

IMPLEMENTATION OF THE DEATH PENALTY IN THE LEGAL SYSTEM INDONESIA HUMAN RIGHTS PERSPECTIVE

Erric Ananda Rizky ¹, M. Ridwan Lubis ²

^{1,2} Fakultas Hukum Universitas Muslim Nusantara Al Washliyah Medan

Email : ericanandarizki023@gmail.com ², muhammadridwanlubis76@gmail.com ²

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ABSTRACT

The implementation of the death penalty continues to generate debate among experts. The results of the discussion concluded that the regulation of the death penalty regarding Law Number 1 of 2023 concerning the Criminal Code in Indonesia which has been enacted since January 2, 2023, provides new hope for increasing respect for human rights. With several considerations such as the good behavior of the defendant, the defendant's commendable actions, and other mitigating factors, it can be used as a "tool" by the defendant to avoid the actual death penalty and be replaced by another sentence (life imprisonment). And if the defendant fails the probationary period as described in Article 1 of the Criminal Code, by not showing good attitudes and behavior and without hope of improvement, then the death penalty will still be imposed. The implementation of the death penalty in Law Number 1 of 2023 concerning the Criminal Code is stated in Article 100, namely the conditional death sentence. The convict will be given a 10-year probationary period for the convict to do well in prison. If during the 10 years he does good, his sentence can be commuted to life imprisonment by Presidential Decree. The application of the death penalty in Law Number 1 of 2023 from a human rights perspective is based on the Constitutional Court's decision in MK Decision No. 3/PUU-V/2007, which states that the death penalty for serious crimes is essentially a form of restriction on human rights

1. Introduction

The 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) states in Article 1 Paragraph (3) that, "The State of Indonesia is a state of law". The meaning of the state of law itself is essentially rooted in the concept of the theory of legal sovereignty which in principle states that the highest power in a state is the law, therefore all state apparatus whatever their name, including citizens, must submit to and obey and uphold the law without exception.

Some groups believe that the death penalty should not be abolished, as high-profile criminals, drug dealers, sadistic murderers, rapists, or suspected terrorists will not hesitate to commit serious crimes against others because the punishment is light, allowing sadistic crimes to continue to thrive due to the lax punishment. Other groups believe that the death penalty is effective in preventing greater crimes. Therefore, the death penalty is still considered relevant to be implemented, of



course, with a more humane approach and the availability of supporting regulations to prevent it from being categorized as a human rights violation.

The death penalty is closely linked to the right to life, especially for all citizens of the Republic of Indonesia without exception, as stipulated in Article 28A of the 1945 Constitution of the Republic of Indonesia, which states that everyone has the right to life and the right to defend their life and livelihood. Therefore, the right to life and to defend their life is protected by the constitution and is a fundamental right or recognized as a Human Right (HAM).

The implementation of the death penalty in Indonesia is not without reason. While the right to life must be upheld in the name of human rights, fundamental or basic obligations must also be fulfilled. The imposition of the death penalty or the threat of the death penalty on perpetrators of extraordinary or serious crimes constitutes a form of human rights restriction. The right to life is limited by the constitution and law because the commission of the crime violates the right to life of others. The imposition of the death penalty is necessarily based on a court decision that takes into account both the principles of legal justice and legal certainty

2. Research Method

This research is descriptive analytical, that is, research that describes, examines, explains, and analyzes laws and regulations related to the objectives of this research. In accordance with the problems and objectives of the research, the type of research used is normative legal research. The type of research used in this research is normative legal research by examining library materials or secondary data materials that include books and legal norms contained in laws and regulations, legal principles, legal rules and legal systematics as well as reviewing statutory provisions, court decisions, and other legal materials relevant to the formulation of the research.

3. Results And Discussion

The provisions regarding the implementation of the death penalty as stated in Article 11 of the Criminal Code are no longer in accordance with the development of the situation and the spirit of the Indonesian revolution, therefore with Presidential Decree No. 2/1964 the implementation of the death penalty is carried out by being shot dead in a place within the jurisdiction of the court that issued the verdict in the first instance.

Pancasila is the philosophy and ideology of the Indonesian state that should inspire every law in the Indonesian legal system. One of the principles of Pancasila reads "just and civilized humanity," which contains respect for human values. Human values cannot be separated from the concept of the "right to life" as part of human





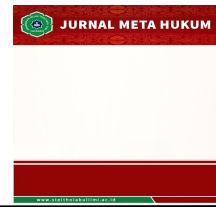
rights. The second amendment to the 1945 Constitution, Article 28 paragraph 1, states: "The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under retroactive laws are human rights that cannot be reduced under any circumstances. Although the right to life is protected by the constitution, which is imbued with the humanitarian values of Pancasila, the death penalty remains in force in the Indonesian legal system. This seems to contradict the concept of humanity enshrined in Pancasila. The death penalty has been declared constitutional in the Indonesian legal system by Constitutional Court Decision No. 2-3/PUU-V/2007.

Upon closer examination, the death penalty remains in place, with several differences, such as its placement as a special punishment, a postponement of execution, and the possibility of a change to the death penalty. The concept of maintaining the death penalty constitutes criminal policy. Sudarto stated that criminal policy encompasses all policies implemented through legislation and official bodies aimed at upholding central societal norms. Crime prevention policies and efforts are essentially an integral part of social defense and social welfare efforts. Therefore, it can be said that the ultimate goal or primary objective of criminal policy is to protect society to achieve social welfare.

The concept of maintaining the types of serious crimes, namely the death penalty and life imprisonment, in its formulation policy also considers the protection and interests of individuals. The retention of the death penalty is also based on the idea of avoiding demands or reactions from society that are retaliatory, emotional, arbitrary, uncontrolled, or constitute "extralegal execution." This means that the provision of the death penalty in the law is intended to provide an outlet for emotions or demands from society. The absence of the death penalty in the law does not guarantee its absence in reality in society.

To avoid irrational personal or societal revenge, it is considered wiser to have the death penalty available by law. With the death penalty in law, it is hoped that its application by judges will be more selective and based on rational/controlled considerations. Thus, it is also intended to protect individuals/communities from arbitrary and emotional retaliation from victims or the community if the death penalty is not regulated by law.

Indonesia, which adheres to the Pancasila ideology, according to Barda Nawawi, in his view on the death penalty, Pancasila contains the value of balance between one principle and the others. However, when viewed partially, emphasizing Pancasila, some argue that the death penalty contradicts Pancasila, while others argue that it does not. Therefore, opinions that reject and accept the death penalty are both based on Pancasila.



From the perspective of the purpose of punishment, the death penalty is not essentially the primary means of regulating, discipline, or improving individuals and society. It is merely a last resort or an exception. Therefore, Law Number 1 of 2023 concerning the Criminal Code emphasizes that the death penalty is an alternative measure to protect society.

For the Indonesian legal community, Pancasila serves as a system of values and a guiding principle for national legal development policies and programs. It aligns with the legal character of Indonesian society, as reflected in the five principles of Pancasila. Therefore, it is unquestionable or questionable, as it is reinforced by the religion and beliefs of the people that have grown and developed over centuries in the archipelago.

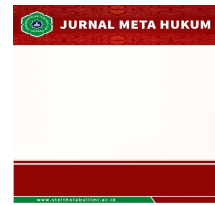
The existence of the death penalty in Law Number 1 of 2023 concerning the Criminal Code must remain based on Pancasila, which is a system of values and determines the direction of policies and programs for developing the national legal system.

Crime prevention efforts using criminal law sanctions are the oldest method, as old as human civilization itself. Even today, criminal law is still used and relied upon as a political tool for criminal justice. The death penalty is a last resort, an alternative to protecting society. The use of penal measures (criminal law sanctions) to regulate society through legislation is essentially part of a policy.

In early 2023, the government issued the latest Criminal Code (KUHP) through Law Number 1 of 2023, replacing the previous KUHP. Law Number 1 of 2023 is intended to replace the Criminal Code, also known as the Criminal Code, as stipulated in Law Number 1 of 1946 concerning Criminal Law Regulations, which has been amended several times.

Replacing the Dutch-era Criminal Code is one effort to develop national law. This effort is being carried out in a focused, integrated, and planned manner to support national development in various fields, in accordance with development demands, the level of legal awareness, and the dynamics of society.

The reform of the Criminal Code is directed towards a single mission that contains the meaning of decolonialization of the Criminal Code in the form of recodification, in the course of the nation's history it ultimately also contains various broader missions in relation to developments, both national and international. The second mission is the mission of democratization of criminal law. The third mission is the mission of consolidating criminal law because since independence, the legislation of criminal law has experienced rapid development, both inside and outside the Criminal Code with its various characteristics, so that it needs to be reorganized within the framework of the principles of criminal law regulated in Book I of the Criminal Code.



The drafting of the new Criminal Code was carried out based on the fourth mission, namely the mission of adaptation and harmonization to various legal developments that occurred, both as a result of developments in the field of criminal law as well as the development of values, standards, and norms recognized by nations in the international world. This mission is placed within the framework of legal politics by drafting this Law in the form of codilation and unification which is intended to create and enforce consistency, justice, truth, order, benefit, and legal certainty by paying attention to the balance between national interests, Indonesian interests based on Pancasila and the 1945 Constitution of the Republic of Indonesia.

After tracing the history of criminal law in Indonesia, it is known that the Criminal Code in force in Indonesia originates from the *Wetboek van Strafrecht voor Nederlandsch-Indie* (*Staatsblad* 1915: 7321). After Indonesia's independence in 1945, the *Wetboek van Strafrecht* was still in force based on Article I of the Transitional Provisions of the 1945 Constitution of the Republic of Indonesia.

Based on Law Number 1 of 1946 concerning Criminal Law Regulations (*State Gazette of the Republic of Indonesia II* Number 91, *Wetboek van Strafrecht voor Nederlandsch-Indie* is referred to as the Criminal Code and is stated to apply to Java and Madura, while for other regions it will be determined later by the President.

The effort to realize the existence of a unified criminal law for the entire territory of the Unitary State of the Republic of Indonesia, *de facto* has not been realized because there are areas occupied by the Dutch as a result of the Dutch military actions I and II for which the *Wetboek van Strafrecht voor Nederlandsch-Indie* (*Staatsblad*, 915: 7321 with all its amendments) is still in force.

Since then, it can be said that after independence in 1945 there was a dualism of criminal law in force in Indonesia and this situation lasted until 1958 with the enactment of Law Number 73 of 1958. This law stipulates that Law Number 1 of 1946 concerning Criminal Law Regulations with all its amendments and additions applies to the entire territory of the Unitary State of the Republic of Indonesia.

Thus, a uniform material criminal law applies to all of Indonesia, which is based on the law in force on March 8, 1942, namely the *Wetboek van Strafrecht voor Nederlandsch-Indie*, which is hereinafter referred to as the Criminal Code.

Unlike the old Criminal Code, Law Number 1 of 2023, or the new Criminal Code, regulates legal provisions that exist within society. This is based on the fact that in certain regions in Indonesia there are still unwritten legal provisions that exist within the community and apply as law in those areas. In the field of criminal law, this law that exists within society is usually referred to as customary criminal law. To accommodate this customary criminal law, the new Criminal Code explicitly regulates it in Article 2 of Law Number 1 of 2003.

The provisions in Article 1 paragraph (2) of Law Number 1 of 2023 constitute an exception to the principle that criminal provisions are regulated by statutory





regulations. It is acknowledged that customary criminal law aims to fulfill the sense of justice that exists within certain communities.

Explanation of Article 2 Law Number 1 of 2023 states that "living law in society" is customary law, which determines that a person committing a certain act is subject to criminal penalties. The living law in society, in this article, relates to the unwritten law that still applies and develops in Indonesian society. To strengthen the validity of this living law in society, regional regulations regulate these customary crimes.

Furthermore, the purpose of the law in force in that place of residence in Article 2 paragraph (2) of Law Number 1 of 2023 is to apply to anyone who commits a customary crime in that area. This paragraph contains guidelines for determining customary criminal law whose validity is recognized by Law Number 1 of 2023.

Article 2 paragraph (2) of Law Number 1 of 2023 is a guideline or criteria in determining the source of material law (law that lives in society). This paragraph is oriented towards national and international values. That "law that lives in society" is applied in a limited manner, namely in accordance with the values of Pancasila, the constitution, human rights and general legal principles recognized by the community of nations.

In line with Article 1 paragraph (2) of the old Criminal Code, the provisions of Article 3 paragraph (1) of Law 1 of Law Number 1 of 2023 allow for the application of criminal law retroactively as long as the regulation benefits the perpetrator. The article reads as follows: "In the event of a change in statutory regulations after the act has occurred, the new statutory regulations shall apply, unless the provisions of the old statutory regulations benefit the perpetrator and accomplices in the crime."

Law Number 1 of 2023 explicitly prohibits the use of analogical interpretation in determining criminal acts, and Law Number 1 of 2023 recognizes the existing law in society, previously known as customary criminal law. Law Number 1 of 2023 contains two principles of legality: formal legality and material legality. In the formal legality principle, the basis for criminalizing an act is the law (written law) that existed before the act was committed. Meanwhile, in the material legality principle, the basis for criminalizing an act is the existing law in society (unwritten law).

4. Conclusion

Legal regulations regarding the implementation of the death penalty in Indonesia are regulated in Law Number 1 of 2023 concerning the Criminal Code in Indonesia which has been enacted since January 2, 2023, provides new hope for increasing respect for human rights. With several considerations such as the good behavior of the defendant, the defendant's commendable actions, and other



mitigating factors, the defendant can be used as a "tool" to avoid the actual death penalty and be replaced by another punishment (life imprisonment). And if the defendant fails the probationary period as explained in Article 1 of the Criminal Code, by not showing good attitudes and behavior and without hope of improvement, the death penalty will still be enforced.

The perspective of Law Number 1 of 2023 concerning the Criminal Code on the death penalty Article 100 stipulates a conditional death sentence. The convict will be given a 10-year probationary period to perform good deeds in prison. If they perform good deeds during the 10 years, their sentence can be commuted to life imprisonment by Presidential Decree.

The application of the death penalty in Law Number 1 of 2023 human rights perspective based on the decision The Constitutional Court through the Constitutional Court decision No. 3/PUU-V/2007 stated that in essence the death penalty for serious crimes is a form of restriction on human rights, this is understandable, because the death penalty contains a lot of controversy or differences of opinion and views, because it concerns the right to life or the life of a person who cannot be rehabilitated if the death penalty has been carried out.

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