THE URGENCY OF ALTERNATIVE THREATS AND PROBATION IN THE APPLICATION OF THE DEATH PENALTY

THESIS

Arranged By:

ANWARUL MUARIF (18410648)

FACULTY OF LAW

INTERNATIONAL PROGRAM

UNDERGRADUATE STUDY PROGRAM IN LAW

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Arranged by:

ANWARUL MUARIF

Student Number: 18410648

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بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ

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Has Been Examined and Approved by Thesis Advisor and submitted before the Board of Examiners in the Final Thesis Examination on the date ……... 2022

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Thesis Advisor

(Ayu Izza Elvany, S.H., M.H)

NIK. 184100104

بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ

A BACHELOR DEGREE THESIS

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This bachelor degree thesis has been approved by Thesis Supervisor to be examined by the Board of Examiners at the Thesis Examination on November 26th, 2022

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Language Advisor,

Ima Dyah Savitri, S.S., M.A.

بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ

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Defended Before the Board Examiners on
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Board Examiners	Signature
1. Ayu Izza Elvany, S.H., M.H.	
2. Hanafi Amrani, S.H., M.H., LL.M., Ph.D.	
3. Dr. Mahrus Ali, S.H., M.H.	

Universitas Islam Indonesia
Faculty of Law
Dean,

Prof. Dr. Budi Agus Riswandi, S.H., M.Hum.
NIP: 014100109

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ORISINALITAS KARYA TULIS ILMIAH BERUPA TUGAS AKHIR

MAHASISWA FAKULTAS HUKUM UNIVERSITAS ISLAM INDONESIA

Bismillahirrahmanirrahim

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Nama : **ANWARUL MUARIF**

NIM : **18410648**

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Yogyakarta, 04 Desember 2022

Yang Membuat Pernyataan

NIM : 18410648

CURRICULUM VITAE

1. Name : Anwarul Muarif
2. Place of Birth : Sumenep
3. Date of Birth : March 29th 1999
4. Gender : Male
5. Address : Jalan Perhutani Nomor 24, Desa Sawah Sumur, Kecamatan Arjasa, Kabupaten Sumenep
6. Parents Identity
   a. Father : Samsuri
      Occupation : Farmer
   b. Mother : Wani
      Occupation : Housewife
7. Education
   a. Elementary School : SD Negeri Sawah Sumur II
   b. Junior High School : MTS Al-hidayah Arjasa
   c. Senior High School : SMK Ibrahimy I Sukorejo
   d. College : Universitas Islam Indonesia
8. Organization Experiences
   a. Deputy Coordinator for Human Resources at theIkatan Santri Salafiyah Syafiiyah Sukorejo (IKSASS) Rayon Kangean (2015-2016)
   b. Public Relations Coordinator at the English Students Association (ESA) Sukorejo (2016-2017)
   c. Deputy Coordinator for Study and Discussion Forum Kajian dan Penulisan Hukum (FKPH) LEM FH UII (2020-2021)
   d. Head of the Study and Discussion Unit at the Himpunan Mahasiswa Islam (HMI) Commissariat of FH UII (2020-2021)

MOTTO

“Tidak Penting Motto-mottoan yang Penting Cuma Senyum Ibu”

-Anwarul Muarif-

DEDICATION

This Thesis is wholeheartedly dedicated to:

Allah *Subhanallahu wa ta'ala,*
Thanks to Allah SWT who always gives me strength, health, and broad knowledge which made it possible to complete my thesis;

My Beloved Parents, My Brothers, My Sister, and All of my Family,
who always provided me with love, continuous support, and affection;

My Alma Mater,
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All of my lectures at the Faculty of Law, Universitas Islam Indonesia,
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who always help during my study

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who always be on my side in easy and hard times.

All of People,
Who always ask when I will graduate

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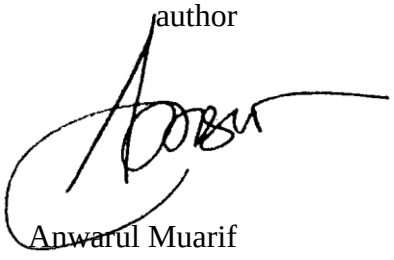
Finally, the author realized that there are still a lot of things that need to be improved, hence any kind of suggestion will be gladly accepted and considered for better future knowledge. Hopefully, this thesis can be useful for anyone who reads this.

Yogyakarta, July 29th 2022

author



Anwarul Muarif

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ABSTRACT

This study aims to determine the normative framework of The Urgency Of Alternative Threats And Probation In The Application Of The Death Penalty, because the existence of this concept raises debates and problems. Both the existence of which is doubtful conceptually and the effectiveness of the application. The formulation of the problem in this research is What the urgence of alternative threats and probation in the application of the death penalty? And What is the ideal concept of implementing death penalty from the perspective of sentencing theories and human rights? This type of research is normative with an instrumental approach method which is then supported by empirical data. The urgency of Alternative Threats And Probation In The Application Of The Death Penalty is not fundamentally philosophical, juridical and sociological. Second, the lack of clarity of conception, so that it will potentially cause problems in its enforcement. Third, a review of norms must be carried out by considering the aspects of progressive legal reform. Fourth, the state is obliged to make progressive and special policies for cases of serious crimes other than the application of the death penalty.

Keyword: Death Penalty, Alternative Threats, Probation, sentencing, human rights.

CHAPTER I

INTRODUCTION

A. Background of Study

Ubi societas ibi justicia, This legal adage is quite well known among the public in general and law students in particular. The adage which means "where there is society there is law" is sufficient to illustrate that the human need for law is an absolute basic need that must be met for the creation of a good social ecosystem. In carrying out and realizing social life, conflicts between individuals and social groups are very vulnerable. In order to protect the occurrence of conflicts in the process of social interaction, then the law especially criminal law is present in the middle of people's lives.

In simple terms, criminal law can be defined as the rule of law which contains elements of imperatives and prohibitions, where the two elements by lawmakers (criminal law) are usually associated with sanctions as a reaction to violations of criminal norms. Criminal law in this sense is the applicable criminal law or law positive punishment which is also often called *jus poenale*. The criminal law includes:

1. Commands and prohibitions for violation of the organs declared authorized by law to be associated with threats criminal law, norms that must be obeyed by anyone.

2. Provisions specifying what means can be used as a reaction to the violation of these norms.
3. Rules that are temporally or within a certain period of time set limits on the scope of work from norms.[1]

Among the types of criminal sanctions in Indonesia, the death penalty is a type of criminal sanction that is never finished for discussion and always brings out its appeal to be a subject of debate. One of the basic reasons for these debates is that there is a conflict between the view of protecting the public interest in the elements of the purpose of punishment and the review of the protection of human rights. those who oppose the death penalty argue that the death penalty is a form of serious injury to the basic human rights that humans have. This is as regulated in Article 28A of the 1945 Constitution of the Republic of Indonesia, "Everyone has the right to live and has the right to defend his life and life."[2] As well, it is stated in article 3 UDHR "Everyone has the right to life, liberty and the security of person."[3] as stated by De Savornin Lohman, in the Code there can be no acknowledgment that the state has the right to take the lives of criminals who do not heed the rules at all.[4]

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[1] Jan Remmelink, *Hukum Pidana Komentar Atas Pasal Terpenting Dari Kitab Undang-Undang Hukum Pidana Belanda Dan Padanannya Dalam Kitab Undang-Undang Hukum Pidana Indonesia*, PT Gramedia Pustaka Utama, Jakarta, 2003. p.1.

[2] See Article 28A Constitution of the Republic of Indonesia 1945.

[3] See Article 3 Universal Declaration Of Human Rights.

[4] Rudy Satriyo Mukantardjo,"Rancangan Kuhp Nasional Menghindari Pidana Mati", *Journal Legislasi Indonesia*, Vol. 2 No. 1, 2005. p.5.

At the same time, those who agree with the death penalty say that the death penalty is still needed to maintain public order in the midst of a developing society or a society where the serious crime rate is very high. Opinions related to the existence of the death penalty in a country were conveyed by Bichon van Ysselmonde, who said, among other things "I still always believe that the threat and implementation of the death penalty must exist in every country and society that is organized, both from the point of view of legal propriety and from the point of view it cannot be excluded.As well.[5] formally the death penalty is permitted by our constitution as regulated in Article 28J paragraph 2 of the 1945 Constitution of the Republic of Indonesia which reads "In exercising their rights and freedoms, everyone is obliged to comply with the restrictions stipulated by law with the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and to fulfill just demands in accordance with considerations of morals, religious values, security and public order in a democratic society." [6] As well the UDHR has provided exceptions to the fulfillment of human rights as contained in Article 29 paragraph 2 which reads: [7]

> *"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".*

[5] *Ibid.*
[6] See Article 28J Section (2) 1945 Indonesian Constitution.
[7] Article 29 Section (3) Universal Declaration of Human Rights.

There is certainly different from the previous Criminal Code where the death penalty is part of the main criminal offense as we mentioned earlier. The existence of the death penalty in the RKUHP is reformed into a separate type of criminal sanction, which is stated in article 64 point C with the article "criminals that are specific to certain crimes specified in the law." In this regard, the application of the death penalty is then further referred to as the imposition of alternative punishment. Apart from these differences, there are outlines that can be drawn in seeing how the development of Indonesian criminal law is, namely the need for the Indonesian criminal system for the death penalty which is still deeply rooted.

In the context of the death penalty in the RKUHP, there have been various responses from the public. Coordinating Minister for Politics, Law and Security (Menko Polhukam) Mahfud MD, who in his opinion when responding to the application of the death penalty for corruptors, said “If you want to be more assertive, that the death penalty must be applied to corruptors, it can be included in the draft law. criminal law that we are currently discussing," Mahfud said in Jakarta, Thursday (12/12/2019). According to Mahfud, indeed, the death penalty has been in Law No. 31 of 1999 as amended in Law No. 20 of 1999. 2001 concerning the Eradication of Criminal Acts of Corruption (UU Tipikor), but its scope is still limited, so

that if this is regulated in the RKUHP, it is possible to have a different formulation.[8]

As well As, Arsul sani, a member of Commission 3 of the DPR RI, said that one of the crucial issues of the RKUHP is the death penalty which is rejected by some members of the public and 22 European Union Ambassadors. They want the total abolition of the death penalty. However, Commission III also accepts the aspirations of the people who want to maintain the death penalty as the main punishment as stated in Article 10 of the current Criminal Code. "So as a middle ground for legal politics that is put in place is that we don't abolish, we don't completely eliminate the death penalty from our criminal law, but we also don't maintain our position of the death penalty as the main punishment. The moderate position is that we don't abolish the death penalty, but our position shift from the main punishment to the special punishment that must be imposed alternatively.[9]

Even so, the rejection of the existence of the death penalty in the formulation of the RKUHP still reaps many rejections, including those conveyed by a Criminal Law expert from Padjadjaran University (Unpad), Romli Atmasasmita, that it is better for the death penalty to be abolished from the RKUHP. The reason is because the implementation of punishment and

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[8] Andrian Pratama Taher, *Mahfud MD Ingin Hukuman Mati Untuk Koruptor Dimasukkan Ke RKUHP*, Https://Tirto.Id/Mahfud-Md-Ingin-Hukuman-Mati-Untuk-Koruptor-Dimasukkan-Ke-Rkuhp-Enkj, Accessed on July 23, 2022.

[9] Risky Surya Randika, *Legislator Klarifikasi Soal Hukuman Mati Dan Penghinaan Presiden Di RKUHP*, Https://Www.Republika.Co.Id/Berita/Retym3485/Legislator-Klarifikasi-Soal-Hukuman-Mati-Dan-Penghinaan-Presiden-Di-Rkuhp, Accessed on July 23, 2022.

politics in Indonesia does not want the death penalty.[10] The Civil Society Coalition for Reforming the Criminal Code views that the death penalty should be abolished in the Draft Law on the Criminal Code (RUU KUHP). On the other hand, the coalition criticized the government's proposal that the death penalty should no longer be used as the main punishment. They consider the concept of the death penalty as an alternative punishment is not clear. The government also includes additional rules regarding the provision of the death penalty in Article 100 of the Criminal Code Bill. Broadly speaking, the article explains that the panel of judges can give the death penalty after giving a probationary period of 10 years. The Coalition considers that giving a probationary period to postpone the execution is the right of the defendant.[11] The same thing was also stated by Institute for Criminal and Justice Reform (ICJR) researcher Erasmus Napitupulu who said that the probationary period to postpone the execution of the death penalty must be the right of everyone who is sentenced to death, should not depend on the judge's decision. The application of the death penalty as an alternative punishment has also sparked criticism from human rights activists. They view

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[10] Aliansi Nasional Reformasi RKUHP, *Pakar Pidana Setuju Hukuman Mati Dihapuskan Dari Rkuhp,* Https://Reformasikuhp.Org/Pakar-Pidana-Setuju-Hukuman-Mati-Dihapuskan-Dari Rkuhp/, Accessed on July 23, 2022.

[11] Tatang Guritno *RUU KUHP Masih Atur Hukuman Mati, Koalisi Masyarakat Sipil: Seharusnya Tidak Boleh Ada*, Https://Nasional.Kompas.Com/Read/2022/05/27/06395261/Ruu-Kuhp-Masih-Atur-Hukuman Mati-Koalisi-Masyarakat-Sipil-Seharusnya-Tidak?Page=All Accessed on July 23, 2022.

that although the death penalty is placed as a special crime, its essence still exists as a principal crime.[12]

Alternative criminal itself is a criminal system which in the threat of punishment provides other options, relating to the alternative punishment of imposing the death penalty, becomes interesting because it contains specificities that apply automatically. As stated in article 67 of the RKUHP. The special punishment as referred to in Article 64 letter c is the death penalty which is always threatened with alternatives.[13] The provisions in this article are further explained in the explanation chapter which reads. In this provision, criminal acts that can be subject to special punishments are very serious or extraordinary crimes, including narcotics crimes, terrorism crimes, corruption crimes, and serious crimes against human rights. For this reason, the death penalty is included in a separate section to show that this type of punishment is truly special. When compared with other types of crimes, the death penalty is the most serious type of crime. Therefore, they must always be threatened with other criminal alternatives, namely life imprisonment or a maximum imprisonment of 20 (twenty) years. On the other hand, in the application of the death penalty, the judge is given the authority to give a trial sentence for a period of 10 years. This gives the convict time to change and improve themselves within a certain period of time. The success of carrying

[12] Kristian Erdianto , *5 Masalah RKUHP, Dari Penerapan Hukuman Mati Hingga Warisan Kolonial*, Https://Nasional.Kompas.Com/Read/2019/08/29/08014781/5-Masalah-Rkuhp-Dari-Penerapan-Hukuman-Mati-Hingga-Warisan-Kolonial?Page=All, Accessed on July 23, 2022.

[13] See Article 67 Draft Criminal Code.

out the probationary sentence then became a way for the opening of a change in the sentence of the convict to a life sentence. based on a presidential decision and with the consideration of the Supreme Court. On the other hand, if the convict fails to carry out the probationary sentence, the death penalty will also be imposed based on the order of the attorney general. this is regulated in article 100 Draft Of Indonesian Penal Code (RKUHP). This idea also raises problems that need to be studied more deeply, among others: *first* whether the system is effective in meeting the objectives of punishment. and the *second* is whether the system is conceptually mature in its application.

Therefore, it is important to study more deeply about alternative punishments in the death penalty. So based on the above background the author examines "The Urgency of Alternative Threats And Probation In The Application Of The Death Penalty".

B. Problem Formulations

Based on the description of the background above, the problem is formulated as follows?

1. What is the urgence of alternative threats and probation in the application of the death penalty?
2. What is The Weaknesses In The Concept Of Alternative Threats And Probation In The Application Of The Death Penalty Stipulated In The RKUHP?

C. Research Objective

The objectives to be achieved from this research are:

1. To analyze what the urgence of alternative threats and trial criminal sentence in the implementation of the death penalty from the perspective of sentencing theories and human rights.
2. To analyze What is The Weaknesses In The Concept Of Alternative Threats And Probation In The Application Of The Death Penalty Stipulated In The RKUHP.

D. Research Originality

To ensure the authenticity of this research, and to avoid replication of research with the same emphasis on the same study, it is necessary to trace previous studies. Based on the search results from the author, there are two previous studies that discuss relevant alternative crimes to be taken into consideration. The research that the author found was the first in the form of a thesis and the second in the form of a journal entitled:

1. *"The Urgency of Alternative Criminal Laws in Renewing Indonesian Criminal Law (Study of Alternative Criminal Substitutes for Imprisonment in Order to Realize the Purpose of Sentencing)"* This thesis was written by Randa Ananda Lakenda from the Law Studies Program, Faculty of Law, State University of Semarang in 2017. The research discusses the formulation of the problem in the form of:
    a. What is the urgency of alternative punishment as a substitute for imprisonment in realizing the purpose of sentencing?

b. What is the potential for alternative punishments as a substitute for imprisonment in Indonesian criminal law regulations and in the reform of Indonesian criminal law in the future?

2. *"Threats of Death Penalty that are Special and Alternative in the Draft Criminal Code"*. This journal was written in Journal Kajian Ilmiah UBJ Volume 16 Number: 1 In January 2016 by Hesti Widyaningrum, Lecturer at the Faculty of Law, Bhayangkara University Jakarta raya.

If you read at a glance, it will indeed appear that the research we did with the research that is the material for comparison of originality will look a little similar. However, if we examine further between the research we conducted and the two studies above, there are points of emphasis and focus of discussion that are much different. These differences include:

In the *first* research example above, the researcher focuses on general discussion of alternative punishments as a substitute for imprisonment, as well as the prospects for using alternative punishments as a substitute for imprisonment in Indonesia in the future. This is reflected in the formulation of the problem mentioned. This is certainly different from our research which focuses and emphasizes on alternative punishments to the death penalty. As we explained a little about the background of the problem, the understanding of alternative punishment in the context of punishment in general instead of imprisonment is different from the context of alternative punishment in the death penalty which generally applies automatically. So, it can be concluded

that there are differences in generality and specificity in these studies. Apart from that, our research also offers an ideal concept in applying alternative punishment to the death penalty which was not mentioned at all by the first research.

Furthermore, *the second* research is in the form of a journal, in that research the formulation of the problem is not included. The research is also simple in that it only explains what the purpose of sentencing, the death penalty is and how it is regulated in the Draft Criminal Code. Of course this is certainly different from our research as we have mentioned above. Apart from that, our research is more in the context of questioning the urgency of applying alternative penalties to the death penalty, not just explaining how alternative punishments to the death penalty are.

E. Literature Review

1. Penal Policy Reform

In legal discourse, it is difficult to find the right definition, which can then be used as a general definition in the application of law. It is not surprising then that the definition of law by experts gives rise to various meanings. One of these differences is of course due to differences in the natural, cultural and social surroundings that affect the differences of opinion that arise. In short, the difficulty in making a legal definition is caused by:

1. because of the vastness of the legal field;

2. the possibility to review law from various angles (philosophy, politics, sociology, history, etc.) so that the results will be different and each definition contains only one package of law;
3. the object (target) of law is society, even though society is constantly changing and evolving, so the definition of law will also change.[14]

Among the experts who express their opinion in defining law is Van Apeldoorn, according to him law is a social phenomenon; there is no society that does not know the law, then the law becomes an aspect of culture such as religion, morality, customs, and habits. and should be adhered to by all members of the community concerned. Meanwhile, according to Tirtaamidjata, the law is all the rules (norms) that must be followed in behavior and actions in social life with the threat of having to compensate if they violate the rules that will endanger themselves or their property, for example people will lose their independence, be fined, and so on.[15]

Although there are many differences in the definition of law by experts, on some sides we also find similarities that it feels like there is no debate in it. Among them are related to the legal function that is used as a guide for people's life in carrying it out. This also applies to criminal law. In that case, it is a logical consequence that there must be a

[14] Ishaq, *Dasar-Dasar Ilmu Hukum,* Sinar Grafika, Jakarta, 2018. p.1.

[15] Pipin Syarifin, *Pengantar Ilmu Hukum,* Pustaka Setia, Bandung, 1998. p. 23.

"contextual" characterization of the law, especially criminal law. In the sense that criminal law must be able to adapt to changes in people's lives that are dynamic. Criminal law must be a concept that lives in the soul of society itself, or in Savigny's language called volkgeist. To achieve this, appropriate legal reforms must be carried out. This reform, which in the KBBI is synonymous with the word refinement, is a form of contextualization of criminal law, by making changes as considerations, materials and reasons for changes. Of course this leads to the goal of good law and the good of society.

2. Sentencing

Punishment is a synonym for the word punishment. Thus, punishment can be interpreted as a system in criminal law that regulates the provision of punishment and its mechanism is regulated by the judge for the crime committed. Or in other words, punishment is an activity to realize the mechanism for giving criminal sanctions regulated by law. According to Barda Nawawi Arief, if the notion of punishment is defined broadly as a process of giving or imposing a crime by a judge, then it can be said that the criminal system includes all of the statutory provisions that regulate how the criminal law is enforced or operationalized concretely so that a person is sanctioned (criminal law)). This means that all laws and

regulations regarding substantive criminal law, formal criminal law and criminal law enforcement can be seen as a unified criminal system.[16]

a. The Sentencing Theories

The theory of punishment in the development of law undergoes changes according to the needs of society. In its development, punishment has its own view in its changes from time to time with various streams or classifications, namely:

1) Absolute Theory (*vergerldings therien*).

According to this theory, the punishment is imposed solely because people have committed crimes or criminal acts. This theory was proposed by Kent and Hegel. The absolute theory is based on the idea that punishment is not practical, such as fixing criminals, but that crime is an absolute demand, not just something that needs to be imposed but becomes a necessity, in other terms, the essence of crime is revenge (revegen). This theory puts forward witnesses and criminal law is imposed solely because they have committed a crime which is an absolute consequence that must exist as a retaliation to the person who committed the crime.

2) Relative Theory (*Doel Theorien*)

[16] Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana*, Citra Aditya Bakti, Bandung, 2002. p. 129.

The relative theory or also called the combined theory, this theory stems from the premise that the imposition of criminal penalties must have a clear purpose. Among them as a tool to bring order to the community, as a tool to improve the behavior of perpetrators and so on. In this theory, punishment is no longer defined as a means of retaliating against the perpetrator's crime but as an effort to achieve goals that are beneficial to society.

3) Combined theory (*Vereningings Theorien*)

This theory is none other than the theory of merging between absolute theory and relative theory in one unit. In the view of this theory, punishment is double where punishment is considered as a retaliation as a moral criticism, while the character of the goal lies in the purpose of moral criticism and the retaliation is as a reform of the behavior of the perpetrators of the crime.

3. Human Rights

The struggle to glorify human dignity has existed since humans existed. The missions carried out by the prophets with their books illustrate that the human mission always undergoes a transition process according to the context of the times. But then the history of human rights became a global humanitarian movement with almost the same

appearance only recently emerged. The milestone that started this was started by the constitution of the Islamic state of Medina which was later referred to as the Medina charter. This charter became the originator of the human rights movement which was pioneered by Negra in its constitution. In its later development, human rights can be ordered by the emergence of events that have a major influence on the development of human rights. in England the Magna Charta charter was made in 1215, in America there was the Declaration of Independent 1776, Parliament Act 1911. In France the document was known as the Declaration des Droits de I'homme et du Citoyen 1789, and then the climax was the creation of the UDHR in 1948. Apart from the above documents. The political situation in the world also has a great influence on the development of human rights. Mainly the influence of World War I and II which resulted in institutions and various conventions. Among these institutions there was a league of nations which was later replaced by the unity of nations because it was considered the failure of the league of nations in solving problems caused by world war I, especially humanitarian issues.

Although human rights are awareness and a global movement in promoting human dignity, the definition of human rights globally is not found. This is considering the differences between what are considered rights and obligations between one region and another. This then gave rise to the flow of universalism and relativism in human rights. However, there are various schools of thought in characterizing human rights that

can be used as a basis such as natural theory, utilitarian theory, Marxist theory and others. In Indonesia, the definition of human rights is contained in Article 1 number 1 of Law No. 39 of 1999 concerning Human Rights. Human rights are a set of rights that are inherent in the nature and existence of humans as creatures of God Almighty and are His gift that must be respected, upheld, and protected by the state, government, and everyone for the sake of honor and protection of dignity and worth man".[17]

F. Operational Definition

The operational definition aims to frame the research subject in the thesis so that the discussion does not get out of the research topic. Given the alternative criminal has many types with their own characteristics. Then rather than that so that the specialization of the research carried out by the author makes it easier for readers to understand.

Alternative threat is a mechanism for imposing criminal sanctions that provides options for different types of sanctions and or other types of sanctions other than the main sanctions for a particular criminal offense.

Probation is the provision of opportunities for someone who has been sentenced to criminal punishment to improve himself within a certain period

[17] See on Article 1 number 1 Law No.39 of 1999 concerning Human Rights.

of time. this is then the benchmark and condition whether the criminal sanctions that have been imposed will be continued or removed and or replaced with other types of criminal sanctions.

Death penalty is a type of criminal sanction in which the perpetrators of certain criminal crimes are taken right to life based on court decisions and with procedures that have been regulated in the legislation.

Sentencing in Indonesian law is a method or process to impose sanctions or penalties for someone who has committed a crime or violation.

According to the KBBI the definition of reform is a change that occurs drastically where the aim is to improve in the social, political, religious and economic fields, in a society or country. Therefore, *criminal law reform policy* can be defined as a systematic, planned and rational effort to change criminal law positively to adapt to social, political developments, and people's aspirations for the progress and relevance of criminal law.

G. Method of Research

1. Type of Research

This research is normative legal research, namely research conducted by examining library materials covering legal principles, legal theory, legal systematics, comparative law, and opinions of scholars. This normative legal research is based on primary and secondary legal materials, namely research

that refers to the norms contained in the legislation.[18] However, apart from being studied, it is also related to the existence of the death penalty in the status quo.

2. Research Approaches

This research method is carried out using a statute approach and a conceptual approach. The statute approach is an approach used to review and analyze all laws and regulations that have to do with the legal issues being handled. The conceptual approach is moving from the views, doctrines that develop in the science of law.[19]

3. Object of Research

The object of this research is:

1. What is the urgence of alternative threats and probation in the application of the death penalty?
2. What is The Weaknesses In The Concept Of Alternative Threats And Probation In The Application Of The Death Penalty Stipulated In The RKUHP?

[18] Soerjono Soekanto, *Pengantar Penelitian Hukum*, UI Press, Jakarta, 1984. p.20.

[19] Peter Mahmus Marzuki, *Penelitian Hukum*, Kencana Prenada Media Group, Jakarta 2010. p.93.

4. Research Legal Materials

The data sources used in this study are secondary data consisting of primary legal materials, secondary legal materials, tertiary legal materials, namely

a. Primary Legal Material

Primary legal materials are legal materials that have legally binding force consisting of applicable laws and regulations related to the issues under study, including:

The 1945 Constitution of the Republic of Indonesia, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, Rome Statute, Cairo Declaration, Declaration Of Stockholm 11 December 1977 Tap Mpr No. Xvii/Mpr/1998 on Human Rights, Law no. 39 of 1999 concerning Human Rights, Law of the Republic of Indonesia Number 22 of 2022 concerning Corrections, Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Protection of Witnesses and Victims, Decision of the Case Number: 013/Puu-I/2003 the Constitutional Court, Constitutional Court's Decision No. 2-3 / Puu - V / 2007. P. 467 and Indonesian Criminal Code.

b. Secondary Legal Material

Secondary legal materials are legal materials that do not have legally binding force, such as Draft Indonesian Criminal Code, books, scientific journals, newspapers, and the internet

c. Tertiary Legal Material

Tertiary data, are legal materials that provide explanations for primary legal materials and secondary legal materials including the Big Indonesian Dictionary, Legal Dictionary, and English Dictionary.

5. Legal Material Collection Method

The method that will be used in order to collect data to support the discussion in this research is literature study. Literature study is a method of collecting data by elaborating various data sources and writing materials by reading and understanding texts and pre-texts to obtain concepts related to objects or problems that will be raised in research.[20]

6. Data Processing Method

This data processing method is a non-statistical data processing. This is based on that normative research focuses on library research, so that it examines various related literature. In connection with this research, the authors examine the urgency of alternative punishments in

[20] Bambang Sanggono, *Metodologi Penelitian Hukum. Suatu Pengantar*, Rajagrafindo Persada, 2002, Jakarta. p. 43.

the application of the death penalty and develop an ideal concept of implementing alternative punishments in the death penalty.

7. Data Analysis Method

Legal materials obtained from the results of library research will be analyzed descriptively qualitatively, [21] namely collecting and selecting legal materials in accordance with the problems studied, then described to produce a picture or conclusion that is in accordance with what it should be, so as to be able to answer all existing problems.

H. Thesis Framework

This research will be arranged systematically into 4 (four) chapters, in the following details:

CHAPTER I, Introduction, background of the problem that shows the reason why this study is important to do, problem formulation, research objectives, research benefits, theoretical framework, literature review, operational definitions, research methods, and writing systematics.

CHAPTER II, Theoretical Framework. This chapter will describe the theory of punishment, the theory of the death penalty and human rights, and the theory of legal reform

CHAPTER III, Findings and Results. In this chapter, we will discuss the urgency of alternative crimes in the application of the death penalty as a form

[21] *Ibid*, p.43.

of reform of the criminal system in Indonesia which is viewed from a philosophical, juridical, and sociological perspective. Then an analysis is carried out related to the ideal concept of implementing alternative criminals in the death penalty

CHAPTER IV, Closing. In this chapter, conclusions will be presented from research results from research results as well as recommendations based on research results that are useful for future legal developments, especially in the field of criminal law.

CHAPTER II

OVERVIEW OF SENTENCING THEORY, THE DEATH PENALTY, HUMAN RIGHTS

A. Criminal Law Reform

1. General Understanding

Humans basically cannot live alone, humans are social creatures who always coexist with others and communicate with each other so as to form a group which later becomes a wider form, namely society. In reality, social life requires every individual to act in accordance with the surrounding environment or not to run away from the customs and culture in which he is located, the habits and culture that have been held in such a way as to make it a law in society. As it is known that the source of law is everything that gives rise to rules that have coercive power.[22] Talking about law cannot be separated from social reality and human dynamics where the law is located. This is considering that human existence itself is impossible to separate from a community. The need for grouping is then in a wider scope facilitated by the existence of an institution that we call the state. The state is an extension of the interests of the community. He is given the authority to control and regulate the direction of policy for the realization of the ideals and goals of

[22] Yulies Tiena Masriani. *Pengantar Hukum Indonesia*, Sinar Grafika, Jakarta, 2004, p.13.

the communal (society). One of the instruments used by the state is law, so the existence and development of law with the existence and development of society are two things that are closely related. In line with that understanding, Cicero, an ancient Roman philosopher, said that *ubi societas ibi ius.*

In the context of society, change is a common thing, life in the past and now will clearly be different, even between today and tomorrow there can be a form of change, changes that occur are something commonplace that cannot be avoided in social life. Changes can occur because of the arrival of the community which requires the government to form rules for this matter or changes that come because of new rules formed by the government that require the community to change according to the applicable rules. The government carries out a large and important role and responsibility, realizing the country's goals.[23] The developments that occur in society also require the presence of the law to become an appropriate institution through various approaches.

One approach that can be expected to easily provide understanding is the renewal approach by prioritizing social jurisprudence. With this approach, positive law that applies in society is no longer only positioned as a rule, but also as a living law. So furthermore, the law is no longer only to strengthen the habit and behavior patterns of the community, but further than that the law is also used as a tool to direct people's behavior. Eliminate behaviors that

[23] Sudiko Mertokusumo. *Mengenal Hukum*. Liberty, Yogyakarta, 2005. p.77

are considered inappropriate and or create new patterns of community behavior. This thought was first put forward by Roscoe Pound, in the Indonesian context this opinion was later elaborated further by Muchtar Kusumaatmaja that the conception of law as a means of community renewal has a wider scope and reach. This is due to the nature of Indonesian law that emphasizes legislation in the process of legal reform. Therefore, so that the intended reform is in accordance with what is desired, the legislation is expected to be in accordance with the law that reflects the values that live and exist in society. The establishment of the rule of law to renew or regulate society so that the concept of law as a means of renewal in society can be achieved in accordance with what the law itself wants.

Legal thought that is well-known as one of the theoretical frameworks supporting legal reform is the theory of development law. This theory has received tremendous attention considering that apart from being made by a native Indonesian (Mochtar Kusuma Atmaja), this theory is also very Indonesian in style. In its growth and development, development theory adapts to the pluralistic culture and style of Indonesian society. The reasons above are also supported by the style of development theory itself which refers to the way of life of the Indonesian people who live in a sense of kinship, holding firmly to the principles of Pancasila. So basically this theory is to direct the function of law as a means of community renewal (law as a tool of engineering) with an Indonesian pattern which is very necessary for the development and renewal of Indonesian law.

In more detail, Mochtar Kusumaatmadja said that the law is a tool to maintain order in society. Considering the nature of the function of the law, basically it is conservative, meaning that the law is to maintain and maintain what has been achieved. Such a function is needed in every society, including those who are developing, because here too there are results that must be preserved, protected and secured. However, for a developing society, which in our definition means a rapidly changing society, it is not enough for the law to have such a function. He must also be able to help the process of community change. An old-fashioned view of law that emphasizes the function of maintaining order in a static sense, and emphasizes the conservative nature of law, assumes that law cannot play a significant role in the reform process.[24] To say that law is a "means of community renewal" is based on the assumption that the existence of order or order in development and renewal efforts is something that is desired or deemed (absolute) necessary. Another assumption contained in the conception of law as a means of renewal is that law in the sense of legal rules or regulations can indeed function as a tool (regulator) or a means of development in the sense of channeling the direction of human activity in the direction desired by development and renewal.[25]

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[24] Mochtar Kusumaatmadja, *Konsep-Konsep Hukum Dalam Pembangunan (Kumpulan Karya Tulis)* Penerbit Alumni, Bandung, 2002, p.14.

[25] Mochtar Kusumaatmadja, *Pembinaan Hukum Dalam Rangka Pembangunan Nasiona*l, Penerbit Binacipta, Bandung, 1986, p.11.

2. Reform and Criminal Law

The reform of criminal law in its pattern emphasizes the renewal of basic ideas, renewal of concepts or renewal of the paradigm of punishment. Such renewal by Barda Nawawi stated that it was not only textual changes to articles. But there is a priority value that is also very important. It is said to be a priority because basically law is a crystal of value which is then in its embodiment constructed through the text of norms or articles. Because law is a form and description of value, the assessment of the good or bad quality of a law is measured by the good and bad embodiment of that value. Without the values that are brought, the articles and legal norms are mere empty texts.

Because of the importance of paying attention to the value content in legal reform, especially criminal law, there must be clear and logical signs in theory. This is so that the desired renewal does not deviate from good and useful values for the community. In his opinion, Muladi said that there are at least five signs in the reform of the national criminal law. First, reform of criminal law, apart from being carried out for sociological, political and practical reasons, must consciously be structured within the framework of the national ideology of Pancasila. Second, reform of criminal law must not ignore aspects related to the human condition, nature and Indonesian traditions while still recognizing the law that lives in society, both as a source of positive law and as a source of negative law. Third, criminal law reform must be adapted and adapted to the universal trends that grow in civilized

society. Fourth, taking into account the harsh nature of criminal justice and one of the objectives of punishment which is preventive in nature, the reform of criminal law must also consider preventive aspects. Fifth, criminal law reform must always be responsive to the development of science and technology in order to increase the effectiveness of its functions in society.[26] From what Muladi's opinion described above, it becomes clear the nature of legal reform, including criminal law, namely reviewing and reassessing sociopolitical and socio-cultural values. Changes in the criminal paradigm which can then be used to reconstruct normatively the criminal law that is aspired to and in accordance with current values. Make textual improvements, enforcement, cultural systems and legal infrastructure.

By looking at the state of Indonesian criminal law, which in the formulation of the article is largely a product of colonial heritage, of course, reform of criminal law is very important to do. In carrying out this renewal, according to Barda Nawawi, it must use a humanist approach, a cultural approach and a religious approach. Of course, this approach must be contextualized more deeply within the national legal framework so that the desired substantive justice can then be achieved. The pluralistic nature of Indonesian society is what makes the problem of legal reform in Indonesia so complex. Moreover, the difference in interpretation of cultural values,

[26] Sudarto, *Hukum Pidana Jilid I A-B*, Semarang, Fakultas Hukum Universitas Diponegoro, 1989, p.143-170.

humanist values and religious values between one region and another, apart from being different, each has also developed quite significantly.

The work of analyzing and then reconstructing or carrying out legal reforms cannot be separated between criminal policies and social policies. The existence of the relationship between the two things above also requires that the purpose of the presence of criminal law be in the community with the objectives of social policy, such as the realization of welfare and public peace. These problems can be called the criminalization problem. According to Muljatno, there are three general criteria for criminalizing, namely, first, the determination of an act as a criminal act must be in accordance with the legal feelings of the community; second, whether the threat of punishment and the imposition of a criminal is the main way to prevent the violation of these prohibitions; and thirdly whether the government by passing through the relevant state instruments is really able to actually carry out the criminal threat if it turns out that someone violates the prohibition.[27] Sudarto then expressed his opinion, to realize the above (harmony between criminal policy and social policy) the following matters must be considered:

a. The use of criminal law must take into account the objectives of national development, namely realizing a just and prosperous society that is materially and spiritually evenly distributed based on Pancasila. In

[27] Muljatno, *Asas-Asas Hukum Pidana*, Bina Cipta, Jakarta, 1985. p.5.

connection with this, the use of criminal law to tackle crime for the welfare and protection of society.

b. Actions that are attempted to be prevented or overcome by criminal law must be "undesirable acts" i.e. actions that cause material or spiritual harm or community members.

c. The use of criminal law must also take into account the principle of "costs and results" (cost benefit principle).

d. The use of criminal law must also take into account the capacity or working power of law enforcement agencies, i.e., there should not be an overload of duties (overbelasting).[28]

Talcott Parsons explains that society consists of sub-systems that are interconnected and influence each other. The relationship between these sub-systems is through the flow of information and energy flows. Law is in a cultural or social sub-system that has a high flow of information, but the energy it has is the lowest among other sub-systems so that the existence of law is influenced by other higher sub-systems, namely the political and economic sub-system. This shows that in making a regulation, economic and political factors drive the policy direction of the regulator. In other words, the energy of the economic and political sub-systems greatly influences the formation/renewal of laws. Meanwhile, according to Gustav Radbruch, in

[28] Barda Nawawi Arief , *Kebijakan Legislatif Dalam Penanggulangan Kejahatan Dengan Pidana Penjara*, Cetakan Keempat, Genta Publishing, Yogyakarta, 2010. p.35.

reforming a regulation, it must be based on legal ideals (rechtsidee). According to him, the legal ideals that are desired by the community include three things, namely certainty, expediency and justice. In realizing the legal ideals of Gustav Radbruch, it must be done by paying attention to the balance between legal certainty, legal benefits and justice, so that the substantive justice to be realized in legal reform can be achieved.[29]

3. Renewal of Law in Islam

In the tradition of Islamic intellectual treasures, the term renewal (in this context, Islamic renewal) is considered a translation of the Arabic word *tajdid,* as well as modernism in Western terminology. Realizing the negative meaning, of course, in addition to the positive meaning, in terms of modernism, Harun Nasution gave advice, especially to Muslims (Indonesia) that they should only use the term "reform" to refer to reform in Islam, including in Indonesia..[30] In a more specific realm, namely in the aspect of reforming Islamic law, the use of *ijtihad* is known. Etymologically *ijtihad* is a derivation of the word *al-juhd* which has the meaning of devoting all abilities, potentials and capacities. From here then *ijtihad* literally means maximum effort and bear a heavy burden.[31] Ijtihad, in terms, is defined as the earnest effort of an expert in Islamic law (faqih) to produce zany

[29] Any Ismayawati, Pendekatan Dan Politik Hukum Dalam Pembangunan Hukum Pidana Di Indonesiayudisia, *Jurnal Pemikiran Hukum Dan Hukum Islam*, Volume 12, No.1, 2021. p.120.

[30] Harun Nasution, *Pembaharuan Dalam Islam, Sejarah Pemikiran dan Gerakan*. Bulan Bintang, Jakarta, 1992. p.12

[31] Makhluf, *Al-Munjid Fi Allughah Wa Al-A'lām*, Dar Al-Masyriq, T.Th, Beirut, p.105.

religious conclusions from detailed arguments. With this, Islamic law is strongly influenced by the context of society, place and time. This is what later became the basis of the universalism of Islamic law (*fiqh*).

As it is generally known that Islam is a very comprehensive religion in regulating all lines of human life. Islam regulates in detail how humans should interact with God, humans interact with each other and humans interact with their environment. This holistic style of Islam certainly will not work without being accompanied by the ability of Islamic law to adapt to various geographical, cultural and era conditions. With the spread of Islam quite widely and its existence that remains firmly in control of human life to this day, it is enough to prove that Islam is an adaptive religion. This high adaptability is obtained from the closeness of Islamic discourse with contemporary discourse and the neat mechanism of Islamic law in terms of carrying out legal reforms that do not conflict with things that are considered principal. At first, Islamic law relied directly on its main source, namely the Qur'an and the Prophet Muhammad as the messenger of Allah SWT (hadith). Allah SWT provides a legal explanation of a phenomenon through the Qur'an, or the explanation is obtained directly from the Prophet Muhammad. So that practically the determination of law only comes from the Qur'a and the Prophet SAW. However, after the main source of Islamic law in this case the Qur'an stopped coming down and the prophetic mission of the Prophet Muhammad also stopped when the Prophet Muhammad died, Islamic law inevitably had to be developed with various epistemologies and

methods. This necessity is driven by the fact that the Qur'an and the Sunnah of the Prophet SAW do not contain in detail and thoroughly the problems of human life, let alone problems in the future.[32]

The limited existence of the revealed texts of the Qur'an and the hadith of the prophet as well as legal problems in the community that continue to develop make legal reform in Islam a logical consequence of the actualization of Islamic law. For this reason, there are at least some things that are inherent in efforts to reform Islamic law, including First, reform in Islam refers to efforts to make changes. Second, the teachings of Islam, especially the results of ijtihad and the thoughts of previous scholars, are the targets of Islamic reform. In other words, the actual renewal of Islam does not pretend to update or make changes to the Qur'an and Sunnah, because the truth is absolutely *shalih likulli zaman wa makan* (true for every time and place). In this regard, reform in Islam does not pretend to make changes to the principles and fundamentals of Islamic teachings. Judging from the context of the categorization of the verses of the Qur'an on *qath'i addilalah* and *dhanni ad-dilalah*, Islamic reform only enters the area of the verses of the Qur'an which are categorized as *dhanni ad-dilalah*. However, what has been updated, once again, is not the verses of the Qur'an or the hadiths, but

[32] Darliana, Pembaharuan Hukum Islam di Indonesia, *Al Ahkam Jurnal Hukum Pidana Islam* Volume 4, No.1, 2022. p.2.

the interpretation of the scholars of Islamic teachings contained in the Qur'an and the hadith, especially those categorized as *dhanni ad-dilalah*.[33]

In the use of ijtihad there are several methods commonly used. The existing methods then experienced different views in type and naming. It is said so because basically the existing differences lead to differences in terminology but principally remain the same. There are at least three main methods used by Islamic thinkers, namely:

a. Ijtihad Bayani, this ijtihad is ijtihad with the method of giving deep meaning to one of the texts by strengthening the meaning contained in it. This ijtihad aims to find the law in the text that is *dzanni.*
b. Ijtihad Qiyasi, this type of ijtihad is ijtihad to find the law against something for which there is no evidence, either the *qat'i* argument or the *dzanni* argument. However, only found arguments that have similarities *illat* of the law (because of the emergence of law). So then an analogy is made to the *illat.*
c. Ijtihad Istilahi, this type of ijtihad is a type of ijtihad on something for which there is no law at all or other similar legal illat. So then for such cases, the general principle of maqasidal-syari'ah (the purpose of Islamic law) is used and with the aim of preventing damage and giving rise to benefits (*dar ul mafasid muqaddamun 'ala jalbil mashalih).*

[33] Harun Nasution, "Tajdid: Sebuah Respons Terhadap Perubahan", *Jurnal Pesantren*,Volume V, No.1 , 1988. p.34.

Meanwhile, Yusuf al-Qaraddlawi detailed the typology of ijtihad into three types, namely *ijtihad intiqā'i, ijtihad insyā'i* and convergence ijtihad. *Ijtihad Intiqā'i* is choosing an opinion from some of the strongest opinions contained in the legacy of Islamic fiqh with fatwas and legal decisions. *Ijtihad insya'i* is the taking of legal conclusions from an issue that has never been raised by previous scholars or the way for a contemporary mujtahid to choose a new opinion on the matter that has not been found in the opinion of the salaf scholars. Meanwhile, the combination of the two ijtihad is to choose the opinion of the previous scholars who are considered more relevant and stronger, then new elements are added to that opinion.[34]

The approach used by the mujtahid in carrying out legal *istimbath* (simply eans the process of carrying out and exploring new laws) is to use the linguistic approach and the *maqasidus sharia* approach. With a linguistic approach, *mujtahids* try to understand in depth the *lafadz* or text or other implied meanings. Because in Islamic legal discourse the main argument is the Koran and hadith that use Arabic, it is absolutely legal for mujtahids to understand, and understand with a high capacity the sciences related to Arabic. As for the *maqasidus sharia* approach, it is different from the linguistic approach, this approach is based on the objectives of the text, or the existing *lafadz*. This approach uses the purpose of benefiting and

[34] Yusuf Al-Qaradlawi, *Masyarakat Berbasis Syari'at Islam, Akidah, Ibadah Akhlak, Terj. Abdus Salam Masykur*, Era Intermedia, Solo, 2003. p.125-130.

preventing the evil from having texts or *lafadz* as contextualization materials. This is because the text is limited while the context continues to evolve.

In the development of contemporary thoughts then emerged several theories about legal reform put forward by Islamic thinkers. The emergence of these theories as a form of contextualization of Islamic teachings that must still exist to accompany the swift current of modernity. Among these theories include:

a. Fazlur Rahman's "Double Movement" Theory

> Fazlur Rahman, a Pakistani Islamic thinker in his method often uses the historical criticism method. This method consists of three main steps: first, a historical approach to find the meanings of the Qur'anic texts in the spread of the Prophet's da'wah. Second, distinguish between legal provisions and the goals and objectives of the Qur'an. Third, understand and set the goals of the Qur'an by paying full attention to its sociological background.[35] because of the emphasis on the sociological situation then this method will bring up many differences and difficulties. With this method, Fazlur Rahman criticized classical scholars who often criticized classical and contemporary scholars in interpreting the law. For example in the case of cutting hands for

[35] Fazlur Rahman, "Islamic Modernism: Its Scope, Method and Alternatives", *International Journals Of Middle East Studies*, Volume. I, 1970, p. 329-330.

thieves. He criticized classical scholars who made a narrow definition of theft as well as contemporary scholars who seem only metaphorical but neglect the historical aspects comprehensively about the texts or verses about the theft.

b. Theory of Deconstruction of Shari'ah al-Na'im

In reforming the theories of Islamic public law, An-Naʿim departed and used the theory of his teacher Mahmoud Mohammed Taha, known as the naskh theory or the "reverse text" theory. This constructive approach, An-Naʿim took in order to adapt the texts of the Qur'an and al-Sunnah to modern conditions. This is done to meet the demands of the application of the Qur'an and al-Sunnah. Therefore, it needs adequate interpretation so that the spirit it contains can be captured. Furthermore, an-Naʿim argues that Islamic public (criminal) law, especially aspects of hudd, qisās and the like, is considered to be able to be used as a basis and consistent with its historical context. However, according to him, it cannot be used as an excuse and (not consistently) in accordance with the current context. Various aspects of sharia public law -- in a political context -- are no longer accurate or functional.[36]

c. Ibrahim Hossen's *"zawājir"* Theory

[36] Junaidi Abdillah,'' Gagasan Reaktualisasi Teoripidana Islam Dan Relevansinya Bagipembangunan Hukum Di Indonesia Ijtimaiyya'',*Jurnal Pengembangan Masyarakat Islam*, Volume 10, No.1, 2017. p. 70

In this approach, the punishment in Islamic punishment imposed on perpetrators of criminal acts does not have to be exactly or the same form of punishment as what is textually stated in the Qur'an and al-Hadith. Offenders can be punished with any form of punishment. With a record that the punishment is able to achieve the legal purpose of deterring the perpetrators and causing fear for others to commit criminal acts.[37]

B. Overview of Sentencing

1. Definition and Understanding

Sentencing is a sub system in criminal law whose main discussion is related to sanctions against perpetrators of criminal acts. Sentencing becomes very important in criminal discourse, given its very basic role in the series of criminal liability processes. This includes the determination of sanctions, the mechanism for imposing sanctions, the implementation of sanctions, and other related matters. W.A. Bonger argues that punishment is “punishing, i.e. wearing suffering. Punishing is tantamount to "declaration of decency" that arises from the crime, which is also suffering. Punishment is essentially an act committed by the community (in this case the state) consciously. Punishment does not come from one or several people, but must be a group, a collectivity that acts consciously and according to the calculation of reason. The new

[37] Juhaya S. Praja, *Teori Hukum Dan Aplikasinya*, Pustaka Setia, Bandung, 2011. p.86-87.

"main element" of punishment, is "the opposition expressed by the collectivity consciously".[38]

Seen from the language point of view, the word sentencing which has the basis of the word criminal is often interpreted the same as "punishment". Such understanding is approved by the opinion of Prof. Sudarto said that sentencing and punishment are the same terms, which are related to the act of "stipulating or deciding on punishment".[39] However, Moeljatno has a different opinion. In his opinion, he distinguished the terms criminal and sentencing with punishment/punishment. According to him, the most appropriate term in synonyming the word criminal is with the word *straf* and the threat of punishment with the *word gestraft*. This is different from the conventional opinion which defines *straft* with punishment and the word *getstraft* with punished. According to him, if it is interpreted that way, the word *straft recht* means that it has the meaning of punishment. Furthermore, he argues that being punished means that the law is applied, both civil law and criminal law. Punishment is the result or result of the application of the law which has a broader meaning, because in this case the judge's decision is also included in the field of civil law.[40] From several opinions, there is a point of difference that arises is the synonymy and use of the term punishment. Is it

[38] W.A. Bonger, *Pengantar Tentang Kriminologi. Terjemahan Oleh R.A. Koesnoen*, PT. Pembangunan, Jakarta. p.24-25

[39] Muladi dan Barda Nawawi A. *Teori – Teori dan Kebijakan Pidana*, Alumni, Bandung, 1984. p.01

[40] Moeljatno, *Membangun Hukum Pidana*, Bina Aksara, Jakarta, 1985. p.40

only for the application of sanctions in criminal acts or sanctions in civil law are also part of punishment. So if a middle line is drawn on the existing differences of opinion, it can be concluded that the definition of sentencing is as we alluded to at the beginning.

2. Purpose of Sentencing

Criminal law as one of the branches of law that plays a major role in regulating human interaction in social life. Present in the community to provide protection, as a guarantee of peace and security for the community. Thus, sentencing of perpetrators of criminal acts, which is a sub-system of the implementation of criminal law, is still required to follow the basic principles of criminal law, namely the creation of a sense of security and peace in the community. According to Wirjono Prodjodikoro, the objectives of punishment are:

1. To frighten people not to commit crimes, either by scaring the people (generals preventive) or by scaring certain people who have committed crimes so that they will not commit crimes again (speciale preventive); or.
2. To educate or improve people who commit crimes so that they become people of good char acter so that they are beneficial to society.[41]

[41] Wirjono Prodjodikoro, *Tindak Tindak Pidana Tertentu Di Indonesia,* P.T Eresco, Jakarta , 1980. p.3.

The above opinion can be used as a general description of the purpose of punishment that punishment serves for prevention, improvement and education of the community.

There are various theories regarding sentencing that can be used as an academic basis by lawmakers and law enforcers in formulating and implementing criminal sanctions. In its existence, theories about sentencing are adapted to the politics of criminal law where criminal law is carried out. This certainly affects the development of sentencing objectives which will continue to develop as a reaction to the dynamics of society, the development of forms of crime and the politics of criminal law in a country. In general, there are three theories related to sentencing, namely absolute, relative and combined theories. Later in its development, new theories emerged which in the author's view were an extension and refresher of the previous theories, which we will then detail in more detail:

a. Absolute theory

Absolute theory is also known as retaliation theory. This is because the basic idea of this theory is the use of crime as retaliation against perpetrators of criminal acts. This is seen as a consequence of the suffering caused by the perpetrators of the crime. then the state must be present as a representative of the victim or the public through a criminal instrument to provide retribution for suffering to the perpetrator, thereby creating a sense of satisfaction for the victim or the injured public. The opinion expressed by Muladi and Barda Nawawi Arief regarding this theory is "Criminal is an

absolute consequence that must exist as a retaliation to people who commit crimes, so the basis for justification of a crime lies in the existence or occurrence of the crime itself".[42]

The logical ratio of the application of this theory is the cause and effect between criminal acts and punishment (retaliation). So with this rationality, punishment (retaliation) by using a criminal can only be applied when the reason exists, namely the existence of a criminal act. Vice versa, when there is a criminal act, whatever happens there must be punishment (retaliation). Again, this is because they are a causal entity. The originator of this theory is Immanuel Kant who is quite famous for his adage "*Fiat justitia ruat coelum*" which means that even though tomorrow the world will end, the last criminal must still be punished for his actions.

The theory of retaliation or absolute theory itself is divided into two kinds, namely:

1) Objective Retaliation Theory

   Oriented towards fulfilling the satisfaction of feelings of revenge from the community. In this case, the act of the criminal must be repaid with a punishment in the form of a disaster or loss that is balanced with the misery caused by the criminal.

2) Subjective Retaliation Theory,

[42] Muladi dan Barda Nawawi Arief, *Op.Cit*. p.10.

Oriented to criminals. According to this theory, it is the fault of the perpetrator who must be repaid. If the big loss or misery is caused by a minor mistake, then the perpetrator of the crime should be given a light sentence.[43]

b. Relative Theory

The relative theory is also referred to as the theory of objectives, this mention is quite basic considering the view of the relative theory which demands that there must be a clear purpose of sentencing to criminals. In this theory, sentencing is no longer placed as a means of retaliation, but there must be benefits intended for the application of criminal sanctions. In other words, the imposition of a crime which is naturally a process of giving suffering must be avoided unless the imposition of criminal sanctions can provide the benefits in question can be in the form of benefits for the perpetrators of crimes or benefits, to the community and this cannot be achieved in any other way.[44] According to Muladi and Barda Nawawi Arief regarding this theory that "Criminal is not just to retaliate or reward people who have committed a criminal act but has certain useful purposes, therefore this theory is often referred to as (Utilitarian Theory) as the basis for The

[43] Erdianto Efendi, *Hukum Pidana Indonesia*. Refika Aditama. Bandung, 2011. p.142.

[44] The leading figures in this theory are Paul Anselm van Feurbach was a German legal scholar. His major achievement was a reform of the Bavarian penal code which led to the abolition of torture and became a model for several other countries. He is also well-known for his work on Kaspar Hauser.

justification for the existence of a crime according to this theory lies in its purpose, the punishment is not *"quia peccatum est"* (because people make crimes) but *Ne Peccetur* (so that people don't commit crimes)".[45]

This theory is then further divided by Andi Hamzah into two types, namely:

1) General Prevention

   In this sub-theory review, the emphasis is on the sentence imposed. Where the imposition of this crime which is then known by the public will give fear to all members of the community who have evil intentions to commit a similar crime. Van Hamel expressed the opinion that "Special prevention of a crime is that it must contain a frightening element in order to prevent criminals who have the opportunity not to commit their bad intentions, and the criminal must have an element of improving the convicted person".[46]

2) Special Prevention

   In this sub-theory review, sentencing must provide fear so that it becomes a deterrent for the perpetrator to carry out the actions he has planned or prevent the perpetrator from repeating the evil deeds that have been done. So to achieve this, the criminal must contain elements of scaring, repairing and also eliminating crime.

[45] Muladi dan Barda Nawawi *Op.Cit.* p.16.
[46] Djoko Prakoso, *Hukum Penitensier di Indonesia*, Liberty, Yogyakarta, 2010. p.36.

c. Combined Theory

As the name suggests, this theory is a combination of absolute theory which focuses on retaliation with retribution theory which emphasizes that there must be a clear goal of sentencing. So in this theory retaliation as a main character in the purpose of sentencing is possible, as long as it is seen as a moral answer to the wrongdoing committed by the convict. But on the other hand sentencing must also have a clear goal, especially in making improvements to convicts as well as prevention and education to the community. "This theory is a reaction to the previous theory which was not able to satisfactorily answer the nature of the purpose of sentencing. According to the teachings of this theory, the legal basis of sentencing lies in the crime itself, namely retaliation or torture, but besides that it is also recognized as the basis for sentencing that is the goal of the law".[47]

Seeing its nature which is a combination of the two previous theories, then in terms of imposing a criminal according to this theory, at least two things must be considered. First, in the case of the implementation of the function of retaliation, the punishment

[47] Satochid Kartanegara, *Hukum Pidana Bagian Satu*, Balai Lektur Mahasiswa, Jakarta, 1998. p.56.

must not exceed the severity of the suffering caused by the criminal act. Second, in terms of the implementation of the function of maintaining public order, the imposition of a criminal offense must not exceed the necessary and sufficient limits to maintain public order.

d. Some of The Latest Theories

In its development, several theories emerged regarding the purpose of sentencing outside the three general and conventional theories above. However, the author does not describe it in detail and only includes it in one sub-chapter. Because these theories in the author's view are the elaboration and development of the three previous theories. The theories in question include:

1) In-capacitation

This theory holds that actions make a person incapable of committing a crime. If a criminal is put in prison for committing a crime, it means that the public is protected from the next crime that the offender may commit for the period of time he is imprisoned..[48] this theory posits that sentencing should have protective properties against the general public. One way that is considered the most effective is to limit criminals in building interactions with the

[48] Din Muhammad, *Sari Kuliah Hukum Acara Pidana*, Diklat Pendidikan Calon Hakim Angkatan ke V, Departemen Kehakiman, Jakarta. 1988. p.174

community. The application of this theory is generally aimed at the types of criminal acts that are considered dangerous to society, such as murder, terrorism, robbery, etc.

2) Rehabilitation

This theory focuses more on reforming or improving the perpetrators of the crime. This theory is to provide treatment and remedial actions to perpetrators of crimes in lieu of punishment. This positive flow argument is based on the premise that the perpetrator of the crime is a sick person who requires treatment and remedial action.[49] Then it becomes clear that according to this theory sentencing is fixing the perpetrator. So that they can return to being good members of society and not do bad deeds again. Apart from that, according to this theory, sentencing must consider the condition of the perpetrator of the crime. This theory is the antithesis of the retribution theory which considers criminals to be punished for their actions.

3) Restoration

This theory assumes that the best application of law to criminal acts is one that has an element of improvement. The intended improvement is that both parties are between the perpetrator and the victim, so that then the victim and the perpetrator can both get

[49] Marlina, *Hukum Penitensier*, Reflika Aditama, Bandung, 2011. p.59

justice for a criminal incident and on the other hand both parties benefit from the punishment. The main element of this theory is the *ultimum remedium*, where criminal punishment is the last option.

4) Social Defense

According to this theory, sentencing must pivot on social protection. The mechanism that is considered ideal by this theory is the existence of a mechanism for sanctions for actions based on the needs and aspirations of the community. So that the perpetrators remain integrated with the community. The famous figure of this school is Filippo Gramatica.

3. The Purpose of Punishment According to Islam

Sentencing in Arabic terms is often called *''uqubah''*, which is a form of revenge for someone for his actions that violate the provisions of *syara'* set by Allah and His Messenger for the benefit of mankind.[50] The basic thing about the concept of Islamic law related to sentencing with positive law is the basic foundation of its application. Islamic criminal law is certainly based on Islamic law and is part of the faith in Islam. As an integral part of religious teachings, the implementation of sentencing in Islam spouts out on the texts of the

[50] A. Rahman Ritonga, dkk, *Ensiklopedi Hukum Islam*, Ichtiar Baru Van Hoeve, Jakarta. 1997. p.187.

Qur'an and Hadith. The purpose of sentencing in Islamic law is the realization of the objectives of Islamic law itself, namely as retaliation for evil deeds, prevention in general and prevention in particular as well as protection of the rights of the victim. Another definition states that sentencing is a suffering that is imposed on a person due to his actions violating the rules.[51]

In Islamic criminal law, the purpose of sentencing does not become separate goals as we find in positive law. In other words, all sentencing must have an element of purpose that covers all existing sentencing purposes. Things like this are rarely encountered in positive law. For example, the retributive theory which often contradicts the relative theory, etc. As for Islamic criminal law (fiqh jinayah), the purpose of punishment (*uqubah*) is categorized into several objectives, namely:

a. Retaliation (*al-Jazā'*)

This concept generally implies that the perpetrator of a crime needs to be recompensed according to what he did regardless of whether the punishment is beneficial for himself or the community. This is in accordance with the concept of justice which requires a person to be recompensed according to what he

[51] Abd. Al-Qadir, *Awdah, aal-Tasyri' al-Jina'I al-Islami*, Daral-Fikr, Bairut 1992. p. 214.

has done.[52] In the Qur'an, there are several verses that form the basis for retaliation against perpetrators of evil deeds, including QS. As-shura verse 40[53] and QS. Al-Maidah verse 38.[54]

b. Prevention (*az-Zajr*)

Prevention or deterrence is the purpose of sentencing in Islam which pivots on prevention so that criminal acts do not happen again. The verse of the Koran that forms the basis of this concept is QS. Az-Zukhruf verse 48[55] and QS. At-Taubah verse 126.[56] In summary, the verses above give the meaning that the actions taken by Allah Swt. against humans in this world the aim is not to merely torture, but actually to warn them to avoid misguidance and ill-treatment. In fact, in the second verse above Allah Swt. reproach people who do not take heed of such warnings.[57] Recovery/Remediation (*al-Islāh*) is the purpose of sentencing in Islam which pivots on the improvement and

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[52] Mahmood Zuhdi Ab. Majid, *Bidang Kuasa Jenayah Mahkamah Syari`ah di Malaysia*, Dewan Bahasa dan Pustaka, Kuala Lumpur, 2001. p.40.

[53]With the meaning of the translation "And the recompense of a crime is a recompense, but whoever forgives and does good (to those who do evil) then his reward is from Allah. Indeed, He does not like the wrongdoers".

[54]With the meaning of the translation "As for men and women who steal, cut off their hands (as) in retribution for what they have done and as punishment from Allah. And Allah is Mighty, All-Wise".

[55]With the meaning of the translation "And We did not show them a miracle except (the miracle) is greater than the (previous) miracles. And We inflicted on them punishment so that they return (to the right path)".

[56] With the meaning of the translation "And don't they (the hypocrites) notice that they are tested once or twice every year, but they do not (also) repent and do not (also) take lessons".

[57] Mahmood Zuhdi Ab. Majid, Op.cit. p.44.

recovery of the perpetrator from the desire to commit a crime. The verses of the Quran that discuss this goal include QS. Al-Maidah verses 38-39.[58] The fact that shows that this remedy is one of the basic goals in the Islamic criminal law system is the jurists' views on the purpose of exile or imprisonment. According to them, the purpose of the sentence of exile or imprisonment is to restore the perpetrators of the crime. Based on this goal, they argue that such punishments will continue until the perpetrators of the crime truly repent.[59]

c. Restoration (*al-Isti`ādah*)

This is a goal where sentencing pivots on repairing and returning to its original state. There needs to be reconciliation between the victim and the perpetrator and the perpetrator's responsibility to correct his mistakes. This can erase the victim's grudge against the perpetrator, and the perpetrator remains responsible for his mistakes for the realization of peace for all

[58] With the meaning of the translation "As for men and women who steal, cut off their hands (as) in return for what they have done and as a punishment from Allah. And Allah is Mighty, Wise - But whoever repents after committing the crime and improves himself , then verily Allah accepts his repentance. Indeed, Allah is Forgiving, Most Merciful."

[59] Mahmood Zuhdi Ab. Majid, Op.cit. p.48-49.

parties. Among the verses of the Koran that form the basis of this concept is QS. Al-Baqarah 178.[60]

d. Elimination of Sins (*at-Takfīr*)

One of the things that distinguishes Islamic criminal law and secular criminal law is the existence of hereafter dimensions in Islamic criminal law. When a human commits a crime, he is not only charged with accountability/punishment in this world *(al-`uqūbāt ad-dunyawiyyah*), but also responsibility/punishment in the hereafter (*al-`uqūbāt al-ukhrawiyyah*).[61] This is what makes the difference between positive law and Islamic law. So in the purpose of punishment in Islam also aims to erase sins.

C. The Death Penalty

1. Death Penalty In Indonesian Criminal Law

The application of the death penalty at the level of reality has always been a controversial issue, both among the government, legal practitioners, clergy, and the community itself. It is no exception because it violates the most basic rights for humans, namely the right to live and improve their

[60] With means of translation "O you who believe! It is obligatory on you (to carry out) qisas regarding the person who was killed. Free people with free people, slaves with slaves, women with women. But whoever gets forgiveness from his brother, let him follow him well, and pay him well (as well). That is light and mercy from your Lord. Whoever exceeds the limit after that, then he will get a very painful punishment".

[61] Muhammad Abū Zahrah, *Al-Jarīmah wa al-`Uqūbah fī al-Fiqh alIslāmī: al-Jarīmah*, Dār al-Fikr al-`Arabī, Kairo 1998. p.20.

lives. Indonesia, as a country with the largest Muslim majority in the world, recognizes that the death penalty is appropriate and urgent to apply for certain crimes or crimes that disrupt public order, threaten human life and state stability.[62]

The existence of the death penalty in the Criminal Code and the RKUHP has quite different characteristics. In the Criminal Code, the death penalty is categorized as part of the main crime. Meanwhile, in the RKUHP, the death penalty is a separate type of criminal sanction that has a special nature. This is stated in article 64 point C which reads "criminals that are specific to certain crimes specified in the law". The specificity referred to is further explained in Article 67 which reads "The special punishment as referred to in Article 64 letter c is a death penalty which is always threatened with alternatives. In the explanation of the article above, it is stated that in this provision, criminal acts that can be threatened with special crimes are very serious or extraordinary crimes, among others, narcotics crimes, terrorism crimes, corruption crimes, and serious crimes. to human rights. For this reason, the death penalty is included in a separate section to show that this type of punishment is truly special. When compared with other types of crime, the death penalty is the most severe type of crime. Therefore, it must always be threatened alternatively with other types of

[62] Khermarinah, "Pandangan Hukum Islam Terhadap Hukuman Mati Bagi Terpidana Bali Nine Dalam Tindak Pidana Penyalahgunaan Narkotika" *Manhaj*, Volume 4, No.1, 2016. p.1.

punishment, namely life imprisonment or a maximum imprisonment of 20 (twenty) years.

Apart from the above, the provisions in the application of the death penalty allow for a probationary period of 10 years based on a court decision. If later the death row convict shows a commendable attitude and action, the death penalty can be changed to life imprisonment with a presidential decree and consideration from the Supreme Court. This concept is at first glance similar to clemency, but upon further examination it turns out to be different. Where the change in punishment is no longer a request from the convict but an automatic result of the convict's success in carrying out a trial sentence.

So far, several historical studies have found that the death penalty was used in the 18th century BC (BC) in the law imposed by King Hammurabi of Babylon, there were 25 cases of crimes that were sentenced to death. In the 14th century BC to 5 BC, the death penalty was also enforced in Athens (Dracodian Code) and the Roman Empire (Twelve Tablet). The death penalty is carried out in various ways that are quite heinous in modern terms, such as; crucifixion, drowning, torture to death, burned, and others.[63]

[63] Ayub Torry Satriyo Kusumo, *Hukuman Mati Ditinjau Dari Perspektif Hukum Dan Hak Asasi Manusia Internasiona,* Documentation Center Collection of Elsam.

2. Death Penalty in Islamic Criminal Law

In Islamic criminal law, the death penalty is a type of punishment that is intended as a maximum sanction and is intended for types of crimes that are considered serious and as a last resort for law enforcement and justice. This implies that the death penalty aims to provide protection to the community and individuals against crimes. In Islam, the death penalty can be imposed in three forms of punishment, namely *qishas, hudud, and ta'zir*. The death penalty using the *qishas* method is used for crimes of intentional or premeditated murder. In the case of *hudud,* the threat of the death penalty is for those who commit *zina muhsan*, *hirâbah*, *al-baghyu*, and *riddah*. Whereas in the case of *ta'zîr*, the threat of the death penalty is intended for perpetrators of crimes outside of *qishâsh and hudd* which the state (ruler) considers very dangerous for the survival and benefit of society..[64]

a. types of Crimes Sentenced to Death Penalty in Islamic Law

1). intentional murder

The crime of murder causes two sides of damage to the family of the person killed whether intentionally or not, namely the first family of the life of the person who provides their livelihood. Second, they feel sad and difficult because of his death so that Allah,

[64] Abd al-Qadir Audah, *Al-Tasyri' al-Islâmi Jina'iy: Muqâranah bi al-Qanûn al-Wadh'i,* Al-Risâlah Mu'assasah, Beirut, 1992, p. 663.

the Most Wise, obliges to pay *diyat* in order to repair the damage to the person who is the place for the family's hopes, so that the broken heart can be healed.[65]

2). *zina muhsan*

Adultery is a sexual relationship between a man and a woman without a marriage bond. Adultery is an evil crime, the root of corruption and is a major sin. As for the prohibition of adultery, it can be viewed from various aspects, including maintaining offspring because if offspring are lost, then tribes, groups, races and families or families will also disappear and the principle of knowing each other is lost, which God wills and having aunts and brothers.[66] The adultery that is treated with the death penalty is adultery muhsan, namely adultery committed by two people, both or one of whom is bound by marriage.

3). robbery *(alhirabah)*

Hirâbah is the release of an armed group in an Islamic area and commits chaos, shedding blood, confiscation of property, destroying honor, destroying crops, livestock, religious images, morals, and public order, both from among Muslims and infidels

[65] Khermarinah, Op.Cit. p.5.

[66] Ali Ahmad Al Jurjawi, *Falsafah dan Hikmah Hukum Islam*, Asy-Syifa', Semarang, 2003, p. 452.

(dhimmiy and harbiy). Included in hirâbah, are crimes committed by syndicates, mafia, and triads. For example, child theft syndicates, bank and house robbery mafia, payment killer syndicates, and mass brawls.[67]

4). Apostates *(riddah)*

The basis for the death penalty for apostates is explained in the hadith of the Prophet SAW. which means "...from Ibn 'Abbas ra. He said: The Messenger of Allah said: "Whoever changes his religion, kill him" (H. R. Bukhari). In another hadith it is stated, that "From 'Aisha ra. Rasulullah SAW said, "It is not lawful for the blood of a Muslim except the one who kills the soul so that he must be killed, or the person who commits adultery and he is a Muslim, or the person who apostates after he was Muslim" (H.R. Ahmad).[68]

CHAPTER III

THE URGENCY OF ALTERNATIVE THREATS AND PROBATION IN THE APPLICATION OF THE DEATH PENALTY

A. The Urgency of Alternative Threats and Probation in The Application of The Death Penalty

[67] Muhammad Hatta, "Perdebatan Hukuman Mati Di Indonesia: Suatu Kajian Perbandingan Hukum Islam Dengan Hukum Pidana Indonesia" *Miqot,* Volume 36, No. 2, 2012. p. 238.

[68] *Ibid,* p.239.

The discussion about the death penalty in Indonesia has been around for a long time. Discussions around this area have become part of social discourse, especially in the field of law which continues to develop and change in a small room in a large house called sentencing. Towards the ratification of the draft Indonesian Criminal Law, the debate on the death penalty then resurfaced with the formulation of death penalty as a special crime in article 64 of the RKUHP.

The existence of the death penalty in the Indonesian legal and sentencing system needs to be studied in depth and seen from a fair perspective from all sides. Moreover, the death penalty is currently trying to be presented in the form of a different concept, namely as a separate type of criminal sanction, using separate threats in the form of alternative threats, and the mechanism for imposing sanctions which is also made different from the existence of probationary criminal sanctions. To explore and study this matter the author tries to review it from a philosophical, juridical and sociological point of view.

The state is a territorial area whose people are governed (governed) by a number of officials and which successfully demands from its citizens obedience to its laws and regulations through monopolistic control of legitimate power. [69] Law plays an important role in realizing state goals, one

[69] Miriam Budihardjo, *Dasar Dasar lmu Politik*, Gramedia, Jakarta, 1986. P.40

of which is through the existence of criminal law. In general, criminal law functions to regulate people's lives in order to create and maintain public order. Humans in an effort to meet the needs and interests of their different lives sometimes experience conflict between one another, which can cause harm or interfere with the interests of others. In order not to cause harm and interfere with the interests of other people in an effort to meet their needs, the law provides rules that limit human actions, so that he cannot do as he pleases.[70]

With these reasons for protecting public ideals, criminal law then imposes sanctions on violators. The existence of these sanctions takes various forms, from light ones such as mandatory reporting, confinement, fines to quite heavy ones such as imprisonment, revocation of some rights and there is even a maximum level of punishment, namely the death penalty for types of criminal acts with a very serious level. The imposition of sanctions is considered important and must be seen from the point of view that the violating act is an act of harming social harmony that is being sought by the Company. In their famous expression, Hugo Bedau and Paul

[70] Dr.Fitri Wahyuni, *Dasar-Dasar Hukum Pidana Di Indonesia*, Nusantara Persada Utama, Tangerang Selatan, 2017. P. 6

Cassell said that *even if civil society revolved to dissolve itself, the last murderer lying in the prison ought to be executed.* [71]

With regard to its nature which can deprive certain rights in society, the formation of criminal law must be made as perfect as possible. This perfection must begin in the process of forming norms, constructing conceptions and effective enforcement processes. Here, conception becomes one of the most important instruments that must be placed on a strong philosophical foundation. This is nothing but for the sake of guaranteeing the proper use of criminal law for society. The concept of alternative threats and probation that the RKUHP is trying to offer is actually a new thing. This concept provides fresh air for the enforcement of the death penalty which has long been a debate in Indonesia. but we must examine the existence of this alternative concept at least from the point of view of justice (philosophical value), certainty (juridical value) and expediency (sociological value). Gustaf Rudbruch in Sudikno Mertokusumo states that: "there are 3 elements that must always be considered in law enforcement, namely legal certainty (rechtssicherheit), expediency (zwekmassigkeit), and justice (gerechtigkeit)". [72] In carrying out law enforcement there must be a compromise between these three elements. Efforts must be made to have a

[71] Hugo Bedau Dan Paul, *Debating the Death Penalty*. Oxford University Press, New York, 2004. P 197

[72] Mertokusumo, Sudigno. 1991. Mengenal Hukum. Liberty. Yogyakarta. p. 134.

balanced proportion to realize the perfection of legal norms and their enforcement.

1. **Justice (Philosophical Value)**

Justice is the very first and foremost element that must be met in the existence of law as an element in orderly social dynamics. Gustav Radbruch as a prominent figure who put forward the purpose of law (justice, certainty and expediency) said east auntem jus a Justitia, sicut a matre sua ergo prius fuit justitia qurmjus. This expression means that justice predates the law, just as a mother predates the fetus she contains. However, on the other hand, justice itself has a very subjective nature, this characteristic is very different from the nature of the objective element of legal certainty.

Because for the realization of objectivity, the existence of the concept of alternative threats and probation in the application of capital punishment offered by the RKUHP Article 67 and Article 100 paragraph 1 must be based on the justice that the law itself wants to aim for. It is at the same time a test material whether the justice to be achieved is in line with the existence of these concepts and norms. Referring to the academic text of the RKUHP, the definition and justice that the RKUHP wants to aim for is justice that is positivistic but still opens as wide as possible to extracting values that are considered fair by society outside of written laws. So that the existence of the concept of alternative threats

and probation in the application of death penalty is also oriented towards the value of justice.

We can see this in the excerpt of the academic text page which says "Thus Kelsen's opinion that justice is legality based on positive law can still be accepted. The reason is that a general regulation (law) is "fair" if it is actually applied to all cases according to the contents of the law that must be applied. [73] in addition to written sources of law (laws) as the main formal criterion/benchmark, also still gives place to sources of unwritten law that live in society as a basis for determining whether an act is criminally deserving". [74]

Such legal justice does not only correlate with the goal of controlling society but also forms a morally good society that is held by the community itself. It is usually mentioned as an instrumental expressive function carried out by law. Expressive when expressing views on life, cultural values and justice and instrumental when, among other things, it becomes a means of creating and maintaining order and stability. The legal order that operates in a society is basically the embodiment of the ideals of law into various positive legal rules, legal institutions, and processes.

[73] Academic manuscript of the Draft Criminal Code, p. 87
[74] Academic manuscript of the Draft Criminal Code, p 25

Seeing this position, the existence of the concept of alternative threats and probation in the application of the death penalty is a breath of fresh air for the problems of enforcing the death penalty in Indonesia. Given this concept, it is oriented towards a balance between fulfilling social justice for the community. Indonesia with a high crime rate certainly still needs the existence of the death penalty, where the agreement on this need has been represented by community representatives in the legislative council. Based on data, the crime rate in Indonesia is 90 per 100,000 residents in 2021. This means that 90 out of 100,000 residents were victims of crime last year. [75]The death penalty is generally considered the most logical reason for people with a high crime rate to apply the death penalty. The normative basis that is generally used is the existence of an open legal policy article 6 paragraph 2 of the ICCPR which reads In countries which have not abolished the death penalty, sentences 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

[75]Ridhwan Mustajab, DataIndonesia.id, https://dataindonesia.id/ragam/detail/tingkat-kriminalitas-di-indonesia-alami-penurunan-pada-2021, accesed on 28 December 2022

Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.[76]

On the other hand, the existence of the concept of alternative threats and probation in the application of the death penalty still provides a way to fulfill justice for the perpetrators. namely with the opportunity to obtain alternative punishments other than death penalty with the aim of improving the perpetrators. This is also in line with the purpose of punishment which is not only oriented towards retaliation but the self-improvement of the perpetrators and the general public. As explained on the theoretical basis in the previous chapter, that punishment is a series of systems as an effort to awaken criminal offenders so that those concerned regret their actions, educate the public not to commit similar acts. This is an urgency for the Indonesian people to build a paradigm of good punishment. and progressive. that the function of sentencing no longer only emphasizes retributive aspects but is also an effort to rehabilitate and social reintegrate for perpetrators of criminal acts.

In Islamic law, alternative punishments are also known in the application of the death penalty, namely the payment of a fine (diat) as an alternative if an agreement is reached and the victim forgives. By

[76] Article 6 Paragraph 2 ICCPR

the language of the Koran, this is referred to as a mercy from God. Islam positions the death penalty as a means of justice for victims, not as the only obligation and an effective sentencing method. So that there is no dispute outside the framework of legal settlement. Victims and perpetrators both get the justice they want. In this case we can find the philosophy and spirit of justice brought by Islam by emphasizing the existence of other sentencing options.

2. Certainty (juridical value)

Legal certainty emphasizes that the law or regulation is enforced as desired by the law/regulation. Everyone hopes that the law can be enacted in the event of a concrete event. How is the law that must apply, so basically it is not permissible to deviate, even though this world is collapsing but the law must be upheld. This is what legal certainty wants. Legal certainty as justifiable protection against arbitrary actions, which means that someone will be able to obtain something that is expected in certain circumstances. The community expects legal certainty, because with legal certainty the community will be more orderly. The law is tasked with creating legal certainty because it aims at public order. [77]

[77] Sulardi dan Yohana Puspitasari Wardoyo, "Legal Certainty, Purposiveness, And Justice In The Juvenile Crime Case", *Jurnal Yudisial* Vol. 8 No. 3 Desember 2015. P.264

The Criminal Code is the mainstay of the criminal system in Indonesia In the current Indonesian criminal system, there are two types of criminal sanctions as stated in Article 10 of the Criminal Code which reads:

crime consists of:

a. main crime:

1. capital punishment;

2. imprisonment;

3. confinement;

4. a fine.

b. additional punishment:

1. revocation of certain rights;

2. confiscation of certain goods;

3. Announcement of the judge's decision. [78]

This type of sanction in the Draft Criminal Code has been updated with the provision in Article 46 which includes the death penalty as a separate and specific type of sanction. It states that "Criminal consists

[78] Article 10 of the Criminal Code

of: a. main crime; b. additional punishment; and c. criminal offenses that are specific to certain criminal acts specified in the law. [79]

It has become knowledge among jurists that the Criminal Justice System is not infallible. It is this awareness that the Criminal Justice System is not infallible that has given rise to efforts to reform criminal law. These efforts need to be maximized, sustainable and progressive. Considering that society and social change in society as objects of the enactment of criminal law is a necessity. Within the framework of our national criminal law, the Criminal Code, which is a colonial legacy, of course, must be reformed. The renewal work is being carried out by the state where the results of the reform of the criminal law code will later have a major impact on the development of criminal law in Indonesia. The idea of forming a national Criminal Code was initiated in 1963, the draft basic idea and main ideas of the initiating team were then submitted to the DPR in 2013. However, the process of forming a national Criminal Code turned out to take a long time, that is, until today (30 September 2022) the product of the national Criminal Code it hasn't been confirmed yet. On the occasion of the National Symposium and Training on Criminal Law and Criminology in Banjarmasin, last May 2016, Barda had joked that the RKUHP was

[79] Article 64 of the Draft of Criminal Code

like a baby in the womb of a woman who was not born and did not die. "This fetus is too old," he said. [80]

One of the aspects affected by the reforms in the RKUHP is the application of the death penalty. It is understood that before that the death penalty raises many problems, one of which is the uncertain waiting period for death execution in Indonesia. This phenomenon gave rise to many convicts with death sentences waiting to be executed for a long period of time. in 2020 there were recorded 538 death convicts who were awaiting execution in Correctional Institutions (Lapas). Of the 538 convicts awaiting execution, 4 (four) of them have been waiting for execution for more than 20 years. Then, there were 16 convicts awaiting execution for 16-20 years. There are 37 convicts awaiting execution for 11-15 years. Then, convicts who were waiting for execution for 6-10 years were 97 people, and those who were waiting for 8 months-5 years were 204 people. [81]

This phenomenon is an old problem that needs to be unraveled and resolved, one of which is by updating our penal code. Because if

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[80] *Sekilas Sejarah Dan Problematika Pembahasan Rkuhp, Aliansi Nasional Reformasi RKUHP*, Https://Reformasikuhp.Org/Sekilas-Sejarah-Dan-Problematika-Pembahasan-Rkuhp/ accesed on 30 September 2022.

[81] Ardito Ramadhan "538 Terpidana Mati Tengah Tunggu Eksekusi, Empat di Antaranya Sudah Menunggu Lebih dari 20 Tahun", https://nasional.kompas.com/read/2020/10/08/17555811/538-terpidana-mati-tengah-tunggu-eksekusi-empat-di-antaranya-sudah-menunggu. Accesed on 28 december 2022.

not, before the death row convict receives the death penalty, the death convict experiences a phase called the waiting period or the waiting series phenomenon. This problem can then be overcome by the existence of the concept of alternative threats and probation offered in the reform of the Criminal Code which provides a middle ground for this problem. in the status quo, the phenomenon of waiting for a long execution is caused by the judicial process which is still at the appeal stage, there is a request for judicial review or clemency from the convict. So with the concept of alternative threats and probation sentences which are written in writing in the new Criminal Code, commutation is not only the president's prerogative. Commutation is also a way to seek justice and a sentencing path that is in accordance with Pancasila values, namely continuing to respect humanity with the opportunity to make self-improvement and get alternative punishments.

The existence of this concept in the Criminal Code is necessary as a guarantee of certainty and legality. Where later it will cover all criminal acts that carry the death penalty, both those regulated in the Criminal Code and outside the Criminal Code. as well as being a guarantor of legal certainty for perpetrators in obtaining commutation and certainty of the waiting period for the execution of their criminal sentence. Even though in the RKUHP appeal process, requests for PK

or clemency from convicts are still stages that can be taken by convicts, coupled with the existence of a probationary period it does not necessarily lengthen and further creates ambiguity in the waiting period, but for us this is not the case. In discussing the second formulation of the problem, we will try to offer how to streamline the legal process that can be taken by convicts and the probation sentence that will be served.

3. Expediency (Sociological Value).

The principle of expediency in the formulation of norms is a principle that cannot be simply dismissed. This principle is the most visible form of output for social development. Where the fulfillment of the principle of expediency, the existence of law has provided usability in managing order and the formation of public morals. The community expects benefits in implementing or enforcing the law. Law is for humans, so the implementation of law or law enforcement must provide benefits or uses for society. In addition to the benefits for society, the benefits for perpetrators and victims are also other important aspects that must be fulfilled.

The existence of alternative threats and probation in the application of the death penalty tries to provide a balance of benefits to society, perpetrators as well as victims. Namely the idea of a monodualistic balance between the interests of society (general) and

individual interests as well as a balance between "social welfare" and "social defense". As you know, this concept does not necessarily abolish the death penalty. however, provide alternatives and other means before the death penalty is implemented so that it is guaranteed that the death penalty is truly used as a last option. This paradigm is in line with the development of the developing punishment paradigm towards death penalty, where the death penalty must be carried out if there is no other way to realize the goal of sentencing.

So that there are alternative threats and probation in the application of the death penalty, justice for the victim so that the perpetrators who have committed crimes against him can still be avenged. Likewise for the perpetrator he still gets the opportunity to change for the better (pedagogical education). This aspect contains the concept of appropriate therapy that must be included in every sentence imposed. In the sense that the judge is of the opinion that the crime committed by the defendant really must be sentenced according to the purpose of the punishment itself, not merely as retaliation/repressive but as a preventive effort and more emphatically educative, constructive and motivating for the life of the accused in the future While for the community the existence of this concept provides benefits as a shock therapy. The public is reminded not to approach and touch criminal acts, especially crimes that carry the death penalty,

because of the severity of the threat, namely the death penalty. And even if the death penalty is released, there is still life imprisonment instead.

Albert Camus said that absolute freedom never existed, freedom in its implementation must always be linked to and pay attention to the freedom of other individuals. Law and criminal law is a means to maintain and increase individual freedom in society. The right to guard and maintain that freedom is left to the state to punish. According to Camus, the perpetrator of the crime is still a human offender and as a human he is always free to learn new values and new adaptations. The imposition of sanctions can be justified only if it is calculated that they have the ability to re-educate an offender and thereby return him or her to society as a whole human being. Because of that, according to Camus, punishment is rehabilitative in nature, namely by re-education. Punishment seeks to protect and guard in order to reduce the freedom of criminals. [82]

Referring to the opinion above and then contextualizing the death penalty with the concept of alternative threats and probation, it becomes consistent that the death penalty is still regulated in the Criminal Code as a form of protecting the freedoms of society and the

[82]Marlina, *Hukum penetensier*, PT Refika Aditama, Bandung. P 35

individuals in it. However, on the other hand, the sentencing of death row convicts must still pay attention to the element of educating the perpetrators apart from the element of retaliating and protecting the public. To realize this, alternative threats and probation sentences are the middle way and the answer to this.

B. Weaknesses In The Concept Of Alternative Threats And Probation In The Application Of The Death Penalty Stipulated In The RKUHP

The paradigm of national development linkages which concerns all aspects of life with the anticipation of a legal dimension is a necessity. Development requires the transformation of society from a certain condition to a better condition. Humans as part of development activities determine how the 'faucet' of transformation is an effort to operationalize the transformation on purpose. The concept of transformation and its operationalization starts from normative concepts that will guide, regulate, and regulate its embodiment. [83] The establishment of a national legal system, especially the criminal law system, must continue to be made progressive and comprehensive. Must accommodate various things, various considerations, aspects in the dynamics of the country and global developments.

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[83] Abdul Gani Abdullah, *Pengantar Kompilasi Hukum Islam Dalam Tata Hukum Indonesia*, Gema Insani Press, Jakarta, 1994, P.12

National criminal law must be based on an established philosophy, juridical and sociological basis. If this is not achieved then it will have a domino effect for the sustainability of the criminal law itself. Misconceptions will occur between one legal norm and another, which in turn will also have an impact on the law enforcement process and of course on the implementation of criminal penalties. According to Sudikno Mertokusumo, that law is not a goal, but law is a means or tool to achieve goals that are non-juridical in nature and develop based on stimuli from outside the law, so that the law itself becomes dynamic. [84] Therefore a grand design of criminal law is needed that is good input, process and output.

The RKUHP as one of the results of efforts to reform criminal law in Indonesia is the same. The RKUHP is part of the elements of legal substance in Friedman's legal system. Perfection of the substance of criminal law is mandatory. Compulsory perfection of this criminal law is based on the nature of the crime that can provide limitations and revocation of certain rights to the public directly. Barda Nawawi Arief stated that there is no reason for the criminal law (KUHP) to be replaced/updated, if it is not prepared or accompanied by a change in criminal law knowledge. Criminal law reform or legal substance reform must be accompanied by renewal of

[84] Sudikno Mertokusumo, *Mengenal Hukum. Suatu Pengantar*, Liberty, Yogyakarta, 2002, P. 40

knowledge about criminal law (legal/criminal science reform). [85] This must also be accompanied by renewal of the legal culture of society (legal culture reform) and renewal of the legal structure or instruments (legal structure reform). Due to the reasons above, the writer tries to explain the weaknesses of the technical mechanism in the concept offered in alternative threats and probation in the application of death penalty in the RKUHP and at the same time the writer tries to offer how this should be regulated.

As is known and previously mentioned, the existence of the death penalty in the RKUHP is different from the current KUHP. Death penalty is positioned as a separate and special type of sanction. Furthermore, this specificity is related to the position of the death penalty as a separate type of punishment as well as alternative threats, in article 98 it is stated that "Death penalty is threatened alternatively as a last resort to prevent criminal acts and protect society." [86]

This understanding of alternative threats is then explained in the elucidation of Article 98 which reads “Death penalty is not included in the principal criminal system. Death penalty is determined in a separate article to show that this type of punishment is truly special as a last resort to protect society. Death penalty is the most serious punishment and must always be alternatively threatened with life imprisonment or imprisonment for a

[85] Barda Nawawi Arief, *Beberapa Aspek Kebijakan Penegakan Dan Pengembangan Hukum Pidana,* Citra Aditya, Bandung, 1998. P. 133

[86] Article 98 of the Draft Criminal Code

maximum of 20 (twenty) years. Capital punishment can also be imposed conditionally, by providing a probation period, so that within the grace period of the probation period the convict is expected to improve himself so that the death penalty does not need to be carried out, and can be replaced with life imprisonment." [87]

Legislators see this provision as a middle ground for the two currents of debate pro and con against the existence of the death penalty. But the debate that took place was basically not on that line. This means that the reason for compromise does not at all accommodate opinions that are against the existence of the death penalty. In the author's view, the legislator's decision to contain these provisions is a half-measure decision and does not answer the problem. This does not answer the philosophical, juridical urgency that the author has explained clearly and at length, as well as sociologically, as the author will describe in the following sub-chapters. The existence of articles 64 and 98 which stipulate capital punishment as a separate type of sanction with the nature of alternative threats does not completely answer the problem. The two articles emphasize that the death penalty must be applied with caution.

Articles relating to the death penalty are also included in article 100. The essence of this article is the mechanism for imposing capital punishment by judges. The interesting thing about this article that becomes

[87] Elucidation of Article 98 of the Draft Criminal Code

the discussion is the concept of probation by judges. The meaning of this trial is where the judge can decide on probation for death row convicts with a probation duration of 10 years. It is in this duration of time that the convict will see the good and bad changes. If the change is considered good and appropriate, the convict may change his sentence from death penalty to life imprisonment. Vice versa if the convict does not change well and is deemed inappropriate within the duration of 10 years, the convict will still be sentenced to death. Article 100 reads:

i) The judge may impose death penalty with a probationary period of 10 (ten) years by considering: a. the defendant's remorse and hope for self-improvement; b. the role of the accused in the Criminal Act; or c. there are mitigating reasons.
ii) Death penalty with probation as referred to in paragraph (1) must be included in the court decision.
iii) The probationary period of 10 (ten) years begins 1 (one) day after the court decision obtains permanent legal force.
iv) If the convict during the probationary period as referred to in paragraph (1) shows commendable attitudes and actions, the death penalty can be changed to life imprisonment with a Presidential Decree after obtaining consideration from the Supreme Court.
v) If the convict during the probationary period as referred to in paragraph (1) does not show commendable attitudes and actions and

there is no hope of improvement, the death penalty may be carried out on the orders of the Attorney General. [88]

In the elucidation of Article 100 paragraph 1, another consideration is added which reads. The imposition of capital punishment with a probationary period should also pay attention to the reaction of society. [89]

In the author's review, this article is an article that is conceptually incomplete and also technically incomplete. These reasons include:

First, in academic manuscripts there is absolutely no academic basis for choosing a duration of 10 years, both in criminology and psychology. *Second*, in Article 3 the probationary period is only calculated after the court's decision has permanent legal force, greatly ignoring the sense of justice. In fact, the trial process often takes a long time, especially for trials in serious cases that carry the death penalty. Under these circumstances the accused will usually be in the detention process, so that if later the time during the detention process is not considered then once again it is contrary to the sense of justice. living by a presidential decision with the consideration of the supreme court, this provision is tantamount to the provision for granting pardons by the president which existed long before, even the provisions in this article are more impractical. *Third*, there are no

[88] Article 100 of the Draft Criminal Code
[89] Elucidation of Article 100 of the Draft Criminal Code

more technical norms in the RKUHP, nor is there an open legal policy that mandates that technical regulations will be regulated in other laws and regulations. So that this can raise problems in the running process such as, what if the convict on probation in the first 6 years does good and in the last 4 years commits acts that are not commendable, or what if on the contrary in the first 6 years the convict commits an act - bad deeds and in the last 4 years doing good deeds and changes. These problems are very likely to exist and also other issues that may be more complex. *Fourth*, there is no monitoring and evaluation mechanism as well as appropriate and inappropriate parameters. Who has the authority to determine whether or not a convict is good or bad. How is the correctional technique, of course this requires special attention from convicts with sanctions other than death penalty

With the description and explanation as in the previous section, the ideal concept that can be applied as a formula for death penalty in the RKUHP is a probation sentence that applies automatically. With this concept, it will facilitate the process of criminal imposition and prevent transactional potential in handling cases. A similar pattern is found in the enforcement of death penalty laws in China. This was conveyed by Erasmus Napitupulu from the Institute for Criminal and Justice Reform (ICJR). Apart from that, for the sake of creating effectiveness and answering the problem of the waiting time for death penalty which sometimes drags on, the

available legal remedies can be carried out simultaneously during the probationary period. So that when the probationary period is over, it is the final stage which is truly the end and at the same time determines whether the sentence turns into a life sentence or execution is imposed depending on the propriety of the convict while on probation.

Then, regarding the period for calculating a probation sentence, it is ten years from the issuance of a court decision which has legal force reduced by the detention period. . In conventional criminal cases that are subject to imprisonment, the calculation of the prison period is after a permanent legal decision (inkracht) is deducted from the detention period. In the context of probation on death penalty, the aim of reducing the period of detention as part of the calculation of probation has a different purpose. If in a legal case with a prison sentence, the aim is for the perpetrator to get justice and shorten his prison term, while in a probation sentence it aims to cut time and the convict can more quickly find out his certainty. Was he successful on probation so that his sentence was changed or vice versa he was considered a failure and was sentenced to death. This is indeed not very significant considering that the alternative to probation which turns into a life sentence for the perpetrator, but shortening the period of uncertainty by cutting the calculation of the probation period from the detention period, is the fulfillment of justice that deserves to be fulfilled and strived for.

For the effectiveness of the probationary period, it is necessary to establish a special institution under the Ministry of Law and Human Rights which has the authority to determine whether or not it is appropriate for the offender to receive relief when the probationary period ends. This institution also has the task and function of fostering and outreach to death row convicts. This specificity is based on differences in general punishment and capital punishment which are specific in nature, so that more special treatment is needed. 2. Involvement of Victims in Imposing Sanctions

In various types of criminal characteristics in Indonesia there are several examples of criminal acts that are given specificity in the enforcement and judicial process. Of the many types of criminal acts with special handling, what is of particular interest to us is the juvenile justice system. Using a restorative justice approach and good for all parties. This is a form of a shift in the paradigm of punishment in Indonesia from retributive to restorative-rehabilitative or the daad-dader-strafrecht model or balance of interests. This shift for the better must be worked into many aspects of our penal system in general and the death penalty in particular. This is due to the peculiarities of the nature of juvenile crimes (because the perpetrators are children) as well as the specifics of crimes that carry the death penalty (because of the impact and nature of serious crimes).

Restorative justice itself is a concept of solving criminal cases by involving all parties and with the aim of benefit and justice for all. In

restorative justice there are at least three elements. First, in resolving cases efforts are made so that perpetrators and their families as well as victims and their families can sit together to discuss problem resolution, including victim recovery (restitution in integrum). Second, restorative justice essentially gives punishment to the perpetrator, but the punishment is educational in nature so that it benefits both the perpetrator and the victim. This is in line with the augium per iram provocatus puniri debet mitius arrears. Third, the a quo regulation uses two approaches, namely the victim-offender mediation approach as implemented in North America and court-based restitutive and reparative measures, as practiced in England.

Furthermore, there must be involvement of the victim when opening up options for resolving cases with the death penalty. Again, this is based on the specificity of serious crimes, so that victims who are directly affected often die and/or cannot be involved. So by redefining the victim, later the victim can be represented by his attorney, family or special law enforcement agency and or anything that according to the law can be categorized as representing the interests of the victim. Even the involvement of the victim is not in a position to determine the sanctions to be applied, but the wishes and point of view of the victim are used as material for consideration which the court may use as a means of weighting or mitigating the sentence of the convict later. It will be a separate problem if the victim is defined in terms of the current definition of victim, namely the definition of a victim is a

person who suffers physical, mental and/or economic losses as a result of a crime.

Such a law enforcement paradigm must first be supported by some basic paradigm shifts. With the pattern of settlement of the involvement of victims in certain crimes that carry the death penalty, at least a change in the paradigm of criminal acts is not purely a conflict between the individual and the state. the victim needs to be considered as a third party, the fact that the loss suffered by the victim as a result of the perpetrator's actions is something that we cannot ignore. In current criminal enforcement, even though the perpetrator has been convicted according to the provisions of criminal law enforcement, the victim does not get back the losses he has earned. The state does not provide such a mechanism, so that the resolution is only limited between the actor and the state.

More technically, it is necessary to formulate a paradigm in positive norms. In it, it is necessary to regulate technical mechanisms, determine the limits of the victim's involvement in the law enforcement process. Etc. This does not necessarily distort the role of law enforcement agencies. In fact, this will bring collective justice and benefits for all parties. The demands of the state's sense of justice will be fulfilled by law enforcement, the victim's sense of justice will be fulfilled by the involvement of the victim in setting sanctions and the perpetrator will also get a fair punishment for his mistake.

CHAPTER IV

CLOSING

A. Conclusion

Based on the results of the research and discussion in the previous section, this study concludes as follows:

1. In order to know the urgency of the existence of capital punishment with alternative threats and with the choice of trials in the Draft Criminal Code, it can be studied through philosophical, juridical and sociological approaches. Philosophically, looking at this position, the existence of the concept of alternative threats and probation in the application of the death penalty is a breath of fresh air for the problems of enforcing the death penalty in Indonesia. Given that this concept is oriented towards a balance between fulfilling social justice for the community. On the other hand, the existence of the concept of alternative threats and probation in the application of the death penalty still provides a way to fulfill justice for the perpetrators. namely with the opportunity to obtain alternative punishments other than death penalty with the aim of improving the perpetrators. the existence of alternative threats and probation in the application of the death penalty in an expedient manner also tries to provide a balance of benefits to society, perpetrators as well as victims. Namely the idea of a monodualistic balance between the interests of

society (general) and individual interests as well as a balance between "social welfare" and "social defense".

2. The ideal concept that can be applied as a formulation of capital punishment in the RKUHP is the existence of a probation sentence that applies automatically. the existence of this automatic concept will simultaneously simplify the misconceptions that exist in the RKUHP concept. such as the unclear parameter of feeling sorry and wanting to change the accused as a condition for the judge to set a probation period, the existence of community reactions as one of the judge's considerations in setting a probation period and so on. for effectiveness it is also necessary to form a special institution under the ministry of law and defense to guide and later determine the suitability of the accused to get a criminal commutation.

B. Suggestion

The suggestions that the author would like to convey, among others:

1. To the government (executive and/or legislative institutions) to formulate sanctions for serious crimes as well as sanctions mechanisms and techniques for punishment that are specific to enforcement and sentencing.
2. To law enforcers to continue to improve their respective performances, especially regarding their integrity.
3. To the public to continue to oversee the course of Indonesian law, especially criminal law.

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ATTACHMENTS

FAKULTAS HUKUM

SURAT KETERANGAN BEBAS PLAGIASI

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Yang bertanda tangan di bawah ini:

Nama	: **Joko Santosa, A.Md.**
NIK	: **961002136**
Jabatan	: **Staf Perpustakaan Referensi Fakultas Hukum UII**

Dengan ini menerangkan bahwa :

Nama	: Anwarul Muarif
No Mahasiswa	: 18410648
Fakultas/Prodi	: Hukum
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