

## PRINCIPLE OF FORMAL LEGALITY: DEATH PENALTY IN THE INDONESIAN NATIONAL CRIMINAL CODE

Kartini Malarangan<sup>1</sup>, Syachdin<sup>2</sup>, Muhammad Hatta Roma Tampubolon<sup>3</sup>,  
Andi Intan Purnamasari<sup>3</sup>, Supriyadi<sup>4</sup>

<sup>1</sup>Faculty of Law, Tadulako University, Palu, Indonesia.

<sup>2</sup>Faculty of Law, Tadulako University, Palu, Indonesia.

<sup>3</sup>Faculty of Law, Tadulako University, Palu, Indonesia.

<sup>4</sup>Faculty of Law, National University of Malaysia, Malaysia

<sup>5</sup>Faculty of Law, National University of Malaysia, Malaysia.

**ABSTRACT :** TLaw number 1 of 1946 concerning the Criminal Code, which covers one of the main crimes involving the death penalty, is the source of criminal punishment. However, regarding the implementation of death penalty sanctions against perpetrators of criminal acts, there is still a fairly serious debate about execution, which still relatively does not provide legal certainty. Moreover, after Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code, there is a new breakthrough that the death penalty is no longer the main crime but a special crime that is threatened alternatively with the death penalty. The purpose of this study is to see how important the Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code is to repeal the conditional death penalty. The research specifications used are descriptive and include data collection techniques using literature studies. The normative juridical approach is used by examining several norms. The results showed that Law Number 1 of 2023 concerning the Criminal Code can allow the death penalty as a death penalty after good behavior for 10 (ten) year's probation and obtain the approval of the President after consideration by the Supreme Court. After that, the sentence can be changed to life imprisonment. As mentioned in paragraph 4 of Article 100, the provision of the death penalty is conditional with the word "may". As a result, it is unclear whether the death penalty can be replaced with a life sentence. This shows that the time limit for his criminal probation period is too long. As a result, the judicial process is not yet clear about when the president will make a decision.

**KEYWORDS :** *Legality, Renewal, Death Penalty and Indonesia*

### I. INTRODUCTION

According to Hans Kelsen, the law is a commandment that imposes justice on the level of human beings. Criminal law is the law that governs the public interest and the public interest. According to Van Hamel, (Wahyudi, 2012) Criminal law is the whole set of principles adopted by the state in its duty to enact the law, that is, by prohibiting what is contrary to the law and imposing suffering or penance on those who violate it. To protect the interests of the state and society, it is regulated and given suffering or punishment. (Manoppo et al., n.d.)

To protect it all, the penal code requires people who violate it to be subject to criminal penalties and suffering, as well as the added consequences of educating and preventing other criminal acts from being committed by the rest of society. Therefore, this is in accordance with the principles used by criminal law as *primum remidium* (which deals with criminal acts) and *ultimum remidium* (which serves as a last resort when other sanctions outside the criminal law no longer provide for it). (Lalu, 2015) Article 10 of the Criminal Code (KUHP) stipulates that the main crimes consist of: death penalty, imprisonment, confinement, fines, and cover-up. These criminal sanctions are currently in effect in Indonesia.

SatochidKartanegara argued that the death penalty is one of the main crimes and is a punishment carried out by taking the soul of

a person who violates the law and who must be punished by Kartanegara. (Sethuraju et al., 2016) Thus, the death penalty can be used as a means of social defense to prevent great harm or threat to society to crimes that undermine the order of religion, society, and the state. Therefore, the death penalty is still applied to a number of criminal acts in Indonesia, including Article 340 of the Criminal Code which regulates premeditated murder.

One example of the application of the death penalty is the case in the Jakarta District Court against the defendant Ferdy Sambo, with case number 796/Pid.B/2022/PN JKT. SEL, where a panel of judges has sentenced the defendant Irjen to death. Pol. Ferdy Sambo for the murder of Brigadier Yosua Hutabarat, a member of the Indonesian Police. In the case of the death penalty, it remains a debate whether the death penalty was actually given. This debate then has an impact on how pending executions do not provide legal certainty to defendants, ranging from the imposition of the death penalty by a panel of judges of first instance to other legal remedies. This phenomenon is known as the "waiting series". Under these conditions, the government and the House of Representatives (DPR) have drafted the Draft Criminal Code (RKUHP) since 1963 which has had a long journey and was finally passed on Tuesday, December 6, 2022 into Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code (hereinafter referred to as the Criminal Code Law). Upon the passing of the Criminal Code Law, there are several changes including with regard to the death penalty law, while the current fundamental difference in the death penalty initially as the main crime changed to a special crime as contained in Article 64 of the Criminal Code Law, which is threatened alternatively and imposed with a ten-year probation period as stated in Article 100 paragraph (1) "The judge imposes the death penalty with probation for 10 (ten) years by taking into account: a. the defendant's sense of remorse and hope for improvement; orb. the role of the accused in the Criminal Offence". In this probation period, of course, it is very irrelevant to the reason when it comes to the status of a defendant, then being a fostered citizen in a prison will always behave well. (Aeni, 2020) The purpose of the correctional budget, according to Article 2 of Law of the Republic of Indonesia Number 22 of 2022 concerning Corrections, is to form, train, and provide coaching. For fostered citizens so that they can be the kindest people and regret what they did in the future.

Thus, when that reason can be used to change the sentence of the accused, then there will be a high probability that the public will question the content of Article 100 Paragraph (4) which mentions the phrase "may", because this phrase gives rise to a broad interpretation and creates legal inaction in the application of the death penalty by being given the breadth to change the sentence to be lighter or lighter. In addition, this decision can be amended if this penalty is on the Presidential Decree after consideration by the Supreme Court; however, the timeframe for the issuance of the Presidential Decree has not yet been determined.

This discussion will concentrate on strengthening the importance of conditional criminal convictions regulated in Law of the Republic of Indonesia Number 1 of 2023 concerning the criminal code, as well as its relationship with the principle of legal certainty. This study aims to evaluate how important the Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code is to apply the conditional death penalty.

## II. MATERIALS AND METHODS

The research method used by the author in this study uses normative juridical methods, considering the problems examined in response to the enactment of Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code to the urgency of imposing conditional death sentences related to the principle of legal certainty. By analyzing the written laws that have been promulgated. (Benuf & Azhar, 2020)

The specification of the study uses descriptive which aims to provide an overview and explanation of the problems studied regarding changes in the death penalty in Indonesia. The type of research data used in this study is qualitative data. Data sources are materials that provide explanations of primary legal materials, secondary legal materials and tertiary legal materials. Primary legal materials include laws and regulations and all official documents containing legal provisions. Secondary legal materials are documents or legal materials that provide explanations of primary legal materials such as books, articles, journals, research results, papers and so on that are relevant to the problem to be discussed. While tertiary legal materials are legal materials that provide instructions and explanations to primary and secondary legal materials, such as dictionaries, and encyclopedias. Furthermore, in data collection techniques using literature studies by analyzing qualitative data that has been collected through literature and online by citing legal concepts or laws and regulations, which are closely related to the subject matter.

## III. RESULTS AND DISCUSSION

The existence of the death penalty in Indonesia is juridically-historically regulated in the Criminal Code, as a legacy from the Netherlands named *Wetboek van Strafrecht (WvS)*. However, in the Netherlands itself as the originator of the death penalty in Indonesia, in 1870 it was abolished,

Except for criminal acts that disturb the stability of the state and public order, such as in a state of war. Then it will be subject to the death penalty.

Juridically formally, the death penalty law in Indonesia contained in Article 10 of the Criminal Code states, the death penalty is the main type of crime and among other main crimes, this sanction is the heaviest. Because the beginning of the death penalty sanction was carried out by an executioner in the hanger by trapping a rope tied to the gallows around the convict's neck and then dropping the board where the death row prisoner stood, as explained in Article 11 of the Criminal Code. However, the implementation of the death penalty

changed after the issuance of Presidential Decree Number 2 of 1964 concerning Procedures for the Implementation of the Death Penalty imposed by the Court in the General Court and Military Court. That the implementation of the criminal straf modus is by being shot to death by the firing squad.

According to data compiled by Amnesty International, in 2020 there were 117 cases sentenced to death, in 2021 there were 114 cases and the most crimes were sentenced to death for drug cases, both murder cases and three terrorism cases. However, with these data in the implementation of executions in Indonesia, there are still problems, including this act is very contrary to Human Rights (HAM). Because Indonesia has recognized human rights systemization as explained in Law Number 39 of 1999 concerning Human Rights. Moreover, the pressure from the international world is very strong and criticizes the existence of this death penalty, including the recommendation of the United Nations (UN). For all these considerations, criminal law began to be discussed and considered to find alternative solutions. Therefore, in the discussion of the Criminal Code Bill, that Indonesia has the idea of an 'Indonesian way', which positions the criminal law as the last resort and basic sanctions.

With the Indonesian way concept, the death penalty against someone sentenced to death will be given probation for 10 (ten) years. If the convict shows a direction of good behavior, then there is a sense of remorse, then the sentence can be changed to life or lighter than the previous sentence. Then this idea was mentioned in Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code which was passed on December 6, 2022 into a law that replaced the Criminal Code made in the Dutch East Indies which had been used for approximately 104 (one hundred and four) years. However, the Criminal Code Law can be used later after 3 (three) years of its enactment into law or more precisely in 2026. With this, the death penalty law will be categorized as a special criminal law or called the conditional death penalty law.

With the changes and reforms of Indonesian criminal law, of course, it is a matter of national pride to have its own National Criminal Code, sociological reasons to be jointed with the national value system in Indonesia and practical reasons The language used uses native Indonesian. In addition, with the existence of the Criminal Code Law as a tangible manifestation of the true identity of the Indonesian people and based on Pancasila or called the Five Guiding Principles).

For these reform efforts, the problem will be that later this Criminal Code Law has come into effect. One of them relates to the conditional death penalty law, as affirmed in Article 67 of the Criminal Code Law that: "Special crimes as referred to in Article 64 letter c are death crimes that are always threatened alternatively".

The purpose of the death penalty can be carried out alternatively, this sanction given to convicts there are two possibilities, namely "death penalty" or "conditional death penalty". In this case, the death penalty is no longer the main crime, except under Article 99 paragraph (1) of the Criminal Code Law, the death penalty can be carried out after the application for clemency for the convict is rejected by the President and this conditional death penalty will be given after good behavior with probation for 10 (ten) years. Therefore, in Article 100 paragraph (1) of the Criminal Code Law, the judge imposes a death penalty with probation for 10 (ten) years if the defendant has:(Laia, 2023)

- a. The defendant's sense of remorse and hope for improvement; or
- b. The role of the accused in the criminal act

For this regret, being given a conditional death penalty must be included in the judgment, according to paragraph (2). Furthermore, paragraph (3) explains that when a conditional death penalty sentence is given with a probation period of 10 (ten) starting 1 (one) day after the court decision has obtained permanent legal force. Furthermore, paragraph (4) by being given the probation period, then from the convict showing commendable attitudes and deeds, the death penalty can be changed to life imprisonment.

With the explanation of the conditional death penalty in the Criminal Code Law, when the convict is sentenced to death, it must be appropriate that someone who is sentenced will behave well, because this is in accordance with the purpose of the correctional system that conducts coaching to fostered citizens based on Pancasila, by conducting coaching as a form of improving the quality of fostered citizens to realize mistakes and be able to improve themselves.(Hatta, 2012)

This is by being given the death penalty, the convict will prepare himself to face his death, starting from improving himself by repentance, getting closer to God and asking for spiritual flush or advice from religious leaders in the institution. An example of what happened in the case of Freddy Budiman was known as a big drug kingpin who was sentenced to death by Freddy and even when complaining about the Judicial Review (PK), Fredy read a statement of repentance at the Cilacap District Court, in his statement, Freddy hoped that through the letter he could grant the PK he submitted.(Anugrah & Desril, 2021)

Unlike the case of Ferdy Sambo in the first instance and the level of appeal which are both sentenced to death. So this case will be 10 (ten) years with probation will get a conditional death sentence, as explained in Article 100 (Manoppo et al., n.d.) paragraph (4) of the Criminal Code Law that "the death penalty can be changed to life imprisonment by Presidential Decree after obtaining the consideration of the Supreme Court".

All considerations are given based on Article 28 paragraph (1) letter c of Law Number 14 of 1985 concerning the Supreme Court ("Supreme Court Law") which reads:

- (1) The Supreme Court shall have the duty and authority to examine and decide:
  - a. petitions;
  - b. disputes about the authority to adjudicate; and
  - c. application for review of the decision of the Court that has obtained permanent legal force.

In this explanation, what is meant by "getting the consideration of the Supreme Court", still leaves the question. Because of this form of consideration of the supreme court, to change the death penalty to life or 20 (twenty) years. Waiting for this process and stages will certainly take a long time. Because based on the Supreme Court Law, that the authority of the Supreme Court is only related to the three points above. Therefore, the issue of changing the death penalty can actually be pursued at the time of the trial and adjusted to the actual facts of the trial. So that the panel of judges will give consideration according to the existing positive law, whether sentenced to death, life or several years. {Citation}

Therefore, the granting of conditional death penalty sanctions is only prioritized to focus on non-juridical reasons, rather than juridical considerations, which should be the main reason for balancing the change in sentence. Because criminal acts that can be given criminal sanctions are narcotics trafficking, terrorism, corruption, and premeditated murder. Surely this has a tremendous impact on the state and society when the sentence is commuted on these non-juridical grounds, it will adversely affect the law itself.

Thus, it is better since the examination of the subject matter at the first court stage or other stages of legal remedies that have been given clear criminal sanctions and provide legal certainty, whether given the death penalty or life imprisonment. Thus, the provision of this death penalty can be carried out on the basis of thoroughness and prudence. This is in line with the opinion of Hermann Mostar, a German writer who described, that courts should not be a legal place to kill people, meaning in

Acting on the death penalty law can be done selectively with justice, certainty and expediency.

2. The provision of conditional criminal punishment is related to the principle of legal certainty

Criminal sanctions are given none other than to prevent crime and to reward the perpetrators appropriately. One of them is related to the death penalty which has changed, since the existence of the Criminal Code, then in the discussion in the Draft Criminal Code Law (RUU KUHP) with its initial formulation in 1971/1972 until 1980, for the concept of death penalty law is still categorized as the principal crime. Furthermore, in 1964, the concept of the Criminal Code Bill formulated the death penalty as an exception and in 1964 changed its formulation to a special principal crime. In the end, the formulation in 1983/19834 until the concept of the Criminal Code Bill in 2015 and until the passing of the Criminal Code Law for the death penalty is no longer the main crime. (Aeni, 2020) With the regulation of the death penalty as a special crime, that will be given a conditional death penalty upon the decision of the panel of judges to impose the death penalty with probation for 10 (ten) years and for certain crimes.

With the probation period, the defendant will see his progress while in the prison there are two things, namely whether the convict admits and regrets his actions and the convict has hope to change for the better. Thus, when that reason is used as a reference for convicts in making decisions on the granting of conditional death sentences with a Presidential Decree after obtaining consideration from the Supreme Court. This is to provide legal certainty in criminal arrangements is still an issue and is still a very serious debate. As explained in Article 100 paragraph (4) of the Criminal Code Law "If the convict during the probation period as referred to in paragraph (1) shows commendable attitudes and deeds, the death penalty can be changed to life imprisonment by Presidential Decree after obtaining the consideration of the Supreme Court". (Manoppo et al., n.d.)

From that chapter, when examined there is the phrase "may", this phrase has a broad interpretation. This will provide an opportunity for the granting of conditional death sentences that do not provide legal certainty. Because, there is no time limit in waiting for the president's decision on whether or not the sentence can be changed for the accused. Moreover, the enforcement of conditional crimes depends on the existence of a Presidential Decree. This is a problem, because the term of office of the President in granting changes the status of the death penalty to life imprisonment is limited, which changes every 5 (five) years or 10 (ten) years if he returns to power, then when given his decision, this is if the change of president will be his political decision and not based on a decision based on law.

Thus. Probation period and waiting for a decision from the President, the possibility of adverse effects will lead to a disguised prison sentence and there is an unimportant role in the crime can be sentenced to death For the existence of the conditional death penalty, which becomes a concern in the future, namely the arbitrariness of office holders towards reducing or changing these death criminal sanctions, it may be necessary: (Anugrah & Desril, 2021)



1. The potential for corruption arises from the convict to the Head of Lapas, to the Supreme Court as a recommendation to the President and the Attorney General's Office as the implementation of the death penalty;

2. It will be an opportunity for diplomacy between foreign countries and Indonesia, whose citizens are threatened with the death penalty to be reduced to life imprisonment and surely other countries want their citizens to be free from the threat of punishment;

3. The system is too complicated, because to give this trial period. Starting from the decision of the panel of judges must include probation for 10 (ten) years in its decision, then the Prison as a coach of the community will assess this convict to behave or not, then the convict submits a conditional crime by the Supreme Court will be assessed and considered, at the discretion of the Supreme Court given to the President and the President issues a decision for this convict to be given a conditional criminal sentence.

Thus, conditional sanctions can be given when the conditions of punishment have been fulfilled. In this case, the death penalty when it is no longer the main crime in the Criminal Code Law, consideration and conviction are needed which are very important for the imposition of death or lower sentences.

#### IV. CONCLUSION

According to Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code, after good behavior with a probation period of 10 (ten), obtaining approval from the President after consideration by the Supreme Court, the death penalty can be changed to life imprisonment. and, the granting of conditional death penalty, where the word "may" is used in Article 100 paragraph (4). This is the time limit at which criminal proceedings drag on and the judicial process is uncertain about the outcome. This deadline is also not clearly set on when the president will make the decision. The government and law enforcement officials for granting the conditional death penalty for terrorism, drugs and corruption should not be given a chance, this is the impact of the perpetrators is very detrimental to the community and the state of the impact of their actions and the death penalty should not be abolished. The government should make an implementing guideline through the Supreme Court Regulation, which will later provide convenience in giving legal consideration to the conditional death penalty, so that the provision of recommendations for criminal sanctions against this presidential decree is not abused of the authority given.

#### REFERENCES

- [1]. Aeni, M. D. N. (2020). *Penjatuhan Pidana Mati Dalam Persepektif Hak Asasi Manusia*.
- [2]. Anugrah, R., & Desril, R. (2021). *Kebijakan Formulasi Pidana Mati Dalam Pembaharuan Hukum Pidana Indonesia*. 3.
- [3]. Benuf, K., & Azhar, M. (2020). Metodologi Penelitian Hukum sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer. *Gema Keadilan*, 7(1), 20–33. <https://doi.org/10.14710/gk.2020.7504>
- [4]. Hatta, M. (2012). PERDEBATAN HUKUMAN MATI DI INDONESIA: Suatu Kajian Perbandingan Hukum Islam dengan Hukum Pidana Indonesia. *MIQOT: Jurnal Ilmu-ilmu Keislaman*, 36(2). <https://doi.org/10.30821/miqot.v36i2.121>
- [5]. Laia, A. (2023). PEMBERLAKUAN HUKUMAN PIDANA MATI DI DALAM NEGARA PANCASILA. *Ndrumi: Jurnal Ilmu Pendidikan dan Humaniora*, 6(1), 24–35. <https://doi.org/10.57094/ndrumi.v6i1.812>
- [6]. Lalu, N. G. (2015). PIDANA MATI DAN HAK ASASI MANUSIA. *to-ra*, 1(1), 57. <https://doi.org/10.33541/tora.v1i1.1095>
- [7]. Manoppo, G. A., Pongoh, J. K., & Bawole, G. Y. (n.d.). *ANALISIS PIDANA MATI BERDASARKAN PASAL 100 UNDANG-UNDANG NOMOR 1 TAHUN 2023 TENTANG KITAB UNDANG- UNDANG HUKUM PIDANA*.
- [8]. Sethuraju, R., Sole, J., & Oliver, B. E. (2016). Understanding Death Penalty Support and Opposition Among Criminal Justice and Law Enforcement Students. *SAGE Open*, 6(1), 215824401562495. <https://doi.org/10.1177/2158244015624952>
- [9]. Wahyudi, S. T. (2012). PROBLEMATIKA PENERAPAN PIDANA MATI DALAM KONTEKS PENEGAKAN HUKUM DI INDONESIA. *Jurnal Hukum dan Peradilan*, 1(2), 207. <https://doi.org/10.25216/jhp.1.2.2012.207-234>