

## Legal Politics of Death Penalty Application in Indonesia\*

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### **Abstract**

*In Indonesia, the criminal law system is the one that decides the appropriate punishment for crimes and other legal transgressions. The use of the death sentence is still permitted under Indonesia's Criminal Code (KUHP), as well as some extra-criminal provisions. A translation of the *Wetboek van Strafrecht voor Nederlandsch-Indie*, which has been in effect in the Dutch East Indies (now known as Indonesia) since 1918 under the administration of the Dutch colonial government, can be found within the articles of the Criminal Code that govern the use of the death penalty. However, the Netherlands did away with the death sentence in 1870. Instead, a literature-based approach is used employing a qualitative research method currently being used. The study's findings indicate that significant crimes and the use of the death penalty throughout the history of criminal Law are two aspects of the problem that are strongly related. The legal system reserves the death penalty for those who have committed the most severe crimes. Therefore, many believe that the death penalty is the most severe punishment.*

**Keywords:** *Death Penalty; Criminal Law; Administration of the Death Penalty*

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## A. INTRODUCTION

The death penalty is the most severe punishment; considering it is regarded as a violation of human rights, it is challenging to apply it in a rule-of-law state.<sup>4</sup> However, for someone to stop committing crimes, there must be rules or punishments that use as a deterrent and provide a sense of security to society from all forms of crime.<sup>5</sup> Human Rights (HAM) activists and advocates in Indonesia oppose the death penalty. Even the National Human Rights Commission (Komnas HAM) considers the death penalty inappropriate in Indonesia, and Indonesian human rights (HAM) activists oppose the imposition of the death penalty. Even the National Human Rights Commission (Komnas HAM) considers the death penalty inappropriate in Indonesia.<sup>6</sup> The practice of capital punishment exists in various tribes in the world.<sup>7</sup> In addition, it was included in multiple religions, including Islam.<sup>8</sup>

In Indonesia, the death penalty is still included in the Criminal Code (KUHP), and laws other than criminal Law also regulate capital punishment in criminal sanctions.<sup>9</sup> The death penalty provisions in the Criminal Code are a

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<sup>4</sup> Heriyono. 2020. *Pelaksanaan Hukuman Mati Dalam Persepektif Hak Asasi Manusia*. Indonesian Journal of Law and Policy Studies. Volume 1 No. 1 Mei. DOI: <https://doi.org/10.31000/ijlp.v1i1.2636>

<sup>5</sup> Ni Komang Ratih Kumala Dewi. 2020. *Keberadaan Pidana Mati Dalam Kitab Undang-Undang Hukum Pidana (KUHP)*. Jurnal Komunikasi Hukum (JKH) Universitas Pendidikan Ganesha. Vol. 6 No 1, Februari.

<sup>6</sup> Muhammad Hatta. 2012. *Perdebatan Hukuman Mati Di Indonesia: Suatu Kajian Perbandingan Hukum Islam Dengan Hukum Pidana Indonesia*. Jurnal Ilmu-Ilmu Keislaman MIQOT Vol. XXXVI No. 2 Juli-Desember.

<sup>7</sup> Yohanes S. Lon. 2020. *Penerapan Hukuman Mati di Indonesia dan Implikasi Pedagogisnya*. KERTHA WICAKSANA: Sarana Komunikasi Dosen dan Mahasiswa Volume 14, Nomor 1. <https://doi.org/10.22225/kw.14.1.1549.47-5>

<sup>8</sup> Ebru Aykut. 2017. *Judicial Reforms, Sharia Law, and the Death Penalty in the Late Ottoman Empire*. Journal of the Ottoman and Turkish Studies Association. Vol. 4 No. 1. DOI: <https://doi.org/10.2979/jotturstuass.4.1.02>. See: Blain Auer. 2014. *Dial M for Murder: A case of passion killing, criminal evidence and sultan power in Medieval India*. Asiatische Studien - Études Asiatiques. Vol. 68, No. 3. DOI: <https://doi.org/10.5167/uzh-110392>. Also see: Arzoo Osanloo. 2012. *When Blood Has Spilled: Gender, Honor, and Compensation in Iranian Criminal Sanctioning*. PoLAR Political and Legal Anthropology Review. Vol. 35, No. 2. DOI: <https://doi.org/10.1111/j.1555-2934.2012.01205.x>. ALFRED B. HEILBRUN, Allison M. Foster, JILL GOLDEN. 1989. *The Death Sentence in Georgia, 1974-1987: Criminal Justice or Racial Injustice?* Criminal Justice and Behavior. Vol. 16 No. 2:139-154. DOI: <https://doi.org/10.1177/0093854889016002001>. Nurul Makrifah. 2021. *Hak Asasi Manusia Dalam Pandangan Islam*. At-Turost: Journal of Islamic Studies. Vol. 8. No. 1. DOI: <https://doi.org/10.52491/at.v8i1.52>

<sup>9</sup> Abdul Jalil Salam, Zuhlul Pasha Karim. 2021. *Death Penalty in Indonesia: Revisiting the Debate Between the Retentionist and the Abolitionist*. Lentera Hukum. Vol. 8, No. 1: 115. DOI: <https://doi.org/10.19184/ejrh.v8i1.20138>

translation of *Wetboek van Strafrecht voor Nederlandsch-Indie*, which the Dutch colonial government imposed in the Dutch East Indies (Indonesia) in 1918. The Netherlands abolished the death penalty in 1870. However, after Indonesia became independent, Indonesia legalized Article 2 of the Transitional Regulations of the 1945 Constitution, and the death penalty are still maintained today, even in the draft of new criminal Law. Still recognized, although not listed as one of the crimes in the leading criminal group, but classified as a specific crime, always substitute.<sup>10</sup>

The goal of criminal Law is to deter crime and unlawful activities. The history of criminal Law reveals attitudes and beliefs that the death sentence was the most effective treatment for significant crimes in the past. In the history of criminal Law, crime and the death penalty are two closely associated components. Indonesia, which is now experiencing criminal law reform, is likewise inextricably linked to the subject of the death sentence. This will have repercussions for the long-desired implementation of the new Indonesian criminal code.

Indonesia still applies the death penalty<sup>11</sup> because the death penalty is considered a means to protect the public interest of society, which has been threatened by crimes and criminals and is irreparable.<sup>12</sup> With the development of modern criminal Law, criminal Law is formulated to protect the interests of society and the interests of individuals who are victims of crime and criminals.

Conceptually, in Indonesia, punishment is the last resort in the framework of social rehabilitation and reconciliation after a crime has occurred. Sudikno Mertokusumo also said that criminal sanctions are *Ultimum Remidium* in nature, meaning that criminal sanctions are used when other sanctions are no longer valid. "Criminal Law" regulates punishment, and Article 10 regulates the types of crimes. The most severe punishment is considered the death penalty.<sup>13</sup>

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<sup>10</sup> See: Titin Nurfatlah; Amiruddin Amiruddin; Ufran Ufran. 2020. The Shift Paradigm of the Death Penalty in the Draft Criminal Code. *Unram Law Review*. Vol. 4, No. 1. DOI: <http://dx.doi.org/10.29303/ulrev.v4i1.111>

<sup>11</sup> Muhammad Mustain. 2016. *Eksistensi Penerapan Hukuman Mati Di Indonesia*. *Al-Ahkam Jurnal Ilmu Syariah dan Hukum*. Vol 1 No. 1. DOI: <http://dx.doi.org/10.22515/al-ahkam.v1i1.46>

<sup>12</sup> Adri Noor Rachman, *Hukuman Mati di Indonesia (Death Penalty in Indonesia)* (February 1, 2013). DOI: <http://dx.doi.org/10.2139/ssrn.2407875>

<sup>13</sup> Teguh Prasetyo, 2011, *Hukum Pidana*, Cetakan Kedua, Raja Grafindo Persada, Jakarta, h.117.

Each constitution guarantees the protection of human rights in its contents.<sup>14</sup> As the basis of the state, Pancasila mandates the protection of human rights as a guarantee of a just and civilized sense of humanity.<sup>15</sup> Therefore, the Second Amendment to the 1945 Constitution stipulates that everyone has the right to live and defend their own life.<sup>16</sup> The State of Indonesia recognizes the existence of natural Law, and the right to life is inherent and cannot be revoked by anyone. Some people think that laws that still use the death penalty as a form of punishment are unconstitutional.<sup>17</sup> As a result, many political parties have called for changes to laws that still apply the death penalty. According to Amnesty International's records, as of 2022, 111 countries have opposed the execution of the death penalty. The number of countries still maintaining the death penalty is relatively small, namely 84 countries. This shows that the death penalty is no longer humane and has nothing to do with the development of global Law.

In many debates, the death penalty issue is influenced by the context of international Law, philosophical perspectives that develop, and social changes that occur. Discussing the imposition of capital punishment involves three interrelated aspects: 1) The form of government adopted by the constitution or the highest Law. 2) The dynamics of society, politics and international Law affect social relations. 3) Relevance of old values in more advanced times.<sup>18</sup> In the context of the rule of Law in Indonesia, legal certainty is one of the most

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<sup>14</sup> Muhammad Ridzki Kharisma. 2021. *Pengembangan muatan materi konstitusi tentang hak asasi manusia: perbandingan indonesia, singapura, dan republik rakyat cina*. Jurnal Poros Hukum Padjadjaran. Vol. 2, No. 2. DOI: <https://doi.org/10.23920/jphp.v2i2.263>

<sup>15</sup> Bobi Aswandi, Kholis Roisah. 2019. *Negara hukum dan demokrasi pancasila dalam kaitannya dengan hak asasi manusia (HAM)*. Jurnal Pembangunan Hukum Indonesia. Vol. 1, No. 1: 128. DOI: <https://doi.org/10.14710/jphi.v1i1.128-145>

<sup>16</sup> See: Dany Try Utama Hutabarat, Ade Wahyuni, Dela Amalia Vada, Eko Anuary Sitorus, Rizka Efrianti Nasution, Yuni Widia Astuti. 2022. *Memahami Dan Mendeskripsikan Hubungan Negara Hukum Dengan HAM*. Journal of Humanities, Social Sciences and Business (JHSSB). Volume 1, Issue 2. DOI: <https://doi.org/10.55047/jhssb.v1i2.69>. Also see: Sri Hastuti Puspitasari, (2016). *Paradigma Hubungan antara Kekuasaan Negara dan Perlindungan HAM Di Indonesia*. Jurnal Hukum IUS QUIA IUSTUM, 10(23), 98–110. <https://doi.org/10.20885/iustum.vol10.iss23.art6>

<sup>17</sup> Herliana Heltaji. 2021. *Dilema Hak Asasi Manusia dan Hukum Mati Dalam Konstitusi Indonesia*. Pamulang Law Review, Vol. 4 Issue 2. DOI: <https://doi.org/10.32493/palrev.v4i2.17747>. Wiwik Afifah. 2018. *Hukum dan konstitusi: perlindungan hukum atas diskriminasi pada hak asasi perempuan di dalam konstitusi*. DiH Jurnal Ilmu Hukum. Vol. 13, No. 26. Agustus. DOI: <https://doi.org/10.30996/dih.v0i0.1583>

<sup>18</sup> Nelvitia Purba, Ali Mukti Tanjung, Sri Sulistyawati, Rudy Pramono and Agus Purwanto. 2020. *Death Penalty and Human Rights in Indonesia*. International Journal of Criminology and Sociology. Vol. 9:1356-1362. DOI: <https://doi.org/10.6000/1929-4409.2020.09.156>

important things. Laws that meet constitutional, legislative and social requirements.

## B. METHODS

The authors used qualitative and normative research methods in this study. Using a documentary approach, this study focuses on written sources about the rule of Law in Indonesia.<sup>19</sup> Inter-library checks were conducted to maintain the accuracy of content evaluation and prevent misinformation in data analysis. In addition, careful and repeated reading of the literature, namely the study of cases relevant to the legal problems at hand, and the application of statutory methods by examining all the provisions in the laws and regulations pertinent to the issues at hand. Two types of data sources were used, primary data obtained from respondents and informants and secondary data obtained from the literature. Data collection techniques are used to review relevant legal materials.

## C. RESULTS AND DISCUSSION

### 1. Death Penalty Rules and Procedures in Indonesia

The United Nations (UN) is an international body that categorically rejects the death penalty for all criminals, including those who have committed genocide, crimes against humanity or war crimes. This is the most severe category of crimes under international Law. There are four human rights instruments (HAM) at the international level, one international and three regional, which specifically regulate the abolition of the death penalty. The United Nations has published a guide called Protection Guarantees for Death Row Inmates. These guidelines set limitations on the use of the death penalty.<sup>20</sup>

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<sup>19</sup> Sunggono, Bambang. 1997. *Metodologi Penelitian Hukum*. Jakarta: Raja Grafindo Persada. See also: Soekanto, Soerjono. 2001. *Pengantar Penelitian Hukum*. Jakarta: UI Press.

<sup>20</sup> Resolusi Dewan Ekonomi Sosial PBB No. 50 Tahun 1984, disahkan pada tanggal 25 Mei 1984. Buku Panduan ini disebut Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. See: Nelvitia Purba, Ali Mukti Tanjung, Sri Sulistyawati, Rudy Pramono and Agus Purwanto. 2020. *Death Penalty and Human Rights in Indonesia*. International Journal of Criminology and Sociology. Vol. 9:1356-1362. DOI: <https://doi.org/10.6000/1929-4409.2020.09.156>

The Criminal Code contains provisions regarding the death penalty, including:<sup>21</sup>

- 1). Article 104 of the Criminal Code, anyone who wants to declare treason (treason) to usurp and overthrow the President or vice president shall be punished with the death penalty or life imprisonment or a maximum imprisonment of 20 years.
- 2). Article 124 (3) of the Criminal Code stipulates that anyone who destroys a place for communication equipment or weapons of war or hands it over to the enemy is threatened with the death penalty. In addition, rioters and rebels in the armed forces were also sentenced to death.
- 3). Article 140, paragraph 3 of the Criminal Code, punishment for premeditated murder. The most severe punishment is the death penalty. In addition, he can also be sentenced to life imprisonment.
- 4). Article 365, paragraph 4 of the Criminal Code contains severe punishment for a person or group who commits theft accompanied by violence until the victim's death. Severe punishment here can reach the death penalty.
- 5). Article 444 of the Criminal Code stipulates that anyone who commits piracy at sea, along the beach, or in a river and causes the victim's death is sentenced to death.
- 6). Article 124 bis of the Criminal Code severely punishes people or groups who cause chaos and rebellion against the National Defense institutions.
- 7) Article 368, paragraph (2) of the Criminal Code, provides severe punishment to persons or groups carrying out threats of violence, coercion, and theft.

The rules regarding the death penalty, which are regulated outside the Criminal Code, are as follows: 1). Law Number 5 of 1997 concerning Psychotropics Article 59 paragraph (2); 2). Article 36 Law Number 26 of 2000 concerning Human Rights Courts; 3). Article 2 paragraph (2) of Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes; 4). Article 6 of Law Number 15 of 2003 concerning Stipulation of Government Regulations instead of Law Number 1 of 2002 concerning Eradication of Criminal Acts of Terrorism; 5). Law Number 35 of 2009 concerning Narcotics.

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<sup>21</sup> Moeljatno, 2021. KUHP (Kitab Undang-Undang Hukum Pidana). Jakarta, Bumi Aksara. See also: Soesilo. 1979. Pokok-Pokok Hukum Pidana Peraturan Umum dan Delik Khusus. Bogor, Politela.

Several criminal law specialists recognize the death sentence's existence for various reasons. One of them, Rambonnet, stated that state officials were responsible for ensuring security and order. To maintain Law and order, criminal acts are necessary. Therefore, the state has the authority to punish or pay back criminals. The authorities' power to impose the death penalty follows logically from their right to retaliate with punishment. If a criminal act disrupts only a portion of the order, good relations can be restored by removing the criminal from a part of the public good. In general, this can be accomplished by fighting for independence and property rights.<sup>22</sup> But if criminality doesn't only disrupt the order but rather abandons and destroys the entire system, then the only way for the imperilled order to recover is if the offender is permanently barred from contributing to the public good. Killing criminals would be necessary to eliminate their contribution to general well-being. Furthermore, Rasyd Khairani cites an assertion by De Savorin Lohman that criminal Law is, at its core, a rule of retaliation.<sup>23</sup>

A single article of the Criminal Code governs the execution of the death penalty in Indonesia. It is stated as follows in Article 11: Shooting to death is the method used to carry out a court-ordered death sentence in either a civilian or military court. This is required by the Pnps Law No. 2 of 1964.<sup>24</sup>

Before the passage of Law Number 2 (Pnps) of 1964, an executioner carried out capital punishment at the gallows by tightening a noose around the convict's neck, dropping the board they were standing on, and letting the rope fall. However, since the Dutch East Indies administration, Article 11 of the Criminal Code has mandated that the method of execution is by hanging, although this has not always been the case. Satochid Kartanegara stated, "In the days of the Dutch East Indies, it was stipulated that if a certain executioner could not carry out the death penalty, the sentence must be carried out by shooting in front of the firing squad". The implementation of capital punishment is based on Law Number 2/Pnps/1964 concerning "Methods for the Implementation of Death Penalties handed down by Courts in the Public and Military Environments". Article 1 of Law Number 2/Pnps/1964 stipulates that without prejudice to the provisions of the existing criminal procedural Law

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<sup>22</sup> J.E. Saahetapy, 1982. *Suatu Situasi Khusus Mengenai Ancaman Pidana Mati Terhadap Pembunuhan Berencana*, CV Rajawali, hal. 347.

<sup>23</sup> J.E. Saahetapy, 1982. *Suatu Situasi Khusus Mengenai Ancaman Pidana Mati Terhadap Pembunuhan Berencana*, CV Rajawali, hal. 34

<sup>24</sup> Moh Anwar. 2015. *Tinjauan Yuridis Tentang Pidana Mati Menurut Undang - Undang Nomor 2/Pnps/Tahun 1964 Tentang Pelaksanaan Pidana Mati*. Jurnal Jendela Hukum Vol. 4. DOI: <https://doi.org/10.24929/fh.v4i0.149>

regarding the implementation of court decisions, the execution of capital punishment imposed by courts in the general court environment or military courts is carried out by being shot to death.

In Indonesia, the implementation of capital punishment is carried out based on Presidential Decree Number 2 of 1964, which is stated as one of the Presidential Decrees that follows the people's conscience. Therefore, it remains valid and becomes Law under the name Law Number 2/PNPS/1964.<sup>25</sup> Here the code "PNPS" is used, the purpose of which is to differentiate it from Law Number 2 of 1964 because it is possible that in 1964 there was already Law number 2.<sup>26</sup>

The *Wetboek van Strafrecht*, ratified as the Criminal Code (KUHP) by the Dutch East Indies Government on January 1, 1918, is the source of the potential application of the death sentence in Indonesia. The enactment of the Criminal Code was based on the provisions of Article I of the Transitional Rules of the 1945 Constitution (now known as the 1945 Constitution of the Republic of Indonesia), which states that all existing laws and regulations are still valid as long as new ones have not been enacted according to the 1945 Constitution of the Republic of Indonesia and strengthened by Law number 1 of 1946 concerning the application of *Wetboek van Strafrecht* to become the Criminal Code. This provision states that all existing laws and regulations are still valid.<sup>27</sup>

Law Number 5 of 1969 concerning Procedures for Executing Death Penalties Handed Down by Courts in the General and Military Courts. The Law states that the execution of convicts on death row are executed by being shot to death. Because before, there was never any arrangement regarding how the execution should be carried out. After the 1998 reform, courts in Indonesia still impose death sentences. The death penalty is punishable for several crimes. This is because various statutory regulations still contain capital punishment, which is the pre-reform product but is still valid post-reform.

Law Number 2 of 1964, also known as Presidential Decree Number 2 of 1964, which was stipulated into Law by Law Number 5 of 1969, details the processes that must be followed to execute the death penalty. Law Number 2 Number 1964 controls all procedures that must be carried out when the

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<sup>25</sup> Satochid Kartanegara, *Hukum Pidana*, Balai Lektur Mahasiswa, Tanpa Tahun, hal. 346.

<sup>26</sup> Efryan R. T. Jacob. 2017. *Pelaksanaan Pidana Mati Menurut Undang-Undang Nomor 2/Pnps/1964*. Lex crimen. Vol. VI. No. 1/ jan- feb.

<sup>27</sup> Undang-Undang Nomor 1 tahun 1946 tentang Peraturan Hukum Pidana, Lembaran-Negara Tahun 1958 Nomor 127.



criminal is sentenced by a Court, whether a District Court or a Military Court. These procedures must be followed from the time the convict is sentenced.<sup>28</sup>

Based on Law Number 2 of 1964, before the execution of capital punishment is carried out, death convicts will go through the following:

1. It was implemented in the court's jurisdiction that passed the decision in the first instance.
2. Death sentences imposed on several people in one decision are carried out simultaneously at the same time and place unless circumstances prevent such execution (Article 2).
3. The Head of the Regional Police (KAPOLDA) is responsible for its implementation as well as for determining the time and place for the execution of capital punishment.
4. If the regional police chief is engaged in selecting the time and location, the respective regional police chiefs will negotiate.
5. The regional police chief or an officer appointed by him attends the implementation of the death penalty together with the High Prosecutor or the Prosecutor who is responsible for its performance.
6. Awaiting the execution of the death penalty, the convict is detained in prison or another place specifically appointed by the High Prosecutor.
7. 3 X 24 hours before the execution of the death penalty, the High Prosecutor informs the convict that the death penalty will be carried out.
8. If the convict wants to say something, his statement or message is received by the High Prosecutor/Prosecutor.
9. The death penalty can only be carried out 40 days after the child is born if the convict is pregnant.
10. The defender of the convict, at his request or the convict's request, may attend the execution of the death penalty.
11. Death sentences are carried out not in public and in the simplest way possible unless otherwise determined by the President.
12. For the execution of capital punishment, the Regional Police Chief in charge formed a shooting squad consisting of a non-commissioned officer (Brigadier-now) and 12 enlisted men under an officer's leadership, all from the Mobile Brigade (Brimob POLRI).

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<sup>28</sup> UU Nomor 2 tahun 1964, yaitu Penpres Nomor 2 Tahun 1964 (LN 1964 Nomor 38) yang ditetapkan menjadi undang-undang dengan Undang-Undang Nomor 5 Tahun 1969. Undang – Undang Nomor 2 Nomor 1964.

13. Specifically, the firing squad does not use organic weapons to carry out this task.
14. The shooting team was under the orders of the High Prosecutor/prosecutor until the execution of the death penalty was completed.
15. The convict is taken to the place of execution of the crime with sufficient police escort.
16. If requested, the convict may be accompanied by a spiritual nurse.
17. The convict is dressed and orderly.
18. Upon arrival at the place of execution of the death penalty, the Guard Commander covers the convict's eyes with a piece of cloth unless the convict does not want it.
19. The convict may serve his sentence standing, sitting or kneeling.
20. If deemed necessary, the High Prosecutor/prosecutor may order that the convict be bound by his hands and feet or be tied to a back specially made for this purpose.
21. After the convict is ready at the place where he will carry out the death penalty, the shooting team, with their weapons loaded, goes to the position determined by the Prosecutor.
22. The distance between the point where the convict is and where the shooting team is located cannot exceed 10 meters and cannot be less than 5 meters.
23. When all the preparations have been completed, the Prosecutor will order the execution of the death penalty to begin.
24. Immediately the convict's companions distanced themselves from the convict.
25. Using his sword as a signal, the Shooting Team Commander gave the order to be ready; then, by moving his sword up, he ordered his Team to aim at the convict's heart, and by pointing his sword down quickly, he gave the order to fire.
26. Suppose the convict still shows signs after the shooting that he is not dead. In that case, the commander of the shooting team immediately orders the non-commissioned officer to fire the finishing shot by pressing the gun barrel against the convict's head just above his ear.
27. To obtain certainty about the death of a convict, you can ask for the help of a doctor.
28. For the burial of the convict, it is handed over to his family or friends of the convict, unless based on the public interest, the Prosecutor decides otherwise.

29. In this last case, and if there is no possibility of carrying out a funeral by his family or friends of the convict, the burial will be determined by the religion/belief of the convict.

The exclusion of capital punishment from the position of principal punishment is based on the consideration that in terms of the purposes of punishment, capital punishment is essentially not the primary means of regulating, ordering and improving individuals/society. The death penalty is only the last means and an exception to protect the community.<sup>29</sup> Such considerations are also supported by several research results which have concluded that the death penalty is necessary to be maintained as a means to overcome and protect society from very dangerous criminals.

## 2. Causes of Capital Punishment in Indonesia

The death penalty is defined as a form of misery or torture that causes suffering to humans and violates norms that are contrary to human life, where the death penalty is closely related to crime and punishment. The death penalty is the most severe punishment known in the criminal system, both in Indonesia and other countries worldwide.<sup>30</sup> But then, the death penalty has created problems that are pros and cons according to their respective arguments. Even now, the death penalty remains an unresolved issue and has always been a hot topic for discussion. Moreover, capital punishment can sometimes become a political issue across national borders, where we often hear of protests from one country against implementing capital punishment in other countries.

The Constitution of the Republic of Indonesia, through Article 28A and Article 28I paragraph (1), states emphatically that the right to life is a Human Right that cannot be reduced under any circumstances (non-derogable rights). Similarly, Article 6 of the 1966 International Covenant on Civil and Political Rights (ICCPR), as ratified through Law Number 12 of 2005, states that the right to life is inherent in every individual and is a right that must be protected. Therefore, the ICCPR calls on countries that have not abolished the death penalty to limit the use of the death penalty only to the "most serious crimes". Crimes that can be sentenced to death under the protocol are not civil crimes,

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<sup>29</sup> Barda Nawawi, 2005. *Pembaharuan Hukum Pidana, Dalam Prespektif Kajian Perbandingan*, Citra Aditia Bakti.

<sup>30</sup> Wirogioto, Ali Johardi. (2021). *Legal Certainty on The Implementation of Death Criminal Decisions that have Permanent Law Power in Indonesia (A Review of the Death Criminal Decision on Narcotics in 2014-2018)*. RA Journal of Applied Research, 7(11), 2616-2626. DOI: <https://doi.org/10.47191/rajar/v7i11.01>

such as narcotics or murder. Unfortunately, even though it has ratified the ICCPR, Indonesia still has not ratified either the optional or the second optional protocol on the ICCPR.

Although the death penalty in Indonesia is not mandatory, it is still one of the punishments provided for by Law (*de jure*), so judges can choose to impose it. Under the current Criminal Code, capital punishment can be aimed at perpetrators of narcotics crimes, premeditated murder, terrorism, and crimes against state security. In practice, the death penalty has been imposed on people involved in narcotics crimes and premeditated murder.

The provisions of the Law in Indonesia open up space for judges to impose capital punishment on certain crimes. Unfortunately, Indonesia does not yet have guidelines (safeguards) that specifically ensure the protection of the rights of defendants who receive the death penalty. However, reflecting on existing best practices, several countries have implemented guidelines/safeguards for imposing the death penalty. There are specific limitations that have been stated in imposing capital punishment; for example, it must be accompanied by aggravating circumstances and no mitigating circumstances; examination of allegations of torture (torture), sadistic treatment (sadism), or cruel motives (motive evincing 'total depravity and meanness'); not targeting victims who are vulnerable groups, such as children, the elderly or the elderly, pregnant women; accompanied by planning (premeditation or significant planning), and so forth.

Article 28 I, paragraph (1) of the 1945 Constitution,<sup>31</sup> states that the right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as an individual before the Law, and the right not to be prosecuted based on a law that applies retroactively are human rights which cannot be reduced under any circumstances.<sup>32</sup> The article makes it clear that the convict still has rights before the Law. Usually, before convicts are executed, their rights must be fulfilled because this type of punishment is the most severe. After all, it is directly related to life. Therefore, against legal decisions that have

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<sup>31</sup> Andi Muhammad Asrun. 2016. *Hak Asasi Manusia Dalam Kerangka Negara Hukum: Catatan Perjuangan di Mahkamah Konstitusi*. Jurnal Cita Hukum. Vol. 4 No. 1. DOI: <https://doi.org/10.15408/jch.v4i1.3200>

<sup>32</sup> Abd Muni. 2020. *Hak Asasi Manusia Dalam Konstitusi Indonesia*. Al Adalah. Vol 23 No. 1. DOI: <https://doi.org/10.35719/aladalah.v23i1.27>. See: Bagir Manan, Susi Dwi Harijanti. 2017. *Konstitusi dan Hak Asasi Manusia*. PADJADJARAN: Jurnal Ilmu Hukum (Journal of Law), Vol. 3, No. 3: 448-467. DOI: <https://doi.org/10.22304/pjih.v3.n3.a1>

permanent legal force, the convict has the right to submit ordinary legal remedies and judicial review (PK) and compassion, the last legal remedies that can be forwarded to the President. Clemency is the prerogative of the President, but if the previous legal treatment is rejected, then the death penalty can be carried out except on the condition that the convict is pregnant. The death penalty can only be carried out after forty days after the convict gives birth to his child. This is regulated in PNPS No. 2 of 1964 on Article 7.

Some of the factors above are supporting elements for the execution of capital punishment. In addition to legal remedies, other supporting factors, such as existing facilities and infrastructure, are also needed to implement capital punishment. Government policies can also be a supporting factor in implementing capital punishment. This implementation is a firm attitude by the government towards narcotics crimes which are categorized as severe crimes. Therefore, the policy of the Indonesian government in combating drug trafficking in Indonesian territory is essential.<sup>33</sup>

Although the death penalty is one of the government's policies in combating narcotics crimes, the death penalty is often a matter of debate in various circles, and there are also obstacles in carrying out capital punishment. Only ethics can provide sound and bad judgments determined by morals on the death penalty policy, so morals choose good or bad. These two things will then become a knife in examining norms for human rights (HAM) and whether they need to be implemented or abandoned.<sup>34</sup>

Several inhibiting factors influence the implementation of capital punishment, including:

1. The provisions of Article 264 Paragraph (3) of the Criminal Procedure Code, which do not regulate the timeframe for requests for review of convicts, tend to drag on time by not immediately submitting a review.
2. Issuance of Constitutional Court Decision No. 34/PUU-IX/2013, which allows the application for review to be submitted more than once, will slow down the implementation of the death penalty.
3. The issuance of the decision of the Constitutional Court Number 107/PUU-XIII/2015 in which the decision removed the provision for the period for filing a request for clemency, namely one (1) year since the

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<sup>33</sup> Bambang Hariyono, 2009. *Kebijakan Formulasi Sanksi Pidana Terhadap Pelaku Tindak Pidana Narkoba di Indonesia*. Fakultas Hukum Universitas Diponegoro, Semarang, h.25.

<sup>34</sup> Anugrah Asmarani. 2022. *Etika Politik Dalam Pemenuhan Hak Asasi Manusia*. OSF Preprints. December 13. DOI: <https://doi.org/10.31219/osf.io/2nckd>

decision has permanent legal force. This decision can often be misused to hinder execution utilizing the convict asking for clemency just before the execution of the death penalty.

In the Criminal Code, Indonesia limits the possibility of imposing the death penalty on several serious crimes. What is meant by severe crimes are:<sup>35</sup>

- a) Usurp or remove the President or vice president from office. Article 104 of the Criminal Code states that anyone who declares treason or treason with the intent to usurp or overthrow the president-vice President is subject to the death penalty or life in prison.
- b) Destroying an arsenal According to Article 124, paragraph 3 of the Criminal Code, anyone who beats an arsenal and hands it over to the enemy will be sentenced to death.
- c) Committing premeditated murder According to Article 140, paragraph 3 of the Criminal Code, for someone who commits premeditated murder, the heaviest sentence is the death penalty. In addition, he could also be sentenced to life imprisonment.
- d) Pirates. According to Article 444 of the Criminal Code, people who plunder at sea, coasts and rivers and cause death to victims will be sentenced to death.
- e) Give a serious threat. According to Article 368, paragraph 2 of the Criminal Code, a person or group who commits threats of violence, coercion, or even theft, will be sentenced to death.
- f) Drug dealers Law Number 35 of 2009 concerning Narcotics can ensnare drug dealers/dealers by giving the most severe punishment, namely the death penalty.
- g) Terrorism. Law Number 5 of 2018 concerning Amendments to Law Number 15 of 2003 concerning Stipulation of Government Regulations instead of Law Number 1 of 2002 concerning the Eradication of Criminal Acts of Terrorism to Become Law. The death penalty for terrorism crimes is regulated in article 14 of Law Number 5 of 2018.

In addition to crimes regulated in the Criminal Code, the death penalty is also held in criminal law laws outside the Criminal Code, one of which is Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning the Eradication of Corruption Crimes. However, the weighting of acts or criminal acts of corruption is only for enriching oneself, another person, or a

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<sup>35</sup> Moeljatno, 2021. KUHP (Kitab Undang-Undang Hukum Pidana). Jakarta, Bumi Aksara. See also: Soesilo. 1979. Pokok-Pokok Hukum Pidana Peraturan Umum dan Delik Khusus. Bogor, Politeia.

corporation (Article 2 of Law Number 31 of 1999) which carries the death penalty. Meanwhile, corruption can be categorized into seven types of criminal acts:<sup>36</sup> 1). State financial losses; 2). Bribes; 3). embezzlement in office; 4). Extortion; 5). fraudulent acts; 6). Conflict of interest in procurement; 7). Gratification.

Death penalty in corruption cases is only aimed at the type of criminal act of loss to state finances. This is also applied if there is an objection to the provision regarding capital punishment in Law Number 31 of 1999, regulated in Article 2, paragraphs (1) and (2). The provisions of Article 2 paragraph (1) stipulate that "Anyone who unlawfully commits an act of enriching himself or another person or a corporation that can harm the state's finances or the country's economy, shall be punished with life imprisonment or imprisonment for a minimum of four years and a maximum of 20 (twenty) years and a fine of at least IDR 200,000,000.0 (two hundred million rupiahs) and a maximum of IDR 1,000,000,000.00 (one billion rupiahs)". Whereas paragraph (2) stipulates that "If the criminal act of corruption as referred to in paragraph (1) is committed under certain circumstances, capital punishment can be imposed.

#### D. CONCLUSIONS

In light of the evolution of modern criminal law, which formulates punishments to protect society and the interests of individuals who offenders have victimized, the death penalty is a means of protecting social interests that are threatened by crimes and criminals who are no longer capable of being rehabilitated. Regarding rehabilitation and social reconciliation following the commission of a crime, the concept of punishment in Indonesia is seen as an absolute last resort. This is based on the nature of the term itself. It is also possible to refer to criminal sanctions as the *Ultimum Remidium*, which signifies that these punishments are implemented after other sanctions are no longer effective. The Criminal Code contains the rules that govern the application of punishment. For certain offenses, which can no longer be expected to alter, the threat of the death sentence is believed to be the most severe kind of punishment that can be expected to be meted out.

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<sup>36</sup> Tim Penyusun Komisi Pemberantasan Korupsi. 2006. *Memahami untuk membasmi buku panduan untuk memahami tindak pidana korupsi*. Jakarta, Komisi Pemberantasan Korupsi (KPK).

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