

COMPARISON OF THE CONCEPT OF LEGAL CERTAINTY IN THE REGULATION OF THE DEATH IN THE OLD CRIMINAL CODE AND THE NATIONAL CRIMINAL CODE (INDONESIA)

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ABSTRACT

The presence of the death penalty in the new National Criminal Code (KUHP) enacted in 2023 has sparked a great deal of controversy. Just like its existence, the death penalty still generates many problems and has both proponents and opponents. This research employs a juridical-normative approach and utilizes methods of legal analysis, conceptual analysis, and comparison. The results reveal that the regulation of the death penalty is more legally uncertain when compared to the previous Criminal Code because it is considered highly open to multiple interpretations, lacks clarity, conflicts with other regulations, and presents numerous loopholes that can be exploited by irresponsible individuals for legal transactions.

Keywords:
KUHP, Death
Penalty, Legal
Comparison,
Legal; Certainty.

INTRODUCTION

In essence, the death penalty has existed since ancient times. Even in the days of kingdoms, the death penalty was widely used to execute anyone considered to have committed treason against the King. It is still fresh in the memory of legal scholars how Socrates was sentenced to death. He died by drinking poison because his philosophical teachings were deemed a threat to the ruling kingdom at the time and influenced the residents of Athens. The death penalty was applied for many years without any abolition efforts due to the significant influence of the ancient kingdom's government.

However, with the evolution of time and thought, many philosophers began to disagree and even revolt against the absolute authority of the ancient kingdom's government. Many started advocating for human rights, which were previously not respected by the absolute rule of the monarchy. The influence of these new ideas led to the gradual abandonment of old regulations that were perceived as inhumane to people.

Regarding the death penalty, controversy has been rampant, and even today, various groups have declared themselves as either pro or anti-death penalty. This controversy has made every decision taken by a state regarding approval or disapproval of the death penalty seem unfair. For example, Indonesia, which still enforces the death penalty, is considered unfair by groups that are against the death penalty, especially human rights advocates in Western countries.

Like it or not, as Indonesia has joined the United Nations and ratified various international instruments, Indonesia must follow the flow of Western, predominantly liberal, ideas. However, concerning the death penalty, even though Western thinkers tend to favor its abolition, in international instruments such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), there are still loopholes that allow countries that have ratified them to apply the death penalty.

Indonesia is one of the countries that ratified the UDHR, which stands for Universal Declaration of Human Rights. Article 3 of the UDHR states, "Everyone has

the right to life...". Meanwhile, Article 29(2) of the UDHR states, "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law...".

In the UDHR, it is stated that life is a right for every human being. "Everyone" here means every individual without any distinction, such as race, religion, or other status, and without distinguishing the political, legal, or international status of the country or territory they come from, whether it is an independent state, a trust territory, a non-self-governing territory, or under any other form of sovereignty, as regulated in Article 2 of the UDHR.

Besides the UDHR, another instrument that regulates the right to life is the International Covenant on Civil and Political Rights (ICCPR). This instrument has also been ratified by Indonesia under Law No. 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights (ICCPR). In the ICCPR, the right to life is governed by Articles 6(1) through 6(6). Article 6(1) states that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Article 6(2) specifies that "In countries which have not abolished the death penalty, a sentence of death may be imposed only for the most serious crimes....", while Article 6(3) clarifies that "Nothing in this article shall be invoked to delay or to prevent the abolition of the death penalty by any State Party to the Covenant."

From Article 6 of the ICCPR, which has been ratified by Indonesia, we can see that the right to life is an inherent right of every individual that must be protected by law. However, Article 6 of the ICCPR still provides an opportunity for the implementation of the death penalty, which fundamentally involves the deprivation of a person's right to life (Wicaksono, 2016). Therefore, it can be said that the right to life is not absolute according to the ICCPR, but its deprivation needs to be restricted based on specific circumstances and carried out through a legally binding court decision.

In the ICCPR, there is an understanding of "a public emergency which threatens the life of the nation." This means an emergency situation that can be invoked to limit rights that are otherwise inalienable. The regulation of such an emergency is stipulated in Article 4 paragraph (1) of the Annex to Law No. 12 of 2005 concerning the Ratification of the ICCPR.

The gap that allows for the continued implementation of the death penalty in these national instruments has led Indonesia to maintain the regulation of the death penalty in its legal framework. Both in the old Criminal Code (KUHP) and the new National Criminal Code (KUHP Nasional), the death penalty continues to be stipulated and enforced.

However, there are differences in the regulations between the two, and these differences are quite prominent and substantive. This has led to various arguments, especially regarding legal certainty. The new National Criminal Code (KUHP Nasional) is considered to lack legal certainty and is considered highly relative by various legal experts compared to the old Criminal Code (KUHP lama).

According to the Wetboek van Strafrecht, also known as the old Criminal Code (KUHP lama), the death penalty was considered the most severe primary punishment. However, based on Law Number 1 of 2023 concerning the new Criminal Code (KUHP), the death penalty is no longer a primary punishment. Referring to Article 67 of the new KUHP, the death penalty is a special punishment that is always threatened alternately.

As for the old Criminal Code (KUHP lama), some criminal offenses that were subject to the death penalty included

1. Article 104: Treason with the intent to assassinate the president and vice president.
2. Article 111 paragraph (2): Establishing relations with a foreign state that leads to war.
3. Article 124 paragraph (3): Treason, disclosing or delivering to the enemy during wartime, inciting and facilitating riots or rebellions within the armed forces.
4. Article 340: Premeditated murder.
5. Article 365 paragraph (4): Aggravated theft involving violence in collaboration that results in severe injuries or death.
6. Article 444: Maritime piracy resulting in death.
7. Article 149K paragraph (2) and Article 149O paragraph (2): Aviation and aviation-related crimes.

All the articles in the old Penal Code (KUHP) listed above can be punished with the death penalty by a judge. Once a verdict related to the death penalty has been issued and has gained legal force, it cannot be revoked, except through a presidential pardon (grace). However, if the pardon is rejected, then the death penalty will be carried out definitively and without further delay.

However, in the new Penal Code (KUHP), there are substantial changes in the regulations. Article 100 of the new KUHP states that a judge may impose the death penalty with probation for up to 10 years, taking into account: (1) Remorse and the possibility of rehabilitation; (2) Role in the criminal act.

In the future, the death penalty with probation must be specified in the court's decision. The 10-year probation period is calculated from 1 day after the final and binding legal decision or "inkrah." If the convicted person shows a change in attitude and commendable behavior during the 10-year probation period, the death penalty can be commuted to life imprisonment.

This change of penalty is determined through a Presidential Decree (Keppres) after receiving considerations from the Supreme Court (MA). However, if the convicted person does not demonstrate a change in attitude and there is no hope for improvement throughout the probation period, the death penalty is executed at the order of the Attorney General. The death penalty will only be carried out after the convicted person's plea for clemency has been rejected by the president.

The probation period in the new Criminal Code (KUHP) is what has caused controversy among the public, especially legal experts, as it is considered highly relative and lacks legal certainty.

Therefore, this paper is created to analyze how the concept of legal certainty is present in the old Criminal Code (KUHP) and the new Criminal Code (KUHP). With the hope that, after understanding how legal certainty functions in the current regulations, constructive and improved changes can be implemented.

METHOD

The research methodology used in this study is a juridical-normative approach. This research is conducted by analyzing legal regulations, legal theories, concepts, and legal principles related to the death penalty. The research approach used in this paper includes the statutory approach, which is used to analyze all the existing

regulations concerning the death penalty in Indonesia, and the conceptual approach, which is employed to examine the concept of legal certainty in the old and new Criminal Codes (KUHP). (Rohmatika, 2019).

RESULTS AND DISCUSSION

Before delving into the discussion and analysis of legal certainty in the old and new Criminal Codes (KUHP), it is advisable to first discuss and understand what legal certainty is and how it is applied in legal regulations. Subsequently, we will discuss the concept of legal certainty in the old Criminal Code (KUHP) and then the concept of legal certainty in the new Criminal Code (KUHP baru).

a. Legal Certainty

One of the philosophers with a relativistic inclination, Gustav Radbruch, articulated his ideas about the concept of law. Radbruch aimed to harmonize legal thought that was once narrow and confined to a single perspective, expanding it to encompass various viewpoints. For example, normative law only employed a positivistic approach, and empirical law solely relied on a sociological approach.

Gustav Radbruch attempted to combine the three classical perspectives (philosophical-normative-empirical) into one and transformed them into three fundamental values of law, according to Radbruch. Philosophical (justice), normative (certainty), and empirical (utility) (Satjipto Raharjo, 1996). Gustav then referred to this concept as "idee des recht," emphasizing that the enforcement of the law must adhere to these three fundamental values.(Wantu, 2007)

Among the three fundamental values, namely justice, utility, and certainty, their application must follow the principle of priority. This principle of priority should be followed in the following order:

- a. Justice
- b. Utility of Law
- c. Legal Certainty (Muhammad Erwin, 2012)

Initially, according to Radbruch, legal certainty held the highest position. However, with his theory, the Nazis used it to legalize and implement cruel wartime laws. Therefore, due to this reality, Radbruch altered the order of priority in his theory. According to Radbruch, the concept of justice in the law serves not only to evaluate whether a norm is just but can also be used as a constitutive basis. Without the concept of justice in the law, the law itself would lose its meaning. (Soejono Koesoemo Sisworo, 1995).

In line with this view, Rudolf Stammeler stated that the concept of justice in the law serves as a determinant of the direction towards achieving the aspirations of society. Although the entirety of these legal aspirations may not all be achievable, their existence remains important. Because through these legal aspirations, positive law can be evaluated, and legal aspirations become a common goal for all positive law, making it clear that it strives to regulate the structure of societal life. Therefore, just law is one that is guided by these legal aspirations to achieve its objectives.(A Hamin S Atamimi, 1990).

Legal certainty is one of the legal aspirations, where positive law strives toward one of its objectives. A tangible form of legal certainty can be seen in the process of law enforcement and the execution of orders in accordance with the provisions of the law, regardless of who committed the act. "People tend to be more cautious when legal certainty exists, as it enables them to anticipate the legal consequences of

specific actions." Legal certainty is upheld to realize the principle of equality before the law. (Arizona, 2008).

Legal certainty provides individuals with standardized behavior, as written norms exist and are definite, allowing someone to know what they must do and what they must not do. Legal certainty is normative, both in terms of regulatory provisions and judicial decisions in court. Legal certainty aims to create an orderly, consistent, clear, and coherent pattern of life that is not influenced by subjective factors in society. (Arizona, 2008).

Legal certainty is normative, not sociological. Normatively, it means that a regulation is designed and enacted with precision, clearly and logically. Clear means it does not create doubts (multiple interpretations), and logical means it does not conflict with or create conflicts with other norms because it forms a unified system between one norm and another. According to Sudikno Mertokusumo, legal certainty can take the form of law enforcement in accordance with its regulations, allowing the community to ensure that the law is implemented.

Therefore, it can be concluded that legal certainty can mean clarity, the absence of multiple interpretations, non-contradiction, and enforceability. The law must be enforced firmly within society, and it should also incorporate transparency so that everyone can understand the meaning of its provisions. Furthermore, the law should not be contradictory from one aspect to another to avoid creating doubt. (Fence M. Wantu, 2011).

b. The Concept of Legal Certainty in The Old and New Indonesian Criminal Codes

If we want to compare legal certainty between the regulation of the death penalty in the old Criminal Code (KUHP lama) and the new Criminal Code (KUHP baru), we must first understand the wording of these regulations. Subsequently, we can interpret their meanings by referring to explanations regarding what legal certainty is and how the law can be said to have legal certainty.

As explained above, we can summarize that legal certainty means:

1. Enforcing orders according to the wording of the law regardless of who commits the act,
2. A legal norm must be in writing, exist, and be definite,
3. It should be orderly, consistent, clear, and consistent, not influenced by subjective matters within society,
4. A legal norm must be clear, not open to multiple interpretations, and logical without conflicting with other norms, as they should form a unified body of law.

After understanding the criteria for law to be certain, the next step is to know the provisions of the articles in the old and new Indonesian Penal Code (KUHP). As previously mentioned, in the old Indonesian Penal Code, the regulation of the death penalty is found in:

1. Article 104: Conspiracy with the intent to murder the president and vice president.
2. Article 111 paragraph (2): Engaging in relations with foreign countries resulting in war.
3. Article 124 paragraph (3): Treason by disclosing or surrendering to the enemy during wartime, inciting and facilitating riots or uprisings among the armed forces.
4. Article 340: Premeditated murder.

5. Article 365 paragraph (4): Aggravated robbery committed with violence, resulting in serious injuries or death.
6. Article 444: Sea piracy resulting in death.

In the case of premeditated murder under Article 340 of the Indonesian Penal Code (KUHP), the detailed content or wording of Article 340 KUHP is as follows: "Whoever intentionally and with prior planning takes the life of another person is liable for murder with premeditation, with the penalty of death or life imprisonment or for a certain period, up to a maximum of twenty years." Based on the wording of this article, it specifies the punishments that perpetrators of premeditated murder may receive. Firstly, the perpetrator can be sentenced to death. Secondly, they can be sentenced to life imprisonment. Lastly, the perpetrator may be imprisoned for up to 20 years. This range of penalties reflects that premeditated murder is considered one of the most serious crimes with severe criminal sanctions.

From the wording of the article above, we can see the clarity of the content and the intention of Article 340 of the Indonesian Penal Code (KUHP). Anyone proven guilty of committing premeditated murder, which means planning to kill another person in advance, can be sentenced to one of the following: first, a maximum penalty of 20 years in prison; second, life imprisonment; and third, the death penalty. The determination of the appropriate punishment for the perpetrator lies with the judge, who assesses the case files accordingly. If someone is deserving of the death penalty for their offense and there are no further legal remedies, meaning the verdict is final and irrevocable, then the death penalty must be carried out unless they receive clemency from the President.

Therefore, we can see the clarity and firmness of this regulation. Does this regulation provide legal certainty? Let's break it down step by step according to the definition of legal certainty. Firstly, regardless of the law enforcer, the wording of the law is applied consistently without discriminating against the perpetrator. The regulation doesn't allow the judge to differentiate between the perpetrators based on their social status or position because there is no such provision in the regulation. Secondly, the norm is present, certain, and in writing in Article 340 of the old Indonesian Penal Code (KUHP). Thirdly, it is organized, consistent, clear, and consistent. Fourthly, there is no doubt once the norm is applied, and when the judge's decision is final and irrevocable, the death penalty must be executed. Fifth, there is no room for multiple interpretations as the wording of the norm is very clear and cannot be interpreted differently. Lastly, it does not contradict norms in other regulations; instead, many other regulations that deal with the death penalty align with the old Indonesian Penal Code (KUHP).

Now, how is the regulation of the death penalty in the new Indonesian Criminal Code (KUHP Nasional)? Here are the rules in the new Indonesian Criminal Code (KUHP Nasional) related to the death penalty:(Alvi Syahrin et al., 2023)

1. Article 64
"In Article 64 of the Indonesian National Criminal Code (KUHP Nasional), it is stated that criminal sanctions consist of:
 - a) primary criminal sanctions;
 - b) additional criminal sanctions; and
 - c) sanctions that are specific to certain criminal acts determined by the Law.
2. Article 67

- "The specific criminal sanctions as referred to in Article 64 letter c consist of the death penalty, which is always imposed as an alternative."
3. Article 98
"The death penalty is imposed as a last resort to prevent the commission of a crime and protect society."
 4. Article 99
 - 1) The death penalty can be executed after the President rejects a clemency petition from the convict.
 - 2) The death penalty, as mentioned in paragraph (1), is not carried out in public.
 - 3) The death penalty is executed by shooting the convict to death by a firing squad or by other methods as determined by the law.
 - 4) The execution of the death penalty for pregnant women, nursing mothers, or mentally ill individuals is postponed until the pregnant woman gives birth, the nursing mother ceases to breastfeed, or the mentally ill person recovers.
 5. Article 100
 - 1) The judge imposes the death penalty with a probationary period of 10 (ten) years, taking into consideration:
 - a. the defendant's remorse and the prospect of rehabilitation; or
 - b. the defendant's role in the criminal offense.
 - 2) The death penalty with a probationary period as referred to in paragraph (1) must be included in the court's verdict.
 - 3) The 10-year probationary period commences one (1) day after the court's verdict becomes legally binding.
 - 4) If the convict, during the probationary period as referred to in paragraph (1), demonstrates praiseworthy conduct and behavior, the death penalty can be commuted to life imprisonment by a Presidential Decision after receiving the Supreme Court's consideration.
 - 5) Life imprisonment as referred to in paragraph (4) is counted from the date of the Presidential Decision.
 - 6) If the convict, during the probationary period as mentioned in paragraph (1), does not display praiseworthy conduct and behavior and there is no prospect of rehabilitation, the death penalty may be carried out upon the order of the Attorney General.

From the above regulations, it can be observed that the nature of the death penalty is no longer considered the primary punishment and is now regarded as a specific punishment, with the alternative imposition. The issue of legal certainty arises in Article 100 of the new Criminal Code. It states that an individual who has been sentenced to death by a court with a final and legally binding verdict can have their sentence commuted if they express remorse for their actions and demonstrate a potential for rehabilitation. In paragraph (4), it is mentioned that if the convict, during the probationary period as referred to in paragraph (1), displays praiseworthy conduct and behaviour, the death penalty can be commuted to life imprisonment by a Presidential Decision after receiving consideration from the Supreme Court.

What is the analysis, is this rule legally binding? From the wording of the article, it seems that the death penalty is imposed with significant uncertainty. Unlike the old Criminal Code, if guilt is proven and the death penalty is warranted, then the death

penalty must be executed without any doubt. Doubt in the application of the death penalty under the new Criminal Code is evident because it is subject to a 10-year probation period, taking into account the defendant's remorse and hope for rehabilitation, or the defendant's role in the criminal act. Furthermore, it includes paragraph (4), which explains that the imposition of the death penalty may be cancelled and replaced with a life sentence if the convict displays praiseworthy conduct during the 10-year probation period, indicating that the death penalty can be commuted to life imprisonment.

These articles are highly relative and can be considered as vague or subjective clauses. They can create room for potential abuse or manipulation of the legal system because, in reality, many convicts might be willing to do anything and pay substantial sums to avoid the death penalty. Especially for wealthy individuals, it may be relatively easy for them to engage in corrupt practices to be labeled as well-behaved convicts during their probation period. Now, who is qualified to judge if a convict is behaving well or praiseworthy? What are the criteria for evaluating good behavior and what does it mean to act praiseworthy? How can one's sincerity in performing good deeds be assessed? Can someone's thoughts and intentions be accurately judged by others? And how should the quantity or frequency of these good deeds be evaluated during a 10-year period?

Therefore, this article is considered highly relative and susceptible to becoming a legal transaction platform. The phrases "rasa penyesalan" (remorse) and "memperbaiki diri" (seeking self-improvement) have many interpretations, and these interpretations can vary depending on who is doing the interpretation. Hence, it can be said that the regulation of the death penalty in the National Criminal Code does not adhere to legal certainty. First, this is because the wording of the article in the National Criminal Code related to the death penalty can be applied not in line with the literal text due to many legal loopholes that can be exploited to benefit personal interests. Second, the articles in the National Criminal Code are uncertain, unclear, subject to multiple interpretations, and create doubts. Third, the regulation of the death penalty in this Criminal Code will also affect and generate contradictions with other regulations that address the death penalty. For instance, in the drug law and the law on corruption offenses, the death penalty is regulated without any probationary period and without any assessment of the convict's remorse or their behavior during probation. So, should all laws outside the Criminal Code that regulate the death penalty be amended to follow the provisions of the death penalty in the Criminal Code? This is why it is said that the rules regarding the death penalty in the new Criminal Code contradict other regulations.

CONCLUSION

From the discussion above, we can conclude that a legal regulation can be said to provide legal certainty if its implementation follows the law's provisions without considering who committed the act. The legal norm is written, existing, and definite. The legal norm is applied in an orderly, consistent, clear, and consistent manner and is not influenced by subjective factors in society. The legal norm is clear, does not raise doubts (multiple interpretations), and is logical without conflicting or causing conflicts with other norms because it becomes a unity among different norms.

Hence, it can be concluded that the regulation of the death penalty in the old Criminal Code provides more legal certainty because it is written, definite, clear, not

open to multiple interpretations, does not create doubts, aligns with the wording of the law, is logical, and does not conflict with other norms. On the other hand, the regulation of the death penalty in the new Criminal Code lacks legal certainty because it is unclear, subject to multiple interpretations, highly relative, susceptible to legal transactions, raises doubts, and is not in harmony with other legal regulations that deal with the death penalty.

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