

Progressive Legal Perspectives on the Death Penalty in Criminal Law Reform in Indonesia

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Abstract. *This study aims to analyze the criminalization of the death penalty in positive law and the reform of criminal law in Indonesia in relation to Article 100 paragraph (1) of Law Number 1 of 2023 concerning the Criminal Code from a progressive law perspective. This study uses a normative legal approach. The theoretical approach taken is to use the theory of legal objectives, the theory of justice, the theory of punishment, and various other relevant legal theories to support a proper analysis of the death penalty in the ius constitutum and ius constituendum of Indonesia. Based on the study, it was concluded that 1) the Criminal Code as ius Constitutum is a legacy of the Dutch colonial era and the Theory of punishment in the death penalty currently applied adheres to the Relative Theory (Objective Theory) but is not expressly regulated in the form of norms. The death penalty in positive Indonesian law is found in a number of laws both inside and outside the Criminal Code. 2) Law Number 1 of 2023 concerning the Criminal Code has formulated and emphasized the Relative Theory (Objective Theory) into the form of norms as a means of preventing crime. Article 100 paragraph (1) of Law Number 1 of 2023 concerning the Criminal Code also regulates a concept of conditional death penalty which emphasizes improving the behavior of the Convict in order to obtain a change in punishment from the death penalty to life imprisonment with several requirements. Law Number 1 of 2023 concerning the Criminal Code as ius Constituendum in general has reflected a progressive renewal of criminal law and emphasizes the humanitarian side of punishment, but still requires improvement in determining the right criteria as a condition for imposing a conditional death sentence by a judge.*

Keywords: *Criminal; Death; Progressive; Reform.*

1. Introduction

Before the reformation, precisely since 1958, efforts to re-codify the national Criminal Code (KUHP) had begun, which was marked by the establishment of the LPHN (National Legal Development Institute).¹The main momentum occurred when the First National Law Seminar was held in Semarang in 1963, one of which discussed Law Number 1 of 2023 concerning the Criminal Code in addition to Law Number 1 of 2023 concerning the Criminal Code, Civil Code, Commercial Code. This seminar is said to be the starting point in the history of the renewal of the Criminal Code in Indonesia which was then formulated by the government team in 1964.²

In a global report titled "Death Sentences and Executions 2019: Amnesty International Global Report" published by Amnesty International in 2020.³The information shows a downward trend in the number of executions globally by 5% to 657 executions in 2019, compared to 690 executions in 2018. This is the lowest number recorded in the last 10 years. A significant decrease in executions was recorded in countries that strongly implement the death penalty system, such as Egypt, Japan, and Singapore. On the other hand, Iran, Saudi Arabia and Iraq contributed 81% of all global executions in 2019. Amnesty International also recorded 2,307 death sentences globally in 2019. This figure is down from the 2,531 death sentences recorded throughout 2018.⁴

Article written by Hukum online on Monday, October 19, 2020, Muladi who is a criminal law expert and Professor from the Faculty of Law, UNDIP Semarang said the idea of the 'Indonesian way', as a middle way for regulating the death penalty in Indonesia. This will be a bridge that will end the long controversy between Retentionists and Abolitionists. This middle way will become the foundation for *ius constituendum* in Indonesia.⁵

Explanation of Article 100 of Law Number 1 of 2023 concerning the Criminal Code has regulated provisions regarding the death penalty or conditional death penalty. By regulating the new concept of punishment, in its journey, death row convicts can obtain legal certainty from the Judge's decision regarding the change in their criminal sanctions from the death penalty to life imprisonment if they meet the requirements stipulated in Article 100 of Law Number 1 of 2023

¹[https://www.bphn.go.id/ipage/sejarah BPHN](https://www.bphn.go.id/ipage/sejarah%20BPHN), History of the Establishment of BPHN, accessed on November 4, 2023 at 14.00 WIB.

² Agus Sahbani, Article <https://m.hukumonline.com/berita/baca/lt5a42131b82c60/sekilas-sejarah-dan-problematika-pembahasan-rkuhp/>, A Glimpse of the History and Problems of Discussing the RKUHP, accessed on November 4, 2023 at 14.15 WIB.

³Amnesty International, *Death Sentences and Executions 2019*. Amnesty International Global Report, 2020. p. 6.

⁴*Ibid.*

⁵Muhammad Yamin, *Professor Muladi's Middle Path to the Death Penalty*, Hukumonline, 2020. <https://www.hukumonline.com/berita/baca/lt5f8cdd3c7c243/jalan-tengah-hukuman-pidana-mati-ala-profesor-muladi?page=all> (accessed on November 4, 2023 at 14.30 WIB.).

concerning the Criminal Code. This confirms that the state provides legal protection for all its citizens without exception. In realizing the ideas of the concept of law enforcement, law enforcement is the main way to achieve a sense of justice and certainty in society. Realizing the ideas of law enforcement must always be a reality in the future. Society needs laws that can always be enforced in order to create goodness in their lives. Law enforcement is needed by issuing laws that side with the community.⁶

The death penalty is considered to be a pro and con in Indonesia. For those who are in favor, the death penalty can cause a deterrent effect and can also provide prevention against the same actions from happening again. The punishment applied is considered to be something that does not violate the constitution if it is implemented for reasons that do not violate the law. However, those who are in favor of the death penalty also emphasize that there is a system that needs to be fixed which includes the levels of the investigation process to the prosecution process. For those who are against the death penalty, this punishment is considered to have violated human rights, because it can take away a life which is a right that only God can have. There is a concern that there is an error, where there are other perpetrators who have more responsibility than convicts who have been sentenced to death.

The application of the death penalty is considered not to be contrary to the constitution if its implementation is based on reasons that are not contrary to the law. So, those who are pro the death penalty emphasize that there needs to be an improvement in the legal system, such as from the investigation level to the prosecution level. In addition to the pros, there are cons who argue that human rights violations can occur as a result of the application of the death penalty because only God has the right to take someone's life and concerns that there will be mistakes when the application of the death penalty is carried out, such as if it turns out that other perpetrators who should be more responsible than the perpetrators who have been legally sentenced will be given the death sentence. The death penalty has changed several times since the beginning, which was originally a basic punishment, which was then changed to an exception punishment, and then changed again to a special type of basic punishment and changed again as a special punishment for certain crimes. The change in position on the death penalty shows that the issue of the death penalty has not yet found a meeting point for the application of the death penalty, this can be seen from the arguments from each pro and con party. The changes that occur show that this regulation will always follow the development of conditions in each nation and country.

The purpose of this paper is to examine in more depth the death penalty in Law Number 1 of 2023 concerning the Criminal Code so that a study is needed from

⁶Oksidelfa Yanto, *The State of Law: Certainty, Justice and the Utilization of Law in the Indonesian Criminal Justice System*, Publisher Pustaka Reka Cipta, Bandung, 2020, p. 8.

several published studies including research conducted by Fransiscus Xaverius Ade Kapojos concerning the Analysis of the progressive legal perspective, especially on upgrading criminal law related to Article 100 paragraph (1) of Law Number 1 of 2023 concerning the Criminal Code concerning the principle of the death penalty. Knowing this, this study then has a vision of presenting a theoretical explanation of the regulation of the death penalty in Law Number 1 of 2023 concerning the Criminal Code and the application of the death penalty when viewed from a progressive legal perspective, so that it can provide views and perhaps become an idea for implementing progressive law when creating Indonesian legal products.

2. Research Methods

The approach method used by the author for this writing is the Normative Juridical approach, juridical is an approach that uses legal principles and principles derived from written regulations (Books, Regulations and Legislation). The research specifications used by the author in this study are descriptive analysis.

Data Collection or data that will be presented in this Writing is the type of data that has been published in books, newspapers, magazines, journals, online portals, and others. There is a lot of data available from these sources related to your research field, regardless of the nature of the research field. Therefore, the application of a set of appropriate criteria for selecting secondary data to be used in this study plays an important role in terms of increasing the level of validity and reliability of the study. These criteria include (but are not limited to) the date of publication, the author's credentials, the reliability of the source, the quality of the discussion, the depth of the analysis, the level of contribution of the text to the development of the research field and others.

Data analysis is a very important and decisive stage in every research. In this stage the author must sort the data that has been obtained. Data analysis is essentially an activity to systematize written legal materials to facilitate the work of analysis and construction. The data analysis technique used in this study is a qualitative descriptive technique, namely a data analysis technique that aims to reveal and take the truth from the literature study, namely regarding the renewal of criminal law.

3. Results and Discussion

3.1 Criminalization and Regulation of the Death Penalty in Indonesian Positive Law

The theory of punishment contained in the current Indonesian criminal law system is merely a copy paste of Dutch criminal law. The purpose of punishment seems to be more emphasized as a form of retribution. This theory is known as the absolute theory. In this theory, every crime must be followed by punishment and must not be denied, without bargaining. A person gets punished for having committed a crime. No consequences are seen whatsoever arising from the

imposition of punishment. It is not cared for, whether in this way the community might be harmed. Only seen to the past, not seen to the future.⁷

The theory of absolute punishment according to Wirjono Prodjodikoro, is that a person is punished for committing a crime. No consequences are seen that may arise from the imposition of punishment. It is not considered whether society may be harmed by this. It is only seen in the past, not in the future.

There are several popular motives for using the death penalty in Indonesia, namely: the death penalty has a higher level of effectiveness than other punishment threats because it has a frightening effect (shock therapy) besides being more economical.⁸The death penalty is also used so that there is no eigenrichting in society. Theoretically, this death penalty will also have a very high deterrent effect so that it will cause people to give up their intention to commit crimes, so that it can be used as a good tool for general prevention and special prevention.

According to Sahetapy, the death penalty cannot be explained in terms of criminal law, let alone in a "legalistic positivistic" manner. Even if it is to be explained in terms of its retributive and "deterrent" aspects, then it must be studied in terms of its functional aspects and from the perspective of Law in action. He continued by saying that the death penalty also cannot be successfully explained from a search of criminal law and penitentiary law literature. He even believes that an approach through criminology and victimology will also reject the reasons for the existence of the death penalty.⁹

Furthermore, Sahetapy is of the view that if they still want to refer to the WvS alias the Criminal Code, then Piepers (in Idema, 1934) criticized the WvS (originating from the Penal Code), "... ging het als met een broek die eersrst door vader wordt gedragen, and over-gaat op den oudsten en vervolgens met een lap er op, op den tweede zoon". This means, like a pair of pants that were first worn by the father, then passed on to the eldest son and then with a patch of cloth passed on to the second son. It is not surprising that Pont criticized that Nog steeds worden - Indonesiers - beregt uit een Fransch oogpunt! Wanner schafft men toch de 80 jarige Fransche overheersing af? This means, Indonesians are still being judged through French glasses. When else will the 80-year rule of France be abolished.¹⁰

The current legalistic-positivistic theories of punishment, both in terms of penology and formal juridical (penitentiary recht) taught in state/private law faculties, are all colonial legacies, although in the Netherlands the death penalty

⁷Wirjono Prodjodikoro, *Principles of Criminal Law in Indonesia*, Refika Aditama, Bandung, 2003. Page 23.

⁸Akhiar Salmi, *The Existence of the Death Penalty*, Aksara Persada, Jakarta, 1985, p. 68.

⁹Sahetapy, In Todung Mulya Lubis, Alexander Lay, *Death Penalty Controversy, Differences of Opinion of Constitutional Judges*, Kompas, Jakarta, 2009, p. 219.

¹⁰Ibid, p. 219.

has been abolished since 1870 (S.162). Maintaining the retributive and deterrent theories has not been successful, especially when examined from a criminological perspective. Quoting Sahetapy's opinion that:¹¹It is not surprising that in the New Order era, what was called 'petrus' and which I later added 'matius' (mysterious death) also did not succeed, regardless of the paradigm of the due process model and crime control model from Herbert Packer (1968) in *The Limits of the Criminal Sanction*, let alone from the human rights perspective. All of that was a fiasco.

According to Sidharta, criminal sanctions (usually called punishment) are in the form of imposing suffering or something that is felt as something unpleasant (disadvantageous) for those who are subjected to it. The imposition of suffering on someone by the state demands accountability.¹²In order to be accountable, first of all, the criminal sanction must be a concrete statement of society's assessment of the actions carried out by the convict: that the action is bad, oppresses the dignity of others and endangers the existence of a healthy human society. Second, the criminal sanction must be a warning for people to stay away from actions that can result in the imposition of the criminal penalty (actions that are considered bad, etc.). Third, the imposition of the criminal penalty must be directed to encourage the convict to actualize his human values so that he will be able to control negative tendencies.¹³

Sidharta also argued that the death penalty contained in the Criminal Code and outside the Criminal Code is currently not in accordance with the values contained in Pancasila. The death penalty also no longer has formal enforceable power since the amendment to the 1945 Constitution, because the death penalty contained in the Criminal Code and outside the Criminal Code is contrary to Article 28 I of the 1945 Constitution.¹⁴The above are factors that according to Sudarto are why it is necessary to immediately reform Indonesian criminal law.

The study above has provided the author with an understanding that the concept of punishment in the death penalty contained in positive law in Indonesia currently adheres to the Relative Theory (Objective Theory), but in its enforcement it does not formulate concretely what the purpose of punishment is as a preventive form.

Furthermore, the author knows that after the enactment of Law Number 1 of 1946 in conjunction with Law Number 73 of 1958, Indonesia as an independent country still enforces WvSI and only changes its name to the Criminal Code, which then ultimately the colonial legal product becomes a reference for the creation of various special laws outside the Criminal Code in implementing the

¹¹Ibid, p. 220.

¹²B. Arief Sidharta in Todung Mulya Lubis, Alexander Lay, *Death Penalty Controversy, Differences of Opinion of Constitutional Judges*, Kompas, Jakarta, 2009, pp. 236-237.

¹³Ibid

¹⁴Location Cit

death penalty. The author's opinion after analyzing this is that Indonesia as a country that has become independent and free from Dutch colonialism should have its own legal system, especially in creating and enforcing the National Criminal Code. The author's reason for this opinion is because the current criminal law contained in the Criminal Code is the work of a foreign nation that is not in accordance with the spirit of the Indonesian nation contained in Pancasila.

From the entire description above, the author comes to his analysis and argues that it is time for Indonesia to replace the current Criminal Code which is a colonial legacy. This step must be continued by implementing the National Criminal Code. In the National Criminal Code, the provisions regarding the death penalty are applied as humanely as possible and are aimed at efforts to protect the community. In the future, this is expected to provide a sense of justice for the victim's family and also for the perpetrators of the crime. The National Criminal Code that will be in effect must be aligned with the values contained in Pancasila which is none other than the source of all sources of law that are alive and rooted in the soul of the Indonesian nation.

There are articles that threaten the death penalty in the Criminal Code, including the following:¹⁵

Article 104 on crimes against state security (treason), Article 111 paragraph (2) on conducting relations with foreign countries resulting in war, Article 124 paragraph (3) on treason during war, Article 140 paragraph (3) on premeditated murder of the head of a friendly state, Article 340 on premeditated murder, Article 365 paragraph (4) on theft with violence by collusion resulting in serious injury or death, Article 444 on piracy at sea resulting in death.

Regarding the normative basis for executing the death penalty in Indonesia, it is still...using Law No. 2/Penpres/1964 concerning Procedures for the Implementation of the Death Penalty Imposed by Courts in the General Courts and Military Courts. Law No. 2/Penpres/1964, namely Presidential Decree Number 2 of 1964 which was stipulated as Law with Law No. 5 of 1969. Based on this Law, the procedure for implementing the death penalty in Indonesia is carried out by being shot to death, by a firing squad, which is carried out in a place within the jurisdiction of the court that issued the first instance decision, unless otherwise determined by the Minister of Justice and Human Rights, the implementation of which is attended by the regional commissioner (Kapolres) or an officer appointed by him together with the High Prosecutor/Prosecutor in charge.

3.2 Criminal Law Updates Related to Article 100 Paragraph (1) of Law No. 1 of 2023 concerning the Criminal Code from a Progressive Law Perspective

Forty years before the Reformation era began, precisely in 1958, efforts to re-codify the national Criminal Code (KUHP) had begun, marked by the

¹⁵Moeljatno Ibid, pp. 43-170.

establishment of the LPHN (National Legal Development Institute). The main momentum occurred when the National Law Seminar was held in Jakarta on March 11-16, 1963 thanks to the cooperation between the National Law Institute under the leadership of Susanto Tirtoprodjo, and the Indonesian Legal Scholars Association or Persahi Jakarta Branch under the leadership of Sujono Hadinoto.¹⁶The results of this seminar were then submitted by the government to the MPRS (Provisional People's Consultative Assembly) session in 1963 and approved to be used as material for forming legislation in compiling national criminal law.

Below are several articles in Law No. 1 of 2023 concerning the Criminal Code which regulate the death penalty, namely:

Article 64

Criminal penalties consist of:

- a. principal criminal offense;*
- b. additional penalties; and*
- c. special criminal penalties for certain criminal acts specified in the Law.*

Article 67

The special criminal penalty as referred to in Article 64 letter c is the death penalty which is always threatened as an alternative.

Article 98

The death penalty is threatened as an alternative as a last resort to prevent criminal acts and protect society.

Article 99

- 1) The death penalty can be carried out after the convict's request for clemency is rejected by the President.*
- 2) The death penalty as referred to in paragraph (1) shall not be carried out in public.*
- 3) The death penalty is carried out by shooting the convict to death by a firing squad or by other means specified in the law.*
- 4) The execution of the death penalty against pregnant women, women who are breastfeeding their babies, or people who are mentally ill is postponed until the woman gives birth, the woman is no longer breastfeeding her baby, or the mentally ill person recovers.*

Chapter 100

- (1) The judge can impose the death penalty with a probationary period of 10 (ten) years if:
 - a. the defendant showed remorse and had hope for improvement;**

¹⁶Wirjono Prodjodikoro, Ibid, p. 20.

- b. the defendant's role in the crime was not very important; or there were mitigating reasons.*
- (2) The death penalty with a probationary period as referred to in paragraph (1) must be stated in the court decision.*
- (3) The 10 (ten) year probationary period begins 1 (one) day after the court decision has permanent legal force.*
- (4) If the convict during the probation period as referred to in paragraph (1) shows commendable attitudes and actions, the death penalty can be changed to life imprisonment by Presidential Decree after obtaining consideration from the Supreme Court.*
- (5) If the convict during the probation period as referred to in paragraph (1) does not demonstrate commendable attitudes and actions and there is no hope of improvement, the death penalty can be carried out on the orders of the Attorney General.*

Chapter 101

If a death row convict's application for clemency is rejected and the death penalty is not carried out for 10 (ten) years since the clemency was rejected, not because the convict has escaped, the death penalty can be changed to life imprisonment by Presidential Decree.

Chapter 102

Further provisions regarding the procedures for implementing the death penalty are regulated by law.

In this case, the author only limits and emphasizes the discussion on Article 100 paragraph (1) of Law No. 1 of 2023 concerning the Criminal Code and will touch on several articles related to it. In general, the author arrives at the following analysis:

- a. Article 100 paragraph (1) of Law No. 1 of 2023 concerning the Criminal Code reflects the renewal of Indonesian criminal law in accordance with the characteristics of progressive law which views law as always in the process of becoming (law in the making);
- b. Article 100 paragraph (1) of Law No. 1 of 2023 concerning the Criminal Code is a legal product that is based on sensitivity and concern for changes occurring in society, both locally, nationally and globally.
- c. Article 100 paragraph (1) of Law No. 1 of 2023 concerning the Criminal Code is in accordance with progressivism in future positive law, because its provisions have opened the door to repentance for convicts and become a means for convicts sentenced to death to change their behavior for the better.

4. Conclusion

The theory of punishment in the death penalty that is currently applied is the Relative Theory (Objective Theory), but in its enforcement it does not formulate

concretely what the purpose of punishment is as a form of prevention. The Criminal Code is unable to show clearly and in the form of rules or norms what the purpose of the implementation of the death penalty is as a form of prevention against crime and a form of protection for the community. This makes the Relative Theory (Objective Theory) that is intended to be displayed in the Criminal Code still abstract, even punishment seems more like a form of retribution (Absolute Theory) if we look at it using the Natural Law Theory. The application of the death penalty in Indonesian positive law is based on the provisions of Article 10 of the Criminal Code which lists the death penalty as one of the main types of punishment. The current Criminal Code is a legacy of the Netherlands which was enacted in 1918 under the name "Wetboek van Strafrecht voor Nederlandsch Indie". The Netherlands itself has abolished the death penalty for ordinary crimes since 1870. Currently, the death penalty in Indonesia is still in effect and is found in a number of laws both inside and outside the Criminal Code. The reform of criminal law has resulted in Law Number 1 of 2023 concerning the Criminal Code replacing the colonial legacy of the Criminal Code and becoming the National Criminal Code. In Law Number 1 of 2023 concerning the Criminal Code, there is the concept of a conditional death penalty which is basically in line with the Progressive Legal Theory which emphasizes moral values and the humanitarian side in sentencing. Progressive Legal Theory also emphasizes the purpose of law on human welfare and happiness.

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