



Mechanism of Commuting the Death Penalty to Imprisonment Based on Scientific Evidence

Yovianes Mahar

Program Studi Magister Ilmu Hukum, Universitas Bhayangkara Jakarta Raya, Indonesia. E-mail: yovi.mhr.ip@gmail.com

ARTICLE INFO

Keywords:

Commuting of the death penalty;
Death penalty;
Criminal Law;

Article history:

Received Jan 08, 2025;
Revised Jan 14, 2025;
Accepted Mar 15, 2025;
Online Apr 30, 2025

ABSTRACT

This study discusses the application of the death penalty in the National Criminal Code (KUHP Nasional)) and the legal mechanism related to the commuting of the death penalty to imprisonment for 20 years or life. Although the National Criminal Code accommodates the death penalty as an alternative punishment, there is an urgency to reconstruct a clear mechanism related to the commuting of criminal forms, in order to avoid abuse of power. This study uses legal research methods, with psychological, and philosophical approaches, to analyze the differences between the provisions of the death penalty in the colonial and national codes, as well as the implications of their application. One of the main focuses is the importance of psychological assessment in determining whether a convict deserves a reduced sentence, taking into account factors such as remorse, empathy, and emotional stability. The results of this study show that the punishment commuting mechanism requires further regulation and transparent evaluation to ensure fair and accountable decisions.

This is an open access article under the [CC BY-NC](#) license.



Corresponding Author:

Yovianes Mahar
Program Studi Magister Ilmu Hukum, Universitas Bhayangkara
Jakarta Raya, Jl. Raya Perjuangan No. 81 Marga Mulya, Bekasi Utara
Jawa Barat, Indonesia
Email: yovi.mhr.ip@gmail.com

1. Introduction

As one of the social rules, the law called Mochtar aims to maintain and realize public order. This need for order is a fundamental condition for an orderly society (Aulia, 2019). The distinctive difference between the law and other social rules lies in the provisions of the law that can be enforced in their implementation, including by means of sanctions (Galih Orlando, 2023). In the past, one of the instruments that was believed to be effective in law enforcement was the provision of death penalty sanctions, especially in serious cases (Hendra Arjuna et al., 2024).

As it developed, there were at least two major groups of thought, namely those who had an abolitionist view of the death penalty and those who had a retentionist view (Jouet, 2023). Data in 2013 shows that 100 (one hundred) countries (51%) have abolished the death penalty; 7 (seven) countries (4%) maintain the death penalty for certain crimes (e.g. in wartime); 48 (forty-eight) countries (25%) allow the death penalty for ordinary crimes, but it has not been applied

in the last 10 years and is believed to have implemented a moratorium; and 40 (forty) countries (20%) regulate and implement the death penalty, including Indonesia (Badan Pembinaan Hukum Nasional, 2015).

In the Criminal Law in Indonesia that is currently in force, the provisions that regulate the death penalty are contained in Article 10 of the Criminal Code (KUHP). Although Indonesia has currently passed Law Number 1 of 2023 concerning the National Criminal Code (National Criminal Code) which contains humanitarian principles (Rini Widyaastuty & Sontayati Sihite, 2024), the provisions regarding the death penalty still remain, precisely as stipulated in article 67 of the National Criminal Code.

The death penalty is applied only to certain cases that are *extra-ordinary crimes* such as narcotics crimes, corruption crimes, and terrorism (Aryadi Almau Dudy & Suheflihusnanini Ashady, 2023). The reason (legislative ratio) for the death penalty in Indonesia is that it refers to the main idea that the purpose of punishment is more focused on protecting the interests of the community. (Badan Pembinaan Hukum Nasional, 2015)

Although the death penalty is still enforced, there is a significant difference between the provisions regarding the death penalty as contained in the Colonial Heritage Criminal Code and the National Criminal Code. The difference in question is in the placement of the death penalty as one of the main types of crimes. Meanwhile, in the National Criminal Code, the death penalty is placed in Article 67 (regarding special crimes) which is separate from the main criminal groups such as prison sentences, cover-up crimes, supervision crimes, fine crimes, and social work crimes.

In addition, in Article 98 of the National Criminal Code it is also stated that "*The death penalty is threatened alternatively as a last resort to prevent the commission of criminal acts and protect the community.*", the word "alternative" as contained in article 98 indicates that there is a choice between two or several possibilities. Furthermore, the National Criminal Code also stipulates that even if a person has been sentenced to death, it is still possible to commuting the form of the death penalty to 20 years in prison or life imprisonment. This is not only a legal consequence of the death penalty arrangement which is currently an alternative punishment, but also a form of providing opportunities for death row inmates to improve their behavior.

However, until now there has been no legal regulation regarding the commuting of the criminal form. Article 102 of the National Criminal Code only mentions "*Further provisions regarding the procedures for the implementation of the death penalty are regulated by law*", while Law Number 8 of 1989 concerning the Criminal Procedure Code (KUHP) which is currently the main basis for criminal procedure law in Indonesia, until now has not been amended and contains hukum rules regarding the commuting of the criminal offense. Therefore, in addition to being an interesting thing, there is also an urgency to conduct research on the Application of the Death Penalty in Indonesia, especially regarding the ideal mechanism in commuting ring the death penalty to a prison sentence of 20 years, or life imprisonment. "*Power tends to corrupt, and absolute power corrupt absolutely*" (Sorik & Aulia, 2020), Therefore, this research will be aimed at an effort to find an ideal legal concept so that there is no abuse of power when determining the commuting of criminal forms against a person. In the criminal justice system, especially regarding evidence, scientific evidence is absolutely needed. Likewise, in the commuting of the death penalty to a person, scientific evidence is also needed so that the decision-making process is not carried out subjectively. In this case, the relevant evidence to measure the psychological condition of convicts is the use of psychology.

Based on the background description above, the Problem Formulation that the Author can put forward and subsequently become the subject of discussion in this study is as follows: How is the application of the death penalty based on the Law of the Republic of Indonesia Number 1 of 2023 concerning the National Criminal Code?, and what is the legal mechanism in commuting the death penalty to 20 years in prison, or life imprisonment based on scientific evidence?

2. Method

The research method used by the author is Normative Juridisi, which is legal research that positions law as a normative system. The system of norms in question includes principles, legal rules, and court decisions (Muhaimin, 2020) Furthermore, to be able to answer the problem, in this study the author uses several approaches, including a legislative approach, a psychological approach and a *philosophical approach*. According to Socrates, basically philosophy is not used to answer the questions asked, but to question or re-question the answers given. Therefore, this research will also examine legal *issues* radically (Muhaimin, 2020) and in-depth which will then be followed by the nature of exploratory research, which is trying to find new concepts or ideas that are expected to be able to answer the problems that have been formulated (Eka NAM Sihombing & Cynthia Hadita, 2022). As a science that studies human behavior as an object of study, psychology is seen as quite relevant to answer the questions in this study.

3. Analysis and Results

3.1. The Application of the Death Penalty Based on the Law of the Republic of Indonesia Number 1 of 2023 concerning the National Criminal Code

The death penalty is not essentially the main means (main means) to regulate, order and improve society. In this case, the death penalty is only an exception (Anugrah & Desril, 2021). Such thinking can be identified with the means of amputation or surgery in the field of medicine which in essence is also not the main means/medicine, but is only an exception effort as a last resort/medicine (Baren Sipayung et al., 2023).

Almost all countries that maintain the death penalty have juridical requirements, which regulate the rights of the convict to request review, pardon, change of sentence and suspension of the death penalty. This was then strengthened, namely with the issuance of UN General Assembly Resolution No. 35/172 (UN. Centre for Social Development and Humanitarian Affairs, 1981)

It should also be stated that even though the death penalty is maintained based on efforts to protect the community or more emphasis/oriented to the interests of the community (Rasad, 2021), However, in its implementation, it is expected to be selective, cautious and far oriented to the protection/interests of individuals (perpetrators of criminal acts). Therefore, provisions are made regarding the postponement of the execution of the death penalty or conditional capital *punishment* with a probation period of 10 years (Fitriani, 2023). This thinking is an effort to maintain a balance between those who hold abolitionist views on the death penalty and retentionist groups, which are quite significant, including ambivalence about the death penalty at the international level (Samuel Agustinus et al., 2019).

The effort to place the death penalty (*capital punishment*) apart from the main criminal package is very appropriate, because it is a compromise as a way out between the "retentionists". This means that the death penalty is an exception crime. The judge must give serious and careful consideration before imposing a criminality (Muksin & Rochaeti, 2020).

In the National Criminal Code, the death penalty is used as a threat of criminal sanctions by threatening: (a) The death penalty is the heaviest principal penalty, (b) The death penalty is always threatened as a penalty of aggravation aimed at qualified offenses. (b) The death penalty is always an alternative to life imprisonment and a maximum prison sentence of 20 years

The death penalty was carried out after the President's request for clemency for convicts was rejected and was not carried out in public by shooting the convict to death by a firing squad (Tobing, 2023). The execution of the death penalty against pregnant women or mentally ill people is postponed until the woman gives birth or the mentally ill person recovers (Helmi & Refriani, 2022). The death penalty can only be obtained. The execution of the death penalty can be postponed with a probation period of 10 (ten) years, if: (a) the public reaction to the convict is not too great; (c) the convict shows remorse and there is hope for improvement; (d) the position of the convict in the participation of the criminal act is not too important; and (e) There are mitigating reasons.

3.2. Legal Mechanism in Determining the Commuting of the Death Penalty to 20 Years in Prison or Life Imprisonment

a. Authorized Institutions

Paying attention to the National Criminal Code which will come into effect 3 years from the date of promulgation, namely in 2026 (Hartanto, 2024), regulates the death penalty to be threatened alternatively as a last resort to prevent criminal acts and protect the community. If it is noted that the death penalty is not included in the main criminal record. The death penalty is determined in a separate article to show that this type of crime is really special as a last resort to protect society. The death penalty is the most severe crime and must always be threatened alternatively with life imprisonment or imprisonment for a maximum of 20 years.

In the implementation of the death penalty, it can be carried out after the application for clemency for convicts is rejected by the President. Furthermore, the judge sentenced him to death with a probation period of 10 years by taking into account the defendant's remorse and there was hope for improvement; or the role of the defendant in the crime. The death penalty with this probation period must be included in the court decision (Ismara & Margaretha, 2024).

The 10-year probationary period begins 1 day after the court decision acquires permanent legal force. If the convict during the probation period shows commendable attitudes and deeds, the death penalty can be changed to life imprisonment by Presidential Decree after obtaining the consideration of the Supreme Court. Life imprisonment will be calculated from the time the Presidential Decree is determined. On the other hand, if the convict during the probation period does not show commendable attitudes and deeds and there is no hope for improvement, the death penalty can be carried out on the order of the Attorney General. Then, we should also pay attention and know that if the death penalty is rejected and the death penalty is not carried out for 10 years since the clemency was refused and not because the convict escaped, the death penalty can be changed to life imprisonment by Presidential Decree.

If examined further from the perspective of authority, basically the president's action in issuing a decision is something that falls under the administrative-executive area. Meanwhile, in commuting the death penalty to non-death penalty is a matter that is in the judicial area, so it must be carried out based on the provisions of the Criminal Procedure Law. This is very important, considering that only the judiciary can determine the commuting of punishment from the death penalty to 20 years or life imprisonment. The judicial institution that the author intends to

implement will be carried out by the mechanism of submitting an application from the convict to the District Court which has originally decided the original case. The conversion of the death penalty to imprisonment must first be examined according to procedural law.

The judge who examines the application must always examine carefully before finally imposing a determination on the convict. Convicts who in a court determination have their sentences commuting red must first be able to prove that they have really changed. In accordance with the provisions of Article 100 paragraph (4) of the National Criminal Code which stipulates "*If the convict during the probation period as referred to in paragraph (1) shows a commendable attitude and deed, the death penalty can be changed to a prison sentence....*" Based on that, there must be an appropriate measure to determine whether it is true that a convict to be commuting red the type of criminal has *shown a commendable attitude and deed?* To answer this, in addition to using evidence in the form of witnesses who know the conditions and deeds of the convict during the probation period, a series of scientific procedures must also be carried out, in this case psychology.

b. The Use of Psychology in Determining Changes in the Attitude of Convicts

The debate about the death penalty remains a "live issue" everywhere and usually always revolves around reasons on the basis of measures: public protection and the system of criminal law administration, crime prevention, the discriminatory and cruel nature of the death penalty, cheaper costs, the retributive nature, public opinion for and against the death penalty and the irreversible nature of the death penalty. In this case, it is interesting to highlight what happened in *The Sixth United Nations Congress on the Prevention of crime one the Treatment of Offenders*, 1980 in Caracas. Various delegates reported on what was happening in their country from both a juridical and practical perspective. There are those who abolish the death penalty, but not a few also want to maintain the death penalty. Many countries have also stated that they will maintain the death penalty for the time being, with the note that it will be abolished eventually. In a study conducted on 74 countries, data was obtained that although most of them still maintain the death penalty, various legal tools are regulated to further humanize the death penalty, these legal tools include postponing the death penalty to change or deliver the death penalty, for example on the basis of the mental and physical condition of the convict.

In the death penalty commuting system, psychological measurement instruments play a very important role and are the main basis for decision-making. The decision regarding the commuting of a criminal sentence from the death penalty to life imprisonment or 20 years depends not only on legal or administrative aspects, but also requires a deep understanding of the psychological condition of the convict.

David L. Shapiro discusses the importance of psychological evaluation in the criminal justice system. In this section, Shapiro emphasized the vital role of psychological evaluation in understanding mental capacity, personality, and other psychological factors relevant to the judicial process, including in the context of decision-making related to criminal justice (David L. Shapiro, 1991).

One of the main considerations in the commuting of the death penalty is whether the convict has undergone significant changes in his morals and mentality. The right psychological instrument can evaluate the extent to which the convict shows remorse, a sense of responsibility, and a willingness to change. Some aspects that can be assessed through psychological tests and evaluations include (Perlin, 2012): (a) Introspective ability. Can the convict reflect on his actions and understand the impact of his crime on the victim and society? (b) Empathy. This psychological instrument can assess whether the convict shows increased empathy ability, namely the ability to feel the victim's

suffering and understand the consequences of his actions. (c) Emotional stability. Psychological evaluation also identifies whether the convict has stable emotional tendencies, which is one of the indicators that he is no longer dangerous to society. (d) One of the main objectives of the commuting of sentences is to ensure that the convict is no longer a threat to society. Psychological tests can be used to measure a person's risk of recidivism, or the potential to commit another crime. Some commonly used tools and methods in assessing recidivism risk include (Robert D. Hare, 1999): (1) Psychopathy Checklist-Revised (PCL-R). This instrument assesses the nature of psychopathy, which is often associated with repetitive criminal behavior. A person with a high score on this scale is more likely to repeat a crime. (2) HCR-20 (Historical, Clinical, Risk Management). This instrument helps assess the risk of future violence, taking into account historical factors (such as criminal track record), clinical conditions (current mental health), and risk management (such as social and environmental support after release).

The PCL-R instrument can be used to assess psychopathic traits associated with repetitive criminal behavior (Molina-Coloma et al., 2023). Decisions based on the results of psychological assessments have a stronger foundation in ensuring that the commuting of punishment is carried out fairly and responsibly. When psychological evaluation is carried out in depth, it provides assurance that the convict really deserves a reduction in sentence, not solely for administrative reasons or external factors.

Psychological measurements that are done properly can help the courts and authorized institutions to avoid mistakes in giving sentence commuting s to convicts who are not mentally ready to return to society. This instrument also helps minimize the risk of abuse of power in the decision-making process. With objective and standardized psychological assessments, decisions can be made more transparent and accountable.

4. Conclusion

The National Criminal Code still accommodates the death penalty, but places it as an alternative and special crime. The commuting of the death penalty to prison still requires further regulation regarding the mechanism and authorized officials. There is an urgency to improve the legal system related to the commuting of criminal forms so that there is no abuse of power. Decisions based on the results of psychological assessments have a stronger foundation in ensuring that the commuting of punishment is carried out fairly and responsibly. When psychological evaluation is carried out in depth, it provides assurance that the convict really deserves a reduction in sentence, not solely for administrative reasons or external factors.

There needs to be a clearer law or implementing regulation regarding the commuting of the death penalty by considering scientific evidence such as psychology. Increasing transparency and accountability of authorized institutions in decision-making related to the commuting of the death penalty. The need for further studies on the social and legal impacts of the commuting of the death penalty.

References

- Anugrah, R., & Desril, R. (2021). Kebijakan Formulasi Pidana Mati Dalam Pembaharuan Hukum Pidana Indonesia. *Jurnal Pembangunan Hukum Indonesia*, 3(1), 80–95. <https://doi.org/10.14710/jphi.v3i1.80-95>
- Aryadi Almau Dudy, & Suheflihusnanini Ashady. (2023). Kedudukan Dan Konstruksi Pidana Mati Dalam Undang Undang No 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana (KUHP). *INNOVATIVE: Journal Of Social Science Research*, 3(5), 3462–3472.

-
- Aulia, M. Z. (2019). Hukum Pembangunan dari Mochtar Kusuma-atmadja: Mengarahkan Pembangunan atau Mengabdikan pada Pembangunan? *Undang: Jurnal Hukum*, 1(2), 363-392. <https://doi.org/10.22437/ujh.1.2.363-392>
- Badan Pembinaan Hukum Nasional. (2015). *Draft Naskah Akademik Rancangan Undang-Undang Tentang Kitab Undang-Undang Hukum Pidana (KUHP)*.
- Baren Sipayung, Sardjana Orba Manullang, & Henry Kristian Siburian. (2023). Penerapan hukuman mati menurut hukum positif di Indonesia ditinjau dari perspektif hak asasi manusia. *Jurnal Kewarganegaraan*, 7(1), 134-142.
- David L. Shapiro. (1991). *Forensic Psychological Assessment: An Integrative Approach*. Allyn and Bacon.
- Eka NAM Sihombing, & Cynthia Hadita. (2022). *Penelitian Hukum*. Setara Press.
- Fitriani, F. (2023). PENJATUHAN PIDANA MATI KEPADA PELAKU TINDAK PIDANA DITINJAU DALAM UNDANG-UNDANG NOMOR 1 TAHUN 2023 TENTANG KITAB UNDANG-UNDANG HUKUM PIDANA. *SENTRI: Jurnal Riset Ilmiah*, 2(8), 3016-3024. <https://doi.org/10.55681/sentri.v2i8.1327>
- Galih Orlando. (2023). HUKUM SEBAGAI KONTROL SOSIAL DAN SOCIAL ENGINEERING. *Tarbiyah Bil Qalam : Jurnal Pendidikan Agama Dan Sains*, 7(1). <https://doi.org/10.58822/tbq.v7i1.111>
- Hartanto, H. (2024). FENOMENA PENERAPAN HUKUM PIDANA MODERN TAHUN 2026. *Al-Adl : Jurnal Hukum*, 16(2), 58. <https://doi.org/10.31602/al-adl.v16i2.12161>
- Helmi, M. I., & Refriani, D. A. (2022). Masa Tunggu Eksekusi Terpidana Mati Di Indonesia Dalam Pendekatan Teori Kepastian Hukum dan Maqasid Al Syariah Suatu Kajian Perbandingan. *Mizan: Journal of Islamic Law*, 6(2), 189. <https://doi.org/10.32507/mizan.v6i2.1624>
- Hendra Arjuna, Evi Wulandari, & Basyaruddin Idris. (2024). Kontroversi hukuman mati dalam KUHP Baru: Antara Penegakan Hukum dan Perlindungan Hak Asasi Manusia. *Syariah: Jurnal Ilmu Hukum*, 1(4), 145-154.
- Ismara, Y. cipta, & Margaretha, L. P. (2024). KONSTITUSIONALITAS PIDANA MATI BERSYARAT DARI PERSPEKTIF TUJUAN PEMIDANAAN. *Jurnal Ilmu Hukum: ALETHEA*, 7(2), 133-148. <https://doi.org/10.24246/alethea.vol7.no2.p133-148>
- Jouet, M. (2023). Death Penalty Abolitionism from the Enlightenment to Modernity. *The American Journal of Comparative Law*, 71(1), 46-97. <https://doi.org/10.1093/ajcl/avad011>
- Molina-Coloma, V., Lara-Machado, R., Lara-Barros, B., & Valdez-Miño, C. (2023). Criminal characteristics and psychopathy in women in prison. *Revista Española de Sanidad Penitenciaria*, 25(1), 8-15. <https://doi.org/10.18176/resp.00061>
- Muhaimin. (2020). *Metode Penelitian Hukum*. Mataram University Press.
- Muksin, M. R. S., & Rochaeti, N. (2020). Pertimbangan Hakim Dalam Menggunakan Keterangan Ahli Kedokteran Forensik Sebagai Alat Bukti Tindak Pidana Pembunuhan. *Jurnal Pembangunan Hukum Indonesia*, 2(3), 343-358. <https://doi.org/10.14710/jphi.v2i3.343-358>
- Perlin, M. L. (2012). Mental Disability and the Death Penalty: The Shame of the States (Rowman & Littlefield, 2012) (in Press) Chapter 1: An Introduction and the Dilemma of Factual Innocence. *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.2143178>
- Rasad, F. (2021). Pidana Perubahan Pidana Mati Menjadi Pidana Penjara Melalui Pemidanaan Secara Alternatif Mati Sebagai Pidana Alternatif: Merubah Penjatuhan Pidana Mati Menjadi Pidana Penjara. *Jurnal HAM*, 12(1), 141. <https://doi.org/10.30641/ham.2021.12.141-164>
- Rini Widyaastuty, & Sontayati Sihite. (2024). Pokok Pokok Pemikiran KUHP Baru. *Fauziah Lubis*, 4(4), 3738-3750.
- Robert D. Hare. (1999). *Without conscience: the disturbing world of the psychopaths among us*. The Guilford Press.
- Samuel Agustinus, Eko Soponyono, & Rahayu. (2019). PELAKASAAN PIDANA MATI DI INDONESIA PASCA REFORMASI DARI PERSPEKTIF HAK ASASI MANUSIA. *Diponegoro Law Journal*, 5(4).
- Sorik, S., & Aulia, D. (2020). Menata Ulang Relasi Majelis Permusyawaratan Rakyat dan Presiden Melalui Politik Hukum Haluan Negara. *Jurnal Konstitusi*, 17(2), 372. <https://doi.org/10.31078/jk1727>
- Tobing, S. A. S. L. (2023). Pemberian Grasi Terhadap Terpidana Mati Pengedar Narkotika. *Jurnal Global Ilmiah*, 1(2), 101-107. <https://doi.org/10.55324/jgi.v1i2.14>
- UN. Centre for Social Development and Humanitarian Affairs. (1981). *Crime and Criminal Justice Branch Newsletter United Nations*.
-