

RECONSTRUCTION OF LAW ENFORCEMENT IN THE PROVISIONS OF ARTICLE 100 OF THE NEW CRIMINAL CODE CONCERNING THE DEATH PENALTY ON PROBATION FROM THE PERSPECTIVE OF VICTIMOLOGY

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Abstract

One form of extreme punishment used to deal with serious crimes is the death penalty, which is intended to provide a deterrent effect and protect the community. The history of this punishment shows that, although it has been around for a long time, its success in reducing crime rates is still questionable. Serious cases such as premeditated murder, treason, and extreme violence often involve detention. However, there is no evidence that these arrests are effective in reducing crime, especially corruption and drugs. In addition, human rights, especially the right to life guaranteed by the constitution, and the possibility of irreparable judicial errors after execution, have been a source of criticism. Indonesia uses the "*The Indonesian Way*" approach in Article 100 of the New Criminal Code, which establishes the death penalty as a last resort after ten years of probation.

According to Article 100 (1) of the National Criminal Code, the execution of the death penalty is postponed for 10 (ten) years with two conditions: remorse and desire to repent and improve themselves, as well as the role of the death penalty defendant in the crime. In the National Criminal Code, the death penalty has advantages and disadvantages. The advantage is that the death penalty is regulated as an alternative crime and that execution of the death penalty is delayed, which makes it a middle ground between voters and opponents of the death penalty.

The death penalty is the most severe punishment because it is only given to perpetrators of serious crimes such as premeditated murder. Thus, the death penalty shows that the perpetrator is responsible for his actions and has a deterrent effect. Meanwhile, the weakness of Article 110 paragraph (1) of the National Criminal Code is that there is no legal certainty about when the execution of the death penalty will have an impact on the execution of the death penalty pending the probation period. This causes the President's time limit to issue a ruling after considering the Supreme Court's considerations is not clearly regulated, and criminal cases become too long.

Keywords: Death penalty, probation, Victimology

INTRODUCTION

The 1945 Constitution of the Republic of Indonesia (1945 Constitution of the Republic of Indonesia) emphasizes 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 from 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 fittings regardless of their name, including citizens, must be submissive and obedient and uphold the law without exception. Therefore, all actions of the government as the

holder of power must be based on the applicable laws or regulations.¹

The law regulates developments in society in order to achieve justice and legal certainty for the bearers of rights and obligations. Every event and deed in society is governed by the law itself. In the legal context, an event or occurrence can sometimes fall within the scope of law, which is why it is called a legal event. Of course, there are fundamental differences between the two events, especially with regard to the consequences that the parties to the event must bear. In the great Indonesian dictionary, an event is interpreted as an event, so linguistically a legal event can be interpreted as an event that gives rise to a law that can be applied or an event related to the law.²

Law enforcement is the main pillar in ensuring the implementation of order, justice, and legal certainty in a country. In the state of law, law is not only understood as a collection of norms, but also as a social instrument that must be applied consistently and fairly.³ The effectiveness of law enforcement is largely determined by the quality of the regulatory norms, the ability of law enforcement

officials, and the level of community compliance with the rules. These three aspects make law enforcement a structural, substantial, and cultural process.

Lawrence M. Friedman explains that the effectiveness of law enforcement depends on three main components: the substance of the law, the structure of the law, and the culture of the law.⁴ The substance of the law is related to the quality of the applicable regulations; the legal structure concerns law enforcement agencies and the professionalism of their officials; while the culture of the law is related to the attitude, perception, and awareness of the law. An imbalance in one of these components can result in a weak law enforcement process. This can be seen in various phenomena in Indonesia, such as the existence of overlapping regulations, the low integrity of the apparatus, and the legal culture of the community that is still permissive towards violations.⁵

In an ever-changing social context, law enforcement faces new challenges such as technological developments, rising cybercrime, transnational crime, and societal demands for transparency and

¹ Ayusriad, Abdul Razak, and Muh. Arfin Hamid, "Islamic Law on the Death Penalty Based on Human Rights Related Laws in Indonesia," *Journal of Legal Sciences*, 7, no. 2 (August 2018): p. 227.

² Aris Prio Agus Santoso, "Introduction to Law", Pustaka Baru Press, Yogyakarta, 2022, p. 144.

³ Rahardjo, S, *Law and Social Change*. Kompas, 2009

⁴ Friedman, L. M, *The Legal System: A Social Science Perspective*. Russell Sage Foundation, 1975

⁵ Soekanto, S, *Factors Affecting Law Enforcement*. Rajawali Press, 2016

accountability of legal institutions.⁶ This condition demands a law enforcement system that is adaptive, innovative, and responsive to the times. On the other hand, the phenomenon of low public trust in law enforcement officials shows that there is a gap between *das sollen* (what the law should do) and *das sein* (what happens in practice).⁷

On January 2, 2023, the Indonesian government passed Law Number 1 of 2023 concerning the new Criminal Code, which will come into effect three years after it is promulgated, namely in 2026. In the new Criminal Code, the provisions regarding the types of criminal sanctions are regulated in Article 64, which divides crimes into three categories: principal crimes, additional crimes, and special crimes for certain types of criminal acts stipulated by law. Social changes and developments of the times have caused Article 10 of the old Criminal Code to be revised in the new Criminal Code. This adjustment includes the addition of the main and additional types of criminal offenses. One of the most controversial changes among experts and the public is the addition of provisions on special crimes in the form of death penalty threats. This is explained in Article 67 of the new Criminal Code, in contrast

to the old Criminal Code which places the death penalty as part of the main crime in Article 10.

The death penalty is a type of punishment that occupies the most severe position in the national penal system. This type of sanction has long been known as one of the oldest forms of punishment in the history of human civilization. Because of its extreme nature, namely taking the life of a person, the death penalty is often seen as no longer in harmony with the development of modern human values that uphold the right to life. Nevertheless, Indonesia still maintains the existence of the penalty as one of the instruments in law enforcement, even though the Netherlands, whose criminal law system is the basis for drafting the Indonesian Criminal Code, has first abolished the death penalty from its criminal justice system.

In Dutch terminology, the death penalty is known as *doodstraf*, which is an act carried out by the state to take someone's life as a consequence of certain crimes that are considered very serious. In the context of Indonesian law, the death penalty is understood as a form of punishment carried out through a lethal act, carried out by the state against individuals who are proven guilty based on a court decision that

⁶ Chandranegara, I. S, The Dynamics of Law Enforcement in the Modern Legal State. *Journal of Law and Justice*, 8(3), 2019

⁷ Zainal, F, The Challenges of Law Enforcement in Indonesia in the Perspective of Legal Politics. *Journal of Indonesian Legislation*, 17(4), 2020

has acquired permanent legal force. This means that the implementation of the death penalty is only possible after going through a final judicial process, so that the decision can no longer be challenged.

Thus, the death penalty is not only a form of repressive sanction, but also part of a long discourse on the effectiveness of punishment, the protection of human rights, and the direction of national legal development. The debate over its existence arises not only among academics and legal practitioners, but also in society at large, especially when it comes to the balance between the interests of law enforcement, the victim's sense of justice, and respect for the right to life as a basic human right.

In the early days of its application, the death penalty was imposed without any philosophical considerations or a clear justification basis. In this period, the death penalty was considered the most effective and fast means of dealing with serious crimes that were considered to threaten public order. However, as legal thinking develops and human rights pay rises, there is a need to formulate a more solid and rational basis for the application of such punishments. The State, as the party empowered to impose the death penalty, at the same time also has a responsibility to safeguard and protect the lives of the people as a whole, so that any punitive action

must be placed within the framework of a balance between the public interest and respect for human dignity.

In Indonesia itself, the initial form of execution of the death penalty was carried out by hanging. This is explicitly stated in Article 11 of the Criminal Code (KUHP), which explains that the execution of the death penalty is carried out by the executioner by hanging the convict: a rope that has been attached to the gallows is attached to the neck of the perpetrator, then the board on which the convict stands is dropped until it causes death. The execution model is a practice that was commonly applied during the colonial period.

However, the changing times and the development of views on execution techniques that are considered more "humane" have prompted the government to change its implementation procedures. The hanging method is then no longer used. Through Law No. 2/PNPS/1964 concerning Procedures for the Execution of the Death Penalty Imposed by Courts in the General and Military Judicial Environment, the state stipulates that the execution of the death penalty is carried out by shooting to cause death. This provision is contained in Article 1 of Law No. 2/PNPS/1964, which emphasizes that the mechanism for the implementation of the death penalty in Indonesia since then has

switched from a hanging system to a method of shooting by firing squads.⁸

Provisions regarding the implementation of the death penalty in Indonesia are not only listed in the law, but also regulated more operationally through the Regulation of the Chief of the National Police of the Republic of Indonesia Number 12 of 2010 concerning Procedures for the Implementation of the Death Penalty. This regulation provides a much more detailed explanation of the execution procedure, especially as described in Article 4 which contains the stages of implementing the death penalty. These stages include the preparation phase, technical organization by the apparatus, the execution process itself, to the closing or ending stage after the convict is declared dead. All of these procedures confirm that the method of execution that applies in this regulation still uses the method of shooting to cause the death of the convict.⁹

In practice, courts in various countries, including Indonesia, have imposed the death penalty for various types of criminal acts. The death sentence is often handed down in cases that are categorized as very serious, such as narcotics crimes, premeditated murder, acts of terrorism, serious corruption, and other forms of crimes that are

considered to threaten state security and public safety. However, as human civilization develops and awareness of the importance of respect for human rights increases, the application of the death penalty, especially by the method of mass shooting, has become a topic of widespread debate. The development of human rights thinking presents two opposing camps: one side supports it as an effort to provide a deterrent effect and protect society, while the other side opposes it because it is considered contrary to human principles and the right to life as a right that cannot be reduced under any circumstances.

Responding to various problems and dynamics that arise in national criminal law enforcement practices, the government then established new regulations in the form of Law Number 1 of 2023 concerning the Criminal Code. The presence of this new Criminal Code is intended to provide fundamental updates to the Indonesian penal system, including regarding the regulation of the death penalty. In the provisions of the law, the death penalty is placed as a type of special sanction, as stated in Article 67 which affirms that the special penalty referred to in Article 64 letter c is the death penalty, and the threat is always

⁸ Article 1 of Law No. 2/PNPS/1964 concerning Procedures for the Execution of the Death Penalty Imposed by Courts in the Public and Military Courts

⁹ Article 4 of the Regulation of the Chief of the National Police of the Republic of Indonesia Number 12 of 2010 concerning Procedures for the Implementation of the Death Penalty.

given alternatively. This means that the death penalty is no longer positioned as a sanction that must be imposed, but is an option that can only be taken if certain conditions are met.

Furthermore, Article 98 provides an explanation of the philosophy and purpose of the death penalty regulation in the new Criminal Code. The article emphasizes that the threat of the death penalty is applied alternatively as a form of last resort (*ultimum remedium*) to prevent the occurrence of crimes that endanger the community and to provide optimal protection for public order. Thus, the existence of the death penalty in the new Criminal Code reflects a shift in approach that is more careful, proportionate, and prioritizes the protection of human rights, without completely abolishing its existence in the Indonesian criminal justice system.¹⁰

Furthermore, the provisions regarding the procedure for carrying out the death penalty are explained in more detail in Article 99 paragraph (3) of the new Criminal Code. The article emphasizes that the execution of the death penalty can be carried out through the shooting method to cause the convict to die by a firing squad. In addition, the article also opens the possibility of using other methods as long as it has been expressly regulated

in the applicable laws and regulations. Thus, the mechanism for carrying out the death penalty is not only limited to execution using firing squads, but can also be carried out through alternative procedures set by the state based on positive legal provisions.

Referring to the various provisions regarding the implementation of the death penalty that have been described previously, new problems arise related to the provisions in Article 100 of the new Criminal Code. This article introduces the concept of the death penalty with probation, which radically changes the traditional approach to the death penalty in Indonesia. The provision details that:

1. The judge is given the authority to impose the death penalty accompanied by a probation period of ten years. The imposition of a criminal sentence in this form must take into account the subjective condition of the defendant,
 - a. the existence of sincere regret and the potential to improve oneself,
 - b. assess the extent of the defendant's involvement in the criminal act committed.
2. The provisions regarding the conditional death penalty must be explicitly stated in the court decision, so that it has binding legal force.

¹⁰ Articles 64 and 98 of Law No. 1 of 2023 concerning the Criminal Code

3. The probation period for ten years begins to be calculated from one day after the verdict obtains permanent legal force. During this period, the opportunity to change the fate of the convict is highly dependent on his behavior.
4. If during the probation period the convict shows a cooperative attitude, good behavior, and strong indications to improve himself, then the death penalty imposed can be changed to life imprisonment. This change can only be made through a presidential decree after obtaining consideration from the Supreme Court.
5. The sentence of life imprisonment which is determined in lieu of the death penalty shall be calculated from the date of the President's decree issued.
6. If during the probation period the convict does not show signs of improvement, does not show commendable behavior, and is considered not to have the possibility of rehabilitation, then the execution of the death penalty can be carried out. The implementation was carried out based on the order of the Attorney General. Thus, Article 100 presents a new concept that not only emphasizes the criminal aspect, but also opens up space for moral, humanitarian, and

rehabilitation considerations for death row inmates.¹¹

If the provisions of Article 100 of the new Criminal Code are analyzed further, it appears that the regulation opens up a considerable space for convicts to show remorse for their actions and show the potential for change. The existence of a ten-year probation mechanism makes the death penalty no longer understood as a final and binding sanction that has been absolute since it was handed down by a judge. Consequently, the death penalty in this context can be perceived more as a threat or a contingency punishment option, depending on the development of the convict's behavior during the evaluation period.

This then gave rise to a wide debate in various circles, both among legal academics, criminal experts, legal policy observers, and community leaders. Some consider the provision to be a step forward because it provides opportunities for rehabilitation and reflects a more humane approach. However, not a few also see it as a form of softening the death penalty which has the potential to reduce the deterrent effect of the crime. Thus, Article 100 of Law Number 1 of 2023 concerning the Criminal Code has become the center of a polemic because it introduces a mechanism for leniency for death

¹¹ Article 100 of Law No. 1 of 2023 concerning the Criminal Code.

sentences that were previously unknown in the Indonesian criminal law system.

Based on previous research related to the title that the author raised is very different as follows:

PROBLEM FORMULATION

1. What are the provisions of the death penalty regulated in the provisions of Law Number 1 of 2023 concerning the Criminal Code?
2. What is the Existence of the Death Penalty in Various Countries in Its Current Existence?

RESEARCH METHODS

This research uses a normative legal research method (doctrinal research), because the focus of the research is to evaluate the norms, principles, and legal concepts regarding the principle of equality before the law and criminal cover. This research analyzes relevant laws and regulations, doctrines, court decisions, and scientific works. To enrich the perspective, this normative research is supported by a limited non-doctrinal approach, in the form of observations on the practice of the application of cover crimes in court decisions and public discourse. The research uses several approaches, namely the legislative approach, the

conceptual approach, the case approach and the historical approach. The researcher uses primary, secondary and tertiary legal materials. After the field data is obtained, conclusions are drawn. The method of drawing deductive conclusions draws conclusions from the general to the specific.

RESULTS OF RESEARCH AND DISCUSSION

1. The death penalty is regulated in the provisions of Law Number 1 of 2023 concerning the Criminal Code.

In the new Criminal Code, the rules on the death penalty have undergone major changes. This punishment is no longer the main sanction, but an alternative option and is used as the last step as stated in Article 98 of Law No. 1 of 2023. The judge can impose the death penalty with a probation period of 10 years. If during that period the convict shows remorse and behaves well, the death penalty can be changed to life imprisonment by Presidential Decree after considering the opinion of the Supreme Court. This provision emphasizes that the death penalty is only applied selectively to prevent crime and protect the community. Meanwhile, the implementation procedure is further explained in Article 99 of the same law.

1. The death penalty may only be carried out after the convict's

- application for clemency is rejected by the President.
2. Execution of the death penalty should not be carried out in a public place.
 3. The execution of the death penalty is carried out by firing special squads or other methods regulated by law.
 4. Executions of pregnant women, breastfeeding mothers, or people with mental disorders are delayed until they give birth, finish breastfeeding, or recover from their mental illness.¹²

Deputy Minister of Law and Human Rights Edward Omar Sharif Hiariej stated that the death penalty is a special punishment that can be changed. If the convict behaves well, the sentence can be reduced to life imprisonment or 20 years. Therefore, the death penalty is not considered a primary punishment, but rather a special sanction."¹³ While in prisons or prisons, inmates are fostered to develop independence through mental, spiritual, and skills training. Good behavior during the coaching period can be the basis for granting leniency or parole application. From the perspective of international law and human rights, the death penalty is considered a violation of the right to life in Article 3 of the Human Rights Council, although Article 4 paragraph (1) of the ICCPR provides an

¹² <https://www.detik.com/jateng/hukum-dan-kriminal/d6568016/apa-itu-hukuman-mati-Pasal-99-Law-No.-1-of-2023>

exception for crimes that are considered to endanger the public. The basis for the death penalty regulation in Indonesia is regulated in Law Number 1 of 2023 concerning the Criminal Code.

The death penalty in the new Criminal Code is positioned as the last and alternative sanction. Its implementation provisions are regulated in Articles 100 and 101 of Law No. 1 of 2023, with Article 100 containing the main provisions related to its implementation. as follows:

1. The judge can impose the death penalty with a probation period of 10 years if there are mitigating considerations, such as the defendant's remorse, opportunity to change, level of involvement, or other mitigating factors.
2. The order that the death penalty be imposed with a probation period must be expressly stated in the verdict.
3. The 10-year probation period begins to be calculated the day after the verdict has permanent legal force.
4. If the convict behaves well during the probation period, the death penalty can be changed to life imprisonment through a Presidential Decree

¹³ Edward, who is familiarly called Eddy, was quoted from the kemenkumham.go.id website.

with the consideration of the Supreme Court.

5. If the convict does not show a change in behavior, the death penalty can be carried out based on the order of the Attorney General.

If the clemency of the death row inmate is refused and the execution is not carried out for 10 years without an escape, then the death penalty can be changed to life imprisonment through a Presidential Decree. This rule provides legal certainty for convicts. The explanation of Law 1/2023 emphasizes that the death penalty is not a principal crime, and Article 98 states that the sanction is alternative and is only used as a last resort to prevent crime.

The explanation of Article 98 of Law 1/2023 emphasizes that the death penalty is not a basic crime, but is specifically placed as a very limited sanction and is only used as a last resort to protect the community. As the most severe punishment, the death penalty is always an alternative threat along with life imprisonment or a maximum prison of 20 years. With probation, convicts are given the opportunity to change so that their execution can be commuted to life imprisonment. In the new Criminal Code that took effect on December 6, 2022, there is an important update, where Article 100 stipulates that judges can impose the death penalty with a probation period of 10 years.

Paragraph (1) states that the probation period is given by considering remorse, potential self-improvement, and the role of the defendant in the crime, while paragraph (2) requires that these provisions be included in the verdict. If during the probation period the convict behaves well, his sentence can be changed to life imprisonment through a Presidential Decree after consideration by the Supreme Court as stipulated in paragraphs (4) and (5). However, if there is no change, the death penalty can be executed based on the order of the Attorney General in accordance with paragraph (6).

The National Criminal Code is indeed appreciated, but a number of parties criticize Article 100 which gives a 10-year probation period for death row inmates so that their sentences can be changed to life imprisonment. This topic was again discussed at the FGD "Bridging the Death Gap: Protection of the Right to Life through Intermediary Policies (Interim)" in Bandung on May 19, 2023. The forum, which presented academics and civil society representatives, discussed the death penalty regulation in Law 1/2023, while highlighting the legal vacuum in the regulation.

The 10-year probation period for death row inmates in Law 1/2023 is seen as a middle point between those who oppose and those who support the death penalty, and is considered in accordance with the

values of Pancasila because it tries to balance the interests of individuals and society. However, Pohan assessed that the provisions of Article 100 paragraph (2), which requires the inclusion of probationary periods in the decision, can cause problems if they are not clearly written. In addition to the need for technical rules related to probation, he also highlighted the importance of guidelines for prosecutors and courts in implementing the death penalty after the new Criminal Code takes effect. In the new Criminal Code, the death penalty is positioned as a special punishment that is only used in certain situations, for example without discrimination, without violation of the rights of the accused, and especially for repeat offenders. The Criminal Code also brought major changes: the death penalty is no longer a basic crime, but an alternative crime, and can only be executed after a 10-year delay period. Article 100 confirms that the delay takes into account remorse, self-improvement, and the role of the defendant in the crime. If the convict behaves well during that period, the death penalty can be commuted to life imprisonment through a presidential decree with the consideration of the Supreme Court.¹⁴

¹⁴ Aryo P. Saptohutomo, "Death Penalty with Probation in the New Criminal Code Called Being a Middle-Road," <https://nasional.kompas.com/read/2022/12/1>

According to Prof. Dr. Topo Santoso, the delay in execution for ten years is a compromise step between groups that support and reject the death penalty. This difference of views arises because supporters consider the death penalty important to have a deterrent effect, while opponents see it as a violation of human rights. Indonesia still maintains the death penalty for security and public interest, even though many countries have abolished it. The presence of Law Number 1 of 2023 as a new Criminal Code has also brought changes to the death penalty regulation in Indonesia.

In the new National Criminal Code, the main updates related to the death penalty include its placement as an alternative crime and the delay in execution. This new provision is expected to be a compromise between groups that are pro and con against the death penalty. Therefore, the Constitutional Court should start testing new articles of the Criminal Code since the socialization period, so that if there are unconstitutional provisions that can be corrected immediately without having to wait three years for the rules to take effect. The Constitutional Court is also not prevented from testing the new Criminal Code and the old Criminal Code at the same time, because they

8/22242901/pi death-with-probation-period-in-new-Penal Code is called as a middle-road,

are different laws. If the new Criminal Code cannot be tested just because it has not yet been enforced, then later when the new Criminal Code comes into force and there are still cases that use the old Criminal Code based on *tempus delicti*, the Constitutional Court can no longer test the old Criminal Code. This condition will make the party aggrieved by the provisions of the old Criminal Code have no means to assess the constitutionality of the articles applied to them. Therefore, this logic is considered wrong because it does not provide justice protection for citizens whose constitutional rights have the potential to be violated by both the new Criminal Code and the old Criminal Code.

Based on the previous description, if the Constitutional Court is consistent as the guardian of the constitution, then the Constitutional Court must be authorized to receive, examine, and decide cases related to the new Criminal Code and the old Criminal Code as long as there are still parties affected. This approach is in line with the principle of "prevention is better than cure," because the Constitutional Court's decision is a means of recovery for those whose constitutional rights have been violated. However, if the verdict is late, then the benefits become meaningless. Regarding the regulation of demonstrations, Article 256 of Law 1/2023 threatens criminal

penalties for anyone who holds a march, action, or demonstration without notifying the authorities and then disturbs the public interest or causes a commotion. However, this article has the potential to cause criminalization because it does not explain who is referred to as the authority or the form of notification that must be made whether it is enough to inform, coordinate, or must obtain permission first.

If "notice" is interpreted as an obligation to obtain written permission from the police or authorized authorities, this can open up the opportunity for abuse of authority by denying permission without a clear reason. On the other hand, if the "notification" does not require written permission, the authorities can still carry out repressive actions on the grounds that they do not accept or do not know the existence of an action plan.

The application of Article 100 of the Criminal Code is considered to open up opportunities for convicts to avoid the death penalty. In the case of Ferdy Sambo, the probation period in the article can only be used based on the principle of legality as stated in Article 1 of the Criminal Code. Article 1 paragraph (1) emphasizes that a person can only be punished if there are criminal rules that have been in force before. This means that criminal sanctions should not be imposed without a valid and binding legal basis.

In general, legal principles are the basic principles that form the basis for the formation of rules. Its function is to maintain consistency in the legal system. In this context, the principle of legality plays an important role in criminal law because it provides legal certainty and prevents arbitrary actions. Unlike other principles that are usually abstract, the principle of legality is expressly stated in the Criminal Code, while the abstract principle is usually only the basis for formulating concrete rules.

The principle of legality in criminal law serves as the main regulator in law enforcement because it provides clear and firm certainty in the application of rules in real cases. However, this principle is not applied in Indonesia absolutely, for example related to the prohibition of retroactive criminal law. To ensure legal certainty, criminal rules must be established first before a person can be sanctioned for his violation. This principle is also in line with the general provision that everyone is bound by the law since it was enacted and promulgated in the State Gazette. The exception to the principle of legality is regulated in Article 1 paragraph (2) of the Criminal Code, which states that if the regulations change after an act is committed, then the most favorable provisions are used. The new Criminal Code also affirms this exception through Article 3 paragraph (1), namely if a new rule appears regarding a criminal act, then

the new rule applies as long as it is more beneficial to the perpetrator. Thus, if the legal process against FS is still ongoing in the next three years, it has the potential to use the provisions of the new Criminal Code; but if the process has been completed, then the rules in the old Criminal Code remain in effect.

2. The Existence of the Death Penalty in Various Countries in Its Current Existence

In Indonesia, experts have different views on the death penalty, including whether it is necessary to maintain it. Andi Hamzah argued that the death penalty is still necessary for perpetrators who are considered very dangerous and must be removed from society. Debates about the death penalty generally relate to issues of justice, humanity, and crime prevention. In the new Criminal Code (Law No. 1 of 2023), the death penalty is still applied to certain crimes that are considered very serious, but judges are required to be careful in imposing them. Human rights groups reject the death penalty because it is considered a violation of the right to life and inhumane. Despite differences of opinion, the death penalty is still understood as the harshest punishment imposed by the state on perpetrators of crimes that endanger society.

Various forms of punishment are used as a tool of law enforcement,

and the death penalty is one of the most debated. From Babylonian times to the present, this type of punishment has been applied to certain criminals, although there is no definitive record of when the death penalty was first imposed.

The death penalty is one of the oldest forms of punishment, dating back to the enactment of the Hammurabian Law in Babylon in the 18th century BC. As of June 2006, only 68 countries—including Indonesia—still maintain it, while most countries have abolished the penalty. A total of 88 countries have abolished the death penalty for all crimes, 11 countries only for general crimes, and 30 countries have implemented moratoriums. Despite continuing to reap pros and cons because it concerns human life, the Indonesian government and its supporters still argue that the death penalty needs to be maintained in order to protect the public.

The Indonesian government has executed the death penalty several times according to the Dutch heritage Criminal Code system for cases such as terrorism, drugs, murder, and rebellion. The first execution occurred in 1980 against Kusni Kasdut, who was sentenced to death for robbery and murder.

¹⁵ Syaiful Bakhri, *Criminal Law Its Development and Growth*,: Total Media,, Yogyakarta, 2013, p.1.

¹⁶ Muladi and Barda Nawawi A, *Criminal Theories and Policies*, Alumni,. Bandung, 1984, p.4.

According to the Attorney General's Office, from 1945 to 2015 there were 303 death row inmates, but only 91 were actually executed. In the modern system, laws are formed by legislative institutions based on social realities to be used as written rules, so criminal law is used to enforce the norms set by laws and regulations.¹⁵

Criminal law serves to provide sanctions to control deviant behavior, although it is not always effective. Criminal acts arise from human behavior that is influenced by the values and cultural norms around them. Therefore, crime often occurs due to cultural clashes, social differences, economic factors, the influence of mass media, or limited opportunities to achieve goals.¹⁶ Serious crimes, including the death penalty, aim to protect the public from perpetrators of crimes that are considered irreparable. However, very harsh prison sentences often destroy identities and cause lifelong suffering, even driving some inmates to choose to die, while the death penalty itself is a very extreme punishment.¹⁷

In modern criminal law that considers scientific aspects and Pancasila values, the application of the death penalty must first be seen from its benefits for the public interest

¹⁷ Bambang Poernomo, *The Threat of the Death Penalty in Criminal Law in Indonesia: liberty*,. Yogyakarta, 1982, p.2.

before individual interests. Since both interests are often difficult to meet at the same time, if in a particular case it is better for the individual and not detrimental to the community not to impose the death penalty, then the judge may choose another type of crime.¹⁸

The debate about the death penalty arose because it was considered a violation of the right to life guaranteed by Article 28A of the 1945 Constitution. Roling also considered the death penalty to be destructive, because when the state takes away a person's life, it can reduce people's respect for the value of life and even trigger acts of violence in return.¹⁹

In contrast to Roling, Oemar Senoadji supports the implementation of the death penalty because he considers that the state still needs the punishment to face serious threats to order and humanity. A similar view was put forward by Lombroso and Garofalo who saw the death penalty as a way to eliminate the perpetrator who could no longer be repaired while avoiding the obligation to maintain him in prison. However, the application of the death penalty in Indonesia still sparks debate, because

many parties at home and abroad reject it.

The application of the death penalty is considered contrary to a number of rules in Indonesia, including Law No. 39 of 1999 which affirms that the right to life is a basic right of everyone and should not be restricted under any circumstances.²⁰ The right to life includes the right to remain alive, maintain survival, and improve the quality of life, including enjoying a safe, peaceful, prosperous life, and a decent and healthy environment.

The death penalty is considered inconsistent with the 1945 Constitution because since the second amendment in 2000, the constitution through Chapter XA and Article 28I paragraph (1) affirms the protection of human rights. With this provision, the death penalty actually no longer has a place in the Indonesian constitutional system.²¹ The Chairman of Komnas HAM, Abdul Hakim Garuda Nusantara, stated that the death penalty is no longer relevant and has lost its constitutional basis. In the perspective of Indonesian penalties that uphold human rights, including the rights of the convict, a new view has developed that criminalization is not only oriented

¹⁸ <http://samsulilmi.blogspot.co.id>, retrieved 23 June 2023.

¹⁹ Andi Hamzah, *The Death Penalty in Indonesia in the Past, Present and Future*, Ghalia Indonesia, Jakarta, 1984, p.36.

²⁰ Rhona K.M. Smith ("et al"), *Human Rights Law*, Center for Human Rights Studies,

Islamic University of Indonesia (PUSHAM UII). Yogyakarta, 2008, p. 257.

²¹ Todung Mulyo Lubis and Alexander Lay, *The Death Penalty Controversy*, Kompas Book Publisher, Jakarta, 2009, p. 319 .

towards retribution, but also on efforts to rehabilitate and reintegrate the perpetrators into society.

A penal system that focuses on retribution is slowly considered incompatible with the idea of rehabilitation and social reintegration. The new approach emphasizes that inmates realize their mistakes, not repeat their crimes, and can return to being responsible members of society.

The retaliation-oriented philosophy of punishment is no longer the main basis in Indonesia. Law No. 22 of 2022 emphasizes that prisoners are seen as subjects who could make mistakes, not parties who must be destroyed. What needs to be addressed are the factors that cause them to break the law. Criminalization is directed to make inmates regret their actions and return to becoming law-abiding, moral, and able to live an orderly life in society.

The goal of criminalization continues to evolve in a more rational direction. In the past, punishment focused primarily on revenge or gratitude and was considered the removal of sins. Now, criminalization is more directed at deterrence, community protection, and correction of perpetrators. Modern approaches even encourage coaching through non-criminal means. In theory, the death penalty is seen as able to have a strong deterrent effect.

The deterrent effect of the death penalty is often thought to

prevent a person from committing a crime, so the number of crimes decreases. Although logical, the empirical findings do not support this claim. Studies have shown that the death penalty is not a major factor in suppressing crime and is no more effective than other crimes such as life imprisonment. Since the death penalty is irreversible, its application should be based on strong evidence, not on assumptions or speculation.

The absence of scientific evidence to show that the death penalty effectively suppresses crime, coupled with its irreversible nature, is a compelling reason to abolish it. Many countries also abandon the death penalty because it is considered cruel, inhumane, and degrading of human dignity. In Indonesia, the death penalty is still applied to certain crimes such as premeditated murder, narcotics, and terrorism, and was even constitutionally tested in 2007 related to the Narcotics Law.

In the material test, various reasons for the rejection of the death penalty were submitted, but the Constitutional Court—despite the opinion of the judges—stated that the death penalty did not violate the 1945 Constitution because human rights in the constitution are not absolute. Proponents of the death penalty argue that the crime is necessary to protect victims, fulfill normative rules, and tackle crime, and the law should not only prioritize the rights of the

perpetrator but also the rights of the victim.

The right to life of victims who are taken away by the perpetrators, such as in cases of terrorism or premeditated murder, also needs to be taken into account. Therefore, when there are parties who demand the termination of the death penalty, some parties reject it on the grounds that the death penalty is still valid as a positive law and the verdict that has been handed down must be executed for the sake of legal certainty. They also argue that Indonesia does not need to follow the pressure of other countries because it must maintain its own legal sovereignty.

Proponents of the death penalty also argue that this punishment is necessary to tackle crime, especially due to the rise in extremely violent criminal acts. They question what would happen if the death penalty were abolished, while crime is still rampant. The debate on pros and cons continues in various circles. Under these conditions, some countries have opted for a moratorium, which is to still recognize the legal death penalty but no longer impose it. Indonesia can also take similar steps, because although the death penalty is still listed in several laws, law enforcement can choose not to prosecute it, considering that the death penalty is an alternative and not the only option.

CONCLUSION

1. The death penalty regulation in the 2023 Criminal Code shows a major change from a basic crime to an alternative special penalty with a ten-year probation period. The scheme provides an opportunity to assess the behaviour of convicts and allows for the change of sentence to life imprisonment as a more humane and legally definite step. This reform also answers the problem of *the death row phenomenon* which previously caused psychological suffering due to the uncertainty of execution. However, its effectiveness still depends on consistent application so as not to recreate uncertainty that is detrimental to the principles of legal certainty, justice, and respect for human dignity.

2. The death penalty provisions in various countries in the world still apply it in laws or provisions, including in Indonesia, still apply it in the Criminal Code, but there are also some countries that have indeed abolished the application of the death penalty in the laws and regulations of each country.

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