

# Delay of Death Crime Execution With A 10 Year Probation Period From A Human Rights Perspective

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Article History: Received: January 21, 2024; Accepted: March 16, 2024

## ABSTRACT

The research objective in this research report is to find out how human rights consider that someone who threatens public safety can be sentenced to death and to find out how judges consider in deciding cases of executing the death penalty with a probation period of 10 years. The research method used in this research is a normative juridical research method where the data sources come from laws, books, journals and the internet. The research approach used in this research is a qualitative approach. The results of the research in this writing are firstly that the existence of the death penalty in the legal system in Indonesia is reviewed from a human rights perspective, namely that it is contrary to human rights, especially the right to life. The two judges imposed the death penalty with a probationary period of 10 (ten) years taking into account: a. the defendant feels remorse and there is hope to improve himself; or b. the role of the defendant in the crime. The death penalty with a probationary period as intended must be included in the court decision. The grace period for the 10 (ten) year trial period begins 1 (one) day after the court decision obtains permanent legal force. Postponement of the execution of the death penalty which has been stipulated in writing in Article 100 of the National Criminal Code. In Article 100 paragraph (1) of the National Criminal Code, it is stated that the execution of the death penalty is determined by postponing the death penalty for 10 (ten) years which takes into account two conditions, namely, a feeling of regret and efforts to improve oneself and the role of the death penalty defendant in the crime. Furthermore, Article 100 paragraph (4) of the National Criminal Code states that if the convict has good behavior, then with a presidential decision based on the consideration of the Supreme Court, the death penalty can be changed to life imprisonment. Based on this background, the problem formulation in this research report is: How do human rights consider that someone who threatens public safety can be sentenced to death and how do judges consider when deciding on death penalty execution cases with a probationary period of 10 years.

**Keywords :** Postponement of execution of death penalty and probation period of 10 years

## 1. INTRODUCTION

Indonesia is a rule of law country as stated in the 1945 Constitution of the Republic of Indonesia Article 1 point 3, so the law must be enforced for the sake of justice. Seeing that there are so many victims of crimes that occur and not looking at status or anything, for example people from the lower middle class, children, the elderly, or the state government. This is where we see how law enforcement in Indonesia deals with crime cases that occur, it is not uncommon for criminals to be punished with the death penalty because the actions they commit are very serious and harm many people.

The death penalty is the harshest punishment in the criminal system. The issue of punishment is closely related to a person's life in society, especially when it concerns the interests of legal objects

that are most valuable for social life, namely life and liberty or liberty. While every human being needs peace, sufficiency and prosperity, often what is obtained is the opposite situation and condition, namely war, violence, deprivation and poverty.

The last thing is the main problem faced, especially by developing countries, as is happening in the era of globalization and free markets with the imbalance of competition, giving rise to disappointments, even at the most extreme and radical levels, such as terror (terrorism). . (Masyhar, Ali, 2009) Violent acts such as terrorism, both local and international, are also rejection, resistance or counter reactions shown by a group in a limited or broad environment, which is due to the same ideas and perceptions of the world economic system. which is considered unequal, unfair, and detrimental to the majority of world society, as well as other minority communities, whose aspirations are channeled through the movement's struggle. (Jaenuri, Achmad, 2016)

Terrorism is a criminal act, including actions or behavior that are assessed and receive reactions that are unpopular with the community, and are actions that are not permitted to appear in the midst of community life. The crime of terrorism is a unique crime, because the motives and factors causing this crime are very different from the motives of other criminal acts. Not infrequently, criminal acts of terrorism are committed based on certain motives that deserve respect. As Salahuddin Wahid stated that; Terrorism can be carried out with various motivations, namely for religious reasons, ideological reasons, reasons to fight for independence, reasons to free oneself from injustice, and because of interests.

As is known, acts of terror have existed and occurred for a long time, but the events of September 11 2001 shocked the world, not only in the United States as the place where the incident occurred. The incident which was broadcast live by one of the national television stations in Indonesia (Metro TV) which relayed live broadcasts from CNN was very surprising. Building *World Trade Centre* (WTC) collapsed and was completely destroyed due to attacks that hit the WTC building. President George W. Bush immediately announced to the world that America had been attacked by terrorists in a barbaric manner. The terrorists were Osama bin Laden and his al-Qaeda network. The terrorists are Muslims, Arabs. Since then, the word "terrorism" has become a very popular word.

Then in Indonesia, the bomb tragedy at the Sari Club and Paddy's Club Kuta Legian Bali 12 October 2002, is what deserves to be classified as the biggest crime in Indonesia from a series of existing terror events. This tragedy is clear proof that terror is a very heinous act that does not take into account, does not care and truly ignores human values. Humans who do not know anything about the intentions, missions or goals of terror makers have become innocent victims (*innocent victim*).

Innocent people are only the cost of human barbarity that was won and the supremacy of the terror acts that occurred in Legian Bali.

Furthermore, in the case of the bomb explosion at the Hotel J.W. Marriott on August 5 2003, which killed dozens of people and injured dozens, also further confirmed that apart from the issue of terror being classified as a serious threat to the nation and the world, on the other hand, its impact was also felt on people's lives. The community is finally gripped by fear and their peace will be disturbed if at any time their lives could be lost and their bodies torn apart at the hands of terrorists.

In response to the terrorist cases above, every perpetrator of a crime or criminal act who is found guilty by law for killing must be subject to punishment or punishment, as is the case in cases of criminal acts of terrorism. In Law Number 5 of 2018 concerning Amendments to Law Number 15 of 2003 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2002 concerning the Eradication of Criminal Acts of Terrorism into Law, it states the types of crimes that are threatened against perpetrators who commit acts. The penalties are death penalty, life imprisonment, imprisonment, imprisonment and fine.

In fact, taking the life of someone who has taken the life of another innocent person is not cruel and does not conflict with human rights. A murderer who is sentenced to death is like eliminating a social disease, because if the murderer is allowed to live, then he will continue to commit the same crimes, and may even infect other people in a chain like this. So, killing a murderer is the same as eliminating and banishing disease from society.

In general, everyone supports and tries as much as possible so that every disease can be eliminated. Just like someone who takes the life of another innocent person, the perpetrator is a social disease that must be eliminated, so that no one else becomes the next victim. Apart from that, by eliminating murderers from society, life will become calm, and peace will be created, which will ultimately guarantee a life full of happiness. However, taking the life of a murderer should not be done at will. This must go through a very strict process and requires valid and reliable evidence and is trusted by the court or tribunal as the body that has the power to impose the death penalty on criminals.

Meanwhile, the concepts of "terrorist" and terrorism come from Latin words "*scare*" which more or less means to make tremble or vibrate. The word terror can also evoke horror.[6] Meanwhile, according to the UN Convention, terrorism is any form of crime directed directly at the state with the intention of creating a form of terror against certain people or groups of people or the wider community.



In addition, the crime of terrorism is considered a serious crime, and cannot even be equated with ordinary crimes. In fact, many of its articles threaten the death penalty. The death penalty threat is formulated in the following articles:

1. Article 6 (using violence or threats of violence creates an atmosphere of terror and mass casualties); Any person who deliberately uses violence or threats of violence that creates an atmosphere of terror or widespread fear of people, causes mass casualties by taking away freedom or loss of life and property of other people, or causes damage or destruction to vital strategic objects, the environment or public facilities or international facilities shall be punished with imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years, life imprisonment or the death penalty.
2. Article 8 (crimes against aviation facilities and infrastructure); Convicted of committing a criminal act of terrorism with the same punishment as intended in Article 6, that every person who:
  - a. Destroying, rendering unusable or damaging buildings for air traffic security or thwarting efforts to secure such buildings;
  - b. Causing destruction, unusability or damage to buildings for securing air traffic, or failure of efforts to secure said buildings;
  - c. Deliberately and unlawfully destroys, damages, takes or moves signs or devices for aviation security, or thwarts the operation of such signs or devices, or installs signs or devices incorrectly;
  - d. Due to his negligence causing signs or devices for flight security to be destroyed, damaged, taken or moved or causing incorrect signs or devices for flight security to be installed;
  - e. Intentionally or unlawfully, destroying or rendering unusable an aircraft which wholly or partly belongs to another person;
  - f. Intentionally and unlawfully harming, destroying, rendering unusable or damaging an aircraft;
  - g. Because his negligence causes the aircraft to be injured, destroyed, unusable, or damaged;
  - h. With the intention of benefiting oneself or another person in violation of the law, the insurance underwriter causes a fire or explosion, accident, destruction, damage or renders unusable the insured aircraft against danger or the insured cargo or wages to



- be received for transporting the cargo, or for the purposes of the cargo, security deposits have been received;
- i. In an aircraft with an unlawful act, seize or maintain seizure or control of an aircraft in flight;
  - j. In an aircraft, using violence or threats of violence or threats in other forms, seizes or maintains seizure or controls control of an aircraft in flight;
  - k. Conducted together as a continuation of an evil conspiracy, carried out with prior planning, resulting in serious injury to a person, resulting in damage to an aircraft so that it could endanger its flight, carried out with the intention of depriving someone of their freedom or continuing to deprive someone of their freedom;
  - l. Deliberately and unlawfully committing acts of violence against someone on board an aircraft during a flight, if the act could endanger the safety of the aircraft;
  - m. Deliberately and unlawfully damaging an aircraft in service or causing damage to the aircraft which renders it unable to fly or endangers flight safety;
  - n. Deliberately and unlawfully placing or causing to be placed in an aircraft in service, by any means, tools or materials which could destroy the aircraft making it unable to fly or cause damage to the aircraft which could endanger safety in flight;
  - o. Performed jointly by 2 (two) or more people, as a continuation of an evil conspiracy, carried out with prior planning, and resulted in serious injury to someone from the actions as intended in letters l, letter m, and letter n;
  - p. Providing information that he knows is false and because of this action endangers the safety of the aircraft in flight;
  - q. On board an aircraft, carrying out actions that could endanger the safety of the aircraft in flight;
  - r. On board an aircraft, carry out actions that can disturb the peace and order in the aircraft during the flight.
3. Article 9 (relating to firearms to commit criminal acts of terrorism); Any person who unlawfully enters into Indonesia, makes, receives, tries to obtain, delivers or attempts to hand over, controls, carries, has stock on him or has in his possession, stores, transports, hides, uses or releases to and/or from Indonesia a firearm, ammunition, or explosives or other dangerous materials with the intent to commit a criminal act of terrorism, shall be punished with the death penalty or life imprisonment or imprisonment for a minimum of 3 (three) years and a maximum of 20 (twenty) years. ) year.

4. Article 10 (using chemical weapons and their components to cause terrorism); Sentenced with the same crime as the crime as intended in Article 6, every person who deliberately uses chemical weapons, biological weapons, radiology, micro-organisms, radioactivity or their components, so as to create an atmosphere of terror, or widespread fear of people, causing victims which is mass in nature, endangers health, causes disruption to people's lives, security and rights, or causes damage or destruction to vital strategic objects, the environment, public facilities or international facilities.
5. Article 14 (planning/mobilizing other people to commit terrorism); and Every person who deliberately mobilizes another person to commit a criminal act of terrorism as intended in Article 6, Article 7, Article 8, Article 9, Article 10, Article 10A, Article 12, Article 12A, Article 12B, Article 13 letter b and letter c, and Article 13A shall be punished with the same crime in accordance with the provisions as intended in Article 6, Article 7, Article 8, Article 9, Article 10, Article 10A, Article 12, Article 12A, Article 12B, Article 13 letters b and c, and Article 13A.
6. Article 15 (malicious conspiracy, attempt or assistance in criminal acts of terrorism). Every person who carries out evil conspiracy, preparation, attempt, or assistance to commit a criminal act of terrorism as intended in Article 6, Article 7, Article 8, Article 9, Article 10 Article 10A, Article 12, Article 12A, Article 12B, Article 13 letter b and letter c, and Article 13A shall be punished with the same crime in accordance with the provisions as intended in Article 6, Article 7, Article 8, Article 9, Article 10, Article 10A, Article 12, Article 12A, Article 12B, Article 13 letter b and letter c, and Article 13A.

Responding to the current rampant acts of violence, present and manifest in the lives of the Indonesian people and nation as a scourge, which is frightening and at any time can transform into a "National and Global Tempest", including humanitarian tragedy, the emasculation of the nation's dignity and the historicization of human rights tragedies (HAM). Human Rights (HAM) have lost their existence and lost their sanctity or naturalness in the hands of terror makers who have created barbarism in the form of acts of social, political, cultural and economic animalization.

The decision to use the death penalty will ultimately come down to the court judge's decision as to whether the judge will use the death penalty option or not. The punishment system in Indonesian criminal law is an alternative, especially for the death penalty. Several articles that impose the death penalty are always followed by an alternative sentence of life imprisonment or imprisonment of 20 years or less. With an alternative system, it is hoped that court judges will maximize the non-death penalty option, and choose the death penalty as the final alternative (*last resort*).



As mentioned, Law Number 5 of 2018, in principle, follows the main types of punishment contained in the Criminal Code, namely the death penalty, imprisonment, imprisonment and fines for corporations, however, cover-up crime is not formulated as a threat in Law Number 5 of 2018. The reason for not determining the type of crime was intended by the framers of the Terrorism Law as confirmation that criminal acts of terrorism are separated from political crimes, criminal acts related to politics, criminal acts with political motives, and criminal acts with political objectives as stated in confirmed in Article 5 of Law Number 5 of 2018.

However, currently, in the new National Criminal Code, there are updates regarding the death penalty provisions. One of them is the death penalty, which was originally a basic crime, becoming an alternative crime. Apart from that, the execution of the death penalty can only be carried out by postponing the execution of the death penalty for ten years.

The postponement of the execution of the death penalty has been stipulated in writing in Article 100 of the National Criminal Code. In Article 100 paragraph (1) of the National Criminal Code, it is stated that the execution of the death penalty is determined by postponing the death penalty for 10 (ten) years which takes into account two conditions, namely, a feeling of regret and efforts to improve oneself and the role of the death penalty defendant in the crime. Furthermore, Article 100 paragraph (4) of the National Criminal Code states that if the convict has good behavior, then with a presidential decision based on the consideration of the Supreme Court, the death penalty can be changed to life imprisonment. In Law Number 1 of 2023 concerning the Criminal Code Article 100, that:

1. The judge can impose the death penalty with a probation period of 10 (ten) years by taking into account: a. the defendant feels remorse and there is hope to improve himself; b. the role of the defendant in the crime; or c. there are extenuating reasons
2. The death penalty with a probationary period as intended in paragraph (1) must be included in the court decision.
3. The grace period for the 10 (ten) year trial period begins 1 (one) day after the court decision obtains permanent legal force.
4. If the convict during the probation period as intended in paragraph (1) shows commendable attitudes and actions, the death penalty can be changed to life imprisonment by Presidential Decree after receiving consideration from the Supreme Court.
5. If the convict during the probationary period as intended in paragraph (1) does not show commendable attitudes and actions and there is no hope of improvement, the death penalty can be carried out on the order of the Attorney General.



## Literature review

### Definition of Death Penalty

The death penalty consists of two syllables, namely, "criminal" and "death". "Criminal" comes from the word (*Punishment*) Netherlands, which is often referred to by the term "punishment". The term criminal is more appropriate to use than the term punishment, because law is commonly used and is a translation of *right*. The term "criminal" has a narrow meaning relating to criminal law.

Crime is defined as suffering that is deliberately inflicted on a person or several people who commit a crime as a legal consequence of their actions. Specifically, prohibitions in criminal law are called criminal acts (*criminal act*). The legal dictionary states that the death penalty is a punishment imposed on a criminal by taking his or her life. Kein G. Kartasapoetra said that the death penalty is a punishment that is actually carried out until the convict is executed. Before the execution is carried out, the convict is given the opportunity to submit his final wish, namely to apply for leniency (clemency) to the head of state.

The death penalty is the oldest and most controversial type of punishment of all criminal systems in countries that use the system *Common Law* atau *Civil Law*. There are two main currents of thought regarding the death penalty, namely: *First*, the group that wants to defend the death penalty based on the applicable provisions and the second, groups who want to abolish the death penalty as a whole. Indonesia is one of the countries that still maintains the death penalty in its positive law system. As stated in the Criminal Code (KUHP) and outside the Criminal Code.

The implementation of the death penalty in Indonesia has been going on for a long time since the Dutch colonial era until now, even though the Netherlands abolished the death penalty in 1987. The Criminal Code was implemented in 1918 and its legalization was carried out through *Government Gazette* of 1915 number 732. According to criminal experts, Indonesia continues to maintain the death penalty because of special circumstances that require crimes to be met with the death penalty. Because with a very large area and a large population, the State Police cannot guarantee security.

Bambang Poernomo stated that the death penalty is one of the oldest punishments so it is no longer in line with current developments. However, until now no other alternative solution has been found to replace the death penalty. The death penalty is imposed as a last resort to protect society. The death penalty was carried out after the president rejected the request for clemency for death row inmates. The death penalty is carried out in a special place that has been chosen by shooting the convict to death by firing squad.

The review of the death penalty is based on the theory of crime prevention and control, namely efforts to restore a sense of justice in society. The perpetrator of the crime must accept the consequences of the crime he has committed, namely by being punished by a crime in the form of the death penalty so that it can have a deterrent effect. The death penalty can also prevent vigilante actions carried out by society against perpetrators of crimes. Apart from that, the death penalty can also be used as a lesson for society not to commit crimes so that they do not receive punishment commensurate with their actions, as well as educating criminals and society to repent and not commit crimes that will harm themselves, others and can even harm the state. In positive law, there are three theories in the application of the death penalty, namely:

1. Theory *Absolutely* (Revenge)

This theory emerged in the 18th century, namely a theory that teaches that the basis of legal justice must be sought from within the offense itself.[14] Based on this theory, crime is intended to repay a criminal act that has been committed by someone. Because the essence of a crime is retribution. Therefore, this theory is called the absolute theory or retaliation theory. The characteristic of this theory, according to Kant and Hegel, is the absolute belief in the inevitability of a crime, even though punishment is actually useless, and can even make the condition of a criminal worse. Both of their views are directed towards the past, not towards future benefits.

According to Kant, crime is a practical reason, therefore crime is not a means to achieve a goal but rather reflects justice. So even though the world will end tomorrow, criminals must continue to carry out their crimes.

Meanwhile, according to Hegel, he believes that the death penalty is a logical thing, because it is a consequence of the crime committed by the criminal. However, the theory adopted by Kant and Hegel only looks at the past without paying attention to the future.

2. Theory *Relatively*

This theory emphasizes the search rather than the goal of imposing a crime, namely by deterring criminals. Based on this theory, punishment is a medium for efforts that can be used to create a deterrent effect on criminals. In contrast to the absolute theory, this theory views that punishment is not to satisfy the absolute demands of justice or simply as a means of retaliation for the perpetrator of a criminal act. However, punishment is seen as having useful purposes. Therefore, this theory is often referred to as goal theory.

3. Combined Theory



This theory is a combination of the objectives of punishment between the absolute theory and the relative theory. The aim of criminal law is not only to create a deterrent effect for criminals, but also as an alternative to create protection and security for society. This combined theory was created because according to the teachings of this theory, both the absolute theory and the relative theory (goal) were considered unfair or one-sided.

#### 4. Legal Basis for Imposing the Death Penalty

The pros and cons regarding the death penalty still give rise to various differences of opinion. Those who are pro say that the death penalty needs to be carried out as a way to deter and give fear to criminals and relatively does not cause prolonged pain. Meanwhile, those who oppose it say that the death penalty causes a sense of injustice and is considered ineffective in reducing crime.

Death sentence (*death penalty*) in Indonesia has a strong legal basis for its implementation. Modderman, a former Dutch minister of justice, believes that the death penalty must be applied for the sake of order, however, the application of the death penalty is only a last alternative and must be seen as an emergency authority that can be applied in extraordinary circumstances.

Hartawi A.M. believes that the threat and implementation of the death penalty is a social sanction, the death penalty is a social defense to prevent the general public from disasters and threats of danger that may occur and befall society and result in disruption of order and security in religious and state life.

#### 5. Sentencing Process

The implementation of the death penalty in Indonesia is justified from a formal juridical perspective. This can be proven from several articles in the Criminal Code (KUHP). Apart from that, the death penalty is also found in laws outside the Criminal Code, such as the Law on Terrorism, Corruption, Money Laundering and so on. This proves that the death penalty in Indonesia increasingly exists in the criminal law system. Several legal experts who do not agree with the implementation of the death penalty, namely Arief Sidharta from Parahyangan University, stated that the death penalty has not been proven to have a deterrent effect on criminals compared to life imprisonment without remission. In line with this opinion, Ronald Z. Titahelu from Pattimura University stated that the death penalty is not in accordance with the 1945 Constitution. Because every person has



the right to live and defend his life, including not to be killed based on the statutory provisions and legal system in force in Indonesia.

There are debates between several legal experts who do not agree with the implementation of the death penalty, but in reality, legally the formal implementation of the death penalty is still stated in Article 10 of the Criminal Code in Indonesia which is included in the main crime in the first place and the death penalty is the heaviest type of punishment according to Indonesian criminal laws and regulations. . The Criminal Code enforced in Indonesia is: *Concordance* or in accordance with *Criminal law* which happened in the Netherlands. The history of its formation *Criminal law* In 1918, the Netherlands already recognized the existence of the death penalty, because the institution of the death penalty itself had been abolished by Law dated 17 September 1870, in the *Staatsblad* of 1870 Number 182 on the grounds that the death penalty in the Netherlands was no longer carried out or carried out. For this reason, death row convicts often receive forgiveness from the King, or what is known as clemency. When the Dutch Colonial Government in Indonesia formed the Criminal Code in 1915, it deviated from its country's position and maintained the death penalty in Indonesia for the category of serious crimes. Although some criminal law experts acknowledge objections to maintaining the death penalty because it is supported as *emergency law* (emergency punishment) against individuals who endanger society. In general, native people and foreign easterners such as Chinese, Arabs, Indians and others are afraid of being subjected to the death penalty by force, so the threat of the death penalty is expected to have a greater deterrent effect and as a deterrent to serious crimes than life imprisonment.

The aim of enacting Law no. 15 of 2003 concerning the Eradication of Criminal Acts of Terrorism is very appropriate and strategic to overcome various kinds of unrest and fear in people's lives, especially after a series of bomb terror incidents and so on which claimed so many victims in order to create security and peace in Indonesia. With the implementation of legal rules and norms in society regarding criminal acts of terrorism clearly and firmly accompanied by strict legal sanctions, namely the death penalty, life imprisonment and a minimum prison sentence of 4 (four) years and a maximum of 20 (twenty) year is expected to reduce criminal acts of terrorism regardless of the motives and objectives that cannot be justified. In Law no. 15 of 2003 concerning the Eradication of Criminal Acts of Terrorism, there are regulations containing prohibitions on committing criminal acts of terrorism which must be obeyed by every individual and the entire community who are bound by this law, the death penalty is swift and 'humane'. which was implemented during the French Revolution. The way this tool works is thought to

reduce pain as much as possible, namely the defendant is ordered to lie on his stomach and his neck is placed between two wooden blocks with a hole in the middle for the knife to fall into. At a height of 7 meters the knife was dropped by the executor so that the defendant's head fell into the basket placed in front of him. (source: <https://id.wikipedia.org/wiki/guillotine>).

## **2. RESEARCH METHODS**

To carry out research, it is necessary to have a research design so that researchers can focus on carrying out research according to the title and theme chosen. In this chapter the researcher wants to explain how and what researchers do in using the normative juridical research method methodology, which is a research method carried out by examining library materials as secondary data related to human rights considerations that someone who threatens public safety can be sentenced to death. and reasons for the decision to execute the death penalty with a probation period of 10 years.

## **3. RESULTS AND DISCUSSION**

### **Human rights considerations mean that someone who threatens public safety can be sentenced to death**

Human rights considerations mean that someone who threatens public safety can be sentenced to death. Indonesia is a country that recognizes the existence of human rights, in Law No. 39 of 1999 concerning Human Rights and also in the development of the second amendment to the 1945 Constitution from article 28A -28J which mainly discusses Human Rights. Moreover, Indonesia emphasizes its recognition of the upholding of Human Rights with the mandate of TAP MPR NO XVII of 1998 concerning the establishment of the National Human Rights Commission (Komnas HAM). However, recognition of human rights has not led to the abolition of the death penalty, and the death penalty is still used and recognized in Indonesia. The Criminal Code (KUHP) strictly regulates the death penalty as the main penalty. In Article 10 letter a of the Criminal Code states, the main punishment consists of, death penalty, prison sentence, imprisonment, fine, and cover sentence.

The death penalty as a policy and law has a basic idea. Even though this basic idea later experienced various challenges and debates regarding the validity and empirical evidence in its arguments. Before arriving at this basic idea, it is necessary to first understand what is meant by the death penalty. The death penalty is a punishment imposed on a person by means of loss of life based on a court decision. Therefore, the death penalty must also be distinguished from murder.

There is at least a main basic idea in the death penalty policy, namely that the law is adopted in certain conditions, such as crimes that offend basic humanitarian principles and in countries where security conditions and legal order have not been achieved evenly. Examples of crimes in this category are crimes against state security, premeditated murder, robbery or rape accompanied by murder, terrorism, narcotics, piracy at sea, river and air.

Meanwhile, efforts to test the anti-death penalty perspective with a strategic approach. This approach is based on the theoretical views of academics studying terrorism across disciplines, such as psychology and criminology. The retaliation thesis which appears as a logical implication of the death penalty imposed on terrorism convicts which has been explained now needs to be tested with empirical data, for example the statistical number of terror attacks/amaliyah terror network groups related to the period after the execution of terrorism convicts was carried out.

Based on data previously presented, the Indonesian authorities have only executed terrorism convicts twice, three convicts convicted of the 1985 Garuda Woyla plane hijacking and Bali bombing convicts Amrozi, Imam Samudra, and Ali Gufron in 2008. In the first case the execution was carried out in 1985, in the same year a bomb attack was recorded at Borobudur Temple, Magelang, Central Java. Based on the court decision, the attack was carried out by Abdul Kadir al-Habsyi and Husein al-Habsyi and they were found guilty of the attack. The prosecutor indicated that the attack was a response to the 1984 Tanjung Priok incident, adding that in the same era there was a period of growing rejection of the implementation of the single principle of Pancasila.

In connection with efforts to test the human rights concepts described above, it is necessary to carry out a strategic study of the imposition of the death penalty. One of them is the possible impacts of imposing the death penalty for those convicted of terrorism cases. One of them is the impact of retaliation, as explained in the death penalty policy matrix, we can see that there are threats to both policies. One of them is the threat that arises from existing terror groups or networks as a result of the death penalty for one of their network members. This can be explained theoretically with various approaches, for example sociology in explaining group behavior and solidarity. However, in this research the author tries to focus on a more basic assumption, namely why someone is involved or moved to commit acts of terrorism.

There is a psychological explanation in looking at this case. An American psychologist of Iranian descent Fathali Moghaddam wrote about the legitimization of individuals towards terrorism by using *metaphor ladder, staircase to terrorism*. He explained that injustice is the first stage leading to terrorism, although this is not always the case. Then the next stage after injustice is an effort to bring justice through various channels of social change. The problem is that in this path of social change



there is discrimination or individual incompetence. This then becomes legitimacy that there is an entity that is considered responsible for this injustice, this path then leads individuals who are exposed to an understanding of radicalism to legitimize acts of terror and ultimately join terrorist groups. We can see that the first problem that arises is a feeling of injustice, in the case of the death penalty it is very possible to impose the death penalty.

According to Genoveva[20], the death penalty also violates human rights principles and values, not only because it violates the right to life, but also takes away other human rights, such as the right not to be subject to torture, cruel and inhumane treatment. This is an absolute human right, it cannot be reduced under any circumstances. Apart from that, indications of human rights violations were also found in the execution process. For example, death row inmates often have to wait a pre-execution period which can be very long, but still do not receive certainty until the last seconds of execution.

This condition can cause enormous psychological pressure on the convict. This practice is referred to by the Special Rapporteur of the United Nations (UN), Juan Mendez “torture” (torture). In addition, according to Genoveva, in the death penalty process, violations of the right to a fair trial are often found. Many defendants who are threatened with the death penalty do not receive proper legal assistance during the trial process, so they cannot provide a quality defense.

Another important point is that this is the death penalty often applied disproportionately, tends to target poor groups of people who cannot gain access to adequate lawyers to help provide a defense. Because of these factors, many countries in the world have started to move towards abolishing the death penalty, including Saudi Arabia.

In fact, UN Resolution number 44/128 of 1989 also stated that “all actions to abolish the death penalty are progress and also respect for the right to life. UN Resolution number 69/186 of 2014 also urges countries that still maintain the death penalty to immediately abolish it in order to respect the dignity of a person's life and human rights. At the national level, the Constitution also guarantees the right to life as stated in the 1945 Constitution. Article 28A states “that every person has the right to live and the right to defend his or her life and livelihood”.

In Law no. 5 of 2018 includes several categories that are subject to the death penalty, namely: Article 6 “*Any person who deliberately uses violence or threats of violence that creates an atmosphere of terror or widespread fear of people, causes mass casualties by taking away freedom or loss of life and property of other people, or causes damage or destruction to vital objects that Strategic, environmental or public facilities or international facilities shall be punished with*



*imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years, life imprisonment or the death penalty."*

Article 10A "Any person who unlawfully enters the territory of the Unitary State of the Republic of Indonesia, makes, receives, obtains, hands over, controls, carries, has supplies to him or has in his possession, stores, transports, hides or removes from the territory of the Unitary State of the Republic of Indonesia weapons chemical, biological weapons, radiological, microorganisms, nuclear, radioactive or their components, with the intent to commit a Terrorist Crime shall be punished by imprisonment for a minimum of 3 (three) years and a maximum of 20 (twenty) years, life imprisonment, or criminal dead."

Then in the preamble to the Constitution (UUD) of the Republic of Indonesia in 1945, it was to protect the entire Indonesian nation, all of Indonesia's blood, promote general welfare, make the nation's life intelligent, and implement world order. It is clear that holistically, all forms of crime, including terrorism, that disrupt the nation's ideals are a disruption to Indonesia's national interests, starting from acts of terror that kill lives, impact on investor confidence and currency exchange rates, as well as radicalization and recruitment of terror groups among the nation's children. Therefore, Indonesia's most important national interest in the context of terrorism is the elimination of the potential threat of terrorism in Indonesia.

These three sources are the threat of the death penalty which is currently enforced in Indonesia as an instrument of law enforcement in the context of terrorism. However, the debate on legal approaches related to the death penalty will not be discussed in this research, but rather the human rights perspective and the strategic impact of applying the death penalty to those convicted of terrorism.

Article 89 paragraph (1) The execution of the death penalty can be postponed with a probationary period of 10 (ten) years, if: a), the public's reaction to the convict is not too great; b). death row inmates show regret and hope for improvement; c). the position of the convict in the criminal act is not very important; and D). there is a reason, mitigating. Paragraph (2) If the convict during the probation period as intended in paragraph (1) shows commendable attitudes and actions, then the man\* sentence can be changed to life imprisonment or imprisonment for a maximum of 20 (twenty) years by Decree of the Minister of Law and Rights Human Rights. Paragraph (3) If the convict during the probation period as intended in paragraph (1) does not show commendable attitudes and actions and there is no hope of improvement, then the death penalty can be carried out on the order of the Attorney General. If a death sentence convict's request for clemency is rejected

and the death sentence is not carried out for 10 (ten) years not because the convict escaped, then the death sentence can be changed to life imprisonment by Presidential Decree.

### **Setting the Death Penalty Sentence with a probation period of 10 years**

The death penalty is the harshest punishment in the criminal system. The issue of punishment is closely related to a person's life in society, especially when it concerns the interests of legal objects that are most valuable for social life, namely life and liberty or liberty. From a sociological perspective, of course there are pros and cons in giving the death penalty because the death penalty is considered to be contrary to Law no. 39 of 1999 concerning Human Rights which also regulates that no one may be arrested, detained or have their freedom restricted, and no one can be punished by regulations that apply retroactively and there are many other basic rights that must be guaranteed, protected and enforced by the state.

Regulations regarding the imposition of the death penalty still give rise to debate, especially regarding the implementation of the death penalty. The debate still arises, especially between countries that have abolished the death penalty and countries that impose the death penalty. Those who are pro-death penalty state that the death penalty is still needed for serious legal cases that can threaten other people's human rights.

On the other hand, those who oppose the death penalty state that the death penalty is a cruel, inhumane punishment and is a violation of human rights. The pros and cons regarding the death penalty are not a new controversy among society and legal experts, but have been around for a long time. The death penalty is only an excuse for state authorities as an enforcement tool to maintain legal order in eradicating criminals. The implementation of the death penalty in Indonesia has become the subject of quite topical and polemic discussions.

That the application of the death penalty is not in accordance with the philosophy of the state which adheres to Pancasila, which always upholds a just and civilized sense of humanity. In reality, the application of the death penalty, whatever the reasons and logic, is still implemented in Indonesia in various criminal cases. The relationship between the death penalty and human rights is very close, this is based on the reason that the imposition of the death penalty is closely related to the most basic human rights. According to Law No. 39 of 1999, what is meant by human rights is as regulated in Article 1, which states that human rights are a set of rights that are inherent in the nature and existence of humans as creatures of God Almighty and are His gifts that must be respected, upheld and protected by the state, law and government and everyone for the sake of honor and protection of human dignity. Every person's human rights give rise to basic obligations and responsibilities to



respect other people's human rights reciprocally and it is the government's duty to respect, protect, uphold and promote them.

The reasons for the decision to receive the death penalty with a probation period of 10 years include: According to Prof. Dr. Barda Nawawi, SH, member of the Drafting Team for the Criminal Code Bill is based on three main ideas, namely: First, judging from the purpose of the death penalty, it is not essentially the main or principal means of regulating, ordering and improving individuals or society. The death penalty is only a means of exception. So the death penalty is compared to amputation or surgery in the medical field, which in essence is not the main medicine but is only the last medicine.

Second, the concept of the death penalty as a special punishment departs from the idea of monodualistic balance. This idea is oriented towards balancing the general interest or protection of society and also paying attention to the interests or protection of individuals. This means that, in addition to protecting society, the death penalty also takes into account individual interests, such as the provisions for postponing the implementation of the death penalty for pregnant women and mentally ill people (Article 81 paragraph (3)). Another example is the possibility of postponing the implementation of the death penalty, or what is known as "conditional death penalty" with a probation period of 10 years (Article 82 paragraph (1)).

Third, the maintenance of the death penalty, even though it is a special punishment, is also based on the idea of avoiding demands or reactions from society that are in the nature of revenge or extra-legal execution. This means that the provision of the death penalty in the Law (UU) is intended to avoid people's emotions. The implementation of the death penalty in the Draft Criminal Code is carried out through several stages. The first stage, as far as possible, the death penalty is avoided by choosing an alternative punishment in the form of life imprisonment or imprisonment for a certain period, a maximum of 20 years. The second stage, it is possible to postpone the death penalty with a probation period of 10 years. In the postponement of the death penalty, it is possible to change the death penalty to life imprisonment or imprisonment for a maximum of 20 years. The third stage, the convict has the right to apply for clemency. Meanwhile, the death penalty itself was only carried out after the President rejected the request for clemency. If pardon is refused and the death penalty is not carried out for 10 years, the death penalty can be changed to life imprisonment. Other reasons for the death penalty with a probationary period of 10 years are:

1. Banding

An appeal is one of the ordinary legal remedies that can be requested by one or both parties involved in a lawsuit against a criminal decision. The convict can file an appeal if he is

dissatisfied with the contents of the District Court's decision. The appeal process will be examined by the High Court later. As regulated in Article 67 of the Criminal Procedure Code, which reads: "The Defendant or Public Prosecutor has the right to request an appeal against the decision of the Court of First Instance, except for acquittal decisions, free from all legal claims involving the issue of inaccurate application of the law and court decisions in speedy proceedings." Court decisions that can be appealed are only court decisions in the form of judgments, not determinations, because against determinations the ordinary legal remedy that can be submitted is only cassation. The deadline for a statement to submit an appeal is 7 (seven) days from the time the decision is read as regulated in Article 233 paragraph (2) of the Criminal Procedure Code. If the time period for the statement of appeal has passed, the appeal submitted will be rejected by the High Court because the decision of the relevant District Court is deemed to have permanent legal force/*inkracht*.

## 2. Cassation

Cassation is one of the ordinary legal remedies that can be requested by one or both parties involved in a lawsuit against a criminal decision. The convict can file an appeal against the appeal decision if he is dissatisfied with the contents of the appeal decision of the High Court. The cassation process will be examined by the Supreme Court later. As regulated in Article 244 of the Criminal Procedure Code, which reads: "There is a decision in a criminal case given at the final level by a court other than the Supreme Court, the defendant or public prosecutor can submit a request for a cassation hearing to the Supreme Court except for an acquittal decision." The deadline for filing an appeal is 14 (fourteen) days after notification to the defendant as regulated in Article 245 paragraph (1) of the Criminal Procedure Code. If the time period for submitting a cassation application has passed, the cassation application submitted is deemed to have accepted the previous decision. And it will be rejected by the Supreme Court because the relevant High Court decision is deemed to have permanent legal force/*inkracht*.

## 3. Judicial review

Judicial review is carried out on court decisions that have permanent legal force by the convict or his heirs to the Supreme Court, except for decisions of acquittal or release from all legal demands. The basis for submitting a review is as regulated in Article 263 paragraph (2) of the Criminal Procedure Code, which states:

- (a). If there is a new situation that gives rise to strong suspicion, that if the situation had been known while the trial was still in progress, the result would be a verdict

of acquittal or a decision to be released from all legal charges or the public prosecutor's demands cannot be accepted or lighter criminal provisions are applied to the case. .

- (b). If in various decisions there is a statement that something has been proven, but the matter or situation as the basis and reason for the decision that has been proven, turns out to be in conflict with one another.
- (c). If the decision clearly shows a judge's error or a real mistake. Judicial review can also be carried out on court decisions that have permanent legal force, if the decision is a criminal act that is charged and proven but is not followed by a conviction/sentence."

Another effort to avoid the death penalty that has been imposed on him, but this legal effort is not the only way to escape the trap of the death penalty, Indonesia also regulates ways for death row inmates to receive forgiveness for their actions. The types of forgiveness are:

1. grass

The word graphic comes from the Latin Perdonare, which is translated into English as Pardone. According to Black's Law Dictionary Sixth Edition, compiled by Henry Campbell Black. M.A In 1990 it was written that Pardon: an executive action that mitigates or sets aside punishment for a crime. An act of grace from governing power which mitigates the punishment the law demands for the offense and restores the rights and privileges forfeited on account of the offense. Pardon is regulated in Law no. 22 of 2002 which has been amended in Law no. 5 of 2010. According to Article 1 of Law no. 20 of 2002, what is meant by pardon is forgiveness in the form of a change, reduction, reduction or elimination of the execution of a sentence to a convict given by the President.

In order to avoid carrying out the death penalty, convicts through their legal representatives often apply for clemency to the President to change the death penalty decision. In the new Criminal Code, it is stated that the death penalty will automatically become a life sentence if ten years after the decision to deny clemency is issued by the President, and the prosecutor has not carried out the execution of the death penalty.

This means that the prosecutor must carry out the death penalty before ten years after the appeal is rejected. There is a need to discuss the norms of Article 7 paragraph (2) of Law No. 5 of 2010 concerning Amendments to Law no. 22 of 2002 concerning Clemency. Where the article states that the request for clemency as intended in paragraph (1) is submitted no later than 1 year after the decision obtains permanent legal force. The problem here arises apart from limiting,



obstructing, the President's constitutional right as head of state to grant pardon, this also becomes a problem if it is submitted for more than 1 year then the request for clemency will expire.

If viewed from a criminal law perspective, the President's authority is related to Article 14 of the 1945 Constitution concerning Clemency and Law no. 22 of 2002 as amended by Law no. 5 of 2010 concerning Clemency is actually closely related to two important things in criminal law, namely the abolition of the obligation to carry out a crime and the purpose of punishment. From this perspective, it can be concluded that in relation to pardon, the President actually absorbs a small portion of the judge's authority in determining the type of sentence imposed and the length of time a person will serve the sentence.

In Article 2 paragraph (1) of Law no. 5 of 2010 stipulates that for court decisions that have obtained permanent legal force, convicts can apply for clemency to the President. The word "can" in this provision is intended to give the convict the freedom to use or not use the right to submit a request for clemency in accordance with Law no. 5 of 2010.

The right to apply for clemency is communicated to the convict by the judge or presiding judge at the trial which decided the case at the first instance. If at the time the court decision is handed down the convict is not present, the convict's rights are notified in writing by the clerk of the court which decided the case at the first instance, appeal or cassation. Sentences that can be applied for clemency are the death penalty, life imprisonment, or a minimum prison sentence of 2 years. It is important to remember that a request for clemency can only be submitted once, in order to provide legal certainty in the implementation of the request for clemency and to avoid discriminatory regulations.

## 2. Amnesty

If you refer to the legal dictionary written by Marwan and Jimmy, the definition is as follows: amnesty is a general statement issued through or by law regarding the revocation of all consequences of the conviction of a particular criminal act or a group of criminal acts. In relation to criminal law, the President's authority to grant amnesty actually speaks about eliminating a person's obligation to undergo a sentence, especially in relation to the reasons for forgiveness in criminal law.

By granting amnesty, the President actually states that the unlawful nature of a person's actions is eliminated because the President uses his right to forgive unlawful acts committed by a person or group of people. In contrast to amnesty, it is related to the right to abolition, if viewed from criminal law theory, this has the same idea as the abolition of the right to prosecute which is known in the Criminal Code.

In connection with the elimination of the right to sue in the Criminal Code, in general the prosecution is stopped or revoked if 1. There has been a permanent judge's decision (*de kracht van een rechterlijk gewijsde*) regarding the same action (Article 76). 2. The defendant dies (Article 77). 3. The case has expired (Article 78). There was a settlement outside of court (Article 82). Article 4 of Law 11 of 1954 states that by granting amnesty all consequences of criminal law against people granted amnesty are eliminated.

Meanwhile, for granting abolition, prosecution of people who are granted abolition is eliminated. Amnesty and abolition were implemented as in Emergency Law no. 11 of 1954 regarding at that time a political dispute between Indonesia (Yogyakarta) and the Kingdom of the Netherlands (article 2). This law is an implementation of the 1950 Provisional Constitution. According to the provisions of article 1, the President grants amnesty or abolition with consideration from the Supreme Court based on a request from the Minister of Justice.

The implementing regulations for this provision need to be studied further. With the existence of Article 14 paragraph (2) of the 1945 Constitution which regulates the institutions that provide advice to the President differently, the provisions of Article 1 of the 1954 Emergency Law no longer apply, however, the process for implementing amnesty and abolition as an implementation of the provisions of Article 14 paragraph (2) has not yet been regulated. ) the 1945 Constitution. The "state interest" stated in the 1945 Constitution in granting amnesty is translated into a political context.

The amnesty and abolition laws themselves do not explain the criteria for what is meant by state interests. The two existing regulations regarding the granting of amnesty from the President provide different instructions regarding the mechanism that must be followed. The amnesty and abolition law states that the president can grant amnesty after receiving written advice and the Supreme Court being requested first by the relevant ministry (in this case the Ministry of Law and Human Rights). According to the 1945 Constitution, article 14 paragraph 2, the President's granting of amnesty must be taken into consideration by the DPR. a clear mechanism regarding the granting of amnesty from the President.

Apart from that, the new legal regulations must also clearly clarify the definition and indicators of state interests. This will make it easier for the President to use his prerogatives. Apart from that, the DPR and the public can also monitor the implementation of amnesty by the President because the boundaries are clear. We have not found any statutory regulations regarding standard procedures governing the procedures for granting amnesty.

### 3. Abolition



If you refer to the legal dictionary written by Marwan and Jimmy, the definition is as follows: abolition is the right to eliminate all the consequences of a court decision or to eliminate criminal charges against a convict, as well as to terminate it if the decision has been carried out. It is the President's prerogative that is only granted after asking the Supreme Court for advice.

The President, in the interests of the State, can grant amnesty and abolition to people who have committed a criminal act. The President granted this amnesty and abolition after receiving written advice from the Supreme Court which conveyed this advice at the request of the Minister of Justice (currently the Minister of Law and Human Rights). Referring to Article 2, amnesty and abolition were given to all people who before 27 December 1949 had committed a real crime as a result of the political dispute between the Republic of Indonesia (Yogyakarta) and the Kingdom of the Netherlands. If you understand the substance, it can be concluded that the amnesty and abolition took effect before 27 December 1949.

Legislation concerning standard procedures that regulate the procedures for granting abolition. There is a need for statutory regulations that regulate the mechanism for granting abolition. Abolition applications can be submitted only for the entire ongoing examination process before the court makes a decision on the case. The reasons for abolition must be based on the consideration that carrying out legal proceedings against a suspect or defendant will harm the public interest or the interests of the State.

In the provisions of Law 1/2023 to impose the death penalty, the judge must include the death penalty with a probation period of 10 years by taking into account the defendant's feelings of remorse and hope for self-improvement, or the defendant's role in the crime in the court decision. The 10-year trial period begins the day after the court decision becomes legally binding. If during the probation period the convict shows commendable attitudes and actions, the death penalty can be changed to life imprisonment by Presidential Decree after receiving consideration from the Supreme Court.

However, if the convict does not show commendable attitudes and actions and there is no hope of improvement during the probationary period, then the death penalty can be carried out by order of the Attorney General. Thus, the new Criminal Code or Law 1/2023 provides provisions regarding the postponement of the execution of the death penalty with a probation period of 10 years. The death penalty sentence itself is stated in Article 100 of Law Number 1 of 2023, namely a conditional death sentence. The Criminal Code, which was passed on December 6 2022, explains that convicts will be given a probationary period of 10 years for the convict to



do well in prison. If he has done well for 10 years, his sentence can be changed to life imprisonment by Presidential Decree.

Meanwhile, according to the Ministry of Law and Human Rights (Kemenkumham), the decision to make a mandatory 10 year probationary period for death row convicts in the latest Criminal Code (KUHP) is a solution taken to mediate between the pros and cons of punishment. dead. "So this is a middle way, we still regulate the death penalty but in its implementation it is given a probationary period of 10 years.

In this article, it is stated that the judge can impose the death penalty with a probation period of 10 years, taking into account two things. First, the defendant feels remorse and there is hope to improve himself. Second, the role of the defendant in the crime. Then Article 100 Paragraph (4) states that if during the probation period the convict shows a commendable attitude, the death penalty can be changed to life imprisonment by presidential decision based on the consideration of the Supreme Court (MA).

After serving a 10 year probation period, death row inmates will be given an assessment. This is the basis for recommendations whether the convict's sentence will remain or be changed to life imprisonment. If the death row convict is deemed to have good behavior and has changed, the President will issue a Presidential Decree (Keppres) to change the convict's sentence to life imprisonment. (Whether the person concerned deserves a change in sentence or not, if they don't deserve it, they will be executed, and if they are worthy, a Presidential Decree will be issued changing the sentence from death to life imprisonment).

#### **4. CONCLUSIONS**

Existence The death penalty in the legal system in Indonesia is viewed from a human rights perspective, namely that it will certainly conflict with human rights, especially the right to life. However, the death penalty is also needed as an effort to prevent serious crimes, especially terrorism. Meanwhile, the judge's consideration in imposing the death penalty with a probationary period of 10 (ten) years takes into account: a. the defendant feels remorse and there is hope to improve himself; or b. the role of the defendant in the crime. Article 100 of the Criminal Code Law, for example, states that a defendant who has been sentenced to death cannot now be sentenced to death immediately, but is given the opportunity of 10 years to behave well.

There are suggestions for law enforcers, in this case, judges in Indonesia must be bolder in making decisions regarding the imposition of the death penalty against criminals, remembering the principle of legal certainty, namely a guarantee that a law must be implemented in a good and



appropriate manner. Legal certainty is the main goal of law and legal certainty will direct the public to have a positive attitude towards the State laws that have been determined. The judge's role in deciding cases cannot be half-hearted. First of all, there is no doubt that all forms of terrorism are a threat to Indonesia's national security interests, so it is appropriate for the state to take a role in eliminating this potential threat. Therefore, firmness in imposing the death penalty needs to be implemented while taking into account human rights and also considering the impact and potential threats resulting.

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