



## Removing Bodies from the Grave from the Perspective of National Criminal Law and Islamic Law

Prara Al Hilal<sup>1</sup>, Atikah Rahmi<sup>2</sup>

<sup>1</sup>Fakultas Hukum, Universitas Muhammadiyah Sumatera Utara. E-mail: [praraal187@gmail.com](mailto:praraal187@gmail.com)

<sup>2</sup>Fakultas Hukum, Universitas Muhammadiyah Sumatera Utara. E-mail: [atikahrahmi@umsu.ac.id](mailto:atikahrahmi@umsu.ac.id)

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<p><b>Keywords:</b> <i>IUUF; Criminal Law Regulation, Removal, Corpse</i></p> <p><b>How to cite:</b> Hilal, P.A. Rahmi, A. (2024). Removing Bodies from the Grave from the Perspective of National Criminal Law and Islamic Law. <i>Veteran Law Review</i>. 7(1). 103-110.</p> <p><b>Received:</b> 2024-02-08</p> <p><b>Revised:</b> 2024-04-10</p> <p><b>Accepted:</b> 2024-05-31</p>	<p>Corpse removal is the process of moving the body of a person from one place to another. Sometimes, this is done at the request of the family, for cultural or religious reasons, or even for other reasons such as demolition of the burial site or redevelopment of the burial area. The purpose of this research is to find out the rule of law to answer the issue of grave transfer. This type of research is normative juridical research obtained from secondary data related to the object of research including related laws and court decisions. In this research, data analysis is carried out qualitatively, namely the selection of theories, principles, norms, doctrines and articles contained in the Law that are relevant to this research. Based on the results of the research, the criminal act of corpse removal has criminal law rules, namely in Article 180 of Law No. 1 of 1946 concerning the Criminal Code and in Article 271 of Law No. 1 of 2023 concerning the Criminal Code. The removal of corpses from the grave is also not justified by several Islamic scholars so that this is in line with criminal law. In the case that occurred in Donggala district based on the Donggala District Court Decision No. reg 11/Pid.B/2014/PN.Dgl the Panel of Judges sentenced the defendants to imprisonment for four months each.</p>

### 1. Introduction

Indonesia is a country of law, so everyone must submit and obey the law to ensure the freedom of each resident. This is also the reason the state provides protection from various legal aspects, including Indonesian criminal law. Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, the 4th amendment, states that the State of Indonesia is a state of law in which there is law enforcement as social control in society (Salle, 2020).

The determination of the existence of a criminal act in the Criminal Code is in line with the opinion of Simons who explains *strafbaar feit* as an act that violates the law, because the maker has violated a prohibition or requirement from the legislators of the view that a criminal act is deemed to exist if an act is in accordance with the content formulation of the law (Hanafi, 2019).

From this opinion, an act is declared a criminal act if it violates and is contrary to the formulation of the law, or in other words, a criminal act is identical to going against the law or written law. Therefore, in determining an act as a criminal act, especially a religious crime, the reference used is the provisions that have been formulated in the Criminal Code (Hanafi, 2019).

The Criminal Code as the basics and rules is the aim of criminal law itself, namely to create order in society so that people's lives can continue peacefully and peacefully. The removal of bodies from graves is regulated in Article 180 of the Criminal Code which reads:

"Whoever intentionally and against the right to remove a corpse from a grave or move or lift a corpse that has been removed, shall be punished by imprisonment for a maximum of one year and four months or a fine of up to Rp. 4,500."

This theme is interesting because it concerns corpses, in Islam holding or maintaining corpses is a fardhu and Islam also teaches several ethics related to death, starting from when a person is sick until after the funeral, even after that there are still several ethics that should be followed (Achmad Mufid & Yudistira, 2007).

Islamic Criminal Law is a regulation of Allah SWT which originates from the Koran and al-Sunnah. It is also called *fiqh jinayah*, namely all legal provisions regarding criminal acts or criminal acts that originate from the Al-Quran and the hadith and *ijtihad* of the ulama (Ali, 2023). Meanwhile, Positive Criminal Law is a set of legal principles and rules that apply in Indonesia today, in oral and written form and is specifically and generally binding and is enforced by competent judicial institutions (Ishaq, 2020).

These two laws aim to have a deterrent effect on perpetrators of criminal acts so that they do not repeat their actions and that other people do not imitate them. However, because the different sources of God's laws and human laws have implications for different sanctions for *doen pleger* or people who order to abuse other people and *dader* or people who are ordered to do so. Therefore, this article discusses the criminal liability of *doen pleger* and *dader* according to these two laws in an effort to reveal the similarities and differences between the two (Astuti et al., 2020).

Sometimes, the transfer of bodies is carried out at the request of the family, cultural or religious reasons, or even for other reasons such as demolishing the burial site or rebuilding the burial area. There will be things that are deviant, for example one of the people in Donggala Regency who moved corpses from their private land to *waqf* land without the permission of the bereaved family.

This tomb was moved because it was on someone's private land in Donggala Regency and was moved to *waqf* land or what we usually know as a public cemetery because the tomb was on his private land. The family of the owner of the tomb that was moved felt confused when they wanted to make the

pilgrimage. Moving a body from freehold land to waqf land without the consent of the bereaved family, this action can be considered illegal and violates the law.

## **2. Method**

A research cannot be said to be research if it does not have a research method (Koto, 2021). Research methods are one of the factors of a problem that will be discussed (Hanifah & Koto, 2021). This paper can be categorized as normative juridical legal research where what is researched is legal material obtained from library data in secondary form. The method is to use secondary data as a process of finding legal rules, legal principles and legal doctrine to answer problems (Fajar & Achmad, 2010). The data obtained in this research is from secondary data using data collection tools in the form of libraries carried out through literature searches carried out at the Muhammadiyah University of North Sumatra and supplemented with the opinions of scholars to sharpen the discussion in this research.

## **3. Result & Analysis**

### **3.1. Transfer of Corpses Based on National Criminal Law Perspective**

Criminal law as part of the legal system that applies in a country has an important meaning as is the aim of law in general, namely creating order in society so that people's lives can continue in peace and tranquility. The determination of the existence of a criminal act in the Criminal Code above is in line with the opinion of Simons who explains *strafbaar feit* as an act that violates the law, because the maker has violated a prohibition or requirement from the legislators who are of the view that a criminal act is deemed to exist if an act is in accordance with the contents of the statutory formulation.

In the Indonesian legal system, the above legal requirements have been realized in Article 1 paragraph (1) of the Criminal Code (hereinafter referred to as the Criminal Code). In this article, the principle of legality is found, the oldest legal principle in the history of human civilization. Basically, the principle of legality is also commonly referred to as "principle of legality", "non-retroactive", "de la legalite" or "ex post facto laws". This principle is maintained in various countries as protection against potential arbitrariness in enforcement. Criminal law One of the meanings of the principle of legality according to Moeljatno is that no action is prohibited and punishable by crime if this has not been previously stated in a statutory regulation (Mulyadi, 2023).

The formulation of crimes against corpses in the Criminal Code is contained in Book II Chapter V concerning Crimes Against Public Order. The reason why the transfer of corpses is included in the chapter on crimes against public order is because this is considered to be contrary or violates and endangers the public/society interest.

As has been explained, the problem in this paper concerns one form of crime

against corpses, namely the crime of removing them from the grave. Like the case of mutilation, it can be punished if it begins with the crime of killing a corpse or dismantling a corpse's grave as regulated in Article 180 of the Criminal Code which reads:

"Anyone who intentionally and unlawfully digs up or takes a body or moves or transports a body that has been exhumed or taken, is threatened with a maximum penalty of one year and four months or a maximum fine of three hundred rupiah."

The criminal law system is a unified system with a purpose (purposive system) and criminal law is only a tool/means to achieve the goal. The Criminal Code as currently implemented does not contain the objectives of punishment and the general guidelines for administering sentences (strafdoelbepalingen) are guidelines made by the legislators which contain the principles that need to be taken into account by judges in imposing sentences, there are only rules for imposing sentences (strafdoelbepalingen) (Irmawanti & Arief, 2021). This regulation is not yet in effect but has been ratified by President Jokowi and will take effect in the next 3 years, namely in 2026.

In connection with the above, crimes against corpses are not written violations, even though criminal law is something that is clear and not vague. This crime is regulated in Law No.1 of 2023 concerning the Criminal Code (KUHP) in article 271 which reads:

"Any person who unlawfully digs or dismantles graves, takes, moves or transports corpses, and/or treats corpses uncivilizedly, can be punished with a maximum imprisonment of 2 (two) years or a maximum fine of category III."

With regard to the discussion in this research, there is an example of a case in Donggala district, from the facts revealed that the body of the late Nadjamudin Malewa was moved by 3 defendants, namely Djindan Ponulele, Masrudin, and Haruna. Masrudin and Hanura dismantled and moved the bodies at Djindan's request on the grounds that the graves were on Djindan's land. This grave was dismantled with the grave body and tombstone to be moved to a public cemetery where the grave had previously been prepared. This is against the rights because these three Defendants did it without the knowledge and permission of the family of the late Nadjmudin as stated in the Donggala District Court Decision 11/Pid.B/2014/PN.Dgl.

In this case the Defendants fulfilled the elements of a crime by carrying out actions that met the formulation of the Law which were unlawful. The Panel of Judges was of the opinion that the Defendants were correct in removing Nadjamudin's body from the grave. This was an intentional act because Djindan felt that the burial ground he occupied belonged to him, while Masrudin and Hanura, who also took part, received wages in return. So the Defendants can be punished for committing a mistake, namely violating Article 180 of the Criminal Code Jo. Article 55 paragraph (1) 1st Criminal

Code.

One of the characteristics of almost all legal systems is that personal responsibility for criminal acts that have been committed is always linked to certain mental states. These particular circumstances are formulated in negative form by mentioning the circumstances as reasons for abolishing the imposition of criminal penalties (Sabatian, n.d.). In this decision, the Panel of Judges was of the opinion that although Djindan was only the proponent, he was considered the person who carried it out.

These defendants committed their criminal acts by means of inclusion, namely that someone who does not fulfill all the elements of a criminal act can be punished because of their role in the realization of the criminal act. This participation is included in the form of participation which requires a person to be involved in a criminal act (Pratiwi, 2022). In this case, Djindan did not move the grave of the late Nadjmudin directly, but he ordered Masrudin and Haruna, but Djindan also fulfilled the elements of this article because he was an advocate.

By reading the court decision, this is the result of law enforcement and justice. The result of the decision also depends on the judge's ability and wisdom in making decisions that reflect justice. Every decision issued by the judge contains the words "For the sake of justice based on belief in the Almighty God." So that every decision taken by a judge must be a decision issued wisely and judiciously which prioritizes a sense of justice based on the belief in the Almighty God (Rafli & others, 2023).

### **3.2. Sub-heading of the discussion**

Apart from criminal law, in Indonesia there are laws that apply formally, namely customary law and Islamic law. However, Islamic law that applies in Indonesia generally only regulates matters of a familial nature or regulates relationships between individuals, for example marriage and inheritance issues (Mentari, 2020).

Similar to criminal law, in Islamic law moving a corpse after it has been buried means digging up the grave and taking the body to be moved to another cemetery where the body that has been buried cannot be disinterred again, unless there is a cause that requires it to be dismantled or confiscated. Regarding the law on transferring corpses, there are differences between scholars, namely:

- a. According to the Shafi'i group, it is haram to move corpses from one country to another, except to the areas of Mecca, Medina or Baitul Maqdis. If you go to one of these three areas then this is permitted because of its priority and nobility. If someone leaves a will to move the body to a place other than this noble place, then the will must not be fulfilled, because it will slow down the burial and cause the body to rot. It is also haram to remove him from the grave except for a justifiable purpose, for example if he is buried without being washed

- or perhaps because he is not facing the Qibla (Pramono, n.d.).
- b. According to the Maliki group, it is permissible to move it from one place to another, either before or after burial. If it is for a purpose, for example if they are worried that the grave will be submerged by sea water, or be dismantled by wild animals, or to make their family's pilgrimage easier, they are buried in the area and hope for blessings from that place. If there is a situation like this, it is permissible for the Maliki group to move the body as long as it does not damage the honor of the body such as being scattered, rotting or breaking bones (Pramono, n.d.).
  - c. According to the Hanafi group, Makruh is the law of moving from one country to another, and Sunnah is the law of burying in the cemetery of the country where he died. But there is no problem moving bodies that have not been buried a mile or two, because usually the distance to the cemetery is two miles. If it has been planted then it is haram to move it except for the reasons mentioned earlier and if the son dies and is buried outside his country and without his mother present, then the mother is impatient and intends to move him then this plan cannot be carried out and must be rejected (Pramono, n.d.).

In line with the opinion above, according to Muhammad Jawad Mughniyah, school of thought scholars agree that basically it is haram to dismantle graves, whether the deceased is the body of a child or an adult, a madman or an intelligent person. However, it is permissible to dismantle a grave for the benefit of the corpse, such as the grave being in a place where water flows, on the bank of a river; buried in a place of ghasab, whether at the enemy's place or not, because they did not know or because they forgot, while the person who owned it did not want to receive compensation; or be shrouded in a cloth that should not be used as a shroud; or buried together with property, whether belonging to the corpse or other people (Pramono, n.d.). Based on the above, the transfer of the body is not justified, or the transfer is not something that is permitted because it involves human honor. However, in some contexts this prohibition can be interpreted as a matter of urgency and permits moving the body.

Respecting the dead is the same as respecting the living by adhering to the word of Allah in Q.S Al-Israa/17:70

وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْبَرِّ وَالْبَحْرِ كَثِيرًا مِمَّنْ خَلَقْنَا تَفْضِيلًا

Meaning: "And indeed we have glorified the children of Adam, we carried them on the plains and in the seas, we gave them sustenance from the good things and we gave them perfect advantages over most of the creatures that we have created."

Sharia and criminal law do not see who the perpetrator is, but in Islam they adhere very clearly and firmly to the principle of equality before the law and legal protection without discrimination. The command to uphold justice is

often repeated in various holy books because of its universal value. Judges are tasked with carrying out their duties fairly and impartially. In any case, crimes must be punished, because punishment can be not only compensation for crimes, but also amelioration and deterrence for society at large. All the laws of the world want the same thing.<sup>1</sup>

#### 4. Conclusion

In regulating the crime of moving corpses, there are various kinds of positive laws that regulate it. Based on Article 180 of Law no. 1 of 1946 concerning the Criminal Code and Article 271 of Law No. 1 of 2023 concerning the Criminal Code states that digging or moving bodies is not permitted. In line with Indonesian criminal law, Islamic law, there are several groups of ulama's opinions which essentially do not allow moving graves. So if we reflect on the Donggala District Court Decision No. 11/Pid.B/2014/PN.Dgl, the Panel of Judges decided that the actions of the Defendants, namely the crime of removing a corpse from a grave, were punished under Article 180 with imprisonment for 4 months..

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<sup>1</sup> Syaibatul Hamdi dan Sumardi Efendi. (2022). "Konsep keadilan Delik Pembunuhan Dalam Hukum Positif Indonesia dan Hukum Islam". *Jurnal Maqasidi*. 2(2);144-159.

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