

# Transformation of Punishment Paradigm: From Death Penalty to Probation

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## Abstract

*Punishment sanctions in Indonesia vary, the most highlighted is the death penalty. In the development of Indonesian criminal law, the death penalty became a long debate among various groups. Until finally in the normative development, the death penalty shifted to the probationary death penalty, which will turn into life imprisonment. This is certainly a middle ground regarding the long debate on the criminal sanction. This research is written with the aim of knowing, understanding, and analyzing the development of legal norms relating to the death penalty and probation in the Indonesian criminal justice system. With normative juridical research method. The point of this paper is that although the death penalty is legally recognized, the change to probation reflects a reflection of concerns over the risk of error and the enforcement of human rights.*

**Keywords:** *Death Penalty; Legal Norms; Probationary Death Penalty*

## 1. INTRODUCTION

In social life we often experience conflict and are subject to punishment, the type of punishment varies according to the crime.<sup>1</sup> Criminal punishment is imposed by the government in the form of suffering against the perpetrator of the crime and is declared guilty by the judge.

The Indonesian criminal justice system recognizes the death penalty as one of its types of sanctions. The death penalty is the most severe punishment under current Indonesian law and is listed in Article 10 of the Criminal Code (hereinafter abbreviated as KUHP). Most laws in Indonesia include the death penalty,

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<sup>1</sup> Barda Nawawi Arif dan Muladi, *Teori – Teori Dan Kebijakan Pidana*, Bandung, Alumni, 2005, dalam Tia Ludiana, *Eksistensi Pidana Mati Dalam Pembaharuan Hukum Pidana (Kajian Terhadap Pidana Mati Dalam Ruu Kuhp)*, JURNAL LITIGASI (e-Journal), Vol. 21 (1) April, 2020, hal. 61, link jurnal <http://journal.unpas.ac.id/index.php/litigasi>

especially in certain laws outside of the general criminal law (KUHP) which are scattered in special laws.

The Indonesian criminal justice system has 13 laws that include the death penalty in a separate law in addition to the Criminal Code. This sanction is established against crimes included in the Criminal Code and against crimes outside the Criminal Code.<sup>2</sup>

In the development of the new Criminal Code, namely Law Number 1 of 2023 which will take effect in 2026, the death penalty is classified as an alternative criminal offense and is no longer included in the type of main punishment. Alternative punishment means that if the convicted person is sentenced to death and behaves properly within a period of ten years, then the death penalty can be changed to life imprisonment. The death penalty as an alternative punishment is a middle ground between the unpreparedness of the state and/or society to abolish the death penalty and the pressure from various groups to abolish the death penalty.

The transformation of the punishment paradigm from the death penalty to probation in the Indonesian criminal justice system marks a significant change in the approach to justice and law enforcement. Criminal punishment, as the main instrument in the criminal justice system, reflects the values and norms of society at a certain time. This paradigm shift is of major concern as it represents a normative evolution that reflects the development of society's values and views on justice and human rights.

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<sup>2</sup> Syahrudin Husein, *Pidana Mati Menurut Hukum Pidana Indonesia*, Medan, USU Digital Library, 2003, *Ibid*, Tia Ludiana...

The changing paradigm of punishment<sup>3</sup> from the death penalty to probation in the context of the Indonesian criminal justice system reflects the social, cultural, and legal dynamics that develop in society. This transformation not only reflects the evolution of societal values, but also a response to global developments in the enforcement of human rights and the concept of justice.<sup>4</sup>

Historically, the death penalty has been an integral part of the Indonesian criminal justice system. However, over time, there has been a shift in society's views regarding the ethics and effectiveness of the death penalty. The emergence of moral, ethical, and human rights questions regarding the imposition of the death penalty has prompted the government and society to reflect on the approach to criminal punishment.<sup>5</sup>

The shift is reflected in criminal law reforms and policy changes that support the reduction of the use of the death penalty and the introduction of probation as an alternative. Therefore, it is important to understand and analyze the accompanying normative developments, especially in the context of legal justice values.

In the context of the transformation of the sentencing paradigm from death penalty to probation, focusing on how the legal rules relating to criminal punishment reflect the principles of justice as rules can provide a cohesive analytical view. H.L.A. Hart, a leading legal philosopher of the 20th century, played an important role in developing a vision of legal positivism that separated law from morality. In his monumental work "The Concept of Law; (1961)", Hart

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<sup>3</sup> Artikel PANRB, *MenkumHAM: Perubahan Paradigma Pemidanaan Indonesia Suatu Keniscayaan*, diunggah pada 14 April 2023, dilihat pada 2 Desember 2023, dapat diakses di <https://sipn.menpan.go.id/berita/52134/lembaga-pembinaan-khusus-anak-kelas-i-martapura/menkumham-perubahan-paradigma-pemidanaan-indonesia-suatu-keniscayaan>

<sup>4</sup> Eva Achjani Zulfa, *Menakar Kembali Keberadaan Pidana Mati (Suatu Pergeseran Paradigma Pemidanaan di Indonesia)*, Lex Jurnalica Vol.4 No.2, April 2007

<sup>5</sup> *Ibid*, Eva Achjani Zulfa

presented the concept of law as a system of rules that can be analyzed objectively without being tied to certain moral values. One of the central concepts of his theory is "justice as a rule", which provides a philosophical foundation for understanding how law can achieve justice through the application of clear and fair rules.<sup>6</sup>

It is important to note that the theory of justice as a rule has particular relevance in the context of the transformation of the sentencing paradigm, as proposed in this study. How is the development of legal norms relating to the death penalty and probation in the Indonesian criminal justice system? This paper uses normative juridical research, because the research conducted is included in the literature study based on legal materials obtained, by processing and analyzing the theories raised, books, legal principles, and also applicable laws and regulations. The legal sources used in compiling this writing come from primary legal materials, which are composed of laws and regulations that are used as the basis for discussion in this study.<sup>7</sup> Secondary legal materials, consisting of books, journals, theses, and websites related to the transformation of the sentencing paradigm from punishment to probation. By compiling the existing legal materials comprehensively and associating them with relevant theories, it is expected to get a firm and clear answer to the issues raised.

## 2. DISCUSSION AND ANALYSIS

The death penalty has become one of the punishments imposed on criminal offenders in Indonesia since the issuance of the Constitutional Court, in Indonesia as known as Mahkamah Konstitusi (MK). Decision on the judicial review of the

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<sup>6</sup> Petrus CKL. Bello, *Hubungan Hukum Dan Moralitas Menurut H.L.A Hart*, Jurnal Hukum & Pembangunan, Vol. 43 No. 3, 2017, hal. 348, link jurnal [https://www.researchgate.net/publication/318651803\\_HUBUNGAN\\_HUKUM\\_DAN\\_MORALITAS\\_MENURUT\\_HLA\\_HART](https://www.researchgate.net/publication/318651803_HUBUNGAN_HUKUM_DAN_MORALITAS_MENURUT_HLA_HART)

<sup>7</sup> Sugiono, *Metode Penelitian Kualitatif, Kuantitatif dan R&D*, Bandung, Alfabeta, 2008, hal. 73

application of the death penalty in Law Number 22 of 1997 concerning Narcotics.<sup>8</sup> This has shown that the existence of the death penalty in Indonesia has had its legality and its existence is recognized. However, on the other hand, the issuance of the Constitutional Court's decision has triggered a polemic of pros and cons in the community regarding the implementation of the death penalty in Indonesian positive criminal law.

From a historical perspective, the emergence of pro and con opinions related to the death penalty has existed since the past, where the figures in the past who were divided into pro and con sides, each had arguments that could be accounted for juridically. Figures in the past who opposed the death penalty included Beccaria, Voltaire, Marat, and Robespierre, to German poets Lessing, Klopstoc, Moser, and Achiller. Meanwhile, those who are pro-death penalty can be mentioned several figures such as Bichon Van Yuclmonde Ysselmonde, De Savornin Lohman, Rambonnet, Lombroso, Garovalo, and Otto von Bismarck.<sup>9</sup>

In positive criminal law, the death penalty is a type of main punishment that is hierarchically substantive as the heaviest criminal sanction. According to Article 10 of the Criminal Code, the main punishment consists of the death penalty, imprisonment, confinement, and fine.<sup>10</sup> The death penalty itself is a controversial topic in the legal system in many countries.

One of the arguments of the pro-death penalty community is that this punishment can be considered as a form of revenge for victims or families of victims of very serious crimes.<sup>11</sup> Many proponents of the death penalty believe

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<sup>8</sup> Sambas, Nandang. *Penerapan Pidana Mati Dalam Hukum Pidana Nasional Dan Perlindungan Hak Azasi Manusia*. Bandung Islamic University, 2007, hal. 248

<sup>9</sup> Roeslan Saleh, *Masalah Pidana Mati*, Aksara baru, Jakarta, 1978, hal. 53

<sup>10</sup> Moeljatno, *Kitab Undang-Undang Hukum Pidana (KUHP)*, Bumi Aksara, 1999

<sup>11</sup> Artikel Fakultas Hukum UMSU, *Apa Itu Hukuman Mati?*, diunggah pada 26 Agustus 2023, dilihat pada 7 Desember 2023, dapat diakses di <https://fahum.umsu.ac.id/apaitu-hukuman-mati/>

that only by giving the appropriate punishment can justice be achieved and society can feel safe. In addition, proponents of the death penalty argue that this punishment can serve as a deterrent for perpetrators of serious crimes. In their view, the death penalty can deter more serious crimes due to the severe consequences. They argue that by eliminating the most dangerous offenders, society can become a safer place and avoid acts of violence.

However, it is important to remember that the death penalty also has many critics. One argument that is often raised is the risk of irreparable harm. There are many cases where innocent people have been executed, and this raises concerns about the fairness of the legal system. In addition, the death penalty has also drawn controversy for violating human rights, including the right to life.

Countries that still impose the death penalty often face pressure from human rights organizations and the international community to abolish this practice. Many countries have replaced the death penalty with other punishments that are considered more humane, such as life without parole. In conclusion, the death penalty is a controversial topic. Although there are pro arguments that argue that this punishment can bring justice and a deterrent effect, but there are also criticisms that state the risk of irreparable harm and violation of human rights.

Likewise, those who reject the death penalty always base themselves on the reason that the right to take human life is God Almighty, and on the Precept of Humanity, the death penalty is seen as incorrect. This opinion is also seen from the angle of Pancasila quite reasonably. One of the rights possessed by every human being is the right to life. This right is also explicitly stated in the International Declaration of Human Rights. In line with the wave of reform, the reflection of the protection of human rights in the second amendment of the 1945 Constitution has been expressly regulated as stated in Chapter X A Articles 28 A-28 J.

Based on Article 28 A of the Amendment of the 1945 Constitution which states that every person has the right to life and the right to defend his/her life, many people argue that the existence of the death penalty in Indonesia is contrary to Article 28A. Thus, the death penalty in Indonesia is considered to have violated constitutional rights. At the same time, the implementation of the death penalty is an act of human rights violation.

Juridically, what is meant by human rights violations is: *"Every act of a person or group including state apparatus either intentionally or unintentionally or negligently that unlawfully (pen) reduces, obstructs, limits and or revokes the human rights of a person or group of people guaranteed by this law, and does not get, or is feared will not get a fair and correct legal settlement, based on the applicable legal mechanism"*.<sup>12</sup>

Several countries have made significant changes in the death penalty by replacing it with probation. The change from the death penalty to probation is a reflection of the changing views of society towards the death penalty. Many countries have considered the moral, ethical, and effectiveness arguments of the death penalty. One of the main reasons for this change is that there are doubts about the fairness of the death penalty. There are many cases where innocent people have been executed. In an imperfect legal system, mistakes can happen and there is no way to correct them if someone has already been executed.

In addition, proponents of this change argue that the death penalty is ineffective in deterring crime. Several studies show that the death penalty does not have a significant deterrent effect on crime rates.<sup>13</sup> Instead, probation gives

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<sup>12</sup> Pasal 1 ke 6 undang-undang No.39 Tahun 1999 tentang HAM, Sinar Grafika, Jakarta, 2000.

<sup>13</sup> Artikel IJRS, *Pakar Menjawab: Alasan Mengapa Hukuman Mati tidak Efektif dan Harus Dihilangkan, Terlepas Apapun Kasusnya*, diunggah pada 12 April 2022, dilihat pada 7 Desember 2023, dapat diakses di <https://ijrs.or.id/pakar-menjawab-alasan-mengapa-hukuman-mati-tidak-efektif-dan-harus-dihentikan-terlepas-apapun-kasusnya/>

offenders the opportunity to correct their behavior and turn their lives around. Probation also gives those who have made mistakes the opportunity to repent and become productive members of society. By allowing them to serve a probationary sentence, they can be allowed to rehabilitate themselves, admit their mistakes, and pay back to society.

However, this change also has its critics. Some argue that probation is not a fair and adequate form of punishment. They argue that serious offenders should be given a punishment commensurate with their actions. In converting the death penalty to probation, countries must ensure that their legal systems are fair and transparent. The court process must be conducted properly and there are adequate mechanisms to ensure that mistakes do not occur.

When associated with H.L.A Hart's theory of justice which emphasizes justice as a rule, justice emphasizes the importance of legal norms in regulating human behavior. Hart argues that legal norms are social norms that provide guidelines for action and create a framework of justice. In this context, the development of legal norms related to the death penalty and attempted death penalty can be understood as part of the development of the Indonesian criminal justice system.

It should be emphasized that H.L.A. Hart is a legal philosopher who is famous for his theory of "law as a system of rules". Although his thoughts are more focused on general law than specific crimes, his concept can provide a basis for understanding the development of law regarding the death penalty and capital punishment.



In general, the theory of justice explains how legal norms develop and are applied in the Indonesian criminal justice system, taking into account the role of criminal law and social policies implemented and endorsed by society.

Justice theory often includes philosophical and moral aspects that reflect society's views on truth and justice. This position can be reflected in legal standards that treat the death penalty as a form of justice or conversely criticize the death penalty as contrary to humanitarian principles.

Legal norms can also be reflected in society's views on the death penalty. If public opinion changes or demands a more humane criminal policy, this can be reflected in the development of legal norms regarding the death penalty.

The shift of death penalty norms to a probationary death penalty means that if the perpetrator sentenced to death has good behavior, it can be changed to life imprisonment. This is stated in the latest National Criminal Code, namely Law Number 1 Year 2026.

Overall, the change from the death penalty to probation is an interesting step in dealing with crime. It reflects the changing views of society and is a reflection of efforts to achieve better justice in the legal system. However, this change also requires careful thought and careful consideration to ensure that justice is upheld.

### **3. CONCLUSION**

The change in law from the death penalty to the attempted death penalty reflects changes in legal norms, which are influenced by changes in social values and views on justice. By referring to H.L.A. Hart's theory of justice, it can be understood that legal norms develop over time and reflect complex dynamics in society. Societal views, changes in values, and changes in philosophical views on justice all contribute to shaping legal norms related to criminal punishment. In the development of Indonesian legal norms related to the death penalty and capital punishment, there is a shift in society's view and response to the values of justice

and human rights. Although the death penalty is legally recognized, the change to the probationary death penalty reflects a reflection of concerns over the risk of error and the enforcement of human rights. History shows a polemic between the pros and cons, reflecting the complexity of this issue from a philosophical and moral perspective.

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