

The Existence of the Death Penalty Sanction for Narcotics Criminal Acts Following the Enactment of Law Number 1 of 2023 on the Criminal Code

Surya Oktarina

dosen00247@unpam.ac.id

Faculty of Law, Universitas Pamulang, Indonesia

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Abstract

*The enactment of Law Number 35 of 2009 on Narcotics introduced provisions imposing the death penalty for certain offences, while Law Number 1 of 2023 on the Criminal Code (KUHP) also regulates narcotics-related crimes under Articles 609, 610, and 611, with Article 610(2)(a) and (b) specifying the death penalty. This creates a conflict between the Narcotics Law, as a *lex specialis*, and the new Criminal Code, raising questions about the continued application of the death penalty for narcotics cases. Using a sociological and juridical-empirical approach, this research analyses the issue through the legal responsibility theory (grand theory), penal objectives theory (middle range theory), and applied theories of legal effectiveness, legal certainty, and criminal law politics. The findings reveal that the death penalty remains part of Indonesia's narcotics eradication strategy, aimed at deterrence, despite human rights concerns. Under Article 100 of the new Criminal Code, the death penalty is now an alternative sanction with a 10-year probation period, during which good behaviour may lead to commutation to life imprisonment by presidential decree. However, ambiguities exist regarding the authority to assess behaviour and the probation period's alignment with criminal justice objectives, especially as narcotics trafficking remains a severe issue. The study concludes that the death penalty still exists but recommends harmonising the Narcotics Law and the Criminal Code to ensure legal certainty in its implementation.*____

1. Introduction

The history of Indonesian criminal law is intrinsically linked to the evolution of Indonesian society, which has undergone distinct phases: the era of kingdoms, the period under Dutch colonial rule, and the post-independence era. The introduction of modern Indonesian criminal law began during Dutch colonisation. Traditional laws, known as *adat* laws, continued to exist in society without formal recognition by the Dutch administration, encompassing both pre-existing and evolving norms. These laws reflected the moral and ethical values regarded as fundamental truths by each community or nation. Such truths shaped societal views on what is considered good or bad, right or wrong, proper or improper, acceptable or unacceptable, and just or unjust. These values, rooted in shared beliefs and aspirations, became the foundation for organising social, national, and state life. The adherence to these truths was voluntary and grounded in collective awareness rather than compulsion.

From this perspective, it is not an overstatement to assert that a sound legal system must be constructed upon the values prevailing within society and the principles recognised as universal truths. When laws are established based on these societal values and acknowledged truths, they will be upheld voluntarily and with full awareness, rather than through coercion.

Looking back, the foundational idea of Indonesia as a state governed by law, as explicitly stated in the 1945 Constitution, is inherently inseparable from the role of *Pancasila* as the state philosophy, the source of all legal principles, and the spirit of the Indonesian nation. *Pancasila* embodies the essence of the Indonesian legal system, as it serves as the nation's philosophy and encapsulates "*de zin van wereld en leven*" (the meaning of the world and life). As such, *Pancasila* has been universally accepted as the philosophy of the Indonesian people, with its truth requiring no further validation. Consequently, all activities and efforts in building the Indonesian state and society must be rooted in *Pancasila*, encompassing all fields—law, education, economy, arts, governance, and beyond.

The Indonesian worldview, which connects the relationship between humans and God, humans with one another, and humans with the universe, providing individual conviction within society, is embodied in *Pancasila*. It is only fitting that Indonesia's legal system should be rooted in *Pancasila* as the nation's ideology and the ultimate source of all laws. This implies that every regulation in Indonesia must be derived from *Pancasila*, ensuring it serves as the foundation of all legal norms.

For nearly a century, the Criminal Code (KUHP), originally a product of Dutch colonial law, has been in effect in Indonesia. Enacted through Law No. 1 of 1946, the *Wetboek van Strafrecht* (WvS) was applied with modifications and later formalised nationwide under Law No. 73 of 1958. The WvS itself was influenced by France's *Code Penal* due to France's occupation of the Netherlands for approximately three

years.

The aspiration to establish a national Criminal Code (KUHP) drafted by Indonesians, drawing from Indonesia's own legal traditions while integrating modern developments in criminal law, has long been articulated. Notably, there are significant structural differences between the old and new Criminal Codes. The former comprises three books: general provisions, crimes, and violations, while the latter consists of only two: general provisions and criminal acts. A fundamental distinction lies in the treatment of the death penalty. In the old KUHP, it was categorised as a primary punishment, whereas in the new KUHP, it is no longer classified as such.

Narcotics are substances or drugs used in medicine, scientific development, and healthcare services. However, they can cause dangerous addiction and dependency if misused or consumed without strict supervision by authorised parties. This becomes even more hazardous with the presence of illegal narcotics circulation within society, which can disrupt social structures, erode cultural values, and ultimately weaken national resilience.

The current state of narcotics abuse and illicit trafficking is deeply concerning. Originally intended for medical purposes, narcotics have increasingly led to addiction among users or victims. One alarming development is the rise of illegal narcotics trade, which has made drug-related crimes an international issue threatening humanity. As Siswanto observed (Totomutu, 2021):

"Today, both Indonesian society and the global community face an alarming situation due to the increasing misuse of various narcotics. This concern is further heightened by the widespread illicit trafficking of narcotics within society, including among the younger generation. This phenomenon profoundly impacts the future of the nation and state, as the younger generation is the successor of the nation's and state's aspirations." Such conditions highlight the urgent need for comprehensive efforts to combat narcotics abuse and illegal trade to safeguard societal values and the nation's future.

Viewed universally, narcotics-related crimes cause significant harm to society and the state. The urgency of imposing the death penalty on perpetrators of such crimes stems from their extensive and detrimental impacts, including widespread victimisation, substantial costs for rehabilitation and law enforcement, the destruction of the younger generation, and damage to the fundamental pillars of societal and national life. Empirical data show that the number of victims affected by narcotics crimes continues to rise, resulting in both physical and psychological implications not only for individual users but also for society at large.

In the context of public protection, narcotics crimes require swift and specialised handling due to their extensive and far-reaching consequences. The international

community is acutely aware of these impacts, as reflected in international legal frameworks. Article 6(1) of the *International Covenant on Civil and Political Rights* (ICCPR), ratified by Indonesia through Law No. 12 of 2005, categorises narcotics crimes as among the "most serious crimes." This recognition underscores the need for stringent measures to combat such offences, given their profound implications for the well-being and stability of society.

Article 6(1) of the *International Covenant on Civil and Political Rights* (ICCPR) establishes an exception under Article 6(2), which allows for the death penalty exclusively for the "most serious crimes." However, determining what constitutes "most serious crimes" varies based on differing benchmarks. International law outlines the following characteristics of such crimes: (1) Grave and Atrocious Acts: Crimes that are heinous and brutal, shocking the conscience of humanity and posing a threat to international peace and security. (2) Deliberate, Systematic, and Extensive Harm: Acts intentionally and systematically designed to cause death or other extremely serious consequences. (3) Severe Impact on State and Society: Criminal acts with far-reaching effects, such as disrupting public order, committing large-scale economic crimes, employing execution methods that are inhumane (e.g., extremely brutal practices), and posing threats or causing significant harm to national security and public welfare (Sefriani, 2013). The dangers of narcotics abuse extend beyond individual drug users, leading to broader consequences that disrupt the social order. This abuse produces profound and complex impacts, affecting not only the individuals involved but also their families, communities, the social environment, and the nation as a whole. Such wide-ranging consequences highlight the severity of narcotics-related offences, which meet the criteria for the "most serious crimes" under international standards.

Article 6(1) of the *International Covenant on Civil and Political Rights* specifies that the death penalty may only be applied to the "most serious crimes." The interpretation of "most serious crimes" varies, but narcotics offences, particularly those involving drug traffickers, align with the outlined characteristics of such crimes. These acts are heinous, brutal, and profoundly shocking to the conscience of humanity. Considering this, it becomes evident that the impacts of narcotics offences are immense and far-reaching. Such crimes do not only affect individual users but also have broader consequences on public health, including physical, psychological, and even spiritual well-being. When narcotics-related crimes occur, they generate harm on a large scale, affecting not just the perpetrators and users but also society at large. This underscores the urgent need to address and prevent narcotics-related offences comprehensively. According to statistical data from the official website of the National Narcotics Agency (BNN), the number of narcotics-related cases and suspects uncovered by the police and BNN has increased over the past five years, with 2020 recording the highest number of cases compared to previous years (BNN, 2023). This alarming trend raises serious concerns about the future of the younger generation, as well as the nation and the state.

The misuse of narcotics has continued to rise year by year, as reflected in the increasing prevalence rates of narcotics abuse. During the 2019–2021 period, the one-year prevalence rate increased by 0.15%, from 1.80% in 2019 to 1.95% in 2021. This rise is significant when viewed in absolute terms, with an estimated 3,662,646 people aged 15–64 abusing narcotics within the past year—a rise of 243,458 people compared to 2019's figure of 3,419,188. Similarly, the lifetime prevalence rate of narcotics abuse also rose by 0.17%, from 2.4% in 2019 to 2.57% in 2021. In absolute terms, approximately 4,827,616 people aged 15–64 were estimated to have used narcotics at least once by 2021, representing an increase of 292,872 individuals compared to the 4,534,744 recorded in 2019. This increase in prevalence rates indicates a significant rise in the circulation of narcotics within society, resulting in a growing number of narcotics users in just two years. The data is illustrated in the table below, highlighting the trends in narcotics abuse prevalence rates.

Table 1
Prevalence Rate of Narcotics Abuse (2017–2022)
Past-Year Narcotics Use

No	Year	Total Population	Number of Ausers (Indv)	(%)	Description	Source
1	2017	179.200.000	3.376.115	1.77	--	https://ppid.bnn.go.id/konten/unggahan/2020/10/hasil_lit_bnn_2017.pdf
2	2018				Data for Past-Year Narcotics Use Abusers Not Found, Data for 3,811,529 in the Student and Worker Categories Found, but Not Universal	https://ppid.bnn.go.id/konten/unggahan/2020/10/SURVEI-PENYALAHGUNAAN-DAN-PEREDARAN-GELAP-NARKOBA-TAHUN-2018.pdf
3	2019	186.616.874	3.419.188	1.8	--	https://ppid.bnn.go.id/konten/unggahan/2021/01/Infografis-Survei-Prevalensi-Penyalahgunaan-Narkoba-Tahun-2019.pdf
4	2020				Past-Year Narcotics Use Abuser Data Not Found	
5	2021	187.513.456	3.662.646	1.95	--	https://puslitdatin.bnn.go.id/konten/unggahan/2022/07/SURVEI-NASIONAL-PENYALAHGUNAAN-NARKOBA-TAHUN-2021-1.pdf
6	2022				Past-Year Narcotics Use Abuser Data Not Found	https://puslitdatin.bnn.go.id/konten/unggahan/2023/07/IDR-2023-FIX_English.pdf

Diagram 1



Reflecting on the parameters above, the death penalty provision in the Narcotics Law holds legal force and can adapt to international conventions. By including and maintaining the death penalty, it serves as a preventive measure, both for individuals and the public, in a general and concrete sense.

In the 2009 Narcotics Law (Law No. 35), various criminal sanctions are outlined, including fines, imprisonment, and the death penalty. Indonesia has entered into agreements concerning the death penalty in cases of drug abuse. In 2021 alone, nearly 114 individuals were sentenced to death in Indonesia, with 94 or 82% of those sentences handed down for drug-related crimes (Pramuditya, 2018). This figure is close to the 117 death sentences issued in 2020, some of which have already been carried out. As of April 2022, at least 46 death sentences remain, with one being commuted to a life sentence, while the others are awaiting execution.

Nevertheless, despite the numerous death sentences handed down to narcotics offenders, it has not proven to be a deterrent. This is evidenced by the rising number of narcotics abuse cases each year. In 2019, there were 3.41 million suspects, and this figure increased to 3.66 million suspects by 2021 (Savitri, 2022). Observations show that the most commonly abused narcotics are marijuana, methamphetamine (shabu), and ecstasy. Approximately 40-50 users are reported to die from drug-related causes every day. Additionally, the economic and social losses resulting from narcotics abuse are estimated to reach Rp. 63 trillion annually. The number of death sentences in Indonesia in 2021 was also among the highest in the Asia-Pacific region. However, at the same time, an increasing number of countries, including neighbouring nations, have taken steps to abolish the death penalty.

Given the facts and the continued increase in the circulation of narcotics, which involves a large number of victims, the imposition of the death penalty for narcotics offenders is seen as a form of human rights protection for society. This is because narcotics crimes are classified as *extraordinary crimes* and are part of an organised

network, controlled from the top down to the grassroots level, stretching from upstream to downstream. These crimes cause significant material and immaterial harm to the nation (Sembel, 2020).

Inmates who oppose the execution of the death penalty tend to clash with the general principles outlined in the 1945 Constitution and the laws regarding human rights. However, inmates facing the death penalty often experience various consequences resulting from the abuse of narcotics, which has claimed a vast number of victims. It is the human rights of these narcotics crime victims that must be protected. Millions of young generations could be ruined, and countless lives could be lost if the punishment for narcotics crimes, especially for drug traffickers, is not swiftly carried out. Therefore, in addressing the various pros and cons of imposing punishment on narcotics users, dealers, and traffickers, a broad and expert perspective is necessary to reach a consensus on the application of the death penalty, particularly for drug dealers. Every citizen, without exception, has the right to defend and protect themselves from any attack or threat that endangers their life. This is an absolute human right. However, the state's act of taking life through the death penalty, if done arbitrarily and without a legitimate legal basis, is, in essence, a violation of human rights (Anugrah, 2020).

Regarding the death penalty in Indonesia, the Constitutional Court (MK) has stated that the death penalty does not violate Articles 28A and 28I (1) of the 1945 Constitution, as these articles must be read systematically. Human rights as outlined in these two articles are limited by Article 28J of the 1945 Constitution.

Article 28J of the 1945 Constitution: (1) Every person is obliged to respect the human rights of others in the orderly life of society, the nation, and the state. (2) In exercising their rights and freedoms, every person must submit to restrictions stipulated by law, solely for the purpose of ensuring recognition and respect for the rights and freedoms of others, and to meet the demands of justice in accordance with moral considerations, religious values, security, and public order in a democratic society.

The considerations of the Constitutional Court (MK) in its ruling a quo are as follows: (1) Indonesia does not adhere to the principle of the absolute nature of human rights. (2) Human rights must be exercised with respect for the human rights of others for the sake of public order and social justice. (3) International conventions consider drug crimes to be serious crimes and involve international networks. (4) Drug crimes pose a significant threat to the preservation of the current generation of young Indonesians (Sulistiyani, 2020).

What is interesting about the Constitutional Court's Decision No. 2-3/PUUV/2007, dated October 30, 2007, is that all the legal considerations used by the Court in this ruling are applicable *mutatis mutandis* to the ruling of 2012. In the 2007 decision, the effects of drug crimes were equated with crimes such as terrorism, corruption,

and serious human rights violations. Therefore, the constitutional judges stated that the death penalty in the Narcotics Law does not contradict the right to life as guaranteed by the 1945 Constitution, as human rights protection in the 1945 Constitution does not adopt the principle of absoluteness.

In line with the Constitutional Court's stance, the Indonesian Ulema Council (MUI) also maintains that the death penalty is still necessary in Indonesia. The MUI Fatwa No. 10/MUNAS/VIII/14/2005 and the decision of the Ulama Commission Fatwa Ijtima throughout Indonesia IV in 2012 in Cipasung essentially allow the state to carry out the death penalty for certain crimes, including drug offenses, because their impact is considered far worse than that of khamr (alcohol), which, according to the Hadith of Prophet Muhammad (SAW), is punishable by death. Furthermore, for producers, traffickers, dealers, and those who abuse drugs, the state should not grant leniency or forgiveness in their punishment.

In Islam, the purpose of the death penalty is to protect the general public, which must take precedence over specific dangers. The protection of the victim's rights should be prioritised, as the goals of punishment in Islam are: (1) Protection of society – To maintain the peace and security of the community. (2) Prevention and retribution – To prevent further harm and to provide justice for the crime committed. (3) Reform and education – To guide the individual and society toward moral and ethical improvement (Sulistiyani, 2020). The death penalty, when applied, is seen as a means to safeguard these values by deterring harmful acts and ensuring justice for victims.

During the Jokowi-JK administration, at least 221 death sentences were handed down over a five-year period across various levels of courts in Indonesia. Of these, 166 individuals were sentenced to death for drug-related cases, 51 for murder, three for armed robbery, and one for terrorism. The death penalty during President Jokowi's first term occurred in three waves of executions, where a total of 18 people were executed. In the first wave, on January 18, 2015, six individuals were executed. The second wave took place on April 29, 2015, with eight individuals executed. The third wave occurred on July 29, 2016, with four individuals executed (Faiz, 2019).

The Indonesian Narcotics Law No. 35 of 2009 regulates the death penalty for those involved in narcotics crimes through several articles, such as Articles 113, 114, 116, 118, 119, 121, and 133. Each of these articles stipulates the death penalty as a possible punishment for those engaged in actions related to narcotics, whether it involves production, distribution, or abuse that causes death or permanent disability to others.

However, the imposition of the death penalty in narcotics cases should be approached with caution, as it concerns the right to life of every individual. Therefore, when imposing the death penalty, it must be ensured that the punishment is proportional and can be accepted by both the convicted person and

society. Although the death penalty is explicitly regulated in these articles, it may not necessarily serve as the primary means of punishment to regulate, discipline, or reform society.

Barda Nawawi Arief (Arief, 2009), a member of the drafting team for the Criminal Code Bill (RUU KUHP), suggests that the death penalty should be removed from the list of principal penalties and instead be classified as a special or alternative penalty. He argues that the death penalty is not the main or primary means of punishment but rather an exceptional measure, similar to amputation in medicine, applied only as a last resort after all other options have proven ineffective. This perspective suggests that, while the death penalty is firmly established in the Narcotics Law, it should be viewed as a selective measure, to be applied only in very specific circumstances, with broader considerations of the purpose of punishment and the principle of human rights protection.

The concept of the death penalty as a special punishment is based on the idea of a monodualistic balance. This idea focuses on balancing the interests of public protection and the protection of individuals. This means that while the death penalty is meant to protect society, it also takes into account individual interests, such as provisions for postponing the execution of the death penalty for pregnant women and mentally ill individuals (Article 81, paragraph (3)). Another example is the possibility of a delay in the execution of the death penalty, known as "conditional death penalty," with a probation period of 10 years (Article 100, paragraph (1)). As stipulated in several articles below:

Article 64 Punishments consist of: (a). Principal penalties; (b). Additional penalties; and (c). Special penalties for certain criminal offenses as determined by law.

Article 67: "Special penalties as referred to in Article 64 letter c are death penalties that are always threatened alternatively."

Article 68, paragraph (3): "In cases where there is a choice between the death penalty and life imprisonment, or where the punishment for a crime punishable by 15 (fifteen) years of imprisonment is aggravated, a fixed-term prison sentence may be imposed for a period of 20 (twenty) consecutive years."

Article 9: "The death penalty is imposed as an alternative measure as a last resort to prevent criminal offenses and protect society."

Article 100 Paragraph (1) The judge imposes the death penalty with a 10-year probation period, considering: (a). The defendant's remorse and the possibility of reform; or (b). The defendant's role in the criminal act. Paragraph (2) The death penalty with a probation period as referred to in paragraph (1) must be stated in the court decision. Paragraph (3) The probation period of 10 (ten) years starts the day after the court decision becomes final and binding. Paragraph (4) If the convicted person shows exemplary behavior during the probation period as referred to in

paragraph (1), the death penalty may be commuted to life imprisonment by the president's decision after receiving consideration from the Supreme Court. Paragraph (5) Life imprisonment as referred to in paragraph (4) is calculated from the date the president's decision is issued. Paragraph (6) If the convicted person does not show exemplary behavior during the probation period and there is no hope for reform, the death penalty may be carried out upon the Attorney General's order.

Article 101: "If the death row convict's clemency request is rejected, and the death penalty is not carried out within 10 (ten) years of the rejection, unless the convict has escaped, the death penalty may be commuted to life imprisonment by the president's decision."

With the enactment of Law No. 1 of 2023 on the Criminal Code (KUHP), it is expected that the regulatory framework for the death penalty, especially in narcotics crimes, will be affected. Under the previous KUHP, the death penalty was classified as a principal punishment as regulated in Article 10 of the KUHP:

Article 10 Punishments consist of: (a). Principal penalties: (1) Death penalty; (2) Imprisonment; (3) Detention (4). Fines. (b) Additional penalties: (1). Revocation of certain rights; (2). Confiscation of certain items; (3) Public announcement of the court's decision

Additionally, some experts argue that the death penalty in narcotics cases is inappropriate because the Narcotics Law is considered administrative law, which should not impose the death penalty. Given its administrative nature, the punishment should not be excessively severe, such as the death penalty. With the enactment of the new Criminal Code (KUHP), it is hoped that a fresh perspective will be brought to understanding the objectives of criminal punishment, particularly regarding the death penalty, which should no longer be viewed as a standard punishment with exceptional application. The passage of Law No. 1 of 2023 on the Criminal Code also regulates narcotics crimes, beginning with Articles 609, 610, and 611. Notably, Article 610, paragraphs 2(a) and 2(b), addresses the threat of the death penalty, creating a new issue, especially in relation to the Narcotics Law No. 35 of 2009.

The opinions of those supporting the relaxation of the death penalty cannot be followed indiscriminately and cannot be simplified to theoretical or statistical terms. The recorded criminal behavior shows a concerning criminogenic trend each year. The prison system, with no additional capacity, is continually overloaded with narcotics offenders. For this reason, maintaining the death penalty for certain narcotics offenses under the Narcotics Law should continue, especially to fight narcotics trafficking, particularly for drug lords. In this regard, the Criminal Code only accommodates two narcotics offenses in the closing provisions by incorporating Articles 113(2) and 118(3) of the Narcotics Law into Article 610(2) of the KUHP to ensure legal certainty on how the death penalty provisions are

governed. The procedures follow either the Criminal Code or the Narcotics Law as the original statute. However, certain provisions, such as Articles 114(2), 116(2), 119(2), 121(2), and 133(1), are not accommodated.

In this case, the author must direct their dissertation towards the Narcotics Law, where the death penalty is a principal punishment that functions as a *lex specialis* of the previous Criminal Code, leading to a potential conflict over which law should apply. If such a conflict arises, certain principles of legislative drafting can be referenced, such as "special laws override general laws (*lex specialis derogat lex generalis*)" and "later laws supersede earlier laws (*lex posteriori derogat lex priori*). (Busroh, 2016)"

The paragraph above, with the improvements, in my opinion, is suitable as a closing statement, which could be followed by the title. The two paragraphs below are more appropriately placed in the initial section of the background discussion, with the aim of capturing the empirical situation.

Narcotics, which were once solely used for medical purposes, have now become a widespread issue in society. Narcotics indiscriminately target individuals regardless of age, social class, education, economic status, or even religious beliefs. This fact is widely recognized, with reports often highlighting their use among both adolescents and adults. Narcotics-related crimes have escalated to an extraordinary level because they threaten the future of the nation's youth, prompting significant government attention. Therefore, one of the measures the government has taken to address this issue is the imposition of the death penalty for those convicted of narcotics crimes.

However, in reality, narcotics cases continue to rise. According to data from the National Narcotics Agency (BNN) in 2021, narcotics cases increased compared to the previous year. In 2021, there were 964 narcotics cases, with 1,431 suspects and 4,742 individuals seeking treatment for drug abuse. This was an increase from 860 narcotics cases, 1,328 suspects, and 6,067 individuals in 2020. The rise in narcotics cases has led to overcrowding in several prisons, which affects their ability to function effectively. A tragic example of this was the fire at Tangerang Class IA prison last year, which claimed the lives of 41 individuals, all of whom were convicted of narcotics-related crimes.

From the explanations above, I am interested in examining the death penalty in Indonesia, specifically in relation to narcotics crimes. I believe it is crucial to maintain the death penalty as a principal punishment, without interference, given the widespread and severe nature of narcotics crimes.

There are numerous debates for and against the application of the death penalty in such cases. This has prompted me to undertake this research with the theme: "The Existence of the Death Penalty for Narcotics Crimes Post the Enactment of Law

Number 1 of 2023 on the Indonesian Penal Code.”

2. Research Method

The approach employed in this study is legal sociology, which seeks to examine law within its social context. The intended outcome is to explain, link, test, and critique the operation of formal law within society. Wignjosoebroto refers to this as non-doctrinal legal research, as it is a posteriori in nature, meaning that ideals and theories follow after facts and data, which emerge first. Consequently, the reasoning strategy is inductive. Ideas are viewed as hypotheses, requiring data to substantiate them in order to be developed into a dissertation. Marzuki, on the other hand, terms empirical legal research as socio-legal research (Bachtar, 2021).

The data used in this research comes from both primary and secondary sources, as follows: Primary data refers to information gathered directly from the field and within the community. This research was conducted through field studies at the National Narcotics Agency, the Supreme Court, the Tangerang District Court, and the Indonesian House of Representatives (DPR RI). To obtain relevant primary data, the author employed interviews. Interviews serve as a primary data source, conducted directly with the research subjects or informants in the field. In simple terms, Sugiyono defines an interview as a meeting between two individuals to exchange information and ideas through questions and answers, allowing for the construction of meaning on a specific topic (Bachtar, 2021).

Secondary data is obtained through a review of literature or various sources that relate to the research issue or subject matter (Achmad, 2015). The secondary data in this study includes: (a) Primary Legal Materials: These consist of the 1945 Constitution, the Indonesian Penal Code (KUHP), Law No. 1 of 2023 on the Penal Code, and Law No. 35 of 2009 on Narcotics. (b) Secondary Legal Materials: These are works that provide an overview of primary legal sources, such as books or articles. Secondary legal materials are used on the assumption that primary data alone cannot provide a full explanation of the reality, so secondary sources are utilised. (c) Tertiary Legal Materials: These provide guidance or clarification of primary and secondary legal materials. Tertiary legal materials include online resources, citing the names of the relevant websites.

The data collection methods used in this research include interviews, document or literature studies, and observations. Interviews were conducted directly through question-and-answer sessions with the following respondents: (1) Ahmad Sahroni, Member of the Indonesian House of Representatives (DPR/MPR RI) from the Nasdem Party, with member number A-636; (2) The National Narcotics Agency of the Republic of Indonesia; (3) Barita Sinaga, Head of the Tangerang District Court.

3. Results and Discussion

The death penalty is enshrined in Indonesia's positive law. It is the most severe punishment imposed on a convict due to its connection to the taking of a person's life. In this context, the adage *mors dicitur ultimum supplicium* applies, signifying that the death penalty is the harshest of penalties (Hiariej, 2021). Article 10 of the Indonesian Penal Code (KUHP) regulates the death penalty. A court may impose the death sentence after considering the legal circumstances of the trial and the appropriate evidence, should the judge determine that an individual deserves one of these types of punishment. One of the perpetrators who commits a major crime may receive the death penalty. Narcotics-related crimes are considered serious offenses as they can undermine the foundation and future of the nation's next generation. Drug trafficking has evolved into a transnational crime, committed across borders and regions. Drug crimes are regarded as some of the worst offenses, as they predominantly target the younger generation.

The death penalty for drug trafficking cases is a crucial step taken by the state to execute drug dealers who pose a significant threat to future generations. With the implementation of Law No. 35 of 2009 on Narcotics, drug traffickers can be prosecuted and subjected to the harshest punishment, namely the death penalty.

The Death Penalty Is Not a Primary Punishment

According to Article 3, paragraph 1 of Law No. 1 of 2023, if there is a change in legislation after the act has occurred, the new law will apply, unless the previous law is more beneficial to the perpetrator. Even though the death penalty may still be imposed after a final and binding decision (*inkracht*), and the law applies before the enactment of Law No. 1 of 2023, the provisions of Article 3, paragraph 1 of Law No. 1 of 2023 remain applicable to the death sentence itself, as outlined in Article 100 of Law No. 1 of 2023, which introduces a conditional death sentence. The Indonesian Penal Code, enacted on December 6, 2022, specifies that the convicted individual will be granted a 10-year probation period to demonstrate good behaviour in prison. If the individual behaves well during this period, the sentence may be reduced to life imprisonment through a Presidential Decree.

The debate over the death penalty has influenced the development of penal theory, where the classical school of criminal law provides the justification for punishment, asserting that the state has the right to impose a sentence on a criminal for attacking and violating the rights and legal interests that are protected (Hiariej E. O., 2014). As quoted by Charles L. Black, Edward argues that this serves as the foundation for the justification of the death penalty. In addition to serving as retribution or revenge, the death penalty is also intended to act as a deterrent (Hiariej Z. A., 2021).

This forms the basis of how the Dutch Penal Code (KUHP) was established, where the death penalty was considered a primary punishment. When Law No. 35 of 2009 on Narcotics was enacted, it still aligned with the objectives of the Dutch-inherited KUHP. Over time, however, a significant moment occurred in Indonesia, where the death penalty was challenged before the Constitutional Court through judicial review. In the decision of the Constitutional Court on October 30, 2007, which rejected the material review of the

articles in Law No. 22/1977 on Narcotics, specifically regarding the justification for the death penalty (for producers and organized traffickers), the Court deemed it not to be in conflict with Articles 38a, 28I, paragraphs (2) and (4) of the 1945 Constitution of the Republic of Indonesia, particularly with the "right to life". The Constitutional Court rejected the challenge for the following reasons (Leo Arwansyah, 2020):

a. Indonesia does not adhere to the principle of absolute human rights; b. Human rights should be exercised with respect for and consideration of others' rights in the interest of public order and social justice; c. International conventions regard drug-related crimes as serious offenses involving international networks; d. Narcotics crimes pose a grave threat to the protection of Indonesia's current generation of youth.

The existence of the death penalty in Indonesia, aside from being a cultural and religious issue, is also political in nature (Sulistiyani, 2020). The religious stance on the death penalty can be seen in the fatwa issued by one of the largest religious organizations in Indonesia, namely Fatwa MUI No. 10/MUNAS/VIII/14/2005, and the 2012 Fatwa Ulama Commission's Decision in Cipasung, which essentially permits the state to carry out the death penalty for certain crimes, including narcotics offenses. This is due to the devastating impact of such crimes, which is considered worse than alcohol (khamr), which, according to the Hadith of the Prophet Muhammad SAW, may be punishable by death. For producers, drug lords, distributors, and abusers, the state is not allowed to grant forgiveness or reduce the punishment.

According to Islamic teachings, the purpose of the death penalty is to protect the general public, which should take precedence over specific dangers. The protection of the victim's rights must be prioritized, because the aim of punishment in Islam is: Punishments consist of: (a). Main Punishments: (1) Death penalty; (2) Imprisonment; (3) Confinement; (4) Fines. (b). Additional Punishments: (1) Revocation of certain rights; (2) Confiscation of certain goods; (3) Public announcement of the court's decision.

The following are the formulations of offenses related to drug crimes that carry the death penalty as a sanction, as outlined in various articles of the Narcotics Law:

Article 113, paragraph (2): "In cases of producing, importing, exporting, or distributing narcotics of Group I as referred to in paragraph (1), in the form of plants exceeding 1 kilogram or more than 5 (five) plant stems, or in forms other than plants exceeding 5 (five) grams, the offender shall be sentenced to the death penalty, life imprisonment, or imprisonment for not less than 5 (five) years and not more than 20 (twenty) years, and a fine as stipulated in paragraph (1), increased by one-third (1/3)."

Article 114, paragraph (2): "In cases of offering for sale, selling, purchasing, acting as an intermediary in a transaction, exchanging, delivering, or receiving narcotics of Group I as referred to in paragraph (1), in the form of plants weighing 5 (five) grams, the offender shall be sentenced to the death penalty, life imprisonment, or imprisonment for not less than 6 (six) years and not more than 20 (twenty) years, and a fine as stipulated in paragraph (1), increased by one-third (1/3)."

Article 116, paragraph (2): "In cases of using narcotics on others or administering

narcotics of Group I to others as referred to in paragraph (1) resulting in death or permanent disability, the offender shall be sentenced to the death penalty, life imprisonment, or imprisonment for not less than 5 (five) years and not more than 20 (twenty) years, and a fine as stipulated in paragraph (1), increased by one-third (1/3)."

Article 118, paragraph (2): "In cases of producing, importing, exporting, or distributing narcotics of Group II as referred to in paragraph (1), weighing more than 5 (five) grams, the offender shall be sentenced to the death penalty, life imprisonment, or imprisonment for not less than 5 (five) years and not more than 20 (twenty) years, and a fine as stipulated in paragraph (1), increased by one-third (1/3)."

Article 119, paragraph (2): "In cases of offering for sale, selling, purchasing, acting as an intermediary in a transaction, exchanging, delivering, or receiving narcotics of Group II as referred to in paragraph (1), weighing 5 (five) grams, the offender shall be sentenced to the death penalty, life imprisonment, or imprisonment for not less than 6 (six) years and not more than 20 (twenty) years, and a fine as stipulated in paragraph (1), increased by one-third (1/3)."

Article 121, paragraph (2): "In cases of using narcotics on others or administering narcotics of Group II to others as referred to in paragraph (1) resulting in death or permanent disability, the offender shall be sentenced to the death penalty, life imprisonment, or imprisonment for not less than 5 (five) years and not more than 20 (twenty) years, and a fine as stipulated in paragraph (1), increased by one-third (1/3)."

Article 133, paragraph (1): "Anyone who orders, gives, or promises something, provides opportunities, encourages, facilitates, threatens, uses force, deceives, or persuades a minor to commit a crime as referred to in Articles 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, and 129 shall be sentenced to the death penalty, life imprisonment, or imprisonment for not less than 5 (five) years and not more than 20 (twenty) years, and a fine of IDR 2,000,000,000.00 (two billion rupiah) to a maximum of IDR 20,000,000,000.00 (twenty billion rupiah)."

With the enactment of Law No. 1 of 2023 on the Criminal Code (KUHP), Articles 64 and 67 provide a framework for special punishments as follows:

Article 64: "Punishments consist of: a. Main punishment; b. Additional punishment; c. Special punishment for certain crimes specified by law."

Article 67: "Special punishments as referred to in Article 64 letter (c) include the death penalty, which is always imposed as an alternative sentence."

Article 68, paragraph (3): "In cases where there is a choice between the death penalty and life imprisonment, or where the penalty is aggravated for a crime carrying a 15-year sentence, the prison sentence can be extended to a maximum of 20 (twenty) years consecutively."

The Death Penalty Recognizes a Probation Period

As outlined in Article 100 of Law No. 1 of 2023 on the Criminal Code (KUHP), which

states:

Article 100: (1) "The judge shall impose the death penalty with a probation period of 10 (ten) years, considering: a. the remorse of the defendant and the potential for self-reform; or b. the defendant's role in the criminal act." (2) "The death penalty with a probation period as referred to in paragraph (1) must be stated in the court's decision." (3) The probation period of 10 (ten) years begins 1 (one) day after the court's decision becomes final and binding." (4) "If the convicted person shows exemplary attitude and behavior during the probation period as referred to in paragraph (1), the death penalty may be converted to a life sentence by the President's decision after receiving consideration from the Supreme Court." (5) "The life sentence referred to in paragraph (4) is calculated from the date the President's decision is issued." (6) "If the convicted person does not show exemplary attitude and behavior during the probation period as referred to in paragraph (1) and there is no hope for improvement, the death penalty may be executed upon the order of the Attorney General."

Article

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If the clemency request of a death-row convict is rejected and the death sentence is not carried out within 10 (ten) years from the rejection of clemency, not due to the convict's escape, the death penalty may be converted to a life sentence by the President's decision.

There are several legal issues to consider when examining the provisions in Article 100 above. Paragraph (1), which states that there is a probation period of 10 years, raises ambiguity in the formulation of the criminal provision. Referring to Article 43 of the People's Republic of China, as quoted by Prof. Muladi in his professorial inauguration speech in English:

"In the case of a criminal element who should be sentenced to death, if immediate execution is not essential, a two-year suspension of execution may be announced at the same time the death sentence is imposed, and reform through labor carried out and the results observed."

Muladi views this as a breakthrough that bridges two major perspectives: the absolutist view that rejects the death penalty and the retentionist view that supports it (Muladi, 1990). According to the author, this perspective only creates ambiguity in policy formulation, as there is a significant difference between Article 43 of the Chinese Penal Code, which imposes a two-year probation period, and Article 100 of Law No. 1 of 2023, which sets a ten-year probation period.

The legal vacuum is very apparent when reflecting on the case processes discussed in this chapter, section A, where two out of five decisions show that the trial of a defendant named Ozias Sibanada at the district court (Decision No. 294/Pid.B/2001/PN.Tng) in 2001 resulted in a final and binding decision upon review (Decision No. 64 PK/Pid.Sus/2010) in 2010. Meanwhile, another trial of the defendant

named Okwudili Ayotanze at the district court (Decision No. 268/Pid.B/2001/PN.Tng) in 2001 resulted in a final and binding decision upon review (Decision No. 144 PK/Pid.Sus/2011) in 2011. This is quite ironic when considering the facts showing the widespread abuse of narcotics, especially considering that the execution of the death penalty for drug traffickers does not violate the International Covenant on Civil and Political Rights (ICCPR) (Ahmad Sahroni, 2023), as well as the fact that much of the control over narcotics is within prisons, as seen in the case of Fredy Budiman.

The Role of the President in Commuting the Death Penalty.

The legal ambiguity regarding the death penalty is also evident in determining who has the authority to assess the development of the defendant, as mentioned in Article 100, paragraphs (1) and (4), to decide the future of the convict. This article only briefly outlines the conversion of the death penalty into another punishment through a Presidential Decree after obtaining consideration from the Supreme Court.

Article 100: (1) The judge imposes the death penalty with a 10-year probation period, taking into account: (a). The remorse of the defendant and the hope for self-improvement; or (b). The defendant's role in the crime. (2) The death penalty with a probation period as referred to in paragraph (1) must be included in the court decision. (3) The probation period of 10 years starts one day after the court decision becomes legally binding. (4) If, during the probation period referred to in paragraph (1), the convict demonstrates commendable attitude and behavior, the death penalty may be converted into a life sentence through a Presidential Decree after obtaining consideration from the Supreme Court. (5) The life sentence as referred to in paragraph (4) is calculated from the date the Presidential Decree is issued. (6) If, during the probation period referred to in paragraph (1), the convict does not show commendable attitude or behavior and there is no hope for improvement, the death penalty may be carried out upon the order of the Attorney General.

Referring to Soedarto's opinion that criminal law policy serves as preparation in achieving effective and appropriate legislation, ensuring the guarantee of justice and its utility, on the other hand, efforts to combat crime are fundamentally part of an integrated effort to protect society in order to achieve the welfare of the people (Ahmad Sahroni, 2023). When understood more deeply, the 10-year probation period in the case example above is clearly incompatible with the primary goal of criminal policy regarding public protection and the achievement of social welfare. This discrepancy, in terms of policy-making, allows convicted individuals who have been sentenced with a final and binding court decision to be granted a lengthy probation period, while the reality shows that drug circulation is highly concerning. In essence, criminal law policy does not only involve the establishment of legal norms in a

juridical, systematic, and dogmatic sense, but also requires a factual juridical approach in establishing criminal law norms to address criminal issues. In this factual sense, the law is not merely a set of rigid norms that ignore other facts that exist in the world of reality (Arief, 2014).

The selection of law, as a simple definition of criminal law policy, places policymakers in the position of choosing the most rational course of action among many options. This is particularly true in the case of crimes committed by drug traffickers. The application of the death penalty for drug dealers and distributors must be carried out for the greater humanitarian good. It is better to end the life of one person to save many others from the abuse of narcotics, given the increasing distribution of such substances (Ahmad Sahroni, 2023).

Therefore, the 10-year probation period stipulated in Article 100 of Law No. 1 of 2023 cannot be applied directly, given the massive spread of narcotics. A probation period of such a long duration will create legal uncertainty, considering the lack of clear regulations to assess the behavior of convicts who have already been sentenced by the court.

4. Conclusion

The existence of the death penalty in narcotics cases post the enactment of Law No. 1 of 2023 on the Criminal Code (KUHP) is still upheld, but has shifted. The death penalty is no longer the primary sentence but has become an alternative. This is explained in Article 100, paragraph (1), which stipulates a 10-year probation period. If, later on, the convicted person shows good behavior in the penitentiary, the sentence may be converted to a life sentence by a Presidential Decree. However, Articles 100, paragraph (1) and (4) of Law No. 1 of 2023 on the Criminal Code contain ambiguity regarding who is authorized to assess the convict and what standards of good behavior are to be used. The probation period is inconsistent with the primary goal of criminal justice, as the convict has already been sentenced with final legal force, yet is granted a long probation period. This right becomes paradoxical, as the facts show that the circulation of narcotics is still high and its destructive power significant.

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