

Legal Implications of the President’s Authority to Abolish the Death Penalty During the Trial Period Based on the Indonesian Criminal Code

Yusuf Kurniawan Abadi^{1)*}, Setiawan Noerdajasakti²⁾, Abdul Madjid³⁾
^{1,2,3)} Master of Law, Faculty of Law, Brawijaya University

*Corresponding Author

Email: yusufkurniawanabadi@gmail.com

Abstract

This research analyzes the juridical implications of Article 100 paragraph (4) of the New Indonesian Criminal Code, which grants the President the authority to convert the death penalty into life imprisonment after a probationary period. The research employs a normative juridical method with statutory and conceptual, supported by prescriptive analysis. The prescriptive analysis is used to assess the validity, consistency, and constitutional conformity of the provision, as well as to provide recommendations for its reformulation. The findings indicate that substantively, the provision reflects a reformist orientation of criminal law by redefining the death penalty as a conditional sanction that may be reconsidered on humanitarian grounds. However, constitutionally, the provision raises significant issues because it introduces a new form of presidential authority beyond the four powers explicitly regulated in Article 14 of the 1945 Constitution of the Republic of Indonesia (pardon, amnesty, abolition, and rehabilitation). Through prescriptive analysis, the study recommends a reformulation of Article 100 paragraph (4) to explicitly categorize it under the presidential pardon authority in line with the Constitution. In addition, a multilayered assessment mechanism should be introduced, involving correctional institutions, probation offices, an independent team, the Supreme Court, and ultimately the President. Such reformulation is expected to ensure transparency, accountability, and legal certainty, while aligning with the modern penal policy objective of resocialization.

Keywords: *Legal Implication, Death penalty, Presidential Authority.*

INTRODUCTION

The death penalty, or capital punishment, is commonly known and has been carried out by official legal institutions in many countries across the world, including Indonesia, where it remains a subject of significant public attention. Capital punishment is one form of law enforcement that has long been accompanied by controversy. It has been practiced globally since the Babylonian era and continues to this day, including in Indonesia, where it is still imposed on individuals convicted of serious crimes. (Arief, 2019).

The existence of the death penalty has been legitimized through Law No. 1 of 2023 concerning the new Indonesian Criminal Code, which regulates criminal sanctions in Indonesia. Law is created to regulate and safeguard the differing interests of individuals, society, and the state, ensuring these can coexist without harming one another. Law cannot be static; it must continuously adapt to society, particularly in the realm of public law, as it directly concerns the interests of the people and applies universally, serving as the highest standard for all Indonesian citizens. (Chazawi, 2011). According to Teguh Prasetyo, a criminal act is an unlawful deed committed with culpability by a person capable of bearing responsibility, for which the perpetrator may be punished.

Djoko Prakoso further explained that legal scholars base their arguments for or against capital punishment on rational and logical grounds. Within Indonesia’s Criminal Code, the death penalty is classified as a principal punishment and remains legally recognized to this day. It may be imposed on offenders as long as it falls within the jurisdiction of national law. The debate surrounding capital punishment persists due to conflicting norms within existing regulations. In this regard, Roeslan Saleh argued: “*The death penalty is a radical measure intended to eliminate*

individuals deemed beyond reform. It avoids the need to imprison them—an approach that requires substantial costs. Furthermore, it prevents risks to public safety should such individuals escape from prison and reoffend in society.”

The issue resurfaced in the New Criminal Code, which introduces presidential authority over the annulment of the death penalty. Article 100 clause (4) stipulates: *“If the convict, during the probationary period as referred to in paragraph (1), demonstrates commendable behavior and conduct, the death penalty may be commuted to life imprisonment by Presidential Decree after consideration by the Supreme Court.”*

This provision reflects a tendency toward expanding presidential power through legislative instruments. One example is the mitigation of the death penalty within the New Criminal Code, which will take effect in January 2026. The President is granted the authority to assess whether a convict has demonstrated “commendable behavior and conduct.” If so, upon the Supreme Court’s recommendation, the President may commute the death penalty to life imprisonment.

In a presidential system, the President—both as head of state and head of government—indeed holds judicial prerogatives, allowing intervention in judicial processes or decisions issued by the Supreme Court, as provided in Article 14 of the 1945 Constitution of the Republic of Indonesia. Such authority is not unusual in presidential systems. Alexander Hamilton, in *The Federalist Papers* of the United States, described this power as serving to correct judicial rulings under exceptional circumstances. (Cherry, 2021). However, in Indonesia, the question arises as to the nature of the President’s judicial authority under Article 100 clause (4) of the new Criminal Code: does it qualify as clemency, amnesty, rehabilitation, or abolition?

The Constitution limits presidential powers strictly to those expressly enumerated. In terms of judicial prerogatives, Article 14 of the 1945 Constitution grants the President the authority to grant clemency, rehabilitation, amnesty, and abolition. It should be emphasized, however, that Article 14 provides no room for expansion by statutory law, as it does not delegate such power to legislation. (Rannie, 2020). For clemency and rehabilitation, the President must consider the opinion of the Supreme Court, while for amnesty and abolition, consideration must be sought from the House of Representatives.

From a constitutional perspective, the commutation of the death penalty to life imprisonment under Article 100 clause (4) of the new Criminal Code appears to represent a “**new authority**” of the President, distinct from those stipulated in Article 14 of the 1945 Constitution. This power more closely resembles the concept of clemency or amnesty. By definition, clemency entails altering, mitigating, reducing, or annulling the execution of a punishment imposed on a convict by presidential decision. Yet, Article 100 clause (4) does not explicitly designate this as clemency, and clemency has already been regulated in Articles 99 and 101 of the New Criminal Code.

Moreover, clemency has its own separate statutory regulation outside the Criminal Code, and it must be requested by the convict, rather than being granted on the President’s subjective assessment. Thus, Article 100 clause (4) more closely resembles amnesty. Conceptually, amnesty is the granting of forgiveness or the annulment of a punishment by the President. Substantively, however, the provision does not eliminate the punishment but merely reduces its severity, from death to life imprisonment. (Tokoh et.al., 2024). Furthermore, amnesty requires consideration from the DPR, not the Supreme Court, as stipulated in Article 100 clause (4). Therefore, this provision cannot be classified as amnesty.

Sentence reduction in the Indonesian legal system may also occur through remission. However, under the Correctional Law, remission cannot be granted to convicts sentenced to life imprisonment or death. (Iswanto & Jeumpa, 2018). Thus, the President’s authority to commute the death penalty to life imprisonment represents a new power inserted into the New Criminal Code. In fact, there is no strong constitutional basis in the 1945 Constitution for the President to

delegitimize the death penalty. Article 100 clause (4) of the New Criminal Code therefore presents a normative conflict with the Constitution, as it grants the President authority that potentially violates Article 14 of the 1945 Constitution. Another legal issue arises in relation to Article 100 clause (3), which regulates the probationary period for death penalty convicts, as this concerns the prosecutorial authority in criminal execution. (Tokoh et al., 2024).

In carrying out its function related to judicial power, the Prosecutor's Office operates independently, as stipulated in Article 2 clause (1) of Law No. 11 of 2021 concerning Amendments to Law No. 16 of 2004 on the Prosecutor's Office of the Republic of Indonesia. This independence ensures that state powers, as mandated by Article 2 clause (1), are executed autonomously. Furthermore, the Prosecutor's Office is a governmental institution that performs functions connected to judicial authority independently. Its criminal law duties and powers are outlined in Article 30 clause (1) letter (b) and (c) of Law No. 11 of 2021, which states: "*The Prosecutor's Office is tasked and authorized to execute judicial decisions and verdicts that have obtained permanent legal force and to supervise the execution of conditional punishments, supervisory punishments, and parole decisions.*"

Next, there are several studies relevant to this topic, namely: First, a study written by Fransiscus Xaverius (Ade) Kapojos in 2021, in the conclusion of his research, he emphasized that the punishment of death in positive law and the reform of criminal law in Indonesia in relation to Article 100 paragraph (1) of the Draft Criminal Code must be viewed from the perspective of progressive law based on justice. (Kapojos, 2021) Second, research written by Rini Komala Wijaya in 2023, which only focuses on discussing the regulation of the implementation of the death penalty, which is currently still not based on values of justice in accordance with the values of Pancasila, then analyzes the shortcomings of the current implementation of the death penalty, and then seeks a form of regulation for the implementation of the death penalty based on the values of Pancasila justice. (R. K. Wijaya, 2023).

This study is indeed relevant to previous studies, except that the author's focus in this study is on the issue of the provisions of Article 100 paragraphs (3) and (4) of Law No. 1 of 2023 concerning the Criminal Code and the implications of the provisions of Article 100 paragraphs (3) and (4) of the New Criminal Code, which give the President the authority to reduce the status of a death row inmate to life imprisonment. It can be concluded that Article 100 of the New Criminal Code raises serious legal questions. These include normative conflict with Article 14 of the 1945 Constitution concerning the President's authority to commute the death penalty to life imprisonment (requiring Supreme Court consideration), and issues of legal certainty regarding prosecutorial authority to execute final court decisions. In practice, if a court ruling imposing the death penalty has obtained permanent legal force, the prosecutor must execute it. However, under this provision, such execution is suspended for ten years during the probationary period.

RESEARCH METHODS

This research is a type of normative (legal) research. According to Peter Mahmud Marzuki, in a conceptual/doctrinal framework, normative legal research is referred to as rule-based or dogmatic research, and naturally, this research is an inventory of positive law and contains prescriptive elements. (Marzuki, 2005). Furthermore, according to Jonaedi Effendi, the objects of normative legal research include legal principles, legal systems, and the level of vertical and horizontal synchronization. Therefore, in order to thoroughly examine the issues in this research, the researcher will present findings relevant to primary legal materials derived from legislation and secondary legal materials obtained from academic literature. (Jonaedi Efendi, 2018). The research approach used consists of a juridical approach and a conceptual approach.

RESULT AND DISCUSSION

Based on the analysis can describe more detail, as follows:

1. The Regulation on Capital Punishment under Article 100 of the New Criminal Code

One of the most extreme forms of sanctions in the criminal justice system is the death penalty, namely a punishment that deprives the offender of the most fundamental right in life, the right to live. The death penalty is the heaviest and most final form of punishment, because once imposed and executed, there is no longer any room for correction or restitution should an error in the judicial process later be discovered. (D. R. Arintonang & Elvandari, 2024). Therefore, the implementation of the death penalty raises highly complex moral, ethical, juridical, and philosophical dilemmas. On one hand, the death penalty is regarded as the most assertive and effective form of punishment in deterring crime and creating a sense of justice for victims and society. On the other hand, the death penalty is also considered a form of state-sanctioned violence, which contradicts the spirit of human rights, particularly the right to life as a fundamental right that cannot be diminished under any circumstances.

In the Indonesian context, the death penalty is still recognized as legal within the national legal system. The Criminal Code as well as several special laws, such as the Law on Narcotics, the Law on Terrorism, and the Law on Corruption Crimes, still provide for the death penalty as one of the punishments for offenders whose crimes are deemed extremely serious and dangerous to society or the state. This practice indicates that the state continues to place the death penalty as a repressive instrument to address crimes that threaten public order, public safety, and the survival of the nation. (Angraini et al., 2024).

Nevertheless, the existence of the death penalty in Indonesia's legal system has never been free from debate. This issue remains a heated topic that sparks lengthy discussions among academics, legal practitioners, human rights activists, religious figures, philosophers, and the general public. The arguments in this debate are diverse, ranging from juridical and philosophical to pragmatic considerations. Those who support the death penalty generally adopt a retributive justice perspective, holding that perpetrators of serious crimes deserve punishments proportionate to their actions. (Yogi Natanael Christanto, 2023). In cases such as premeditated murder, terrorism, or large-scale drug trafficking that causes many victims, the death penalty is regarded as the only punishment capable of providing moral satisfaction for the victims or their families, while also serving as protection for society from repeated threats.

Conversely, those opposing the death penalty adhere to universal human rights principles, which uphold the right to life as the most fundamental right. This group argues that the state should not possess the authority to take the life of its citizens, since there is no guarantee that the judicial system can always function perfectly without error. Moreover, the death penalty is also deemed ineffective as a deterrent, as no consistent empirical evidence shows that countries applying the death penalty have lower crime rates compared to those that have abolished it. (Anugrah & Desril, 2021). In addition, capital punishment may serve as a tool of political repression or abuse of power if not strictly controlled, and it is highly vulnerable to misuse, particularly in states where the legal system is not fully independent or free from intervention.

The polemic surrounding the death penalty in Indonesia reflects the complexity between idealism and reality, between human rights principles and the need to maintain social order, between demands for justice for victims and protection of the rights of offenders. This debate unfolds not only in academic and public discourse but also influences the direction of national legal policy, including in the transformation of the New Criminal Code regarding clemency and the execution of the death penalty as part of the President's prerogative. (Dewi, 2020). Indonesia thus stands at a crossroads between retaining the death penalty as a manifestation of legal

firmness against serious offenders or moving toward its abolition in order to uphold more universal humanitarian values.

With the enactment of the New Criminal Code through Law No. 1 of 2023, various perspectives have emerged. On one hand, the National Criminal Code is appreciated, but on the other, criticism has also been voiced, particularly concerning Article 100, which regulates the imposition of a ten-year probationary period for the death penalty, which may subsequently be converted into life imprisonment. The death penalty, in this sense, is always imposed as an alternative alongside life imprisonment. (Dewanto & Susanti, 2023).

Article 100 of the New Criminal Code is a norm laden with philosophical, juridical, and ethical content. Substantively, this provision reforms the traditional approach to capital punishment by shifting the orientation of Indonesia's criminal justice system from the classical retributive model toward a more rehabilitative and resocializing paradigm. In this provision, the death penalty is no longer imperative and final but becomes an alternative form of punishment, accompanied by the opportunity for the convict to demonstrate improved behavior during the ten-year probationary period. (Fitriani, 2023). If, during this period, the convict shows good conduct and there are significant mitigating considerations, the death penalty may be converted into life imprisonment. This mechanism creates juridical space for reducing the harshest punishment on humanitarian grounds while strengthening the judiciary's role in deeply assessing the personal circumstances of the convict.

For nearly 80 years, Indonesia applied the old Criminal Code inherited from the Dutch, namely Law No. 1 of 1946 on Penal Regulations. A fundamental difference between Law No. 1 of 2023 on the Criminal Code and Law No. 1 of 1946 on the Criminal Code lies in the placement of provisions concerning the death penalty. Researchers have identified differences in the regulation of capital punishment, which are presented in the table below:

Table 1.

Differences in the Provisions on the Death Penalty in the New and Old Criminal Code

| No | Law No. 1 of 1946 (Old Criminal Code) | Law No. 1 of 2023 (New Criminal Code) |
|----|--|---|
| 1. | The death penalty is categorized as a principal punishment. | The death penalty is no longer a basic punishment but is categorized as a special punishment. |
| 2. | There is no trial period for implementation. | The existence of a trial period in its implementation is regulated in Article 100. |
| 3. | Implemented after the President rejected the request for a garage. | Implemented if the convict behaves badly during the probation period. |

Source: Legal materials compiled by researchers

In the Old Criminal Code, the death penalty was classified as a principal punishment as stipulated in Article 10. The death penalty was regarded as the most severe form of punishment under Indonesia's positive law. In contrast, under the New Criminal, the death penalty is categorized as a special punishment that is always imposed alternatively. Referring to Article 67 of the New Criminal Code, the death penalty is a special punishment that must always be threatened as an alternative.

The death penalty, as a special form of punishment, is regulated under Articles 98 to 102 of the New Criminal Code. Not only is it designated as a special punishment, but the death penalty under the New Criminal Code is also accompanied by a probationary period of ten years. This probationary period serves as a consideration, with the expectation of behavioral change and

remorse on the part of the convicted person. Article 100 of the New Criminal Code states(Ariyanti, 2019):

- a. The judge shall impose the death penalty with a probationary period of ten (10) years by taking into account:
 - 1) The defendant's remorse and the expectation of self-rehabilitation; or
 - 2) The defendant's role in the criminal act;
 - 3) The death penalty with a probationary period as referred to in paragraph (1) must be stated in the court's judgment;
 - 4) The probationary period of ten (10) years begins one (1) day after the court's decision obtains permanent legal force;
 - 5) If during the probationary period as referred to in paragraph (1), the convicted person demonstrates commendable conduct and behavior, the death penalty may be commuted to life imprisonment by Presidential decision upon the consideration of the Supreme Court;
 - 6) Life imprisonment as referred to in paragraph (4) is calculated from the date the Presidential Decree is issued;
 - 7) If during the probationary period as referred to in paragraph (1), the convicted person does not demonstrate commendable conduct and behavior, and there is no expectation of rehabilitation, the death penalty may be carried out upon the order of the Attorney General.

The fundamental change in the 2023 New Criminal Code, particularly in Article 100 paragraph (4), can be regarded as a major paradigm shift in Indonesian criminal law. Whereas previously the death penalty was positioned as a principal and final punishment under the Old Criminal Code, it is now placed as a special punishment with a ten-year probationary period. This transformation not only affects the normative aspect but also disrupts the structure of the criminal justice system, as it compels all subsystems—police, prosecution, judiciary, correctional institutions, and even society—to adjust their working patterns, orientations, and philosophies in law enforcement.(Ariyanti, 2019). Under the Old Criminal Code, the death penalty was carried out immediately after the decision obtained permanent legal force, whereas under the New Criminal Code, a new space is created that places correctional institutions at the center of determining the convict's fate through long-term rehabilitation and evaluation processes.

In the earlier system, the judiciary was the dominant subsystem in determining the final legal journey of a death row convict. A judge's decision that had obtained permanent legal force (*inkracht*) was the final point, and once the final administrative procedures were completed, the execution was promptly carried out. This mechanism reflected a highly retributive criminal justice system, wherein the death penalty was seen as proportional punishment for extraordinary crimes, without offering any opportunity for rehabilitation or behavioral change.(Hatta, 2008). The police and prosecution merely performed technical functions in investigation, prosecution, and execution, while correctional institutions had virtually no role. In society's perception at the time, the death penalty represented swift and decisive justice, prioritizing punitive over corrective functions.

However, with the enactment of the New Criminal Code, the face of the criminal justice system has significantly changed. While judges may still impose the death penalty, its enforcement is no longer absolute. Judges are now required to consider the defendant's mental state, remorse, and potential for rehabilitation, thereby transforming the judiciary from being merely punitive into a space that offers the opportunity for life.(Adam Ilyas,

2024). At the implementation stage, the prosecution still holds administrative control, but due to the probationary period, it is also responsible for ensuring proper supervision and evaluation of the verdict's execution. The most crucial role, however, lies with correctional institutions, which are no longer merely facilities for serving sentences but also arenas for rehabilitation, resocialization, and behavioral assessment.(R. R. A. Wijaya & Subroto, 2021). Reports from correctional institutions will serve as the primary basis for determining whether a death row convict will have their sentence reduced to life imprisonment or ultimately face execution.

Thus, Article 100 of the New Criminal Code 2023 not only creates technical changes in criminal law, but also shows a major paradigm shift in the Indonesian criminal justice system. The death penalty is no longer merely an instrument of retribution, but rather an instrument that opens up space for balance between legal certainty, justice, and humanity. This change indicates that the criminal justice system is no longer confined to the (Appludnopsanji & Pujiyono, 2020). framework of punishment but also operates within the framework of rehabilitation, reintegration, and a more comprehensive moral assessment, where the role of each subsystem and society becomes increasingly important in maintaining justice that is not only legal-formal but also humanitarian and sustainable.

2. Juridical Implications of Presidential Authority Regarding the Abolition of the Death Penalty During a Probationary Period

The provision of Article 100 clause (4) of the New Criminal Code, which states: *“If the convict during the probationary period as referred to in paragraph (1) demonstrates commendable conduct and behavior, the death penalty may be converted into life imprisonment by Presidential Decree after obtaining consideration from the Supreme Court,”* essentially introduces a new legal construction that places the President as the authority holder to convert the death penalty into life imprisonment if, during the probationary period, the convict exhibits commendable conduct and behavior.

Upon closer examination, such a change of punishment is carried out through a Presidential Decree after first obtaining consideration from the Supreme Court. On one hand, this provision is intended as a manifestation of criminal law reform, particularly in efforts to ensure that the death penalty is no longer considered an absolute and final sanction, but rather a conditional punishment that may be reviewed.(Sukinto,2022). However, from a constitutional perspective, this provision raises serious juridical problems, especially regarding the constitutional limits of presidential authority.

In terms of its regulatory nature, this authority is closer to a pardon since it also concerns a modification of punishment. However, a pardon is in principle granted based on a “convict’s application” through a clear mechanism, whereas Article 100 paragraph (4) of the New Criminal Code makes the President’s decision dependent on an assessment of the convict’s attitude and behavior without establishing a formal application mechanism. This indicates that Article 100 paragraph (4) is not a pardon, but rather appears to constitute a new authority created by statute, thereby causing ambiguity.(Tobing, 2023).

Furthermore, Article 100 paragraph (4) does not clarify whether the reduction of sentence is based on the convict’s request, while the procedure for a pardon is clearly regulated in Law No. 22 of 2002 concerning Pardons, particularly in Article 2, which states: *“(1) Against a court decision that has obtained permanent legal force, the convict may submit a request for a pardon to the President. (2) Sentences that may be requested for pardon as referred to in paragraph (1) include the death penalty, life imprisonment, and imprisonment of not less than 2 (two) years.”*

On the other hand, this provision also cannot be categorized as an amnesty, because amnesty abolishes criminal acts with the consideration of the House of Representatives, whereas Article 100 paragraph (4) merely changes the form of punishment and only requires consideration from

the Supreme Court. Not can it be considered an abolition, since abolition functions to terminate judicial proceedings before a final judgment is reached, while this provision applies after a judgment has permanent legal force.(Mandala, 2021). Likewise, it cannot be regarded as rehabilitation, as rehabilitation only restores a person's good name without affecting the substance of punishment. Therefore, the presidential authority established under Article 100 paragraph (4) of the New Criminal Code is essentially a new form of power not regulated under Article 14 of the 1945 Constitution, and thus may be deemed unconstitutional.

In the context of normative conflict, Hans Kelsen, through his Stufenbau theory, explains that the legal system is like a hierarchy of norms, characterized by graded levels of legal rules in which the relationship between one law and another is a super-subordination relationship. A norm that determines the formation of another norm is a superior norm, while the norm formed is an inferior norm. The creation of norms determined by a higher-level norm provides justification for the validity of the entire legal order as a unified whole.(Syuhada, 2020). Therefore, lower-level legal norms must always refer to and align with higher-level legal norms. Furthermore, Kelsen argues that the most fundamental legal norm is increasingly abstract and requires further elaboration through subordinate legal norms as implementing regulations.

In addition, Hans Kelsen views law as a dynamic norm, meaning that law is something formed through specific procedures, and anything created through such procedures is considered law. This hierarchical theory of legislation by Hans Kelsen was further developed by one of his students, Hans Nawiasky, through his theory often referred to as the *Theorie von Stufenbau der Rechtsordnung*. Rooted in the theoretical perspective above, the validity of a legal norm is assessed from higher norms until it reaches the *grundnorm* as the highest basic norm.

In the Indonesian context, the *grundnorm* is the 1945 Constitution of the Republic of Indonesia. This means that every legal norm, whether in the form of laws or other regulations, is only valid if it is consistent (harmonized) with the 1945 Constitution. Article 14 of the 1945 Constitution explicitly stipulates four forms of presidential authority in the judicial field, namely pardon, amnesty, abolition, and rehabilitation.(Huda, 2024). Thus, constitutionally, the President's authority is limitative and cannot be expanded by laws enacted beneath it. The existence of Article 100 paragraph (4) of the New Criminal Code, which grants the President the authority to change the death penalty into another punishment after a probationary period based on the consideration of the Supreme Court, in fact, raises issues because it is unclear whether this norm constitutes a pardon or creates a new category beyond the four types of clemency provided in the Constitution. From Kelsen's theory of the hierarchy of norms, it can be affirmed that this norm is not derived from the 1945 Constitution, thereby casting doubt on its validity. If a norm does not comply with a higher norm, it risks losing its legal legitimacy.(Sinaga, 2020).

The juridical implications can be explained as the legal consequences arising from an act, policy, regulation, or decision. In regulatory terms, the provision of Article 100 paragraph (4) creates a contradiction with Article 14 of the 1945 Constitution as the supreme law, while also touching on fundamental principles of criminal law, namely the principles of *lex certa* and *lex stricta*. The principle of *lex certa* requires criminal norms to be formulated clearly, firmly, and without ambiguity.(Hardjanti, 2022). However, Article 100 paragraph (4) generates uncertainty, since it is unclear whether the commutation of the sentence falls within the regime of pardon, amnesty, abolition, or rehabilitation. This ambiguity results in procedural uncertainty, both for convicts who wish to exercise their rights and for law enforcement officials who must implement the provision. Consequently, this norm potentially violates the principle of legal certainty, which is an absolute prerequisite for the enforcement of criminal law.

Meanwhile, the principle of *lex stricta* emphasizes that criminal law must not be interpreted broadly or expanded beyond what is explicitly determined by statute. Criminal norms must be strict and restrictive. Article 100 paragraph (4) of the New Criminal Code instead opens room for excessive interpretation, as the President's commutation of the death penalty may be regarded

as a form of pardon, yet its procedure does not follow the mechanism of pardon as regulated in Law No. 22 of 2002 concerning Pardon. This situation creates a gap for interpretation beyond the limits of *lex stricta*, since authority that should be limitative may evolve into a new form of power not recognized in the Constitution.(Sharon, 2020).

Accordingly, from the foregoing explanation, it is evident that the juridical implications of Article 100 paragraph (4) of the New Criminal Code are ambivalent. Substantively, this norm may be viewed as progressive within the framework of respecting human rights, yet formally it gives rise to constitutional problems by creating new presidential authority not recognized under the 1945 Constitution. The absence of a constitutional basis, the vagueness of normative criteria, and the potential for executive intervention in judicial decisions make this provision vulnerable to judicial review before the Constitutional Court.

According to the researcher, should this provision be reviewed by the Constitutional Court, annulment of the article is highly possible on the grounds of unconstitutionality. Such a situation would not only create juridical complexity but could also lead to serious practical implications, such as confusion in the enforcement of the death penalty, delays in execution, or uncertainty regarding the fate of convicts undergoing a probationary period.

Thus, theoretically according to Kelsen, a norm that does not derive its validity from a higher norm cannot be considered legitimate. Juridically, within the framework of criminal law, Article 100 paragraph (4) not only contradicts the 1945 Constitution but also violates fundamental principles of criminal law—*lex certa* and *lex stricta*—ultimately creating legal uncertainty about its meaning, the risk of *ultra vires*, and disruption of the balance of powers within the rule of law.(D. M. Aritonang, 2021).

The juridical implications created are highly multidimensional. On the one hand, the norm reflects a desire to provide a humanitarian space and correction to the death penalty through a conditional elimination mechanism. On the other hand, the provision seriously raises constitutional problems because it expands presidential authority beyond the constitutional mandate, creates conceptual uncertainty, and risks generating disharmony among norms. Ultimately, the implementation of this article may become a crucial point in the relationship between statutory law and the 1945 Constitution, serving as a test for the consistency of Indonesia as a rule-of-law state that places the Constitution as the supreme law of the land.(Mahmud, 2021).

From the perspective of the theory of authority, tensions arise between the source of constitutional authority and authority granted through statutory attribution. If the New Criminal Code is interpreted as granting the President new attribution to abolish the death penalty, a serious problem emerges, since laws do not have the power to create new authority outside the framework of the Constitution. In other words, statutory law may not create new forms of presidential authority not stipulated in the 1945 Constitution. This is explicitly reinforced in Article 4 paragraph (1) of the 1945 Constitution, which states: “The President of the Republic of Indonesia shall hold executive power in accordance with the Constitution.”

Therefore, if such authority is nevertheless implemented, then theoretically it risks being invalid because it contradicts the principle that presidential authority must be derived from the highest norm, namely the Constitution (the 1945 Constitution). Conversely, if this mechanism is forced to be understood as part of the power of pardon, then a new conceptual problem arises in the form of inconsistency. Pardon, in its classical sense, is individual in nature, granted upon request, and not bound by a probationary period. Meanwhile, the commutation of the death penalty in Article 100 paragraph (4) is automatic after evaluation of a certain probation period.(Sharon, 2020). According to the researcher, this creates categorical confusion: can the President’s act of commutation still be called a pardon, or is it something entirely different?

This lack of clarity ultimately produces normative ambiguity that affects the legitimacy of presidential action. Within the framework of the theory of authority, an action lacking a clear source of attribution risks losing its juridical legitimacy. Law enforcement authorities will face

difficulties in placing the abolition of the death penalty within a consistent legal system, since there is a conflict between the nature of authority granted by the New Criminal Code as statutory law and the limits of authority set forth by the 1945 Constitution.

Moreover, this ambiguity reveals uncertainty concerning the origin of authority. The theory of authority teaches that every authority must be traceable to its source hierarchically, whether from constitutional attribution, delegation, or mandate. In this case, Article 100 paragraph (4) of the New Criminal Code creates a form of authority whose origin is difficult to define. It cannot be categorized as constitutional attribution because the 1945 Constitution does not recognize post-probation abolition of the death penalty. It also cannot be classified as delegation, since no other state organ has transferred such authority to the President. Nor can it be understood as a mandate, because the authority is exercised directly by the President, not on behalf of another party.

Therefore, theoretically, the authority in Article 100 paragraph (4) of the New Criminal Code exists in a gray area that creates serious conceptual problems. This authority seems to stand between two regimes: first, on one hand it resembles a pardon but lacks its juridical characteristics; second, it appears as a new attribution by statutory law, but contradicts the logic of hierarchical authority, particularly in the context of delegated regulation. This ambiguity results in legal uncertainty, as it is unclear whether the President's action under this provision can be held accountable within the framework of the prevailing theory of authority. Hence, to create a clearer regulation, a reformulation of Article 100 paragraph (4) is required with greater precision, Namely:

Table 2.
Reformulation of Provisions in the New Criminal Code
Amendments to Law No. 1 of 2023 on the Criminal Code

| Provisions that need to be changed | Proposed Editorial Changes |
|--|---|
| Article 100 Clause (4): If the convicted person during the probation period as referred to in clause (1) demonstrates commendable behavior and conduct, the death penalty may be commuted to life imprisonment by Presidential Decree after consideration by the Supreme Court. | Article 100 Clause (4): If the convicted person during the probation period as referred to in clause (1) has a commendable attitude and behavior, <u>Convicted persons may apply for clemency to the President, which is granted by Presidential Decree after consideration by the Supreme Court.</u> |

Source: Legal materials compiled by researchers

Table 3.

Regulations on the Assessment Mechanism for Death Row Inmates in Government Regulations

| Stage | Competent authority | Form of Assessment | Product |
|------------------------|--|--|--|
| Preliminary Assessment | Correctional Institution | <ul style="list-style-type: none"> - Observation of daily behavior; - Discipline; - Participation in coaching programs; - Regret for criminal acts | Attitude and Behavior Assessment Report. |
| Verification | Probation Office (BAPAS) | <ul style="list-style-type: none"> - Social research (litmas); - Social and psychological assessment; - Analysis of potential for resocialization | BAPAS Verification Recommendations |
| Independent Assessment | Independent Assessment Team (Ministry of Law and Human Rights, Academics/Experts, Psychologists, National Human Rights Commission) | <ul style="list-style-type: none"> - Evaluation Hearing; - Objective feasibility test based on Lapas & BAPAS reports | Independent Assessment Results |

Source: Legal materials compiled independently by the researcher.

At present, Article 100 clause (4) does not provide clear legal parameters for assessing such attitudes and conduct, which, in the researcher’s view, may result in disparities of treatment among convicts and create the potential for abuse of authority. In this context, the President is granted a very broad scope to interpret the standard of eligibility, thereby threatening the principle of equality before the law. Accordingly, the proposed amendment as outlined in the tabulation above seeks to reformulate Article 100 clause (4) so that it explicitly constitutes a presidential power of clemency in accordance with Article 14 of the 1945 Constitution of the Republic of Indonesia, while also emphasizing the importance of a Government Regulation as its implementing instrument to further clarify the mechanism. This ensures that the commendable conduct and behavior of a convict are no longer assessed solely on the President’s subjective judgment, but rather through a layered and structured process.

The process begins with the Correctional Institution (Lapas), which directly observes the convict’s behavior and personal development during the sentence, followed by the Correctional Advisory Board (BAPAS), which provides a data-based social assessment and recommendation. Thereafter, an Independent Team composed of experts or respected community figures with integrity conducts an objective evaluation of the eligibility for clemency. Finally, the Supreme

Court offers judicial considerations that are decisive in assessing the legality and propriety of the request.

Only after all these stages are carefully undertaken and produce supportive results may the President consider and decide on the granting of clemency upon the convict's application. This process not only ensures transparency and accountability in the exercise of clemency but also guarantees legal certainty and prevents abuse of power. Furthermore, such a system aligns with modern principles of criminal justice, which are not merely retributive in nature but also oriented toward resocialization—restoring individuals to society as better and more responsible persons.

CONCLUSION

The provision of Article 100 paragraph (4) of the New Criminal Code, which grants the President the authority to convert the death penalty into life imprisonment after a probationary period, gives rise to serious juridical implications. Substantively, this rule is intended as a reform of criminal law to reframe the death penalty not as an absolute sanction, but as a conditional punishment that may be reconsidered on humanitarian grounds. However, constitutionally, this norm is problematic because it creates a new form of presidential authority beyond the four limited powers explicitly regulated under Article 14 of the 1945 Constitution of the Republic of Indonesia (pardon, amnesty, abolition, rehabilitation). From the perspective of Hans Kelsen's and Hans Nawiasky's theory of norms, every legal norm must derive its validity from a higher norm. Since Article 100 paragraph (4) lacks a constitutional basis, its validity is questionable. Furthermore, this provision violates the principles of *lex certa* and *lex stricta*, as it fails to provide clarity on whether the mechanism falls within the regime of pardon or constitutes a new authority, thereby creating ambiguity and legal uncertainty.

From the perspective of the theory of authority, the attribution of powers can only be granted by the Constitution, not by statutory law. Accordingly, the attribution conferred by the New Criminal Code upon the President is potentially *ultra vires* (beyond authority) and unconstitutional. This ambiguity not only undermines the legitimacy of presidential actions but also creates confusion in criminal sentencing and the implementation of death penalty executions. To address this problem, the study recommends a reformulation of Article 100 paragraph (4) so that it is clearly categorized as part of the presidential pardon authority in accordance with the 1945 Constitution, and complemented by a multilayered assessment mechanism involving correctional institutions, probation offices, an independent team, the Supreme Court, and ultimately the President. Such a process would ensure greater transparency, accountability, and legal certainty, while remaining consistent with the goals of modern punishment that prioritize resocialization.

REFERENCES

- Adam Ilyas. (2024). *Hukum Acara Pidana: Dari Penyelidikan Hingga Eksekusi Putusan*. Pt. Rajagrafindo Persada-Rajawali Pers.
- Anggraini, R. M., Maksun, M., & Dewi, A. P. (2024). Perspektif Ham Dan Maqashid Syari'ah Dalam Meninjau Kebijakan Hukuman Mati Dalam Undang Undang No. 1 Tahun 2023 Tentang Kuhp. *El-Dusturie*, 3(2), 164–182.
- Anugrah, R., & Desril, R. (2021). Kebijakan Formulasi Pidana Mati Dalam Pembaharuan Hukum Pidana Indonesia. *Jurnal Pembangunan Hukum Indonesia*, 3(1), 80–95.

- Appludnopsanji, A., & Pujiyono, P. (2020). Restrukturisasi Budaya Hukum Kejaksaan Dalam Penuntutan Sebagai Independensi Di Sistem Peradilan Pidana Indonesia. *Sasi*, 26(4), 571–581.
- Arief, A. (2019). Problematika Penjatuhan Hukuman Pidana Mati Dalam Perspektif Hak Asasi Manusia Dan Hukum Pidana. *Kosmik Hukum*, 19(1).
- Aritonang, D. M. (2021). Kompleksitas Penegakan Hukum Administrasi Dan Pidana Di Indonesia. *Jurnal Legislasi Indonesia*, 18(1), 45–58.
- Aritonang, D. R., & Elvandari, S. (2024). Studi Perbandingan Terhadap Rumusan Pidana Mati Pada Kitab Undang Undang Hukum Pidana Dengan Undang Undang Nomor 01 Tahun 2023 Tentang Kitab Undang Undang Hukum Pidana. *Delicti: Jurnal Hukum Pidana Dan Kriminologi*, 2(1), 1–15.
- Ariyanti, V. (2019). Kebijakan Penegakan Hukum Dalam Sistem Peradilan Pidana Indonesia. *Jurnal Yuridis*, 6(2), 33–54.
- Chazawi, A. (2011). *Pelajaran Hukum Pidana 3*.
- Cherry, K. B. (2021). Eksistensi Pidana Mati Dalam Tindak Pidana Korupsi Menurut Undang-Undang Nomor 31 Tahun 1999 Jo. Undang-Undang Nomor 20 Tahun 2001 Kaitannya Dengan Hak Asasi Manusia. *Lex Crimen*, 10(2).
- Dewanto, D. R., & Susanti, R. (2023). Hukuman Mati Menurut Undang-Undang Nomor 1 Tahun 2023 Tentang Kitabundang-Undang Hukum Pidana Dalam Perspektif Hak Asasi Manusia. *Wijayakusuma Law Review*, 5(1), 64–70.
- Dewi, N. K. R. K. (2020). Keberadaan Pidana Mati Dalam Kitab Undang-Undang Hukum Pidana (Kuhp). *Jurnal Komunikasi Hukum (Jkh)*, 6(1), 104–114.
- 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.
- Hardjanti, D. K. (2022). Mengkaji Ulang Pembatasan Kekuasaan Presiden Dan Penguatan Kekuasaan Dpr Dalam Undang-Undang Dasar Negara Republik Indonesia Tahun 1945. *Diversi: Jurnal Hukum*, 8(2), 380–405.
- Hatta, M. (2008). *Sistem Peradilan Pidana Terpadu*. Galangpress Group.
- Huda, N. (2024). *Politik Hukum Dan Pembangunan Sistem Hukum Nasional*. Sinar Grafika.
- Iswanto, H., & Jeumpa, I. K. (2018). Tinjauan Yuridis Mengenai Pemberian Amnesti Terhadap Pelaku Tindak Pidana Selain Makar. *Dalam Jurnal Bidang Hukum Pidana*, 2(1).
- Jonaedi Efendi, J. I. (2018). *Metode Penelitian Hukum: Normatif Dan Empiris*. Prenada Media.
- Mahmud, A. (2021). Problema Pidana Mati Terhadap Pelaku Tindak Pidana Narkotika Dalam Sistem Hukum Indonesia. *Jurnal Hukum & Pembangunan*, 51(2), 456–471.
- Mandala, M. M. (2021). Prinsip Mengenali Pengguna Jasa Bagi Notaris Menurut Peraturan Menteri Hukum Dan Hak Asasi Manusia Nomor 9 Tahun 2017. *Officium Notarium*, 1(2), 317–326.
- Marzuki, P. M. (2005). *Penelitian Hukum*.
- Rannie, M. (2020). Hak Prerogatif Presiden Di Indonesia Pasca Perubahan UUD 1945. *Simbur Cahaya*, 98–117.
- P. I. N. I. C. L. A. W., & Kapojos, F. X. A. D. E. (2021). *Perspektif Hukum Progresif Terhadap Hukuman Mati Dalam Pembaharuan Hukum Pidana Di Indonesia*.
- Rizkia, N. D., & Fardiansyah, H. (2023). *Metode Penelitian Hukum (Normatif Dan Empiris)*. Penerbit Widina.
- Sharon, G. (2020). Teori Wewenang Dalam Perizinan. *Jurnal Justiciabelen*, 3(1), 50–63.
- Sinaga, D. (2020). Implikasi Yuridis Terkait Peran Notaris Dalam Pengesahan Perjanjian Perkawinan Di Indonesia Pasca Putusan Mahkamah Konstitusi Nomor 69/Puu-Xiii/2015. *Jurnal Hukum De'rechtsstaat*, 6(2), 99–111.

- Sukinto, I. Y. W. (2022). *Tindak Pidana Penyelundupan Di Indonesia: Kebijakan Formulasi Sanksi Pidana*. Sinar Grafika.
- Syuhada, O. (2020). Rekonstruksi Positivisme Dalam Hierarki Peraturan Perundang-Undangan Di Indonesia. *Journal Presumption Of Law*, 2(2), 1–23.
- Tobing, S. A. S. L. (2023). Pemberian Grasi Terhadap Terpidana Mati Pengedar Narkotika. *Jurnal Global Ilmiah*, 1(2), 101–107.
- Tokoh, A. G., Yohanes, S., & Udju, H. R. (2024). Wewenang Presiden Dalam Pemberian Grasi Kepada Terpidana Warga Negara Asing:(Studi Kasus Pemberian Grasi Oleh Presiden Ke Enam Republik Indonesia, Susilo Bambang Yudhoyono Kepada Schapelle Corby; Dalam Kasus Penyelundupan Ganja Dari Australia). *Jurnal Hukum, Politik Dan Ilmu Sosial*, 3(2), 279–294.
- Wijaya, R. K. (2023). *Rekonstruksi Regulasi Eksekusi Pidana Mati Yang Berbasis Nilai Keadilan Pancasila*. Universitas Islam Sultan Agung (Indonesia).
- Wijaya, R. R. A., & Subroto, M. (2021). Analisis Hukuman Mati Di Indonesia Di Tinjau Dari Prespektif Hak Asasi Manusia. *Rio Law Jurnal*, 2(2), 33–42.
- Yogi Natanael Christanto. (2023). *Quasi Abolisionisme Dan Transformasi Hukum: Implikasi Implementasi Uu No. 1 Tahun 2023*. Penerbit Adab.