



THE RIGHT TO LIFE BASED ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND ITS APPLICATION IN INDONESIAN NATIONAL LAW

Abdul Kadir Zaylani

University of Mataram
email : Velaingzr@gmail.com

Muh. Risnain

University of Mataram
email: Risnain82@gmail.com

Zunnuraeni

University of Mataram
email : Zunnuraeni17@gmail.com

Abstract

This study aims to analyze and understand the protection of the right to life under the International Covenant on Civil and Political Rights (ICCPR) and its application in Indonesia. It also seeks to evaluate whether its implementation in Indonesian national law, particularly concerning terrorism, narcotics, and corruption crimes, aligns with the mandates of the ICCPR. The research methodology used is normative legal research. The findings indicate that the right to life as regulated by the ICCPR and its implementation in Indonesia are consistent and non-contradictory, including the application of the death penalty for terrorism, narcotics, and corruption crimes. This is because the ICCPR restricts the death penalty to the most serious crimes, and these three crimes fall into that category.

Keywords: *Death Penalty, International Covenant on Civil and Political Rights (ICCPR), Right to Life*

A. INTRODUCTION

Every human being has basic rights, this is the right to life, the right to life means the right to live a good life, free from threats, torture or discrimination. Previously, the right to life could also be called natural right (Natural Law) and *ius naturale* from the Romans. The right to life also includes the right to health, education and a decent environment. In international law we know the Universal Declaration of Human Rights (UDHR), namely in article 3 which reads:

“Everyone has the right to life, liberty and security of person”

This regulation confirms that international law has guaranteed the right to life that all individuals have from birth.

Indonesia as a legal state has an obligation to defend human rights as a gift from the Almighty God, this is stated in article 1 number 1 of law number 39 of 1999 concerning human rights which explains that, as a creature of the Almighty God and is a gift which needs to be respected, upheld and protected by the state, regulations, government and all of us for the honor and safety of humanity.

In this regard, Indonesia has ratified several UN conventions on human rights, including:¹

1. (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). It has been ratified by Republic of Indonesia in Law Number 5 of 1998.
2. International Covenant on Civil and Political Rights). It has been ratified by Republic of Indonesia in Law Number 11 of 2005

Indonesia recognizes the protection of human rights in the constitution, we can see this in article 28 A of the 1945 Constitution which reads: "Every person has the right to live and the right to defend his life and living." Meanwhile, article 28 I paragraph 4 of the 1945 Constitution reads: "The protection, promotion, enforcement and fulfillment of human rights is the responsibility of the state, especially the government." Therefore, it can be concluded that the responsibility for protecting human rights for every individual is the responsibility of the state. Protection of Human Rights was then reaffirmed in various regulations such as Law No. 39 of 1999 concerning Human Rights.

The right to life is an absolute and most basic human right compared to other human rights, because without the right to life there are no other human rights. As stated in article 28 I paragraph (1) of the 1945 Constitution which reads:

"The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on the basis of laws that apply retroactively, are human rights that cannot be reduced under any circumstances."

This explains that human rights, in particular the right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on the basis of retroactive laws. This has been guaranteed by the state through the constitution, namely in article 28 I paragraph 4 which reads:

"Protection, promotion, enforcement and fulfillment of human rights is the responsibility of the state, especially the government."

In fact, there are pros and cons related to the right to life, especially regarding the implementation of the death penalty as a sanction. Indonesia itself in this case still applies the death penalty. Even though Indonesia has ratified the International Covenant on Civil and Political Rights through UURI Number 11 of 2005 which is a shield for limiting the application of the death penalty. This is because this regulation only allows the imposition of death penalty sanctions in countries that still apply the death penalty only if a crime falls into the most serious crime category. We can see this in the International Covenant on Civil and Political Rights article 6 paragraph 2 concerning the right to life which reads:

"In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty

1 <https://tirto.id/apa-saja-instrumen-ham-internasional-yang-diratifikasi-di-indonesia-g1AU> (diakses pada 2 November 2023)

can only be carried out pursuant to a final judgement rendered by a competent court.”²

The ICCPR no longer provides additional interpretations of what constitutes the definition of the most serious crime. However, the International Human Rights Committee stated that the translation of The most serious crime must be in line with international regulations, due to the fact that a broad interpretation of The most serious crime would undermine the universal parameters regarding the death penalty proposed by the ICCPR formulators and could create human rights regulations. humans are meaningless.³

Indonesia, as a country that has ratified the ICCPR, is obliged to comply with the provisions of the ICCPR, including Article 6 paragraph (2), so that the imposition of death penalty sanctions should only be imposed on criminal acts that fall into the most serious crime category. Therefore, it is necessary to carry out an analysis to find out whether crimes that are punishable by death in Indonesian national law fall into the most serious crime category.

B. METHODS

In this research the author uses normative legal research methods. Normative legal research is also called doctrinal legal research. This research conceptualizes regulations or laws that are used as rules or norms for people’s behavior regarding what is considered right or appropriate. In this research, researchers analyze legal materials by carrying out interpretations or legal studies to examine and examine the legal materials obtained, so that they can answer the problem formulation in this research. In this case the International Covenant on Civil and Political (ICCPR). The author also uses the Conceptual Approach method, the International Agreement approach, and the Legislative approach.

C. ANALYSIS AND DISCUSSION

1. Protection of the right to life based on International Convention on Civil and Political Right (ICCPR)

In the ICCPR there is an article that regulates the right to life, namely in article 6 where the points are as follows:

a. Prohibition of arbitrary taking of life

We can find this in article 6 paragraph (1) which reads:

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

In this case we can find that the right to life is protected by law and cannot be taken away arbitrarily by society or the government without valid laws and courts, or a law cannot come into force before its promulgation. This has been regulated in article 1 paragraph (1) of the Criminal Code or the principle of legality which reads:

“An act cannot be punished, except based on the strength of existing criminal law provi-

² General Assembly resolution 2200A (XXI), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>, diakses pada 2 November 2023.

³ U.N. Human Rights Council: 2007: 40, U.N. Doc. A/HRC/4/20

sions”

Therefore, there is no problem for the Indonesian state to ratify and sign this convention, because it is in line with the applicable law. In addition, article 28 paragraph (1) of the Constitution regulates that a person may not be punished by a law that applies retroactively or impose sanctions without the law/law being made later in accordance with the words of article 1 paragraph (1) of the Criminal Code mentioned above.

b. Convicted of the most serious crimes (The most Serious Crime)

The death penalty is again limited in article 6 paragraph (2) of the ICCPR which reads:

“In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.”

It does regulate that the death penalty may be imposed but is limited to acts that fall into the category of the most serious crime, but the International Convention on Civil and Political Rights does not limit and explain what the Most Serious Crime is.

c. Not contradictory with the Genocide Convention

In article 6 paragraph 3 which reads:

“When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.”

In this paragraph it is explained that if a crime of taking a life that occurs falls into the category of Genocide then countries that are members of this convention may not reduce any obligations borne by the defendant based on the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. This is also confirmed in article 6 paragraph (2) of the ICCPR :

“In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.”

What is meant is that decisions regarding the death penalty may only be imposed on the most serious crimes and do not conflict with the crime of genocide, because here it can be confirmed that the crime of genocide is the most serious crime, therefore this must not conflict with the Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide.

d. Based on an authorized court decision

In article 6 paragraph 2 there is an element that all provisions or sanctions must be imposed by an authorized court as follows:

“In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.”

Indonesia in the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia) emphasizes that Indonesia is a State of Law. One of the important principles of the rule of law is the guarantee of the independent administration of judicial power, free from the influence of other powers to administer justice to uphold law and justice. It is also emphasized in Article 24 Paragraph (1) of the 1945 Constitution of the Republic of Indonesia that the judicial power is an independent power to administer justice to uphold law and justice.

This is in sync with the ICCPR, especially in the element This penalty can only be carried out according to a final judgment rendered by a competent court, which means that the penalty can only be carried out or imposed by an authorized court, because Indonesia is a rule of law country.⁴

e. The right to ask for forgiveness

In article 6 paragraph 4 which reads:

“Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.”

What is clear is that anyone who has been sentenced to death has the right to apply for pardon or reduction of sentence. Indeed, in Law No. 1 of 2023, article 67, it is regulated that the death penalty is always threatened as an alternative punishment.

Apart from legal measures, Indonesia itself has regulated that death row inmates can receive forgiveness, namely:

1) Clemency

The word pardon comes from the Latin *Pardonare*, which is translated into English as *Pardone*. According to Black’s Law Dictionary Sixth Edition, compiled by Henry Campbell Black. M.A In 1990 it was written that

“Pardon: an executive action that mitigates or sets aside punishment for a crime. An act of grace from governing power which mitigates the punishment the law demands for the offense and restores the right and privileges forfeited on account of the offense”

Pardon is regulated in Law no. 22 of 2002 which has been amended in Law no. 5 of 2010. According to Article 1 of Law no. 20 of 2002, what is meant by pardon is pardon in the form of a change, commutation, reduction or execution of a sentence to a convict given by the President.

Apart from extraordinary legal measures, to avoid the execution of the death penalty, convicts through their legal representatives often apply for clemency to the President to change the death penalty decision. In the new Criminal Code, the death penalty is stated to automatically become a life sentence if ten years after the decision

4 Indonesia, UUD 1945 pasal 3.

to deny clemency is issued by the President, and the prosecutor has not carried out the execution of the death penalty.

This means that the prosecutor must carry out the death penalty before ten years after the appeal is rejected. There is a need to discuss the norms of Article 7 paragraph (2) of Law No. 5 of 2010 concerning Amendments to Law no. 22 of 2002 concerning Clemency. Where the article states that the request for clemency as intended in paragraph (1) is submitted no later than 1 year after the decision obtains permanent legal force. The problem here arises apart from limiting, obstructing, the President's constitutional right as head of state to grant pardon, this also becomes a problem if it is submitted for more than 1 year then the request for pardon will expire.

If viewed from a criminal law perspective, the President's authority is related to Article 14 of the 1945 Constitution concerning Clemency and Law no. 22 of 2002 as amended by Law no. 5 of 2010 concerning Clemency is actually closely related to two important things in criminal law, namely the abolition of the obligation to carry out a crime and the purpose of punishment. From this perspective, it can be concluded that in relation to pardon, the President actually absorbs a small portion of the judge's authority in determining the type of sentence imposed and the length of time a person will serve the sentence.

In Article 2 paragraph (1) of Law no. 5 of 2010 stipulates that for court decisions that have obtained permanent legal force, convicts can apply for clemency to the President. The word "can" in this provision is intended to give the convict the freedom to use or not use the right to submit a request for clemency in accordance with Law no. 5 of 2010.

The right to apply for clemency is communicated to the convict by the judge or presiding judge at the trial which decided the case at the first instance. If at the time the court decision is handed down the convict is not present, the convict's rights are notified in writing by the clerk of the court which decided the case at the first instance, appeal or cassation. Sentences that can be applied for clemency are the death penalty, life imprisonment, or a minimum prison sentence of 2 years. It is important to remember that a request for clemency can only be submitted once, in order to provide legal certainty in the implementation of the request for clemency and to avoid discriminatory regulations.⁵

2) Amnesty

Referring to the legal dictionary written by Marwan and Jimmy, the definition of amnesty is a general statement issued through or by law regarding the revocation of all consequences of the prosecution of a particular criminal act or a group of criminal acts. In relation to criminal law, the President's authority to grant amnesty actually speaks about eliminating a person's obligation to undergo a sentence, especially in relation to the reasons for forgiveness in criminal law.

By granting amnesty, the President actually states that the unlawful nature of a person's actions is eliminated because the President uses his right to forgive unlawful acts committed by a person or group of people. Different from amnesty, related to the right to abolition, if viewed from criminal law theory, this right has the same idea as the abolition of the right to sue which is known in the Criminal Code.

In connection with the elimination of the right to sue in the Criminal Code, in general prosecution is stopped or revoked if:

⁵ <https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/mechanisme-hukuman-mati-di-indonesia>. Diakses pada 2 februari 2022.

- a. There has been a permanent judge's decision (de kracht van een rechter lijkgeveijdsde) regarding the same action (Article 76 of the Criminal Procedure Code).
- b. The defendant dies (Article 77 of the Criminal Procedure Code).
- c. The case has expired (Article 78 of the Criminal Procedure Code). There was an out-of-court settlement (Article 82 of the Criminal Procedure Code).

Article 4 of Law No. 11 of 1954 also states that by granting amnesty all consequences of criminal law against people granted amnesty are eliminated.

Meanwhile, for granting abolition, prosecution of people who are granted abolition is eliminated. Amnesty and abolition were implemented as in Emergency Law no. 11 of 1954 regarding at that time a political dispute between Indonesia (Yogyakarta) and the Kingdom of the Netherlands (article 2). This law is an implementation of the 1950 Provisional Constitution.

According to the provisions of article 1, the President grants amnesty or abolition with consideration from the Supreme Court based on a request from the Minister of Justice. The implementing regulations for this provision need to be studied further. With the existence of Article 14 paragraph (2) of the 1945 Constitution which regulates the institutions that provide advice to the President differently, the provisions of Article 1 of the 1954 Emergency Law no longer apply, however, the process for implementing amnesty and abolition as implementation of the provisions of Article 14 paragraph (2) has not yet been regulated.) the 1945 Constitution. The "state interest" stated in the 1945 Constitution in granting amnesty is translated into a political context.

The amnesty and abolition laws themselves do not explain the criteria for what is meant by state interests. The two existing regulations regarding the granting of amnesty from the President provide different instructions regarding the mechanism that must be followed. The amnesty and abolition law states that the president can grant amnesty after receiving written advice and the Supreme Court requested first by the relevant ministry (in this case the Ministry of Law and Human Rights). According to the 1945 Constitution, article 14 paragraph 2, the President's granting of amnesty must be taken into consideration by the DPR. clear mechanism regarding the granting of amnesty from the President. Apart from that, the new legal regulations must also clearly clarify the definition and indicators of state interests. This will make it easier for the President to exercise his prerogative rights. Apart from that, the DPR and the public can also monitor the implementation of amnesty by the President because the boundaries are clear. We have not found any statutory regulations regarding standard procedures governing the procedures for granting amnesty.

3) Abolition

Referring to the legal dictionary written by Marwan and Jimmyabolisi, it is a right to eliminate all the consequences of a court decision or eliminate criminal charges against a convict, as well as terminate it if the decision has been carried out. It is the President's prerogative that is only granted after asking the Supreme Court for advice.

The President, in the interests of the State, can grant amnesty and abolition to people who have committed a criminal act. The President granted this amnesty and abolition after receiving written advice from the Supreme Court which conveyed this advice at the request of the Minister of Justice (currently the Minister of Law and Human Rights). Referring to Article 2, amnesty and abolition were given to all people who before 27 December 1949 had committed a real criminal act because of the

political dispute between the Republic of Indonesia (Yogyakarta) and the Kingdom of the Netherlands. If you understand the substance, it can be concluded that the amnesty and abolition took effect before 27 December 1949.

Legislative regulations regarding standard procedures governing the procedures for granting abolition are deemed to be lacking, therefore there is a need for legislation regulating the mechanism for granting abolition. An abolition petition can only be submitted for the entire ongoing investigation process before the court decides on the case. The reasons for abolition must be based on the consideration that carrying out legal proceedings against a suspect or defendant will harm the public interest or the interests of the State.

In the future, there will be several important changes regarding the death penalty, especially the reforms that have been made. In the Criminal Code (KUHP) which was passed on December 6, 2022, the judge imposed the death penalty with a probationary period of 10 years. This is contained in Article 100 of Law Number 1 of 2023 concerning the Criminal Code. Article 100 Paragraph 1 of the Criminal Code stipulates that the judge imposes the death penalty with a probation period of 10 years by considering the defendant's feelings of remorse and the hope of improving himself or the defendant's role in the crime.

However, Article 100 Paragraph 2 explains that the death penalty with a probationary period as referred to in Paragraph 1 must be included in the court decision. then when he shows commendable attitudes and actions during the probation period, the death penalty can be changed to life imprisonment. Namely, by Presidential Decree (Keppres) after receiving consideration from the Supreme Court (MA). "The life imprisonment sentence as intended in Paragraph 4 is calculated from the time the Presidential Decree is issued," reads Article 100 Paragraph 5 of the Criminal Code. "If the convict during the probation period as referred to in Paragraph 1 does not show commendable attitudes and actions and there is no hope of improvement, the death penalty can be carried out by order of the Attorney General," reads Article 100 Paragraph 6 of the Criminal Code.

f. It should not be dropped on children under 18 years of age and should not be dropped on pregnant women

This is regulated in article 6 paragraph (5) of the ICCPR which reads:

"Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."

Imposing sanctions on minors is not in accordance with the 1945 Constitution because minors are not legally competent and pregnant women are not one individual but there is one life in their womb.

g. Prohibition to delay/prevent the abolition of the death penalty

Article 6 paragraph (6) of the international Convention on Civil and Political Crime says that:

"Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."

In this provision it is emphasized that all provisions of the ICCPR cannot be a reason to prevent or delay the abolition of the death penalty by countries that are members of

the ICCPR, because according to this convention the death penalty is no longer relevant and effective with current developments.

This is reaffirmed by the Second Optional Protocol aiming at the abolition of the death penalty, which in its opening reads:

The States Parties to the present Protocol, Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights, Recalling article 3 of the Universal Declaration of Human Rights, adopted on 10 December 1948, and article 6 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966, Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable.

In essence, the ICCPR Convention requires that the abolition of the death penalty must be carried out, this is proven by the formulation of article 6 and even the formulation of the Second Optional Protocol which is specifically for the abolition of the death penalty. This is proven by the sound of article 1 which reads:

- 1) No one within the jurisdiction of a State Party to the present Protocol shall be executed.
- 2) Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

2. Implementation of the death penalty for certain crimes in Indonesian national law

Indonesia is a country that upholds the right to life, this is because Indonesia is a country that has managed to be free from the long colonial era, which means that the Indonesian state knows what it feels like to not have the right to express opinions (freedom of speech), the right to life, and etc. Therefore, in the constitution a special chapter was created that discusses human rights, which is contained in article 28 of the 1945 Constitution which clearly regulates human rights. However, in exercising their rights, Indonesian people are limited to respecting the human rights of other people, which we can see in article 28 J paragraphs (1) and (2) which reads:

- 1) Everyone is obliged to respect the human rights of others in orderly life in society, nation and state. **
- 2) In exercising his rights and freedoms, every person is obliged to comply with the restrictions determined by law with the sole aim of guaranteeing recognition and respect for the rights and freedoms of other people and to fulfill fair demands in accordance with moral considerations and religious values. , security and public order in a democratic society. **)

This is very ironic, where behind the regulation of other human rights, other humans inevitably have to limit their rights so as not to interfere with or even take away other people's human rights. And the most crucial of all is of course the deprivation of the right to life, which is included in the Extra Ordinary Crime category. A person who takes away a person's rights, including the right to life, must be given appropriate punishment, including the death penalty. Even so, there is a slight difference between the death penalty in Indonesia and the death penalty in other countries, namely in Indonesia, before the judge sentences a defendant to death, the judge will consider several things, including the defendant's intentions, not necessarily life for life.

Until now in Indonesia there are special regulations governing the death penalty, including:

1. Criminal acts in Indonesia which are punishable by death.

Indonesia is a member of the UN which has signed the International Convention on Civil and Political Rights (ICCPR), however in Indonesian national law there are several statutory provisions that still apply the death penalty. We can see this inside:

a. Undang-Undang no 31 tahun 1999 tentang Pemberantasan Korupsi

Corruption according to Law no. 31 in conjunction with Law no. 20 of 2001 concerning the eradication of corruption is divided into 7, namely bribery, embezzlement in office, extortion, fraudulent acts, conflicts of interest in procurement, and gratification. In Article 8 of the UN Convention Against Transnational Organized Crime and The Protocol Thereto which was initiated by the United Nations Office on Drugs and Crime (UNODC), corruption has two definitions, namely:

First, corruption is promising, offering, or giving to a public official, either directly or indirectly, an undue advantage, either for himself or for another person or entity, so that the official acts or does not act in carrying out his official duties.

Second, corruption is the request or acceptance by a public official, directly or indirectly, for improper benefits, either for the official himself or for another person or entity, for that official to act or not act in the implementation of Robert's official duties. Klitgaard said corruption could be defined as abuse of office for personal gain. This position can be a public position, or any position of power, including in the private sector, non-profit organizations, even lecturers on campus.

Meanwhile, according to Robert Klitgaard, former president of Claremont Graduate University, corruption is the abuse of office for personal gain..

Therefore, the elements of criminal acts of corruption are;

- (a) Corruption is a behavior.
- (b) There is abuse of authority and power.
- (c) Done for personal or group gain.
- (d) Violating the law or deviating from norms and morals.
- (e) Occurs or is carried out in government or private institutions.

In Indonesia, the crime of corruption is one of the crimes punishable by the death penalty, namely in article 2 paragraph (2) which reads:

"In the case of criminal acts of corruption as intended in paragraph (1) which are committed under certain circumstances, the death penalty can be carried out"

In the general provisions of this article, it is also explained that:

"In order to achieve a more effective goal of preventing and eradicating criminal acts of corruption, this Law contains criminal provisions that are different from the previous Law, namely determining a special minimum criminal threat, a higher fine, and the threat of the death penalty which is criminal aggravation."

Which essentially states that the death penalty is not a general crime but only an aggravated crime. This answers why until now Indonesia has never imposed the death penalty on those convicted of corruption cases.

This can be proven by the data below: according to my research, there was only one defendant who was sentenced to death but could not be executed because he died first, namely: Jusuf Muda Dalam, Jusuf Muda Dalam was the Governor of Bank Indonesia in the 1963-1966 period. Jusuf Muda Dalam was sentenced to death for diverting revolutionary funds worth IDR 97 billion. Jusuf also serves as minister for central banking affairs.

To date, only one person has been sentenced to death for a corruption case, namely Jusuf Muda Dalam, and even then he died before the death sentence was carried out.

b. Law No. 35 of 2009 concerning Narcotics

In this article, narcotics are divided into 3 groups, namely:

- 1) Class 1 narcotics, which are the most dangerous class of narcotics because they have very high addictive power, even their use as medicine is strictly monitored. Examples of these narcotics include cocaine, heroin, and marijuana (*Cannabis sativa*).⁶
- 2) Class 2 narcotics are efficacious for treatment but their use must be used as a last resort. This narcotic can also be used for therapy and/or for scientific development purposes. Of course, this drug has a high potential to cause dependence. Examples include morphine, pethidyl, fentanyl, and metadol⁷.
- 3) Class 3 narcotics, this type of narcotics is efficacious for treatment and is widely used in therapy and scientific development, unlike other narcotics, this narcotic has a mild potential for dependence. Examples include; Codeine, Buprenorphine, Ethylmorphine, and Nicocodine.

We need to know that basically narcotics are drugs that can cure diseases so that the use of narcotics with the aim of treating is legally legal, which is proven by the provisions of Article No. 35 of 2009 concerning Narcotics:

“Narcotics can only be used for the purposes of health services and/or the development of science and technology.”

This proves that Narcotics cannot be separated from our daily lives. The Minister of Health even guarantees the availability of Narcotics for the benefit of health services and/or for the development of technological science. This is in line with the sound of article 9 paragraph 1;

“The Minister guarantees the availability of Narcotics for the benefit of health services and/or for the development of science and technology.”

However, the huge use of narcotics cannot be separated from the huge negative impacts, to date data on narcotics abuse in Indonesia has been captured by BNN as many as 3.6 million people. This number is uncertain because there are still many perpetrators who are still at large and have not been arrested (Inspector General Petrus Golose, head of the National Narcotics Agency).

Therefore, the government in Law no. 35 of 2009 concerning Narcotics prepares very harsh punishments for the perpetrators, we can see this in article 113 paragraph 2 which reads:

“in the event of the act of producing, importing, exporting or distributing Class I Narcotics as intended in paragraph (1) in the form of plants weighing more than 1 (one) kilogram or exceeding 5 (five) trees or in non-plant form weighing more than 5 (five)) gram, the perpetrator shall be punished with the death penalty, life imprisonment or imprisonment for a minimum of 5 (five) years and a maximum

⁶ <https://www.klikdokter.com/info-sehat/kesehatan-umum/> Kenali Jenis dan golongan Narkotika (Diakses pada 1 Januari 2024)

⁷ <https://www.alodokter.com/info-sehat/kesehatan-umum/> Nakortika sebenarnya aman (Diakses pada 1 Januari 2024)

of 20 (twenty) years and a maximum fine as intended in paragraph (1) plus 1/3 (one third).”

Which essentially explains if someone commits an unlawful act by producing, importing, exporting or distributing Category I narcotics in the form of plants weighing more than (one) kilogram or exceeding 5 trees or in the form of non-plants weighing more than 5 (five) grams. The perpetrator can be punished with the most serious crime up to the death penalty.

In the next article, namely in article 114 paragraph (2), it is said that:

“In the case of the act of offering for sale, selling, purchasing, being an intermediary in buying and selling, exchanging, handing over or receiving Class I Narcotics as intended in paragraph (1) which in plant form weighs more than 1 (one) kilogram or exceeds 5 (five)) tree trunk or in non-plant form weighing 5 (five) grams, the perpetrator is 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 specified referred to in paragraph (1) plus 1/3 (one third).

In essence, it is explained that every person who offers class I narcotics for anything unlawfully which in plants weighs more than 1 (one) kilogram or exceeds 5 (five) tree trunks or in non-plant form weighs 5 (five) grams, the perpetrator will be punished with a penalty. the most severe or the death penalty. And in article 116 paragraph 2 it is also said that:

“In the event that the use of narcotics against another person or the provision of Category I narcotics for use by another person as intended in paragraph (1) results in the death or permanent disability of another person, the perpetrator shall be punished with the death penalty, life imprisonment or a minimum imprisonment of 5 (five) years and a maximum of 20 (twenty) years and the maximum fine as intended in paragraph (1) plus 1/3 (one third).”

In essence, it says that anyone who provides Category I Narcotics for use by another person, and causes another person to die or be permanently disabled, the perpetrator can be punished with the death penalty. For class II narcotics, it is explained in article 118 paragraph 2 (two) which reads:

“In the event that the act of producing, importing, exporting or distributing Class II Narcotics as intended in paragraph (1) weighs more than 5 (five) grams, the perpetrator shall be punished with the death penalty, life imprisonment or a minimum imprisonment of 5 (five) years and a maximum of 20 (twenty) years and the maximum fine as intended in paragraph (1) plus 1/3 (one third).”

Which essentially is the same as article 113 paragraph 2 (two) which states that anyone who produces class II narcotics in excess of 5 grams can be punished with the death penalty. And in article 119 paragraph 2 (two) which reads:

“In the event that the act of offering for sale, selling, buying, receiving, being an intermediary in buying and selling, exchanging or handing over Class II Narcotics as intended in paragraph (1) weighs more than 5 (five) grams, the perpetrator shall be punished with the death penalty, imprisonment life imprisonment, or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years and a

maximum fine as intended in paragraph (1) plus 1/3 (one third)."

The essence is the same as the previous regulations but only the groups are different. Likewise in article 121 paragraph 2 (two):

"In the event that the use of Narcotics against another person or the provision of Class II Narcotics for use by another person as intended in paragraph (1) results in the death or permanent disability of another person, the perpetrator shall be punished with the death penalty, life imprisonment or a minimum imprisonment of 5 (five) years and a maximum of 20 (twenty) years and the maximum fine as intended in paragraph (1) plus 1/3 (one third)."

And then in article 126 paragraph 2 (two) which reads:

"In the event that the use of Narcotics against another person or the provision of Class III Narcotics for use by another person as intended in paragraph (1) results in the death or permanent disability of another person, the perpetrator shall be punished with imprisonment for a minimum of 5 (five) years and a maximum of 15 (five) fifteen) years and the maximum fine as intended in paragraph (1) plus 1/3 (one third)."

In the three provisions of the legislation above, those who give narcotics to another person causing that person to die or become permanently disabled will be considered an act of murder which can be sentenced to death as a sanction. This is what proves that the government is very serious in eradicating cases of narcotics abuse. In Indonesia itself, many convicts have been sentenced to the death penalty.

For example, in the case of Fredi Budiman who was sentenced to the death penalty in 2012 because Fredy Budiman was caught red-handed carrying hundreds of grams of crystal methamphetamine and ingredients for making ecstasy, and was also proven to be involved in the case of importing 1.4 million ecstasy pills from China. This action committed by the perpetrator while still in prison. What's worse is that in 2013, Fredy Budiman built a crystal methamphetamine factory inside the Narcotics Enforcement Agency at Cipinang prison, where this business was able to produce two kilograms of methamphetamine ready for distribution each time it was produced. Until the end of his life, Fredi Budiman never stopped being a drug dealer and dealer.

c. Law Number 5 of 2018 concerning amendments to Law Number 15 of 2003 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2022 concerning the Eradication of Criminal Acts of Terrorism into Law.

Terrorism is different from ordinary premeditated murder or ordinary mass murder, this is because acts of terrorism are carried out with a specific purpose, for example religious beliefs, politics, etc. Meanwhile, terminologically, terrorism is the use of violence to cause fear in order to achieve goals, especially political goals. Meanwhile, people who use violence with the aim of causing fear, which is usually done for political purposes, are called Terrorists.

According to the 1973 UN convention, terrorism is any form of crime directed directly at the State with the intention of creating a form of terror against certain people or groups of people or the wider community. The term terrorist itself emerged when the twin buildings of the WTC (World Trade Center) in New York, USA, were hit by two civilian planes and the heavily damaged Pentagon building which was the

headquarters of the US Department of Defense was hit by another plane (11 September 2001). This then became a topic of international discussion and Indonesia was no exception.

Regulations regarding the eradication of criminal acts of corruption in Indonesia first appeared in 2002 after the Bali Bombing tragedy that occurred in the Kuta area, which killed 202 people and injured 209 people. This caught the world's attention, coupled with the legal vacuum at that time, so the government decided to apply the retroactive principle by ratifying Perpu No. 1 of 2002 and Perpu No. 2 of 2002 concerning the eradication of criminal acts of terrorism considering that the scale of these crimes was included in the extra ordinary category. crime that shook the world.

This principle means imposing a statutory regulation before the regulation is passed, which should be contrary to the Constitution of the Republic of Indonesia, precisely in article 28 I paragraph 1 (one) which reads:⁸

“The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted based on laws that apply retroactively are human rights that cannot be reduced under any circumstances.”

However, at that time the government needed to answer the doubts of the world community by making this regulation. In Perpu No. 1 of 2001 there are several articles that regulate the threat of the death penalty, including:⁹

article 6 of the regulations in lieu of law no 1 of 2001 which reads:

“Any person who deliberately uses violence or threatens violence to create a widespread atmosphere of terror or fear of people or causes mass casualties, by depriving others of their freedom or loss of life and property, or causing damage or destruction to vital objects. strategic or environmental or public facilities or international facilities, shall be punished with the death penalty or life imprisonment or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years.”

Article 9 of the regulation in lieu of Law No. 1 of 2001 reads:

“Any person who unlawfully enters into Indonesia, makes, receives, tries to obtain, delivers or attempts to hand over, controls, carries, has stock on him or has in his possession, stores, transports, hides, uses or releases to and/or from Indonesia a firearm, ammunition, or explosives or other dangerous materials with the intent to commit a criminal act of terrorism, shall be punished with the death penalty or life imprisonment or imprisonment for a minimum of 3 (three) years and a maximum of 20 (twenty) years.) year.”

Article 14 of the regulation in lieu of Law No. 1 of 2001 reads:

“Every person who plans and/or mobilizes other people to commit criminal acts of terrorism as intended in Article 6, Article 7, Article 8, Article 9, Article 10, Article 11 and Article 12 shall be punished with the death penalty or life imprisonment..”

⁸ Indonesia, Undang-Undang Dasar Negara Republik Indonesia.

⁹ Indonesia, Peraturan pemerintah pengganti Undang-Undang Nomor 1 tahun 2001 tentang pemberantasan tindak pidana terorisme.

However, this regulation still excludes children under 18 years from being punished with the death penalty or life imprisonment if they commit a crime as regulated in article 14 of the regulation in lieu of Law no. 1 of 2001. This is in accordance with the provisions of article 19 which sounds:

“Provisions regarding the imposition of special minimum sentences as intended in Article 6, Article 8, Article 9, Article 10, Article 11, Article 12, Article 13, Article 15, Article 16 and provisions regarding the imposition of the death penalty or life imprisonment as referred to in Article 14, does not apply to perpetrators of criminal acts of terrorism who are under 18 (eighteen) years of age.”

Including the most severe punishment in terrorism regulations is the right thing considering that there is an element of genocide in this crime. We can see this in the ideology of the perpetrators who stated that “killing infidels is a jihad for us” (Imam Samudra).

1. Interpretation of the Most Serious Crime

In Optional Protocol II ICCPR article 2 paragraph (1) it is explained that the assumption of the most serious crime during a war situation can be justified in determining an act is the most serious crime.¹⁰

Thus, the most serious crime must be interpreted in a limited way. Which means that according to this instrument the death penalty must be applied very limitedly as a last resort.

The next document is the ECOSOC Safeguards the protection of those facing the death penalty in respect of the most serious crime. This instrument confirms that the most serious crime can be applied to criminal acts carried out intentionally to cause loss of life or other very serious consequences (extremely grave consequences).

According to the International Human Rights Agency Report dated 24 December 1996, it was stated that:

“the scope of crimes subject to the death penalty should not go beyond intentional crimes with lethal or other extremely grave consequence.”

Therefore, according to the International Human Rights Body, the most serious crimes are international crimes that are intentionally or intentionally planned and have extraordinary impacts,

This is in line with the opinion of international law and human rights expert, Philip Alston, contained in the UN report in January 2007, precisely in paragraph 53, which states that the most serious crime is a criminal act that involves the intention to commit deadly murder.

Furthermore, Article 5 of the 1998 Rome Statute which established the International Criminal Court (ICC), states that:

” The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;

¹⁰ Sefirani, KARAKTERISTIK THE MOST SERIOUS CRIME MENURUT HUKUM INTERNASIONAL DALAM PUTUSAN MAHKAMAH KONSTITUSI, jurnal fakultas hokum universitas islam Indonesia, Jakarta, tanggal 14 maret 2013.

- (c) War crimes;
- (d) The crime of aggression.”

ICCPR General Comment No. 6 on the right to life, established by the HRC in 1982, which states that “the most serious crimes must be interpreted in a limited way considering that the death penalty is an extraordinary measure.”¹¹

Therefore, from the explanation above, it can be concluded that the most serious crime is limited, and contains the following characteristics:

- i. Criminal activities that can endanger world peace and security because they are vile and cruel and can shock the conscience of humanity.
- ii. There is a planned, coordinated, systematic, and widespread component to causing death or other very serious outcomes. (extremely grave consequences).
- iii. Criminal acts that disturb public order, involve extra large amounts of money (economic crimes), are carried out in a very bad way (crimes with very heinous methods), are cruel beyond the limits of humanity, or endanger state security and have very serious consequences for the state or wide community.

2. A criminal offense that is punishable by death as The Most Serious Crime

Based on the conclusions above, there are several crimes that fall into the most serious crime category:

a. The crime of genocide

The crime of genocide is a crime related to ethnic cleansing. The Sixth Committee of the UN General Assembly concluded that the crime of genocide also includes crimes against political groups, because in the committee’s view,¹² These groups are groups that are not easily identifiable, including political groups that will cause international disturbances in a country’s domestic political problems.¹³

Juridically, genocide is defined as an action with the intention of destroying or exterminating all or part of a national, racial, ethnic or religious group. This definition is contained in the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, which was later absorbed by the ICC Statute, and was also later included in Law no. 25 of 2000 concerning Human Rights Courts.

According to Rome Statute Article 6, the crime of genocide is as follows

- 1) Killing group members.
- 2) Causing serious physical or mental harm to group members.
- 3) Intentionally causing conditions of life for the group that are expected to result in physical destruction in whole or in part.
- 4) Implement measures intended to prevent births within the group.
- 5) Forcibly moving children from one group to another group.

b. Crimes against humanity

types of crimes that can be classified as crimes against humanity, are: murder, extermination, enslavement, deportation and other inhumane acts committed against the civilian population, before or during war, or persecution on political, racial or

11 *United Nations Human Rights Committee, “CCPR General Comment No. 6: Article 6 (Right to Life)”, United Nations Document*, diakses pada 2 februari 2024, paragraph 7.

12 Devy Sondakh, *Peradilan Mahkamah Internasional AD Hoc Den Haag, Para Penjahat Perang Di Wilayah Bekas Yugoslavia Dan Kemungkinan Penerapannya di Indonesia*, Tesis, Universitas Padjadjaran, Bandung, 1999, hlm. 53.

13 M.C. Bassiouni (et.al), *ILC Draft Statute for an International Criminal Court With Suggested Modifications*, Chicago, Maret 1996, hlm. 28.

religious grounds in the commission of or in connection with with a crime within the jurisdiction of the Court, whether or not in violation of the domestic laws of the country in which the crime was committed.¹⁴

In this case article 6 c of the Nuremberg charter states:

“murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.”

c. War Crime

According to the Nuremberg Constitution, war crimes which are synonymous with violations of the laws or customs of war include, but are not limited to acts such as:

“killing, ill-treatment or deportation of laborers or for other purposes of the civilian population or within controlled territory, murder or ill-treatment of prisoners of war or persons at sea, killing of hostages, seizing public or private property without justification and destroying cities, villages, or unlawful extermination for military purposes.”

In the 1949 Geneva Convention, the term grave breaches is known, which is substantially the same as war crimes. Grave breaches are regulated in Article 50 of the Geneva Convention (KJ) I, Article 51 KJ I I; Articles 1 30 KJ III and Article 1 47 KJ IV, are used to differentiate between war crimes committed in international armed conflicts, and crimes committed in internal or domestic conflicts (Article 4 in conjunction with Article 147 Geneva Convention IV), consisting of:

- 1) Wilful killing
- 2) Torture or inhumane treatment, including biological experiments.
- 3) Intentionally causing serious suffering, or serious injury to body or health.
- 4) Extensive destruction and expropriation of property, which is not justified in terms of military interests and is carried out deliberately and unlawfully;
- 5) Forcing a prisoner of war or another protected person to serve in an enemy military authority;
- 6) Deliberately ignoring the rights of a prisoner of war or other protected person to the right to an honest and orderly trial;
- 7) Unlawful deportation or transfer or unlawful confinement. • Unlawful;
- 8) Hostage taking.

In the Rome Statute, acts classified as serious violations of the 1949 Geneva Conventions include acts directed against protected persons or objects, and are apparently the same as the description of crime categories as in the ICTY Statute, namely;

- 1) Intentional murder;
- 2) Torture or inhumane treatment, including biological experiments;
- 3) Intentionally causing severe suffering or serious injuries to the body or health;
- 4) Destruction and confiscation of goods on a wide scale without consideration of military needs, and carried out illegally and carelessly;

¹⁴ M C Bassiouni, *Crimes Against Humanity in International Criminal Law*, <http://www.crimesofwar.org/thebook/crimes-against-humanity.html>, diakses pada 2 februari 2024.

- 5) Forcing prisoners of war or civilians to serve in the enemy's armed forces;
- 6) Deliberately denying prisoners of war or civilians the right to a fair trial in an ordinary court ;
- 7) Deportation, transfer or unlawful detention of civilians;
- 8) Taking civilians hostage.

d. Crime of aggression

Aggression in general is a crime against peace. According to the "Convention Concerning the Definition of Aggression", which was signed in 1933 in London, there is a formulation of the definition of aggression, among others, for states which will first involve actions such as:

- (i) declaration of war against another country;
- (ii) carrying out an invasion by force of arms, even without a declaration of war against the Jayah of a country;
- (iii) a weapons attack by land, sea and air against the territory, ships and aircraft of another country;
- (iv) carrying out a naval blockade on the coast or port of another country;
- (v) providing assistance to armed gangs formed in the territory of a country and occupying the territory of another country.

D. CONCLUSION

Criminal acts that are punishable by death under Indonesian national law include terrorism, narcotics and corruption, which are in accordance with the mandate of the 1945 Constitution and the International Convention on Civil and Political Rights because they fulfill the characteristics and criteria of The Most Serious Crime in accordance with ICCPR provisions which provide opportunities for punishment. death is limited to the most serious crimes. In addition, Indonesia has not signed the Second Optional Protocol ICCPR as an additional regulation for the abolition of the death penalty, therefore the existence of the death penalty in Indonesian law does not violate the provisions of the International Convention on Civil and Political Rights.

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