

The Legitimacy Death Penalty Application of Certain Conditions in the Anti- Corruption Law

Legitimasi Penerapan Pidana Mati konteks keadaan Tertentu dalam Undang-Undang Pemberantasan Tipikor

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Abstrak

Artikel ini membahas mengenai penjatuhan hukuman mati yang tertuang dalam pasal 2 ayat (2) Undang-Undang Pemberantasan Tipikor bagi pelaku tindak pidana korupsi yang dianggap merugikan negara dan dapat berdampak luas menyangkut hajat hidup orang banyak. Dalam hal ini terdapat pro dan kontra terkait penjatuhan hukuman mati yang tertuang dalam pasal 2 ayat (2) Undang-Undang Pemberantasan Tipikor, terutama pada kalimat “Keadaan tertentu” pada pasal tersebut yang dikaitkan dengan korupsi dana bantuan sosial penanganan covid-19. Selain itu pasal tersebut juga dianggap bertentangan dengan kewajiban pemerintah dalam upaya penghormatan, perlindungan dan pemenuhan HAM. Artikel ini menyimpulkan bahwa pasal tersebut tidak dapat memenuhi aspek yuridis untuk menjerat pelaku korupsi karena tidak termasuk dalam persyaratan “keadaan tertentu” dan juga dianggap inkonstitusional karena tidak sesuai dengan konstitusi yang memberikan perlindungan terhadap hak hidup seseorang. Penjatuhan pidana mati juga terbukti kurang tepat digunakan dalam pemberantasan tipikor sebagaimana terlihat dalam *Corruption Perception Index* 2019.

Kata kunci: HAM; Keadaan Tertentu; Korupsi; Pidana Mati.

Abstract

This article discusses the imposition of the death penalty as stipulated in Article 2 paragraph (2) of the Corruption Eradication Law for perpetrators of criminal acts of corruption that are deemed to be detrimental to the State and can have a wide impact on the lives of many people. In this case, there are many pros and cons related to the imposition of the death penalty as stipulated in article 2 paragraph (2) of the Corruption Eradication Law, especially in the sentence “Certain conditions” in that article which are related to the corruption of social assistance funds for handling Covid-19. Apart from that, this article is also considered to be against the Government’s obligations in the effort to respect, protect and fulfill human rights. This article concludes that The Article cannot fulfill the juridical aspect of prosecuting corruption actors because it is not included in the requirements of “certain conditions” and is also considered unconstitutional because it is not in accordance with the constitution, which provides protection for a person’s right to life. The imposition of the death penalty has also been proven to be inappropriately used in eradicating corruption, as seen in the 2019 Corruption Perception Index.

Keywords: corruption; death penalty; certain conditions; human rights.

A. INTRODUCTION

1. Background

Corruption is an act carried out by certain parties, both individuals and corporations, that are detrimental to the State and can have a broad impact on the lives of many people if the preventive and repressive actions taken do not cause a deterrent effect for the perpetrators. In this case, the formal juridical aspects that apply in Indonesia become a reference in imposing criminal sanctions against the perpetrators of corruption.

Corruption can be interpreted as the misuse or misappropriation of state money for personal gain.¹ Law Number 31 of 1999 on Corruption Eradication states that corruption can be carried out against the law to enrich oneself or a corporation that is detrimental to state finances and the state economy. Furthermore, in Article 5 of the Law Number 20 of 2001 on Amendments to Law Number 31 of 1999 on Corruption Eradication, it is stated that corruption can be carried out by civil servants or state officials in the form of gifts or promises. In addition, it can also be done by anyone who gives or promises something so that the civil servant or state administrator does or does not do something in his position, which is contrary to his obligations.

¹ Ridwan Jamal, “Korupsi, Kolusi Dan Nepotisme Dalam Perspektif Hukum Islam (Problem Dan Solusinya),” *Jurnal Ilmiah Al-Syiráh* 7, no. 2 (2009).

This means that corruption is a form of abuse of office solely for personal gain or a particular group. From a legal perspective, there are elements that are included in the criminal act of corruption, namely:

- a. *an act against the law,*
- b. *abuse powers, opportunities, or certain means,*
- c. *obtain material benefits for oneself, others, or corporations, and*
- d. *cause losses to the State's financial condition or the economy of a country.*²

The types of corruption that are classified include:

- a. *an element of bribery in the form of gifts or promises*
- b. *commit embezzlement in position,*
- c. *commit acts of extortion in its position,*
- d. *participate in certain improper procurement*
- e. *receive certain gifts that have the potential to lead to gratification.*³

These elements are in line with those expressed by Diego Gambetta, who revealed the various conceptions of corruption. In this case, there are three characteristics that are clearly visible, namely, first, "corruption refers to the deterioration of the ethical character of the person/perpetrator." Second, "genetically, corruption is a description of a family of social practices, which can lead to a deterioration in the performance of an institution/organization/institution." Third, "corruption indicates some kind of practice such as bribery or reward for conspiracy". Some of these practices are called corrupt "not only because of their motives or effects but because of the characteristics of the actions themselves."⁴ The diversity concepts of corruption, as expressed by Diego Gambetta, has also become a phenomenon that occurs in Indonesia, so it requires serious attention to improving the character/morality of officials and institutions so that bribery or sort of that does not occur.

Corruption practices occur in many countries, including Indonesia. The Government is trying to minimize corrupt practices marked by the establishment of Law Number 31 of 1999 on Eradication of Corruption and strengthened by Law no. 20 of 2000 concerning Amendments to Law No. 31 of 1999 concerning the Eradication of Corruption Crimes. In addition, in Article 2 paragraph (1) of the Government Regulation 71 of 2000 on Procedures for Implementing Community Participation and Giving Awards in the Prevention and Eradication of Corruption Crimes stated,

² Zubir Rengil, "Reformulasi Penerapan Sanksi Terhadap Pelaku Tindak Pidana Korupsi Di Indonesia," *Journal Study of Law Enforcement Based Research (EJURIS)* 1, no. 01 (2019): 1–20.

³ H. Sukiyat, *Teori Dan Praktik Pendidikan Anti Korupsi* (Surabaya: CV Jakad Media Publishing, 2020), 54.

⁴ B. Herry Priyono, *Korupsi: Melacak Arti, Menyimak Implikasi*, (Jakarta: PT. Gramedia Pustaka Utama, 2018), 19.

“Every person, Community Organization, or Non-Governmental Organization has the right to seek, obtain and provide information on allegations of corruption as well as submit suggestions and opinions to law enforcement and/or the Commission regarding cases of criminal acts of corruption.” Furthermore, Article 2 paragraph (2) states, “Submission of information, suggestions, and opinions or requests for information must be carried out in a responsible manner in accordance with the provisions of applicable laws and regulations, religious norms, decency, and courtesy.”

Article 2 of Government Regulation Number 71 of 2000 indicates that the problem of corruption must involve the participation of the community.⁵ The existence of the Corruption Court, which was established based on the provisions of Article 53 of Law Number 30 of 2002 on the Corruption Eradication Commission, is a form of the Government’s seriousness in its efforts to eradicate corruption.

The corruption that occurs today, involve state administrator, starting from staff level until high-ranking officials such as ministerial position. At the end of 2020, the public was shocked by the news regarding the arrest of the Minister of Social Affairs, Juliari Batubara, by the Corruption Eradication Commission. The person concerned is suspected of being involved in a corruption case in the procurement of social assistance for Covid-19 handling. It starts with the existence of a social assistance procurement project worth around Rp. 5.9 trillion with a total of 272 contracts and carried out in two stages for handling Covid-19 in the form of basic food packages for people with low incomes. In this case, the social assistance procurement vendor is suspected of bribing the Ministry of Social officials with a fee scheme of Rp. 10,000 (ten thousand rupiahs) for each food package whose value per food package is Rp. 300,000 (three hundred thousand rupiahs).⁶ This case has seized the public’s attention, especially during the Covid-19 pandemic, in which the social assistance should have been helpful in overcoming the economic disparity of the community and protecting against possible social risks to the community.⁷

The public saw that the action was beyond reasonable limits and became a serious concern related to Article 2 paragraph (2) of the Corruption Eradication Law, which could be applied in this case. The article in question states, “In the event that

⁵ Marten Bunga et.al, “Urgensi Peran Serta Masyarakat Dalam Upaya Pencegahan Dan Pemberantasan Tindak Pidana Korupsi,” *Law Reform* 15, no. 1 (2019): 85–97.

⁶ Muhammad Idris, “Jadi Tersangka Korupsi Bansos, Berapa Gaji Menteri Juliari Batubara?,” *Kompas*, accessed January 22, 2020, <https://money.kompas.com/read/2020/12/07/071138726/jadi-tersangka-korupsi-bansos-berapa-gaji-menteri-juliari-batubara?page=al>.

⁷ Christian Victor Samuel Marzuki, et.al, “Aspek Melawan Hukum Pidana Terhadap Perbuatan Penyalahgunaan Wewenang Dalam Penyaluran Bantuan Sosial Di Masa PSBB,” *Jurnal Ilmu Hukum: TATOHI* 1, no. 7 (2021): 672–78.

the criminal act of corruption as referred to in paragraph (1) is committed under certain circumstances, the death penalty may be imposed. The explanation of Article 2 paragraph (2) states that the “certain circumstances” referred to in the provision are a burden for perpetrators of criminal acts of corruption if the crime is carried out under certain conditions, namely when the country is in a state of danger in accordance with applicable laws when a national disaster occurs, corruption repetition, or when the country is in a state of economic and monetary crisis”. In short, the article implies that perpetrators of corruption can be punished with the death penalty.

The implementation of the death penalty for perpetrators of corruption is uncommon in Indonesia. It is the oldest type of punishment by the courts. One of the most common reasons for giving the sentence as an effective punishment is that the death penalty is considered the most appropriate for a convict whose crime cannot be corrected. Economically, the implementation of the death penalty, when calculated, turns out to be less expensive than a life sentence. The punishment can also be used as an attempt to create fear so that others will not commit the same crime.⁸

There are pros and cons to the imposition of the death penalty,⁹ including what is stated in Article 2 paragraph (2) of the Anti-Corruption Law. Therefore, it is necessary to carry out further discussion of the death penalty from various aspects, both legal and human rights, considering that it is a form of violation of the right to life, as stated in Article 9 paragraph (1) of Law Number 39 of 1999 concerning Human Rights. States, “Everyone has the right to live, maintain life and improve his standard of living.”

2. Research Questions

Based on the things that have been stated, the formulation of the problem that can be raised is, first, whether Article 2 paragraph (2) of the Eradication of Corruption can fulfill the juridical aspect in ensnaring the perpetrators of corruption, specifically corruption related to social assistance funds for handling COVID-19. Second, what is the relevance of the imposition of the death penalty on a person’s right to life (human right) considering there is a government obligation to respect, protect and fulfil human rights in Indonesia? Based on these two questions, this paper will discuss more on the formal juridical aspects of Article 2 paragraph (20) and the fulfilment

⁸ Yon Artiono Arba’i, *Aku Menolak Hukuman Mati: Telaahan Atas Penerapan Pidana Mati* (Jakarta: Kepustakaan Populer Gramedia (KPG), 2012), 9.

⁹ Farhan Permaqi, “Hukuman Mati Pelaku Tindak Pidana Narkotika Dalam Perspektif Hukum Dan Hak Asasi Manusia (Dalam Tinjauan Yuridis Normatif),” *Jurnal Legislasi Indonesia* 12, no. 4 (2015): 1-21.

of the Human Rights Aspects as well as Indonesia's commitment to uphold human rights related to the death penalty that may be applied.

B. DISCUSSION

1. The Development of Corruption in Indonesia

Many parties assume that one of the inhibiting factors for Indonesia from becoming a developed country is the widespread practice of corruption that occurs in Indonesia. In this case, the Government has established various laws and regulations to prevent and handle corruption cases, including Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 on Eradication of Corruption, Law Number 30 of 2002 on the Corruption Eradication Commission, Law Number 46 the Year 2009 on the Corruption Court and other related regulations.

In addition the Government has made various efforts to eradicate corrupt practices by coordinating and collaborating with other state agencies or institutions. The Government's action to accelerate the eradication of corruption was realized by issuing Presidential Instruction No. 5 of 2004 on the Acceleration of Corruption Eradication. The contents of the Presidential Instruction specifically addressed to the Attorney General and the Head of the National Police are:

- a. *Optimizing the which investigation/prosecution efforts of corruption to punish the perpetrators and save state's money.*
- b. *Prevent and give strict sanctions against abuse of authority by prosecutors (public prosecutors) members of the National Police in the context of law enforcement.*
- c. *Increase cooperation between the Prosecutor's Office and the Indonesian National Police, the Financial and Development Supervisory Agency Financial Transaction Reports and Analysis Center, and State Institutions related to law enforcement efforts and recovering state financial losses due to corruption.*¹⁰

The next step taken by the Government is to stipulate the National Action Plan for the Eradication of Corruption 2004-2009 as a manifestation of the similarity in prevention and prosecution efforts, both in terms of objectives, common perception and similarity in action plans in eradicating corruption.¹¹ The existence of the National Action Plan for the Eradication of Corruption 2004-2009 is expected to be a guideline for various parties in preparing the corruption eradication program

¹⁰ Husin Wattimena, "Perkembangan Tindak Pidana Korupsi Masa Kini Dan Pengembalian Kerugian Keuangan Negara," *Tahkim: Jurnal Hukum Dan Syariah* XII, no. 2 (2016): 68-86.

¹¹ Hengki Mangiring Parulian Simarmata, *Pengantar Pendidikan Anti Korupsi* (Medan: Yayasan Kita Menulis, 2020), 62.

In this regard, the Corruption Eradication Commission is a State Institution specifically formed in order to carry out the task of eradicating corruption. The preamble of Law Number 30 of 2002 stated that the Corruption Eradication Commission was formed because the attempt to eradicate corruption were not optimal. In addition, the government institutions that handle corruption cases are not yet functioning effectively and efficiently. This is also one of the reasons for the formation of the Corruption Eradication Commission. This condition is very bothering considering the widespread practice of corruption in Indonesia, which carried out systematically, thus violating the social and economic rights of the community.¹²

The presence of the Corruption Eradication Commission has brought change in law enforcement against corruption. However, even though the Corruption Eradication Commission has named a suspect in a corruption case, there are still corruption cases that get court decisions which are considered inappropriate or not balanced with the actions that have been carried out.¹³

In this regard, based on the International Transparency, Indonesia's score on Corruption Perception Index (IPK) is 37. This figure puts Indonesia in the 102nd rank. In this case, there was a decrease from the previous year, namely at rank 86 with an index of 40.¹⁴

Meanwhile, the trend of prisoners in corruption cases and the total number of prisoners and detainees between 2019 and 2020 can be seen in the following table:

Table 1
The trend of Convicts in Corruption Cases¹⁵

No	Indicator	Dec 2019	March 2020
1	Total Prisoners and Detainees	265,648	270,445
2	Total Corruption Prisoners	5,078	1,906

Source: Lokadata (modified)

The two indicators show a downward trend in corruption cases in 2020, seen from the Corruption Perception Index (CPI) and the number of corruption prisoners, which has decreased from 2019 but in the same year, the public was surprised because

¹² M. Darin Arif Mu'allifin, "Problematika Dan Pemberantasan Korupsi Di Indonesia," *AHKAM: Jurnal Hukum Islam* 3, no. 2 (2015): 311-25.

¹³ Risqi Perdana Putra, *Penegakan Hukum Tindak Pidana Korupsi* (Yogyakarta: Deepublish, 2020), 6.

¹⁴ "Indeks Persepsi Korupsi Indonesia 2004-2020," accessed February 2, 2021, <https://lokadata.beritagar.id/chart/preview/indeks-persepsi-korupsi-indonesia-2004-2020-1611921280>.

¹⁵ "Perbandingan Napi Korupsi Dan Total Terpidana 2019-2020," accessed February 2, 2021, <https://lokadata.beritagar.id/chart/preview/total-tahanan-dan-korupsi-2019-2020-1585810257>.

corrupt practices in Indonesia developed unexpectedly. The corruption case allegedly committed by the former Minister of Maritime Affairs and Fisheries, Edy Prabowo, who was arrested by the Corruption Eradication Commission, is still clear in case of the lobster's seed export, which became a polemic in the midst of the Minister's controversial policy to open the lobster's seed export faucet until finally being arrested by the Corruption Eradication Commission related to the case.

It did not stop there; the public was again shocked by the arrest of the Minister of Social Affairs, who, in his press conference, the Corruption Eradication Commission stated that the arrest was allegedly due to a request for a fee related to social aid to deal with the Covid-19 pandemic.

Nowadays, the issue of corruption is very ironic; which many high-level state officials are involved in corruption cases. Corruption cases increase in such a way with modus operandi and situations that may not have been thought of before. The corruption that occurred during the pandemic and related to social aid in handling Covid-19 made the public angry in the midst of all parties' efforts to get through this complicated situation.

2. Juridical Aspect of The Death Penalty in Corruption Cases

The death penalty is the heaviest sentence decided by the judge in cases that are considered it can not be educated within a certain period of time in a correctional institution. Actually, the purpose of the death penalty is to prevent crimes and violations.¹⁶ Legislation in Indonesia also has provisions on death penalty for certain cases, such as terrorism, narcotics, corruption and so on, although, in its implementation, there are still pros and cons regarding the death penalty. One of the death sentences can be seen in the case of Freddy Budiman, a drug lord, through the Supreme Court Decision of the Republic of Indonesia Number 1093 K/Pid.Sus/2014, September 8, 2014. In addition, in 2018, the death penalty in the case of terrorism against Mako Brimob was imposed. Through Decision Number 1034/Pid.Sus/2018/PN Jkt.Tim against Anang Rachman and others.¹⁷

From a legal perspective, the implementation of the death penalty in Indonesia coincided with the enactment of Law Number 1 of 1946 on Criminal Law Regulations. This is in the Criminal Law Regulations in the form of Law Number 73 of 1958 on

¹⁶ Ni Komang Ratih Kumala Dewi, "Keberadaan Pidana Mati Dalam Kitab Undang-Undang Hukum Pidana (KUHP)," *Jurnal Komunikasi Hukum (JKH) Universitas Pendidikan Ganesha* 6, no. 1 (2020): 104–14.

¹⁷ Ahmad Mukhlis Fariduddin dan Nicolaus Yudistira Dwi Tetono, "Imposition of the Death Penalty for Corruptors in Indonesia from a Utilitarian Perspective," *Integritas: Jurnal Antikorupsi*, 8, no. 1 (2022): 1–12.

the Enforcement of Law Number 1 of 1946 for the entire territory of the Republic of Indonesia, which changed *Wetboek van Strafrecht voor Nederlandsch Indie* to *Wetboek van Strafrecht* known as the Criminal Code. Until now, the Criminal Code still stipulates the death penalty as one of the main types of punishment (*Strafrecht*) in addition to imprisonment, confinement and fines (Article 10 of the Criminal Code).¹⁸

The methods of executing the death penalty, which has been applied in various countries, have varied from the past until now, from the most humane way that does not cause prolonged suffering for those who carry it out to the most horrific and inhumane ways.¹⁹ Meanwhile, the implementation of the death penalty in Indonesia refers to Article 11 of the Criminal Code, which states that the execution of the death penalty is usually carried out by the executioner by tying a rope around the gallows around the convict's neck, then dropping the board on which the convict stands. However, the implementation of the death penalty, as stated in Article 11 of the Criminal Code, is no longer relevant to current conditions. Therefore, in Indonesia, the execution of the death penalty is carried out based on Law Number 2/PNPS/1964 concerning Procedures for Executing the Death Penalty Sentenced by Courts in the General and Military Environment". - the existing provisions of the criminal procedure law regarding the implementation of court decisions, the execution of the death penalty, which is imposed by the court in the general court or military court, is carried out by being shot to death, according to the provisions in the following articles." This means that shooting to death by firing squad is the method used in carrying out capital punishment.²⁰

Changes in the provisions of the procedure for executing the death penalty, from hanging to shooting, did not affect the efforts of many parties to abolish this provision. However, it is explained in the Criminal Code that the death penalty is still needed for several reasons, among others, because of exceptional circumstances, namely the danger of disruption to the broader legal order. Another reason is that Indonesia's territory is significant, and its population consists of several types of groups that easily clash, while the police facilities and infrastructure are not complete and so on.²¹

¹⁸ Tina Asmarawati, *Hukuman Mati Dan Permasalahannya Di Indonesia*, (Yogyakarta: Deepublish, 2013), 6.

¹⁹ Jeaniffer Rachel Gabriella Dotulong, et.al, "Fungsi Dan Pelaksanaan Pidana Mati Dalam Sistem Pemidanaan Di Indonesia," *Lex Administratum* 10, no. 3 (2022): 1-13.

²⁰ Robby Septiawan Permana Putra, et.al, "Problem Konstitusional Eksistensi Pelaksanaan Pidana Mati Di Indonesia," *Diponegoro Law Journal* 5, no. 3 (2016): 1-18.

²¹ Efryan R. T. Jacob, "Pelaksanaan Pidana Mati Menurut Undang-Undang Nomor 2/PNPS/1964," *Lex Crimen* VI, no. 1 (2017): 98-105.

These reasons are also in accordance with what Jonkers put forward on the explanation of the draft Indonesian Criminal Code, which states that there are four categories of crimes that can be threatened with the death penalty (Wirjono Prodjodikoro, 1989: 165), namely:

- a. *Crime has potential to threaten the stability of state security (104, 111(2), 102(3), jo .129);*
- b. *crime of murder against certain people and/or committed by severe? (140 (3), 340);*
- c. *Crimes against property and accompanied by strenuous elements (365 (4), 368 (2));*
- d. *Crimes in piracy of sea, river, and beach (444).²²*

Referring to the four categories of crimes, it can be seen that corruption is included in the category of crimes against property. In this case, the property obtained from abuse or abuse of office to accumulate personal wealth. However, there is still a polemic regarding the death penalty in corruption cases, as stated in the Corruption Eradication Law.

Regarding article 1 paragraph (2) of the Corruption Eradication Law, there is a conflict with the sentence “certain circumstances” which are associated with corruption during the Covid-19 pandemic. In the explanation of the article, the meaning of the sentence is stated, namely when the country is in a state of danger, when a national natural disaster occurs, in the case of repetition of certain acts of corruption, or when the country is in a state of economic crisis.

In this regard, the Chairman of the Corruption Eradication Commission, Firli Bahuri, stated that strict action would be taken against perpetrators of corruption in disaster management funds. The primary consideration in the claim is to protect the interests of the community.²³

The statement from the Chairman of the Corruption Eradication Commission indicated that corruption in disaster management funds, including the COVID-19 outbreak, could result in the death penalty. This needs to be a concern considering that what is meant by “disaster” in the explanation of the Anti-Corruption Law is “a national natural disaster.” In this case, Law Number 24 of 2007 on Disaster Management has the meaning of several forms of disaster as stated in Articles 1 number 2, number 3 and number 4, namely:

²² Ismu Gunadi dan Jonaedi Efendi, *Cepat & Mudah Memahami Hukum Pidana*, (Jakarta: Kencana, 2015), 66.

²³ Johannes Mangihot, “KPK: Korupsi Dana Penanganan Bencana Bisa Diancam Hukuman Mati,” accessed January 30, 2021, <https://www.kompas.tv/article/78655/kpk-korupsi-dana-penanganan-bencana-bisa-diancam-hukuman-mati>.

Article 1 number 2: Natural disasters are disasters caused by events or a series of events caused by nature, including earthquakes, tsunamis, volcanic eruptions, floods, droughts, hurricanes, and landslides.

Article 1 number 3: Non-natural disasters are disasters caused by non-natural events or series of events, which include failure of technology, failure of modernization, epidemics, and disease outbreaks.

Article 1 number 4: Social disaster is a disaster caused by an event or series of events caused by humans which includes social conflict between groups or between communities, and terror."

Referring to this, corruption during the Covid-19 pandemic is categorized in Non-Natural Disasters in form of disease outbreaks. Therefore, perpetrators of corruption cannot automatically be sentenced to death because they do not meet the criteria in Article 2 paragraph (2) of the Corruption Eradication Law.

It is also interesting to link the current State of the Covid-19 pandemic with the "state of danger" in which the Explanation of Article 2 of the Corruption Eradication Law is stated. When referring to existing regulations, the establishment of the State of Danger is regulated in Government Regulation in Lieu of Law Number 23 of 1959 on Revocation of Law Number 74 of 1957 (State Gazette No. 160 of 1957). According to Government Regulation in Lieu of Law Number 23 of 1959, Article 1 reads:

- (1) The President/Supreme Commander of the Armed Forces declares all or part of the territory of the Republic of Indonesia in a state of danger with a state of civil emergency or a state of military emergency, or a state of war, if:*
- 1. security or law and order throughout the territory or in part of the territory of the Republic of Indonesia is threatened by rebellion, riots or as a result of natural disasters so that it is feared that ordinary equipment cannot be overcome;*
 - 2. war or danger of war arises, or there is fear of raping the territory of the Republic of Indonesia in any way;*
 - 3. The life of the State is in a state of danger or from special circumstances; it turns out that there are or is feared that there are symptoms that can endanger the life of the State.*

The contents of the article state that the determination of the "state of danger" is the absolute authority of the president. The determination of the intended "state of danger" is carried out by the Government accompanied by the stipulation of a civil emergency, a military emergency or a war emergency. The condition of the State when the corruption occurred during the Covid-19 pandemic was not stipulated in a "state of danger," so it would be inappropriate to use the explanation of Article 2 paragraph 2, "a state of danger" to fulfil the element of the death penalty in the Anti-Corruption Law.

Although the prosecution of the death penalty will still be carried out, the judge's decision will still determine the decision. In this case, the efforts made to decide a case are not limited to juridical technical elements and the application of regulations. However, there are also some principles adopted by judges in court. This condition means the judge will carry out a thorough process and discussion to consider various things in accordance with the values adopted by the judge.²⁴

Based on this, the imposition of the death penalty requires specific consideration considering it is related to the loss of a person's life. Therefore, many developed countries such as the Netherlands, Germany, Italy, Switzerland, Portugal, Austria, and Scandinavian countries have abolished the death penalty. However, there are also countries who try to limit the execution of the death penalty by introducing a suspended death penalty, as happened in the People's Republic of China (PRC). This is different from developing countries such as Indonesia, Singapore, Malaysia, the Philippines, Thailand, China, Pakistan, Vietnam and other countries that still maintain the execution of the death penalty.²⁵

The existence of countries who have abolished or are still implementing the death penalty, the Corruption Perception Index 2019 conducted a search through transparency.org, which was quoted by the Institute for Criminal Justice Reform; the following data were obtained:

Table 2
Comparison of Countries, CPI Ranking,
and Existence of the Death Penalty for Corruption²⁶

Country	CPI Rank	Death Penalty for Corruption in National Law
Denmark	1	No
New Zealand	1	No
Finland	3	No
Singapore	4	No
Sweden	4	No
Swiss	4	No
Norway	7	No
Netherlands	8	No

²⁴ Irfan Ardiansyah, *Disparitas Pidana Dalam Perkara Tindak Pidana Korupsi (Penyebab Dan Penanggulangannya)*, (Pekanbaru: Hawa dan AHWA, 2017), 260.

²⁵ Tina Asmarawati, *Hukuman Mati dan Permasalahannya Di Indonesia*, 7.

²⁶ Adhigama Andre Budiman, et.al., *Laporan Situasi Kebijakan Hukuman Mati Di Indonesia 2020: Mencabut Nyawa Di Masa Pandemi*, (Jakarta: Institute for Criminal Justice Reform, 2020), 34.

German	9	No
Luxembourg	9	No
China	80	Yes
Indonesia	85	Yes
Vietnam	96	Yes
Laos	130	Yes
Iran	146	Yes
Iraq	162	Yes

Source: Institute for Criminal Justice Reform

Table 2 does not describe comprehensively empirical data on the relations between the death penalty and corruption rates. However, from these data, it can be seen that the threat of the death penalty does not directly reduce the number of corruption in a country. One of them is in China, which has the death penalty, not only stated in the legislation, but there is no significant decrease in the number of corruption cases that harm the State. This condition shows that the abolition of crime in a country can also achieve the country's goals in anti-corruption practices to the fullest, such as in Singapore, Finland, New Zealand, and Denmark.²⁷

Thus, if the execution of the death penalty is considered to have a shock therapy law in hope that the perpetrator can improve himself and perform self-recovery, it is logically unreasonable because the opportunity to improve himself is relatively limited only while waiting for the execution of the death penalty and there is no opportunity to participate again in the midst of the death penalty in the community because he has been given a death sentence. On the other hand, without being sentenced to death, there are actually other alternative forms of punishment, such as life imprisonment with or without revocation of certain rights and imprisonment in remote and remote places.²⁸

3. Death Penalty From Human Rights Perspective

The international community recognizes the existence of human rights as fundamental rights that are respected by every nation in the world.²⁹ Indonesia, as part of it, participates in actualizing human rights through formal legal human rights

²⁷ Adhigama Andre Budiman, et.al., *Laporan Situasi Kebijakan Hukuman Mati Di Indonesia 2020*, 34.

²⁸ Edi Yuhermansyah dan Zaziratul Fariza, "Pidana Mati Dalam Undang-Undang Tindak Pidana Korupsi (Kajian Teori Zawajir Dan Jawabir)," *Jurnal LEGITIMASI* 6, no. 1 (2017): 156.

²⁹ Umar Anwar, "Penjatuhan Hukuman Mati Bagi Bandar Narkoba Ditinjau Dari Aspek Hak Asasi Manusia (Analisa Kasus Hukuman Mati Terpidana Kasus Bandar Narkoba: Freddy Budiman)," *Jurnal Legislasi Indonesia* 13, no. 03 (2016): 241-51.

arrangements.³⁰ It shows as an effort to provide legal and human rights protection for the rights of its citizens through various laws and regulations. Bagir Manan explained that human rights are categorized into:

- a. *Classical and social human rights. Classical rights are stipulated in Article 27 paragraph (1), Article 28 and Article 29 paragraph (2) of the 1945 Constitution. While social rights are formulated in Article 27 paragraph (2), Article 31 paragraph (1), and Article 24 of the Constitution. 1945.*
- b. *Human rights relating to Indonesian citizens. This can be read in Article 27 paragraph (2), Article 30 paragraph (1), and Article 31 paragraph (1).³¹*

However, the given protection will not achieve optimal results if there are still conflicts between the laws and regulations. One of them relates to the imposition of the death penalty stipulated in Article 1 paragraph (2) of the Corruption Eradication Law or other cases such as narcotics, terrorism and so on.

The imposition of the death penalty is in contrary to Article 28 A of the 1945 Constitution, which states: "Everyone has the right to live and has the right to defend his life and living." The contents of the article are included in a person's rights that cannot be limited under any conditions (non-derogable rights). Limitation of these rights can be categorized as a form of human rights violation.³²

Article 6, paragraph 2 of the International Covenant on Civil and Political Rights adopted by General Assembly Resolution 2200 A still allows for the death penalty by stating, "In countries which have not abolished the death penalty, the death penalty may only be imposed for certain crimes which in accordance with the positive law at the time of act of the crime, and does not conflict with the provisions of the Covenant and the Convention on the Prevention and Law of the Crime of Genocide. This sentence can only be carried out on the basis of a final decision handed down by an authorized court."

The contents of the article indicate that the death penalty can only be carried out for crimes of a serious nature, such as the crime of genocide. Etymologically, the term genocide comes from the Greek "Geno", which means "race", and the Latin word "cidium", which means "to kill".³³ Thus, what is meant by the crime of genocide

³⁰ Warih Anjari, "Penjatuhan Pidana Mati Di Indonesia Dalam Perspektif Hak Asasi Manusia," *E-Journal WIDYA Yustisia* 1, no. 2 (2015): 108.

³¹ Yon Artiono Arba'i, *Aku Menolak Hukuman Mati: Telaahan Atas Penerapan Pidana Mati*, 51.

³² Osgar S. Matompo, "Pembatasan Terhadap Hak Asasi Manusia Dalam Perspektif Keadaan Darurat," *Jurnal Media Hukum* 21, no. 1 (2014): 57-72.

³³ Ketut Alit Putra et.al, "Analisis Tindak Kejahatan Genosida Oleh Myanmar Kepada Etnis Rohingnya Ditinjau Dari Perspektif Hukum Pidana Internasional," *E-Journal Komunitas Yustitia Universitas Pendidikan Ganesha* 1, no. 1 (2018): 66-76.

is an act that aims to cause the destruction in whole or in part of a group, whether ethnic, ethnic or religious. The type of act in question can be in the form of murder, causing physical or mental suffering, the use of drugs to destroy the group, including the act of sterilization.³⁴

Referring to the definition of the crime of genocide, it can be stated that the death penalty cannot be applied to corruption even though it has inflicted state's finance and disturbed the public. In this case, the perpetrators of corruption can still be sentenced to imprisonment, hoping that the perpetrators of corruption can improve themselves and not repeat the crime so that it can be accepted again by the community.³⁵

It supported by the abolition of the death penalty as regulated in the Second Optional Protocol to the International Covenant on Civil and Political Rights. The regulation aims to abolish the death penalty so that there is an obligation for all member States of the convention to abolish the practice of the death penalty in their countries.³⁶ Although the protocol is an additional instrument, it is able to provide an idea of whether or not the death penalty is in line with the International Covenant on Civil and Political Rights, considering that this protocol was established because of the Covenant.³⁷ In this case, Indonesia has not ratified the second additional protocol, so the imposition of the death penalty is still stipulated in various applicable laws and regulations. This hinders the Government's efforts to respect, protect and fulfill the rights of its citizens.

In this regard, Antasari Azhar stated that the death penalty has not yet been applied, the death penalty for corruptors is not yet a panacea to overcome corruption; the death penalty for corruptors can be applied if it has fulfilled four principles first, namely:

- a. *The death penalty can be applied if the welfare of the people has been achieved;*
- b. *The nature of the death penalty against corruptors is the last resort of punishment;*

³⁴ Herman Surokumoro, et.al., *Hukum Humaniter Internasional: Kajian Norma Dan Kasus*, (Malang: UB Press, 2020), 118.

³⁵ Debi Romala Putri dan Ikama Dewi Setia Triana, "Pelaksanaan Pembinaan Narapidana Dalam Mencegah Residivisme Di Lembaga Masyarakat Kelas II B Cilacap," *Jurnal Media Komunikasi Pendidikan Pancasila Dan Kewarganegaraan* 2, no. 1 (2020): 143-54.

³⁶ Mardenis dan Iin Maryanti, "Pemberlakuan Hukuman Mati Pada Kejahatan Narkotika Menurut Hukum HAM Internasional Dan Konstitusi Di Indonesia," *Jurnal Masalah-Masalah Hukum* 48, no. 3 (2019): 312-318.

³⁷ Setiawan Wicaksono, "Hambatan Dalam Menerapkan Pasal 6 Kovenan Internasional Tentang Hak-Hak Sipil Dan Politik Sebagai Dasar Penghapusan Pidana Mati Di Indonesia," *Jurnal Penelitian Ilmu Hukum: Pandecta* 11, no. 1 (2016): 65-79.

- c. *The death penalty is only applied to corrupt acts that interfere with the lives of many people as regulated by Article 33 of the 1945 Constitution;*
- d. *The death penalty for corruptors can be applied if there is a law.³⁸*

From these four principles, it can be seen that not all of the principles have been fulfilled even though the death penalty already exists in Indonesian laws and regulations. In this case, the reality of people's welfare is still not in line with expectations. Likewise, other principles still need to be improved on the existing system.

In addition, the death penalty is also considered a cruel and inhuman punishment because it causes the loss of the right to life for humans.³⁹ The criteria that can be used to measure whether a punishment is a cruel and strange are as follows:

- a. *If the nature of the punishment itself is so severe that it can violate human dignity.*
- b. *If the way of executing the punishment is very inhumane.*
- c. *if the punishment is not customary or very embarrassing*
- d. *If the punishment is not commensurate (very severe) compared to the severity of the crime committed.*
- e. *If the punishment is not appropriate for the circumstances of the offender.*
- f. *If the punishment is aimed at the status of the person, not against the actions, he has done.*
- g. *Punishing a crime because of the element of revenge or hatred.*
- h. *Punishing crimes against "groups of people", for example, punishing groups of people who believe in sects or religious sects embraced by the majority.*
- i. *Punishing criminal acts that are not criminal acts.⁴⁰*

Referring to these various criteria indicates that the death penalty is concluded in the criteria of cruel and strange punishment. The death penalty is also opposed to the following arguments::

- a. *there are no statistics showing that in countries who apply the death penalty, the crime rate is lower than in countries that do not apply the death penalty.*
- b. *the perpetrator has been proven to have committed one mistake and then was killed (by the death penalty), which in this case is a second crime, namely a moral crime.*

³⁸ H. Agus Kasiyanto, *Tindak Pidana Korupsi Pada Proses Pengadaan Barang Dan Jasa*, (Jakarta: Kencana, 2018), 169.

³⁹ Habib Shulton Asnawi, "Hak Asasi Manusia Islam Dan Barat: Studi Kritik Hukum Pidana Islam Dan Hukuman Mati," *Jurnal Kajian Ilmu Hukum: SUPREMASI HUKUM* 1, no. 1 (2012): 25-48.

⁴⁰ Munir Fuady dan Sylvia Laura L. Fuady, *Hak Asasi Tersangka Pidana*, (Jakarta: Prenada Media Group, 2015), 148.

- c. *the death penalty is inhumane, the right to life is a human right, and human life is sacred.*
- d. *only God gives life to humans, and God also has the right to take their lives*
- e. *there is no frightening effect of the death penalty. A perpetrator of a serious crime or in a frenzy they do not care about the severity of the death penalty.*
- f. *the issue of punishment is a matter decided by a human being who is a judge, judges as humans can be wrong.*
- g. *The death penalty is actually more of retaliation, while the purpose of modern punishment is not revenge but to educate the convict, improve the convict and so on.*
- h. *Very often, the death penalty is handed down due to uncontrollable emotions*
- i. *That in reality, the death penalty is often prejudiced, where the death penalty is often imposed by certain marginal people.⁴¹*

In addition, based on the current situation, there is a shift in the paradigm of punishment from time to time, both in society and in the world. It is more focused on the social goals to be achieved, not on the sanctions. Sanctions are a means of social engineering to achieve the purpose of punishment; however, these sanctions also depend on the perspective of the community where the sanctions are set. The paradigm shift in punishment includes the type of sanctions, the period of punishment as well as the pattern and system of punishment applied.⁴²

C. CONCLUSION

Based on the description, it can be concluded that Article 2 paragraph (2) of the Corruption Eradication Law cannot fulfill the juridical aspect to ensnare perpetrators of corruption, especially corruption in the social assistance fund for handling COVID-19, considering that it is not included in the occurrence of natural disasters in the provisions of "certain circumstances". In addition, the imposition of the death penalty on this article is a form of violation of the right to life as stated in the 1945 Constitution and Law Number 39 of 1999. The death penalty can only be imposed for gross human rights violations such as the crime of genocide, as stated in the International Covenant on Civil Rights. And Politics. This condition has caused many countries to abolish the death penalty because, apart from violating human rights, it has also been proven to be inaccurate to eradicate corruption, as seen in the 2019 Corruption Perception Index.

⁴¹ Munir Fuady dan Sylvia Laura L. Fuady, *Hak Asasi Tersangka Pidana*, 134.

⁴² Eva Achjani Zulfa, "Menakar Kembali Keberadaan Pidana Mati (Suatu Pergeseran Paradigma Pemidanaan Di Indonesia)," *Lex Jurnalica* 4, no. 2 (2007): 93-100.

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