

This debate has arisen because the death penalty is directly related to human life and is considered the most terrifying and severe form of punishment compared to other types of punishment. Although public support for the application of the death penalty continues to exist, this is contrary to the principles of human rights. On the other hand, positive law in Indonesia still recognizes the existence of the death penalty, so that this sanction remains in force in accordance with the existing principle of legality. The Government of the Republic of Indonesia, together with the People's Representative Council as the legislative body, has successfully passed the Draft Criminal Code (RKUHP) into law, which is contained in Number 1 of 2023 concerning the Criminal Code. This law contains several significant changes, particularly regarding provisions on the death penalty. In the new Criminal Code, the death penalty is no longer positioned as the primary criminal sanction but as an alternative for certain criminal offenses as specified in the law. The provisions on the death penalty are set forth in Article 98 of the new Criminal Code, which states that such punishment is the last resort in maintaining the security of the Indonesian nation. [10]

The imposition of criminal penalties is not merely a form of revenge, but more importantly, it serves as guidance and rehabilitation toward the restoration of inmates and probationers. This is so that they may reform and contribute as better members of society in the future. As a result, there has been a shift in the conception of the function of punishment, which no longer emphasizes deterrence but focuses on rehabilitation and moral and social reintegration, often referred to as community reintegration. The mission of reformulating the new Criminal Code is an effort to adapt and harmonize with various legal developments that have occurred, both in the field of criminal law and in the development of values, standards, and norms recognized by countries on the international stage. [11, p. 4]

In order to realize this mission, the government (executive) and the People's Representative Council (legislative) work together to draft and discuss a new Criminal Code, with the aim of codifying and unifying the creation and enforcement of consistency, justice, truth, order, benefit, and legal certainty, while maintaining a balance between national interests, the interests of society, and the interests of individuals within the Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the Republic of Indonesia. One of the values, standards, and norms harmonized in accordance with developments recognized by the international community pertains to norms and standards regarding the death penalty. In the new Criminal Code, the death penalty is regulated as a sentence with a probationary period, whereas in the old Criminal Code, the death penalty was one of the primary sanctions. [12]

Capital punishment is the highest penalty that can be imposed on criminals. With the enactment of the Draft Criminal Code, which changes the status of capital punishment from a primary penalty to an alternative penalty, this issue has received significant attention from the people of the Republic of Indonesia. This is due to provisions in the new Criminal Code, which allow the death penalty to be commuted if the convicted individual demonstrates good behavior over a ten-year period, thereby providing the option of reducing the sentence to life imprisonment or imprisonment for twenty years. Ultimately, criminal law reform in Indonesia continues to be carried out while considering the evolving legal framework and societal dynamics and progress. The death penalty in practice still generates pros and cons. Those who support or oppose the application of the death penalty have existed for centuries, so it is not entirely correct to argue that more countries have abolished the death penalty than those that maintain it today. The view that maintains the death penalty is also not insignificant. Out of 50 states in the United States, only 12 states have abolished the death penalty, while 38 states still maintain and regulate the death penalty as one of the types of punishment that can be imposed on criminals. [12]

Looking at the development of capital punishment regulations, the Constitutional Court has reviewed, adjudicated, and ruled on several challenges to laws related to capital punishment. All requests for judicial review of laws by petitioners who essentially wanted capital punishment to be deemed unconstitutional were rejected by the Constitutional Court. This indicates that the application of the death penalty, which is often criticized by those who oppose it as a form of punishment that violates human rights, is appropriate. The Constitutional Court's rulings reinforce the existence of the death penalty and state that its use does not conflict with the 1945 Constitution of the Republic of Indonesia (constitutional). [12]

Instead of maintaining the death penalty as the primary punishment, Indonesia continues to adopt an unwise approach by making the death penalty one of several alternative sanctions, such as fines, as stipulated in the new Criminal Code (Law No. 1 of 2023). This constitutes inconsistency on the part of the government and the House of Representatives in classifying the death penalty among types of criminal penalties. Furthermore, regardless of the pros and cons of the death penalty, this is also a "victory" for foreign countries that have long wanted to abolish the death penalty in the legal systems of other countries in order to influence our national laws. Countries that still apply the death penalty have various reasons, including that the death penalty is a way to combat serious crimes or at least minimize crime. The imposition of the death penalty for serious crimes such as drug trafficking, murder, and corruption in Indonesia can, psychologically, instill fear or terror in society, thereby reducing the public's desire to commit crimes. [13, p. 94]

This effort is also part of the reform of the death penalty regulations, which in the new Criminal Code are no longer categorized as a primary sanction but are instead regulated as an alternative or special sanction. As such, this policy change has prompted the author of this thesis to conduct an inclusive study and review of capital punishment in the new Criminal Code, which will come into effect in 2026. The author has formulated the following research questions: 1) How can the regulation of capital punishment in national criminal law be optimized?; 2) What is the human rights perspective on capital punishment in the reform of national criminal law?; and 3) What is the ideal form of application and regulation of capital punishment in the reform of national criminal law? The objectives of this research are: 1) To analyze the optimization of capital punishment regulations in national criminal law; 2) To analyze the human rights perspective on capital punishment in national criminal law; and 3) To analyze the ideal implementation and regulation of capital punishment in the reform of national criminal law.

2. Literature Review

Theory enables the construction of a structured paradigm that provides coherence and consistency in responding to all debates regarding rights in society and contributes a model that can be used to measure those assumed rights. Theory also provides mechanisms that can be used to precisely define the limits of rights whose existence has been agreed upon. [14, p. 34]

2.1. Teori Hukum Pembangunan

This theory of legal development is the result of an elaboration of two legal theories proposed by Roscoe Pound, namely law as a tool of social engineering, and Herold D. Laswell and Myres S. Mc Dougal, namely the policy approach. This theory of legal development was

first introduced by the Indonesian legal scholar Prof. Dr. Mochtar Kusumaatmadja. In its subsequent development, this concept of legal development was eventually named by his students as the Theory of Legal Development [15, p. 182] or better known as Madzhab UNPAD, a term that refers to the place where Prof. Mochtar Kusumaatmadja taught and developed his theory of development law.

There are two aspects underlying the emergence of this legal theory, namely: First, there is an assumption that law cannot play a role in or even hinder social change. Second, in reality, Indonesian society has undergone a shift in thinking towards modern law.

Prof. Mochtar Kusumaatmadja has a perspective on the dominant role of legislation in Indonesia. This is one of the objective conditions in the theory of legal development that he advocates. Additionally, Prof. Mochtar Kusumaatmadja states that the Theory of Legal Development remains the legal theory with distinctive characteristics in Indonesia, as it was developed by Indonesian legal experts while considering the dimensions and culture of Indonesian society. Therefore, by utilizing the dimensional parameters of the Theory of Legal Development, this theory can emerge, grow, and evolve in accordance with the existing conditions in Indonesia. As a result, it can be stated that if this theory is applied in practice, it will align with the pluralistic nature of Indonesian society. [16, p. 17]

To elaborate on the implementation of national criminal law development theory, there are two dimensions to this development. The first dimension is an effort to update old legal rules (modernize the law). The second dimension is an effort to make the law function properly by bringing about social change in line with the needs of a society that is building its own legal foundations. Criminal law development is not limited to legislative activities but also includes efforts to make law a tool for social engineering. [17, pp. 1-10]

2.2 Teori pemidanaan

The theory that forms the basis for the justification of punishment is known in three priority groups, including:

- Retributive theory

According to this theory, punishment is imposed solely because a person has committed a crime or criminal act (*quia picatun est*). Nigel Walker divides proponents of the retributive theory into several groups, including: [18, p. 10]

- Adherents of pure retributive theory, who argue that punishment must fit or be commensurate with the wrongdoer's guilt.
- Adherents of the impure retributive theory (with modifications). Adherents of this theory are further divided into:
 - Adherents of limited retributive theory argue that punishment does not have to be commensurate with the offense, but it must not exceed the limits that are appropriate or commensurate with the offense committed by the defendant.
 - Adherents of retributive theory are distributive, or distributive theory for short, arguing that punishment should not be imposed on someone who is not guilty, but punishment also does not have to be appropriate or commensurate and limited by the offense. The principle of “no punishment without guilt” is respected, but exceptions are possible, for example in strict liability.

- Theory of Purpose (Doeltheorien)

This theory argues that punishment is not intended to satisfy absolute demands for justice. Crime is not only a means of retribution for those who have committed criminal acts, but also has specific and highly beneficial purposes. Therefore, this theory is often referred to as the theory of purpose. Punishment is not imposed *quia picatun est* (because a person has committed a crime), but rather *ne peccetur* (to prevent a person from committing a crime).

- General prevention.

General prevention refers to the influence of criminal law on society in general. Prevention aims to influence the behavior of members of society in general so that they do not commit crimes. In his dissertation, Van Veen proposes three functions: upholding authority, upholding norms, and shaping norms. [19, p. 27]

- Special prevention.

Based on the assumption that perpetrators will refrain from committing such acts in the future because they will learn that their actions can cause suffering, the imposition of punishment serves an educational and corrective function. This theory is known as the rehabilitation theory. [19]

- Combined Theory

The originator of this theory was Pellegrino Rossi, who in his legal work entitled *Traite de Droit Penal* (1828) expressed his view that the justification for criminal acts lies in the principle of retribution, whereby the severity of criminal sanctions should not exceed the severity of the crime committed. Additionally, he argued that the application of the principle of retribution is accompanied by the purpose of criminal sanctions, which is to improve social order. In this context, judges must consider the benefits that criminal sanctions provide to the stability of that social order. [20, p. 29] Then, Andi Hamzah, in his book entitled *Principles of Criminal Law*, categorizes this combination/combined theory into three categories, including: [21, p. 37]

- Emphasizing the element of retaliation

Those who fall into this category include Pompe & Van Bemmelen. Pompe said: [21, p. 37]

“People should not turn a blind eye to retribution. Indeed, criminal punishment can be distinguished from other sanctions, but it retains its distinctive characteristics. It cannot be diminished in meaning, as criminal punishment is a sanction and is therefore bound by the objectives of sanctions. And because of this, it will only be applied if it is beneficial to the fulfillment of rules and useful for the public interest.” Meanwhile, van Bemmelen, as quoted by Oemar Seno Adjie, states: [21, p. 38]

“Criminal punishment aims to punish wrongdoing and protect society. Measures aim to protect and preserve objectives. Thus, both criminal punishment and measures aim to return the convicted person to society.”

- Which emphasizes the maintenance of order within society, stating:

According to this theory, punishment should not be more severe than the crime committed, and its purpose should not exceed what is necessary. [21, p. 37] According to Andi Hamzah, this theory is in line with Thomas Aquinas' theory, which states that public welfare is the basis of criminal law in particular. [21]

- Those who balance retaliation with the defense of social order state:

According to Utrecht, as quoted by Andi Hamzah, this theory has been little discussed by scholars. [21]

2.3 Theory of Human Rights

The concept of human rights has developed as one of the most significant discourses in the last two decades, reflecting the conflict between two different ideologies in its implementation: universalism and cultural relativism. The theory of universalism argues that the more primitive cultures will develop towards a legal system and rights equivalent to those of Western cultures. Conversely, the theory of cultural relativism argues that a traditional culture cannot be changed. [22, pp. 18-19]

In practice, the implementation of human rights in Indonesia continues to take into account cultural, religious, and social values that reflect the characteristics of the Indonesian people, as expressed in the nation's philosophy, Pancasila. In this context, the author tends to emphasize the theory of cultural relativism to understand the development of human rights in a country. This theory argues that culture is the only source of freedom of rights or moral norms. [23, pp. 89-83]

The Indonesian people respect every effort made by a country to formulate and regulate human rights in accordance with its own value system and worldview. The Indonesian people are committed to promoting and implementing human rights in accordance with the principles of Pancasila, which form the basis of the national worldview. World history has recorded various forms of suffering, misery, and social inequality caused by acts of discrimination and injustice based on ethnicity, race, skin color, culture, language, religion, group, gender, and other social statuses. [24, p. 184]

Human rights in Indonesia are regulated in the 1945 Constitution of the Republic of Indonesia. An in-depth analysis of the text, including the process of its formulation, shows that the Indonesian people have recognized the universal nature of human rights from the outset. However, in practice, both during the Old Order and the New Order, human rights were often not regarded as universal rights. Although there is universal recognition of human

rights, at the implementation level, these rights must be evaluated from various perspectives, which results in human rights being influenced by what is known as national interests. This, in turn, can erode and reduce the universal nature of human rights themselves. [20, p. 19]

In an official statement, the Indonesian government clearly stated that humanity lives in diverse and organized societies based on different ways of life. Therefore, there is no single solution to the problem of implementing human rights that can be applied in all countries throughout history. The implementation of human rights should be left to national jurisdictions, as each country better understands and is more aware of the issues it faces. [24, p. 186]

Recognition of the right to life as the most fundamental right indicates that deprivation of a person's right to life, if necessary, should be considered an exception. Thus, from a criminal law perspective, the death penalty should be avoided as far as possible and can only be imposed after a very strict procedure. Based on this view, in principle, the state is responsible for protecting human rights.

Human rights are fundamental rights inherent in every individual universally. Therefore, according to Todung Mulya Lubis, the study of human rights actually encompasses all aspects of life. The extent to which our lives provide adequate space for humanity is crucial. Every individual is entitled to these rights, so their validity must be recognized in the existence of humanity, accompanied by a sincere obligation to understand, comprehend, and take responsibility for maintaining them. The presence of rights in a person means that there is an attitude that is in line with the privileges enjoyed by others. [25, p. 47]

3. Metode yang Diusulkan

3.1. Research Types and Approaches

This study uses a legal-normative approach. Therefore, it emphasizes the study of reference materials. Research based solely on reference materials or secondary data can be called normative legal research or library research. [26, pp. 13-14] The definition of normative legal research can be examined from the following opinions of experts:

- Ahmad Mukti Fajar ND and Yulianto

Normative legal research can be defined as research that positions law as a system of norms. The system of norms in question includes principles, norms, rules, as well as legislation, court decisions, agreements, and doctrines (teachings). [27, p. 34] Explaining that normative legal research is "Research that examines the principles, systematics, level of synchronization, history, and comparison of laws, which is therefore known as doctrinal legal research or legal dogmatics." [28, p. 44]

- Peter Mahmud Marzuki

Legal research is a process of discovering legal rules, principles, and doctrines to answer legal questions. [29, p. 47]

- Soerjono Soekanto and Sri Mamudji

Normative legal research is legal research conducted by examining literature (secondary data). It is called normative legal research because it is based on a study of literature. [30, p. 15]

- Bambang Waluyo

Another term for normative legal research is doctrinal legal research, also known as bibliographic research or document study. The term doctrinal legal research is used because this type of research focuses on written regulations or legal sources. Meanwhile, the term bibliographic research or document study is used because this research focuses more on secondary data contained in library documents. [31, p. 13]

Based on the explanations provided by the experts above, it can be concluded that normative legal research is a research process conducted to analyze and examine law as norms, rules, legal principles, legal doctrines, legal theories, and other literature, with the aim of resolving legal issues under investigation. Therefore, based on this opinion, normative legal research can generally be defined as a study of documents that utilizes legal sources such as legislation, court decisions or rulings, contracts, agreements, covenants, legal principles, legal theories, and legal doctrines or opinions of legal experts. [32, pp. 47-48]

In the context of normative legal research, there are several types of approaches that can be applied, including: the case approach, the fact approach, the words and phrase approach, the historical approach, the statute approach, the comparative approach, the conceptual approach, the analytical approach, and the philosophical approach. [33, p. 37]

In order for this thesis to meet the criteria as a scientific paper, the application of scientific methods is very important to find the desired truth. The research method used in this study is normative legal research, in which positive legal regulations are used as the main source in this study or, as often referred to by legal experts, law in the books. [34, pp. 539-548]

The supporting approach used in this thesis research employs a statutory approach, a case approach, an analytical approach, and a conceptual approach to law. This means that the issues addressed in this thesis are analyzed using statutory regulations as the primary source, supplemented by relevant theories, concepts, and legal principles, thereby contributing to addressing the existing issues in society.

3.2. Types and Sources of Legal Materials

This research is classified as library research, which is research that uses library data in the form of books as its source of data. [35, p. 9] Literature research is research that uses primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials are materials whose contents are binding because they are established by the state/government, for example, various laws and regulations and court decisions. Secondary legal materials are materials that discuss primary legal materials, such as books and legal articles. Finally, tertiary legal materials are materials that support primary and secondary legal materials, such as legal dictionaries. [36, pp. 103-104] The legal materials included in this study are as follows:

- Primary legal materials are legal materials that have binding force because they are established by the government, such as:
 - Law Number 39 of 1999 concerning Human Rights;
 - Law Number 26 of 2000 concerning Human Rights Courts;
 - Law Number 1 of 2023 concerning the Criminal Code;
- Secondary legal materials
These are legal materials that provide explanations of primary legal materials, including books (literature), papers, articles, journals, academic manuscripts, theses, dissertations, and legal materials such as documents related to research issues.
- Tertiary legal materials
These are legal materials that provide guidance or explanations on primary and secondary legal materials, such as legal dictionaries, encyclopedias, language dictionaries, and so on.

4. Results and Discussion

4.1. Optimization of the Death Penalty in National Criminal Law

To optimize capital punishment in Indonesian criminal law, it must be done in a measured and comprehensive manner with stricter, more decisive, and impartial formulation for all forms of crime occurring within the territory of the Republic of Indonesia, including the regulation of capital punishment, where capital punishment is an important part of punishment with the highest level of severity applied by law enforcement agencies in cases of Extraordinary Crimes in Indonesia, such as drug-related crimes, premeditated murder, human organ trafficking, mutilation, terrorism, economic crimes including corruption, and other serious criminal offenses of a similar nature.

Although capital punishment has not been carried out in Indonesia since 2016, death sentences continue to be handed down by courts every year. In 2024, 85 people were sentenced to death by Indonesian courts. With this number, there will be 28,085 people facing execution globally by the end of 2024. [37] The two terms of President Joko Widodo have seen an average of 57 death sentences per year, more than the average of the four previous presidents. In particular, Susilo Bambang Yudhoyono, Megawati Sukarnoputri, Abdurrahman Wahid, and B.J. Habibie averaged 13 sentences per year. [38]

Throughout 2023, ICJR found an increase of 218 new criminal cases prosecuted and/or sentenced to death, involving 242 defendants; The number of new criminal cases involving the death penalty reported during the 2023 reporting period shows a continuing upward trend over the past five years; The trend in the number of cases prosecuted and/or sentenced to death in 2023 was still dominated by narcotics-related crimes (89%). Other types of criminal offenses identified include premeditated murder (7%), robbery resulting in death (1%), sexual

violence (1%), premeditated murder and violence against children resulting in death (1%), and rape of children resulting in more than one victim (1%). [39, p. 6]

The execution of death sentences has seen a significant increase since President Jokowi declared war on drugs. Eighteen people were executed by the executioner, all of them in drug-related cases. In line with Jokowi's tough stance on drugs, President Prabowo also expressed his focus on drug policies during an interview. He stated: "We must fight drugs; they are extremely dangerous for our children and grandchildren."

Recently, a joint task force comprising the National Narcotics Agency (BNN), the Riau Islands Provincial Police, the Directorate General of Customs and Excise, and the Indonesian Navy successfully foiled an attempt to smuggle a large quantity of methamphetamine. This methamphetamine smuggling operation is claimed to be the largest in Indonesian history. The amount of methamphetamine seized was a staggering 2,000,000 (two million) grams, equivalent to 2 tons. [40] In this disclosure, six suspects were arrested, consisting of four Indonesian citizens (WNI) and two foreign nationals (WNA) from Thailand. The suspects have been charged under Article 114(2) in conjunction with Article 132(1), and Article 112(2) in conjunction with Article 132(1) of Law No. 35 of 2009 on Narcotics, which carries a maximum penalty of the death penalty or life imprisonment.

Based on the author's findings on the optimization of regulations governing the death penalty, the procedural mechanisms for serious crimes that can be applied by the criminal law on the death penalty as stipulated in various regulations on the execution of the death penalty in Indonesia can be observed. For example, in the case of drug-related crimes involving the distribution of ecstasy pills in Indonesia, the perpetrators of such criminal acts must be sentenced to penalties prescribed in Law No. 35 of 2009 on Narcotics.

Law No. 35 of 2009 on Narcotics regulates several provisions whereby drug abusers may be subject to the death penalty, including:

- Article 113 paragraph (2);

"In the case of the act of producing, importing, exporting, or distributing Narcotics of Category I as referred to in paragraph (1) in the form of plants weighing more than 1 (one) kilogram or more than 5 (five) tree trunks, or in the form of non-plant material weighing more than 5 (five) grams, the perpetrator shall be punished with the death penalty, life imprisonment, or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years, and a maximum fine as referred to in paragraph (1) plus one-third (one-third)."

- Article 114 paragraph (2);

"In the case of acts involving offering for sale, selling, purchasing, acting as an intermediary in the sale or purchase, exchanging, delivering, or receiving Narcotics of Category I as referred to in paragraph (1), where such narcotics are in the form of plants weighing more than 1 (one) kilogram or more than 5 (five) tree stems, or in non-plant form weighing 5 (five) grams, the perpetrator shall be punished with the death penalty, life imprisonment, or imprisonment for a minimum of 6 (six) years and a maximum of 20 (twenty) years, and a maximum fine as referred to in paragraph (1) plus one-third (one-third)."

- Article 116 paragraph (2);
“In the case of the use of narcotics on another person or the provision of Schedule I narcotics for use by another person as referred to in paragraph (1) resulting in the death or permanent disability of another person, the perpetrator shall be punished with the death penalty, life imprisonment, or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years, and a maximum fine as referred to in paragraph (1) plus one-third (one-third).”
- Article 118 paragraph (2);
“In the case of the act of producing, importing, exporting, or distributing Narcotics of Category II as referred to in paragraph (1), where the quantity exceeds 5 (five) grams, the perpetrator shall be punished with the death penalty, life imprisonment, or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years, and a maximum fine as referred to in paragraph (1) plus one-third (one-third).”
- Article 119 paragraph (2);
“In the case of acts involving the offer to sell, selling, purchasing, receiving, acting as an intermediary in the sale or purchase, exchanging, or transferring Narcotics of Category II as referred to in paragraph (1), where the quantity exceeds 5 (five) grams, the perpetrator shall be punished with the death penalty, life imprisonment, or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years, and a maximum fine as referred to in paragraph (1) plus one-third (one-third).”
- Article 121 paragraph (2);
“In the case of the use of narcotics on another person or the provision of narcotics of Category II for use by another person as referred to in paragraph (1) resulting in the death or permanent disability of another person, the perpetrator shall be punished with the death penalty, life imprisonment, or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years, and a maximum fine as referred to in paragraph (1) plus one-third (one-third).”
- Article 132 paragraph (3);
“The aggravation of punishment as referred to in paragraph (2) shall not apply to criminal acts punishable by death, life imprisonment, or imprisonment for 20 (twenty) years.”
- Article 133 paragraph (1);
“Any person who orders, gives, or promises something, provides an opportunity, encourages, facilitates, coerces with threats, coerces with violence, commits fraud, or entices a minor to commit a criminal offense as referred to in Articles 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, Article 123, Article 124, Article 125, Article 126, and Article 129 shall be punished by death or life imprisonment, or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years and a fine of at least Rp2,000,000,000,000.00 (two billion rupiah) and a maximum of Rp20,000,000,000,000.00 (twenty billion rupiah)”.

Regarding capital punishment, how can we maximize the death penalty as a weapon to prevent crime on the one hand, while minimizing its negative impact on the other? This issue also reflects the general direction of punishment regarding the use of capital punishment in criminal law. The inherent protection afforded to individuals by the death penalty is the main source of its negative impact. Therefore, the challenge is to find ways to add protective elements to the death penalty so that it can protect individuals and society as a whole. The use of the death penalty for drug-related crimes is one of the appropriate measures taken by the state to execute drug traffickers who pose a threat to the future generations of the nation. With the provisions on capital punishment in Law No. 35 of 2009 on Narcotics, this can be used to prosecute drug traffickers and dealers with the harshest penalties. Such regulations also serve as a warning to others not to get involved in drug trafficking. The Prabowo administration, through its Asta Cita program, has made drugs and corruption two central issues in its priority agenda. Even the Head of the National Narcotics Agency (BNN), Marthinus Hukom, has commended this initiative, as he believes it reflects the prayers and hopes of the Indonesian people, as well as the government's attention and presence in the fight against narcotics. One of the recent cases involving the death penalty for drug-related offenses is the case of Hendrik Kosumo. [41] The judge stated in his verdict that the defendant Hendrik Kosumo was proven legally and convincingly guilty of committing a criminal offense as stipulated in Article 113 paragraph (2) of Law Number 35 of 2009 concerning Narcotics, namely, “Without authorization or in violation of the law, producing Narcotics of Category I in a non-

plant form weighing more than 5 (five) grams.” This judgment also reaffirms the prosecution's demand for the death penalty against the defendant.

In one of his considerations, the judge stated that crimes related to narcotics are on the rise, both in terms of distribution and quantity, so that these crimes fall into the category of extraordinary crimes.

Current global data indicates that the number of drug users has reached 296 million people, an increase of 12 million compared to the previous year. This figure represents 5.8% of the world's population aged 15-64. Meanwhile, the results of the 2023 national survey on the prevalence of drug abuse indicate that the prevalence rate is 1.73%, equivalent to 3.3 million Indonesians aged 15-64 years. This data also shows a significant increase in drug abuse among the 15-24 age group. [42]

Based on the considerations of the panel of judges who sentenced the defendant Hendrik Kosumo to death, the author believes that the judges viewed the death penalty as a serious matter, considering the consequences it would have in the future. Based on data released by the National Narcotics Agency (BNN), drug abuse in Indonesia has reached 3.3 million people, predominantly young people. According to the court, this poses a serious threat to Indonesian society, particularly the younger generation, who are considered one of the nation's key assets for development. Untuk protect the community, especially the younger generation (*social defense*), and also to provide a general deterrent effect for people who become drug abusers, including drug producers, both now and in the future, the panel of judges ruled that it must be eradicated by extraordinary means, one of which is the Narcotics Law, which regulates the imposition of the death penalty for certain narcotics crimes.

The judges' firmness in imposing the death penalty for narcotics-related crimes aligns with the penalties stipulated in the relevant legislation, namely Law No. 35 of 2009. Thus, the judges of the Medan District Court stated that in capital punishment, there are no mitigating factors, and the sentence can always be aggravated as long as the legal basis is clear. Therefore, it is necessary to map out that in law enforcement, human rights should not be placed in a proportional position, as this would make it difficult for judges to uphold truth and justice.

While continuing to refer to Law No. 35 of 2009, the judge of the Medan District Court remained firm in supporting the application and enforcement of the death penalty. The panel of judges of the Medan District Court opined that although the death penalty is controversial, it is clearly and systematically regulated, and its punishment is still stipulated in the law. On that basis, the judge decided to impose the death penalty on the defendant Hendro Kosumo for the crime of drug abuse by producing narcotics of Class I.

Despite the optimal regulation of the death penalty in this narcotics law, it is also necessary for the author to explain the certainty of the execution of the death penalty for those sentenced to death. Currently, according to Attorney General ST Burhanuddin, the number of death row inmates who have not been executed exceeds 300. He stated that the implementation of the death penalty faces numerous obstacles, particularly for foreign nationals (WNA) on death row. [43]

The Criminal Code, Law No. 2/PNPS/1964, regulations on clemency, and the Circular Letter of the Deputy Attorney General for General Criminal Cases No. B-235/E/3/1994 on the Execution of Court Decisions are legal instruments governing the application of the death penalty in Indonesia. Unfortunately, none of these legal instruments address the issue of the expiration of the waiting period for the death penalty. The experience of death row inmates, exacerbated by poor treatment in detention facilities and the lack of clarity in establishing the duration of the waiting period, has been further complicated by the phenomenon of backlogs.

The execution process is one of several criminal case management procedures used to ensure the integrity and effectiveness of criminal law standards. Specifically, when a decision has been given *inkracht van gewijsde*, or final and binding legal force. [44, p. 225]

In practice, even though all legal efforts have been exhausted and the verdict is legally binding, the authorities do not immediately execute the condemned prisoner. The problem is the length of time the prisoner must wait to be executed. The long and uncertain waiting period for the death penalty does not provide legal certainty for either the victim (and their family) or the prisoner (the perpetrator). This situation creates a “law in limbo” where court decisions that have become final are not immediately enforced, causing various negative impacts on all parties involved. For victims and their families, legal certainty is often interpreted as the enforcement of the punishment decided by the court.

Years, even decades, of waiting undermine the very essence of justice they seek. The death sentence handed down by the judge seems like a legal victory for them. However, when the execution is not carried out, the verdict feels hollow. The question arises, “What is the

point of a death sentence if it is never carried out?” Additionally, the victim's family cannot achieve closure or emotional resolution. Every time there is news about legal efforts by the convict (such as a case review or a request for clemency), their old wounds are reopened. They live in uncertainty as to whether their version of justice will ever be realized. This protracted process can erode public trust, especially among the families of victims, in the effectiveness and decisiveness of the criminal justice system in Indonesia.

On the other hand, death row inmates also endure extraordinary suffering due to this legal uncertainty. Psychologically, living for years under the shadow of execution constitutes severe mental torture. Inmates experience stress, depression, acute anxiety, and loss of hope. This phenomenon is internationally recognized as a strong argument against the death penalty from a human rights perspective. Just like victims, convicted perpetrators also have the right to certainty about their fate, even if it is execution. Indefinite postponement violates this right. This uncertainty does not occur without cause. The Indonesian legal system provides death row inmates with extraordinary legal remedies, namely a review of their case by the Supreme Court and a pardon from the President.

This process can take a very long time without any definite time limit. In addition to this lengthy legal process, another reason why capital punishment is difficult to carry out is because pressure from human rights groups, both domestic and international, often makes the government hesitate to carry out executions.

If we look at the new Criminal Code, it actually “institutionalizes” this waiting period. Article 100 of the new Criminal Code introduces the death penalty with a 10-year probation period. This means that after being sentenced to death, the convicted person will be observed for 10 years. If they show remorse and good behavior, their sentence can be commuted to life imprisonment through a presidential decision.

With the new Criminal Code, Indonesia has consciously chosen a middle ground by maintaining the threat of the death penalty but providing a clear observation period. While this provides a more definite timeframe (10 years), it also definitively confirms that a death sentence is not an absolute end but the beginning of a long waiting period, which ultimately still does not provide certainty of execution for either the victim or the perpetrator. In the author's opinion, ideally, when legal efforts and clemency requests from death row inmates are rejected, at that point the death row inmate meets the requirements for execution to provide legal certainty and justice.

Based on the analysis of the above legal decisions, the author reveals that the optimal form of criminal law regulation for *extraordinary crimes* has actually been implemented quite well, but the execution of the death penalty is still considered weak by the author because the execution must undergo a waiting period in the form of imprisonment for several years first, and the death row inmate must wait for legal efforts and clemency petitions to be submitted. This situation causes victims of criminal acts, particularly drug-related crimes, to feel anxious and restless because the convicted criminals, despite the court's verdict, have not yet been executed.

4.2. Human Rights Perspective on Capital Punishment in National Criminal Law Reform

It is understandable that the death penalty is highly controversial, or a matter of differing opinions and perspectives, as it concerns the right to life (a fundamental right) or the life of an individual who cannot be rehabilitated once the death penalty has been carried out. There are still a significant number of countries worldwide that maintain the death penalty (including countries in the ASEAN region), such as: Russia (once abolished but reinstated), the United States, France, the United Kingdom, Japan, South Korea, China, Cuba, Singapore, Malaysia, and Thailand. However, many countries have also abolished it, including: the Netherlands (the country of origin of Indonesia's Criminal Code, except in military courts), Portugal, Australia, Sweden, Germany, Romania, Denmark, Italy, and the Scandinavian countries. However, it is valid to compare the situation in Indonesia with that of other countries, but it must be remembered that each country has a unique legal history, spirit, and perspective on human rights. Therefore, it is not always appropriate to compare the issue of capital punishment in Indonesia with that of other countries.

There are various views from many experts on the application of the death penalty. Prof. Jimly Asshiddiqie argues that the death penalty should be applied strictly and carefully, taking into account human rights and principles of justice. [44] The death penalty is closely related to human rights, as capital punishment is contrary to human rights because every person has

the right to life. This guarantee is enshrined in Article 28A paragraph (1) of the 1945 Constitution, which states that every person has the right to life and the right to defend their life and livelihood.

Prof. Suhaidi (Professor at the University of North Sumatra) believes that the use of capital punishment in Indonesia is still relevant and should not be abolished because capital punishment is parallel to human rights in protecting the general public. Therefore, capital punishment should be maintained as one of the legal sanctions in Indonesia. [45, p. 72]

A former supreme court judge, Bismar Siregar, also supports the death penalty. He even said that “if the only reason for not imposing the death penalty is that only God Almighty has the right to decide when someone should live or die, then stop being a judge.” [46]

Human Rights (HAM) are also regulated in Law Number 39 of 1999 concerning Human Rights (HAM). Article 1 explains that Human Rights are a set of rights inherent in the nature and existence of human beings as creatures of God Almighty and are His gifts that must be respected, upheld, and protected by the state, law, government, and every person for the sake of honor and protection of human dignity. [47]

Prof. J.E Sahetapy doubts the usefulness of capital punishment, especially from a criminological perspective. He states that the existence of capital punishment cannot explain why people continue to commit crimes despite its existence. [47] Then, questioning the effectiveness of criminal punishment and the death penalty, legal expert Karl O. Christiansen once stated his theory that the death penalty is not a good solution for dealing with serious crimes in society and that alternative punishments are needed to anticipate serious crimes that may occur in the future. [47]

When discussing the application of capital punishment, is it a violation of human rights against the defendant or a form of justice that is as fair as possible for the defendant sentenced to death? There are many pros and cons and controversies that continue to be debated to this day. The reason is that the death penalty, in its implementation, is considered to violate the principles of Human Rights (HR). The death penalty can also be seen as a denial of the right to life, which is enshrined in the 1945 Constitution. The right to life is a fundamental Human Right that cannot be diminished under any circumstances. [48, p. 194]

In the 1945 Constitution of the Republic of Indonesia, as amended, human rights, particularly those related to the right to life, are regulated in Article 28A in conjunction with Article 28I paragraph (1). Article 28A reads: “Every person shall have the right to live, to defend his life, and to live.” Meanwhile, Article 28I paragraph (1) reads: “The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to freedom of religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be punished under retroactive laws are fundamental human rights that cannot be diminished under any circumstances.”

To respond to the allegations of groups that object to the death penalty, claiming that capital punishment is a “crime against human rights,” namely the right to life, Article 28 (I) states as follows: “The right to life” against serious crimes, namely organized murder, is a heinous crime against the human right to life. A country governed by laws that impose the death penalty on convicted persons based on a valid court decision cannot be equated with having committed “organized murder” against perpetrators of serious crimes when soldiers (the military) defend their country and kill enemy soldiers. To police officers, if in a dangerous situation they kill an armed perpetrator in a dangerous situation or if an Indonesian citizen kills someone in self-defense with the intention of saving their own life or that of their family.

Groups that oppose the death penalty have committed an irreparable wrong when they allow perpetrators of serious crimes and organized murder to be protected by this right. There is a horrific situation where a group opposed to the death penalty places organized murderers or serious criminals (drug traffickers, including terrorists) in the spotlight for life. Groups opposed to the death penalty have misplaced this humanitarian principle and allowed it to become so tainted that it leads to something terrible.

Ideally, no major perpetrators should be allowed to roam freely in society, spreading fear and committing crimes, and be able to save their own lives simply by invoking human rights. If this happens, the principle of “the right to life” will become an inhumane principle for the defenders of perpetrators, and this principle has become a kind of enemy of humanity.

The Constitutional Court itself, as the institution authorized to conduct judicial review of laws against the 1945 Constitution of the Republic of Indonesia, has examined, adjudicated, and ruled on a case challenging the Narcotics Law against Articles 28A and 28I of the 1945 Constitution of the Republic of Indonesia. In that constitutional review, the Constitutional Court rejected the plaintiff's claim that the death penalty provided for in the Narcotics Law

was inconsistent or contrary to Articles 28A and 28I of the 1945 Constitution of the Republic of Indonesia. According to the Constitutional Court, the right to life is not absolute for everyone under all circumstances. There are exceptions to this rule and principle.

Article 28I of the 1945 Constitution of the Republic of Indonesia not only mentions “the right to life” but also “the right not to be punished under retroactive laws.” Human rights court laws, both those in force in Indonesia and in other countries around the world, allow the public prosecutor's office to seek retribution for serious human rights violations.

In fact, judges in the context of discovering law do not only adhere to one method of interpretation but must consider other methods that are appropriate to the context of the case being tried. In this case, judges use systematic interpretation, which essentially means that articles in legislation cannot be understood in isolation but must be understood in relation to other articles. Law must always be viewed as a unified whole and not in isolation. Article 28I of the 1945 Constitution must be linked to Article 28J, which constitutes an exception and has the nature of *lex specialis* (special law). Although the nine articles (Articles 28A to 28I) regulate human rights universally, the implementation of these human rights is limited by the 1945 Constitution itself, which states:

- Everyone must respect the human rights of others in the context of social, national, and state life.
- In exercising their rights and freedoms, everyone shall be subject to such limitations as are prescribed by law solely for the purpose of securing due recognition and respect for the rights of others and of meeting the just requirements of morality, public safety, or the general welfare in a democratic society.

Based on the wording of Article 28J of the 1945 Constitution of the Republic of Indonesia above, this provision constitutes the primary basis for the imposition of the death penalty, provided that the death penalty meets the criteria set forth in Article 28J of the 1945 Constitution.

In addition, it is necessary for the author to explain that there is a fundamental difference between the concept of human rights according to the Western perspective and the concept of human rights according to the Eastern perspective. The standard Western view of human rights stems from a view that considers humans as the measure of all things, which has declared itself the legitimate heir to the philosophy and civilization of humanism in history, beginning in Ancient Greece and reaching its peak in the modern era, where there is a conflict between the two sides. The gods, with their actions and consciousness, sought to uphold human injustice. On the other hand, in order to gain freedom and independence, humans had to seize power from the gods and then shift their power to determine their own destiny. Thus, a debate arose between humanism and theism, and as a result, Western human rights are anthropocentric and secular in nature. [49, p. 51–61]

The prevailing ideology in Eastern countries (such as the Soviet Union and China in the past) was communism. The impact of this ideology was the opposite of that of liberalism. The rights of the people were recognized, but not fully respected by the government. The government played a very dominant role in regulating various aspects of life. In the practice of governance, the government adopts an authoritarian stance and disregards the aspirations of the people. This leads to the suppression of the people's voices and the media, thereby eroding democracy, which should be the people's right. [49, p. 53]

As an Eastern country that upholds religious values, ideally the Indonesian people should make religious norms the standard for regulating their behavior. As the religion followed by the majority of the Indonesian people, Islam (which is one of the sources of law in the world, alongside the European Continental System, the Common Law System, the Socialist System, and the East Asian System) teaches its followers to protect reason, lineage, property, life, and religion, as the principles of Islam that must be upheld and not violated by anyone. Murder, corruption, drugs, and terrorism all destroy, do not bring happiness, and harm many people. Therefore, the death penalty is one of the ideal punishments for criminals. The primary basis for the existence of the threat of the death penalty is rooted in the norms established by Islamic Sharia law, as decreed by Allah S.W.T, which cannot be altered or challenged by humans.

In the Qur'an, Surah Al-Isra verse (33), Allah S.W.T Himself commands the implementation of qishash law. As He says, which means: [49]

“And do not kill the soul which Allah has forbidden [to be killed], except for a just cause. And whoever is killed unjustly, then indeed, We have given authority to his heirs, but let not the heir exceed the limits in killing. Indeed, he is protected.”

From the above verse, it can be understood that a murderer who has been proven guilty of committing the crime of murder, the explanation above justifies the application of qisas in the form of the death penalty. However, the death penalty cannot be imposed if the heirs of the murder victim are willing to forgive the perpetrator; instead, the perpetrator must pay diyat (a fine or compensation) agreed upon by the parties.

In another verse, specifically in Surah Al-Maidah verse (33), Allah S.W.T says, which means: [51]

“The response to those who fight against Allah and His Messenger and strive to spread corruption on earth is that they should be killed, crucified, have their hands and feet cut off on opposite sides, or be exiled from their homes. Such is their disgrace in this world, and in the Hereafter they will have a terrible punishment.”

Allah S.W.T in the Qur'an, Surah Al-Baqarah verse (178), emphasizes that: [52]

“In qishash there is (guarantee of) life for you, O people of understanding, that you may be righteous.”

In the concise commentary by Prof. Wahbah Zuhaili, this verse emphasizes that in qishash there is a guarantee of the continuity of life. For if a person realizes that he will be killed if he commits murder, he will carefully consider his actions before committing murder. This verse is addressed to you, O people of reason who are capable of understanding the wisdom behind the punishment of qishash and possess pure minds, so that you may fear Allah and refrain from violating the laws He has established. [52]

The Indonesian Ulema Council (MUI) is of the opinion that: [53, p. 57]

- Islam recognizes the existence of capital punishment and applies it in cases of jarimah, qishas, and ta'zir.
- The state may impose the death penalty on perpetrators of certain criminal offenses in the same manner.

Linked to the theory of human rights in relation to the implementation of Qishash, Qanun, Ta'zir, and similar executions, capital punishment is not only intended as a form of retribution, but also as a preventive measure to maintain social order and balance. However, there are alternative viewpoints that link capital punishment to violations of Human Rights within the context of Islamic law. Capital punishment is considered lawful and just provided it is carried out under strict conditions and in accordance with the procedures established in the Sharia laws of the Quran, while adhering to the philosophical principles of the state, Pancasila. Therefore, by considering these two fundamental principles, it provides room for the defendant's right to pardon, and although the execution of the death penalty is severe, it is still based on the broader principle of justice, which prioritizes the protection of the right to life of a group of Indonesian society and prevents greater harm in the Indonesian region, including Aceh. [54, p. 61]

In the Christian perspective, capital punishment is also recognized. Christian law strongly believes that God Himself gave humans the power to carry out the death penalty for heinous crimes. [55, p. 68] Provisions regarding capital punishment are contained in the old agreement. Crimes punishable by death include: [55]

- Murder (Genesis 9:6, Exodus 21:12, Numbers 35:16-21);
- Hurting your father or mother (Exodus 21:15);
- Cursing an Elder (Exodus 21:17);
- Saying “God is weak” (Leviticus 24:14-16, 23);
- Violating the Sabbath (Exodus 31:14, Numbers 15:32-36);
- Practicing Magic (Exodus 22:18);
- Divination and Practicing Magic (Leviticus 20:27);
- Those who lead others into apostasy (Lamentations 13:1-5, 18:20);
- Adultery for married people or adultery for unmarried people (Leviticus 20:10-12, Lamentations 22:22). A woman having sex before she is married (Lamentations 22:20-21);
- Two people have sex when one of them is engaged (Lamentations 22:23-24);
- The daughter of a priest who practiced prostitution (Leviticus 21:9);
- The rape of a man who was engaged (Lamentations 22:25);
- Sexual intercourse with animals (22:19);
- Idolatry (Exodus 22:20, Leviticus 20:1-5, Lamentations 17:2-7);
- Incest (Leviticus 20:11-12, 14, 19-21);

- Homosexuality (Leviticus 20:13);
- Kidnapping (Exodus 21:16);
- Giving false testimony before the court (Lamentations 19:16-19);
- Contempt of court (Lamentations 17:8-13) burning, use of swords, spears, or arrows (Leviticus 20:27, 21:9, Exodus 19:13, 32:27, Numbers 25:7-8).

In Buddhist belief, Buddhism can approve or at least not prohibit capital punishment in Indonesia. In Samyutta Nikaya I: 227, the Buddha said the following:

“As you sow, so shall you reap. Those who sow good will reap good, and those who sow evil will reap evil. Sow seeds, and you will reap the fruits thereof.”

A prominent figure in the religious movement and former National Police Chief R. Said Sukanto claims that the death penalty is still necessary today due to the unfavorable situation in Indonesia. Crime has become a source of fear. Prisons are still like prisons, R. Said Sukanto stated that the death penalty could be abolished but it is still too early to do so. This statement also highlights the ineffectiveness of various forms of criminal penalties, hence the death penalty is considered important to prevent serious crimes.

According to the human rights perspective, the formulation of capital punishment policies in the upcoming national criminal law reform must continue to be discussed by criminal law experts in Indonesia. Both proponents and opponents of capital punishment among Indonesian criminal law experts can provide critical perspectives on capital punishment to be documented, with their opinions considered for inclusion in the formulation of sentencing policies for capital offenders in Indonesia, aligned with the scientific considerations or legal foundations of each expert in criminal law. [56, p. 113]

In line with the national security policy, the Indonesian government needs to continue its policy of imposing the death penalty on convicted criminals by enforcing capital punishment in accordance with procedures established in the Indonesian legal system and national defense, not only for Indonesian citizens but also for foreign nationals who commit serious crimes within Indonesian jurisdiction, as stipulated in the Criminal Code. [56]

Legal experts, human rights activists, academics, and even the general public always base their pros and cons on institutions that observe capital punishment with logical and rational reasons. Indonesia is one of the countries that imposes the death penalty frequently. Based on records from various international human rights institutions, Indonesia is one of the countries that still applies the death penalty in its criminal justice system (Retentionist Country). [56]

The imposition of the death penalty in Indonesia is quite common, so it is not surprising that there are many pros and cons among legal experts and the general public when it comes to determining the death penalty. The death penalty is not only regulated in the Criminal Code but also in other laws outside the Criminal Code, such as the Narcotics Law, the Terrorism Law, the Corruption Law, and the Human Rights Court Law. [57, p. 7]

With regard to this Human Rights Court Law, it is stipulated that the death penalty does not entirely violate human rights because this law includes the death penalty accompanied by other alternative penalties, as can be seen in Articles 36 and 37 as follows:

Article 36: “Any person who commits an act as referred to in Article 8(a), (b), (c), (d), or (e) shall be punished with death or life imprisonment or imprisonment for a maximum of 25 (twenty-five) years and a minimum of 10 (ten) years.”

Article 37: “Any person who commits an act as referred to in Article 9(a), (b), (d), (e), or (j) shall be punished with death or life imprisonment or imprisonment for a maximum of 25 (twenty-five) years and a minimum of 10 (ten) years.”

Regarding the death penalty, there is a contradiction between Law No. 39 of 1999 on Human Rights and Law No. 26 of 2000 on Human Rights Courts because, according to Law No. 39 of 1999, the death penalty is not permitted as it contradicts that law. While Law No. 26 of 2000 on Human Rights Courts states that the death penalty is permitted under certain conditions as specified in that law. Based on the principle of *lex posteriori derogate legi priori*, Law No. 39 of 1999 on Human Rights is superseded by Law No. 26 of 2000 on Human Rights Courts. [58, p. 73]

Another perspective from legal expert Dr. Munafrizal on the implementation of capital punishment in relation to human rights is that capital punishment is closely related to the right to life, which is the crown of human rights. As a non-derogable right, the state has a positive obligation to protect and ensure the right to life, including that of criminals sentenced to death. [57]

Referring to positive international law, there is no explicit prohibition on the binding application of the death penalty for all countries in the world, so that currently only restrictions

on the application of the death penalty are regulated. The International Covenant on Civil and Political Rights (ICCPR) Article 6 paragraph 2 stipulates that the death penalty may be imposed under specific conditions. [58]

Furthermore, capital punishment is also prohibited under the provisions of the DUHAM. This is because capital punishment violates the rules relating to the recognition of human rights, especially the right to life, which is the most important human right. However, in this case, there are still provisions for countries that wish to continue applying the death penalty in their countries based on their national laws. Its application must be based on the existing legal sources within a country, imposed for the most serious crimes, decided by a competent court, and imposed in emergency situations. [58]

Some of the conditions for the application of the death penalty as stipulated in the International Covenant on Civil and Political Rights/ICCPR include that it is only applicable for the most serious crimes, in accordance with national law in force at the time the crime was committed, and that it does not contravene the ICCPR and the Convention on the Prevention and Punishment of the Crime of Genocide. and may only be carried out based on a final and binding decision by a competent court. Meanwhile, restrictions on the practice of capital punishment include the type of crime (drug-related, economic, corruption), the classification of persons (exceptions for children, pregnant women), and the procedures for imposing capital punishment (court decision and last resort). [58]

Furthermore, based on Kerel Vasak's legal view on the imposition of the death penalty from a human rights perspective, it can be concluded that: [58]

“Freedom, equality, and brotherhood that exist in society reflect the development of categories or generations of rights to life that are different from other societies, so that crimes involving the loss of life of a group of people are not justified.”

The use of the term “generation” in viewing the development of human rights is merely an expression of a very complex development. The generations of human rights are: [58] a. First generation of human rights (freedom); b. Second generation of human rights (equality) c. Third generation of human rights (fraternity). [59, p. 15]

Regarding the imposition of the death penalty based on human rights principles within the national legal system against perpetrators of criminal acts who have been sentenced to death, it is necessary to continue to pay attention to humanitarian considerations and to act fairly as required. The judicial process must be carried out in a proper manner and based on valid evidence, and can be classified as follows: [60, p. 82]

- The guilt of the condemned person must be proven beyond reasonable doubt in court;
- The court that tries capital cases is the competent court;
- The law used in making the decision must be valid and enforceable;
- The death penalty is imposed selectively and has the force of law;
- The death row inmate is accompanied by a spiritual advisor from the time the decision becomes final until the execution;
- The requests or will of the death row inmate must be fully handled by the state in accordance with the provisions of the Indonesian government;
- The execution is carried out after all the rights of the death row inmate have been fulfilled;
- Execution is carried out as exclusively as possible to avoid prolonged suffering or pain;
- The body of the condemned person is treated with dignity and respect, without any discrimination.

Furthermore, regarding capital punishment and human rights, it is imperative for Indonesia to respect the rights of its citizens. Issues based on human rights will certainly not be easy to resolve, because human rights are absolute and must be respected by all of us.

In relation to human rights, imprisonment, even if linked to human rights, can be considered a violation of human rights because it restricts the space and scope of the defendant. [61, p. 33–42] Considering the absolute nature of human rights, this indirectly causes certain problems if all law enforcement against violations that occur in society cannot be carried out properly due to the excessive use of human rights.

Furthermore, in response to these excessive demands for human rights, the 1945 Constitution of the Republic of Indonesia, as the primary positive law in Indonesia after the amendments, sets out the limits of the rights it respects in Article 28A, which reads:

“Everyone has the right to life and the right to defend their life and livelihood.”

The right to life as referred to in Article 28A is very similar to the meaning referred to by the UN UDHR in Article 3. The provisions contained in Article 28A of the 1945 Constitution of the Republic of Indonesia are then detailed in Law No. 39 of 1999 concerning Human Rights. In Chapter III: Human Rights and Fundamental Freedoms; Section One: The Right to Life in Article 9:

- Everyone has the right to life, to preserve life, and to improve their standard of living;
- Everyone has the right to live in peace, security, and happiness, and to enjoy physical and mental well-being;
- Everyone has the right to a good and healthy environment.

It should be noted that another limitation of human rights is the human rights of other groups. Therefore, if a person's human rights are understood and considered absolute, they can be restricted, but such restrictions cannot be interpreted as depriving a person of their life, especially in the case of defendants or those sentenced to death. In alternative methods of enforcing the death penalty, options such as pardon, amnesty, or abolition may be considered to address capital punishment. This requires the involvement of various aspects and components within a state, with the aim that the implementation of such laws can produce effects of regret, fear, and deterrence toward those who commit serious criminal acts. [62, pp. 1-14]

His statement that the death penalty is not contrary to our Constitution and that its existence in positive criminal law should be maintained. However, based on the latest constitutional ruling, any future reform of national criminal law relating to the death penalty should give serious consideration to the following: First, capital punishment is no longer a primary punishment, but rather a special and alternative punishment; Second, capital punishment may be imposed with a ten-year probationary period, during which, if the convicted person behaves well, it may be commuted to life imprisonment or imprisonment for 20 years; Third, the death penalty may not be imposed on minors or individuals under the guardianship of a legal guardian or parent; Finally, the execution of the death penalty against pregnant women and mentally ill death row inmates shall be postponed until the woman gives birth and the mentally ill inmate recovers. [62]

Then, on the other side, several legal figures who opposed and firmly rejected the existence of capital punishment included: Italian legal experts such as Dr. Beccaria, Dr. Ferri, and Indonesian legal expert Roeslan Saleh. Dr. Beccaria's statement against capital punishment is that the execution process is carried out in such a terrible manner against someone accused of killing their own child (some time after the execution, it was proven that the court's decision was wrong), while Dr. Ferri argued that to deter individuals with a predisposition toward serious crimes, life imprisonment is sufficient, and the death penalty is unnecessary. [63, p. 36]

For example, the Netherlands, which abolished capital punishment in its national criminal law, still includes capital punishment in its Military Criminal Code. However, the imposition of such a sentence may only be carried out if the judge deems it necessary for the security of the state (Article 9). Additionally, its neighboring country, Belgium, includes the death penalty in its Civil Code, although this provision has never been enforced in practice. [63]

In addition, Prof. Hermann Mostar, a German author, aptly describes and illustrates capital punishment as judicial murder. Courts can become legal places to kill innocent people if they neglect due diligence and caution in examining cases, leading to errors in evidence and verdicts against defendants sentenced to death. [63]

Another view from legal expert B. Arief Sidharta argues that in order for the imposition of criminal punishment (especially the death penalty) by the state to be justified, it must have at least three aspects, namely: 1) the act committed by the convicted person is evil and oppressive to human dignity and can endanger human existence, 2) criminal sanctions must serve as a warning to deter others from committing such evil acts, 3) the imposition of criminal sanctions must be aimed at encouraging the convicted person to actualize their human values.

The death penalty has been a subject of debate in Indonesia since long before the current era of reform. Those opposed to it primarily cite human rights (HR) as their main reason, one of which is the right to life. This is based on Article 28A of the 1945 Constitution, which states, “Every person has the right to life and the right to defend their life and livelihood.” The legitimacy of the death penalty continues to be questioned. [63]

This relates to the concept of “Natural Law,” which states that the right to life is an inherent right of every individual that cannot be arbitrarily deprived or restricted (non-

derogable rights) by anyone, under any circumstances, including by the state itself, in the name of law or in emergency situations. [63] As a right granted by God, the right to life cannot be taken away by any human being, even in the name of God. Based on this reasoning, the death penalty is contrary to human rights. [64, pp. 121-122]

However, on the other hand, those who are in favor of capital punishment, legal experts in certain countries and some Indonesian legal experts who agree with the implementation of capital punishment argue that the right to life is relative because the state revokes the right to life in order to protect the human rights of other groups in society who are victims of cruel acts that take the lives of perpetrators who have been sentenced to death by a court of law. [65, p. 12]

5. Conclusions

Based on the above discussion, the author can draw the following conclusions:

The optimal form of capital punishment for extraordinary crimes has actually been implemented quite well, but the author considers the execution of the death penalty to be weak because the condemned must first serve a prison term of several years before the sentence is carried out. This situation causes victims of criminal offenses, particularly drug-related crimes, to feel anxious and distressed because the convicted criminals, despite the court's verdict, have not yet been executed.

The use of capital punishment as a form of punishment is not contrary to human rights, especially the right to life. This has been confirmed by the Constitutional Court in its decision No. 2-3/PUU-V/2007. Furthermore, capital punishment is not contrary to the religious values held by the Indonesian people.

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