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The Executability of Capital Punishment under Indonesia's 2023 Penal Code: A Legality Principle Analysis

Sari Mandiana[1], Go Lisanawati[2*]

[1]Faculty of Law, Universitas Pelita Harapan Surabaya, Surabaya
[2]Faculty of Law, University of Surabaya, Surabaya
sarimandiana@gmail.com; go_lisanawati@staff.ubaya.ac.id

**Corresponding author*

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Abstract : *The 2023 Indonesian Penal Code (KUHP Nasional) contains overlapping and inconsistent provisions regulating the execution of capital punishment, resulting in legal uncertainty at the level of implementation. This article examines the application of the death penalty under the KUHP Nasional from the perspective of the principle of legality, a fundamental pillar of criminal law requiring clarity and certainty in the formulation of criminal sanctions. Using a normative juridical approach, this conceptual study is based primarily on statutory analysis of the KUHP Nasional. The analysis demonstrates that the introduction of a mandatory probationary period for death sentences creates an internal contradiction within the Code, effectively rendering the execution of capital punishment legally impracticable, particularly following its full entry into force on 2 January 2026 as stipulated in Article 624. This article argues that the principle of legality must be understood not only in its formal dimension but also in its pragmatic dimension, especially at the judicial application stage. The main contribution of this study is its demonstration that the current legal construction of capital punishment in the KUHP Nasional undermines legal certainty and raises fundamental questions regarding the enforceability of the death penalty in Indonesia.*

Keywords : *capital punishment; principle of legality; National Penal Code; legal certainty; execution*

Abstrak : Kitab Undang-Undang Hukum Pidana Nasional (KUHP Nasional) Tahun 2023 memuat ketentuan yang tumpang tindih dan tidak konsisten dalam pengaturan pelaksanaan pidana mati, sehingga menimbulkan ketidakpastian hukum pada tataran implementasi. Artikel ini mengkaji penerapan pidana mati dalam KUHP Nasional dari perspektif asas legalitas sebagai pilar fundamental hukum pidana yang menuntut kejelasan dan kepastian dalam perumusan sanksi pidana. Dengan menggunakan pendekatan yuridis normatif, penelitian konseptual ini bertumpu pada analisis peraturan perundang-undangan, khususnya KUHP Nasional. Hasil analisis menunjukkan bahwa pengenalan masa percobaan wajib bagi pidana mati menciptakan

kontradiksi internal dalam KUHP Nasional, yang secara efektif menjadikan pelaksanaan pidana mati tidak dapat dilaksanakan secara praktis, terutama setelah berlakunya secara penuh pada 2 Januari 2026 sebagaimana diatur dalam Pasal 624. Artikel ini menegaskan bahwa asas legalitas harus dipahami tidak hanya dalam dimensi formal, tetapi juga dalam dimensi pragmatis, terutama pada tahap penerapan oleh pengadilan. Kontribusi utama artikel ini adalah menunjukkan bahwa konstruksi hukum pidana mati dalam KUHP Nasional saat ini melemahkan kepastian hukum dan menimbulkan persoalan mendasar terkait keberlakuan dan eksekutabilitas pidana mati di Indonesia.

Kata kunci : pidana mati; asas legalitas; KUHP Nasional; kepastian hukum; eksekusi

Introduction

The discourse surrounding the harshest form of punishment, namely the death penalty or capital punishment (see Article 10 of the Criminal Code), remains highly contested. One of the principal arguments underlying the retention of the death penalty is grounded in the concept of retribution, often articulated as retributive justice. Within the traditional penal system, retribution is positioned as a central justification for capital punishment. The death penalty is thus conceived as a response to the most serious crimes, imposed by the state on behalf of victims and the wider community, and directed at offenders who are deemed to have committed morally reprehensible acts.[1]

The policy decision to retain or impose the death penalty constitutes one of the strategies employed in crime control. This policy has generated persistent debate, reflected in both support for and opposition to the existence of capital punishment. Once such a policy is formally adopted and enacted into law, the formulation of the sanction must ensure its enforceability at the implementation stage. This issue may be examined through the framework of criminal law policy. Pursuant to Article 1 paragraph (1) of the Criminal Code, the principle of legality not only governs the definition of criminal offences but also extends to the imposition of criminal sanctions. This principle is encapsulated in the maxim *nullum delictum, nulla poena sine praevia lege poenali*.

In the context of the principle of legality, Hartoyo et al. explain that legality, as formulated in a nation's penal code or constitution, functions as a fundamental principle for ensuring legal certainty. Within the sphere of law enforcement and the administration of justice, the principle of legality requires careful and context-sensitive interpretation. Historically, the emergence of the legality principle is closely linked to the classical school of criminal law, which posits that the primary objective of criminal law is the protection of individual interests against arbitrary state power.[2] Consequently, the principle of legality has come to occupy a central position in the criminal law systems of modern states. In the common law context, Bruce Chen observes that the principle of

[1] Eddy O. S Hiareij, *Prinsip-Prinsip Hukum Pidana*, Cetakan ke 5, Jakarta: Cahaya Atma Pustaka, 2014, 387.
[2] Hartoyo, Noenik Soekorini and Nur Handayati, 'Application of the Principle of Legality in the Criminal Justice System : Ensuring Justice and Protection of Human Rights', *ENDLESS: International Journal of Futures Studies* 6, No. 2 (2023): 254-266.

legality operates as an interpretive guideline, based on the presumption that Parliament does not intend to abrogate or restrict fundamental legal protections without clear and unequivocal statutory language.[3]

The Constitutional Court of the Republic of Indonesia has conducted a judicial review of the death penalty on the grounds that capital punishment is alleged to violate human rights. In its Decision No. 23/PUU-V/2007, the Court ultimately rejected the petition and affirmed that the death penalty remains constitutionally permissible under Indonesian law.

In response to the petitioners' claim that the death penalty is incompatible with human rights, it should be noted that, at first glance, capital punishment appears to conflict with Article 28A in conjunction with Article 28I of the 1945 Constitution of the Republic of Indonesia, as well as Article 9 paragraph (1) in conjunction with Article 4 of Law No. 39 of 1999 on Human Rights. These provisions affirm the right to life as a fundamental and non-derogable right, which is arguably infringed by the imposition of the death penalty. A similar formulation is found in Article 6 paragraph (1) of the International Covenant on Civil and Political Rights (ICCPR), which guarantees that every person has the right to life. However, Article 6 of the ICCPR does not establish an absolute prohibition on capital punishment. Article 6 paragraph (1) explicitly prohibits the arbitrary deprivation of life, while Article 6 paragraph (2) permits the imposition of the death penalty in states that have not abolished it, provided that it is reserved for the most serious crimes, imposed in accordance with the law in force at the time of the offence, and carried out pursuant to a final judgment rendered by a competent court.

Similarly, Law No. 39 of 1999 on Human Rights allows for the limitation of rights under certain conditions. Article 73 provides that rights and freedoms may be restricted by law solely for the purpose of ensuring respect for the rights and freedoms of others, morality, public order, and the interests of the nation. On this basis, the application of the death penalty in Indonesian law is understood as a restricted and exceptional measure.

Developments in criminal policy have significantly influenced the forms of sanctions and methods employed in crime control. Criminal behaviour is not static, but evolves in response to societal change. Consequently, criminal sanctions are not limited to imprisonment alone, but also encompass other severe penalties, including life imprisonment and the death penalty. In this regard, Sudarto argues that criminal sanctions are not immutable, noting that conceptions of crime and punishment shift over time, and that the choice of sanctions ultimately concerns legal certainty and the selection of the most effective means to achieve the objectives of law enforcement.[4]

By referring to the provisions discussed above, this article examines whether death sentences that have obtained final and binding legal force (*inkracht van gewijsde*) prior to 2026 can still be executively enforced once the National Criminal Code (KUHP Nasional) is promulgated and becomes constitutionally binding throughout Indonesian territory.

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[3] Bruce Chen, 'The Principle of Legality : Issues of Rationale And Application' *Monash University Law Review* 41, No. 3 (2015): 329.
[4] Sudarto, *Kapita Selekta Hukum Pidana*, Bandung: Alumni, 1981, 106.

Substantively, the National Criminal Code, particularly Articles 67, 98, 99, 100, and 101, reveals overlapping formulations and normative inconsistencies, especially between Article 98 and Article 100, as well as between Article 99 and Article 101. Article 67 characterises capital punishment as a special sanction imposed in an alternative manner. Article 98 further positions it as an alternative sanction of last resort, aimed at preventing crime and protecting society. Article 99 provides that capital punishment may be executed only after the President has rejected an application for clemency. Conversely, Article 100 introduces a mandatory ten-year probationary period subject to specific conditions, while Article 101 stipulates that if clemency is denied and the execution has not been carried out during the probationary period, the sentence must be commuted to life imprisonment.

This construction leads to the conclusion that the execution of the death penalty becomes legally impracticable, if not impossible. More critically, it raises fundamental questions concerning the function and effectiveness of the principle of legality as a guarantor of legal certainty in law enforcement. The automatic commutation of a death sentence to life imprisonment after a prolonged probationary period may result in double or even multiple forms of punishment, thereby distorting the coherence of the penal system. Such a normative design risks instrumentalising the law to serve particular interests under the guise of achieving policy objectives.

In essence, respect for human rights must be balanced with the imperative to uphold the rule of law. The execution of a death sentence, as a lawful act within the authority of the public prosecutor, should be regarded as legally complete once a final court judgment has been rendered. Guided by criminal policy and legal politics grounded in the principle of legality, law enforcement should aim to realise legal certainty and various dimensions of justice, including retributive, distributive, commutative, and restorative justice.

Criminal law reform must therefore be conducted continuously and structurally to improve the existing penal system. Such reform should be comprehensive rather than fragmentary, encompassing not only substantive norms but also the broader system of criminal law enforcement.[5] Within this framework, the reform of capital punishment under the National Criminal Code, particularly its formulation as an alternative sanction and the postponement of its execution, represents a significant shift in Indonesia's penal policy.[6]

Moreover, the death penalty remains the harshest form of punishment in the penal system, as it directly affects the most fundamental human interest: the right to life. Criminality is inherently linked to social life and individual autonomy. In this context, the Institute for Criminal Justice Reform (ICJR) notes that under the Criminal Code, the death penalty is framed as a deterrent sanction, functioning through several justificatory mechanisms:

[5] Michael Adhyaksa Padang, Billi J. Siregar & Rosmalinda, "Keberpihakan Pemidanaan Dalam Undang-undang Nomor 1 Tahun 2023", *Locus: Jurnal Konsep Ilmu Hukum* 4, No. 2 (2024): 65.
[6] Herman, Handrawan, Sabrina Hidayat, Oheo Kaimudin Haris, Sitti Aisah Abdullah, Andi Agung Hidayat, "Analisis Hukum Pidana Masa Tunggu Pidana Mati Dalam Kitab Undang-Undang Hukum Pidana Nasional Dalam Perspektif Keadilan Korektif (Criminal Law Analysis of the Waiting Period for the Death Penalty in the National Criminal Code from a Corrective Justice Perspective", *Halu Oleo Legal Research* 6, No. 2 (2024): 516-530.

a. as the most severe form of punishment;
b. as a sanction consistently reserved for the most serious offences; and
c. as a penalty commonly prescribed in the alternative to life imprisonment or long-term imprisonment of up to twenty years.[7]

Modern theories of punishment have significantly influenced changes in the provisions governing the death penalty. The shift from a predominantly retributive justice perspective toward restorative justice has been a key driver of these changes. Criminalisation is now increasingly aimed at achieving a balance between the interests of the perpetrator, the community, and the victim, all of whom require protection. This evolving perspective calls for the application of the death penalty in a manner consistent with more humane principles of justice. In this regard, Muhammad Idris et al. emphasize that punishment should protect both victims and perpetrators.[8] The objectives of punishment are thus framed in terms of social defense, rehabilitation, and the resocialisation of convicts, highlighting that the purpose of punishment is not to inflict harm or degrade the dignity of the offender. Consequently, punishment simultaneously safeguards the community and provides guidance and reform opportunities for the offender.[9]

Historically, during the deliberation of the Draft National Criminal Code (RKUHP), Lidya Suryani Widayati offered critical commentary on the death penalty. Legal scholars, philosophers, and social scientists continue to debate its merits and drawbacks. Social and legal acceptance of capital punishment varies widely across countries and jurisdictions: some states have abolished it entirely, while others retain it for specific crimes. Some countries, although formally retaining the death penalty, have effectively ceased executions, aligning with the international movement toward abolition in practice.[10]

The analysis of these perspectives, as highlighted in the state-of-the-art review, serves as the foundation for identifying the key legal gaps that this article seeks to address. The death penalty remains a highly debated and complex issue, requiring a critical assessment of its function and applicability within the Indonesian penal system. This study focuses specifically on the executability of the death penalty under the National Criminal Code, examining whether its implementation can be carried out in a manner that fully respects the principle of legality. The novelty of this article lies in its dual emphasis: first, on clarifying the legal ambiguities and overlapping provisions in the National Criminal Code that hinder the enforceability of capital punishment, and second, on proposing a framework to restore legal certainty in the execution of the death penalty. By doing so, this study not only contributes to the scholarly debate on capital punishment in Indonesia but also provides a practical and doctrinal perspective on how the principle of legality can be

[7] Anggara, Supriyadi Widodo, Ajeng Gandini Kamilah, *Distribusi Ancaman Dalam RKUHP dan Implikasinya,* Jakarta: Institute For Criminal Justice (ICJR), 2016, 3
[8] Muhammad Idris Nasution, Muhammad Ali, Fauziah Lubis, *Pembaruan Sistem Pemidanaan di Indonesia: Kajian Literatur atas KUHP Baru*, Judge: Jurnal Hukum, 2024, Volume 5, No. 1, 17
[9] Noveria Devy Irmawanti, Barda Nawawi Arief, 'Urgensi Tujuan Dan Pedoman Pemidanaan Dalam Rangka Pembaharuan Sistem Pemidanaan Hukum Pidana', *Jurnal Pembangunan Hukum Indonesia* 3, No. 2 (2021): 222.
[10] Lidya Suryani Widayati, 'Pidana Mati Dalam Ruu Kuhp: Perlukah Diatur Sebagai Pidana Yang Bersifat Khusus?', *Jurnal Negara Hukum* 7, No. 2 (2016): 167.

operationalized to ensure consistent, lawful, and just enforcement of the death penalty.

Methods

The research method employed in this study is a normative juridical (doctrinal) legal research method, which involves examining applicable laws and regulations to understand their content, interpretation, and practical implications. The primary legal source is the 2023 Criminal Code, also referred to as the National Criminal Code, while secondary legal sources include scholarly literature on criminal law, the death penalty, the Criminal Code, and related legal materials that provide theoretical and contextual support for the analysis. This study applies both a conceptual approach and a legislative approach. The conceptual approach focuses on interpreting and analysing legal doctrines and principles, particularly the principle of legality, as it pertains to capital punishment as an alternative sanction in the National Criminal Code. The legislative approach examines statutory provisions, including inconsistencies, overlaps, and gaps, to evaluate their enforceability and coherence.

The data are analysed descriptively and analytically. The process begins by identifying the legal issues surrounding the principle of legality in the context of capital punishment, which are then interpreted and clarified through the conceptual framework provided by legal scholars. A systematic analysis of statutory provisions follows to assess how the law functions in practice. The study concludes by drawing normative conclusions regarding the executability of the death penalty under the National Criminal Code and the role of the principle of legality in ensuring legal certainty. This dual approach allows the research to combine doctrinal legal analysis with critical reflection on both the conceptual and practical implications of criminal law reform, particularly regarding the limitations and application of capital punishment.

Result And Discussion

Philosophical Principles of Legality and Execution of the Death Penalty

Quoted from Hoefnagels' opinion: "public order is always the result of a power struggle between efforts to legitimise what already exists and activities that strive for change." This dialectic of authority and critique raises a fundamental question: "What does the ruler intend in cases where it is possible to sentence an individual to death and carry out the punishment? What measures are used to define a criminal act and determine the corresponding punishment?" Despite these questions, the Criminal Code and the National Criminal Code remain highly significant for the judiciary. The issues raised carry practical relevance, particularly in the context of modern legal developments, such as the implementation of the National Criminal Code. These considerations are part of the political constitution that shapes societal order, reflecting the extent to which the state can influence the lives of its citizens under various circumstances and conditions.

In this context, the **Principle of Legality** plays a central role as a fundamental pillar of criminal law, serving to limit arbitrariness and constrain the exercise of state power, thereby regulating the supervisory function of criminal law. This principle underpins the definition of criminal acts and the imposition of sanctions. Joko Sriwidodo and M.S. Tumanggor note that criminal acts generally arise from three elements: the intent of the perpetrator, the opportunity to commit the act, and the act itself. The absence of any one of these elements negates the criminality of the conduct.[11]

Historically, the principle of legality, expressed as *nullum delictum nulla poena sine lege*, demands that the law clearly address all aspects of criminal liability. From a legal-political perspective, it affirms that only the law has the authority to define punishable conduct, establish applicable sanctions, and regulate criminal justice procedures. This framework protects individuals from arbitrary action by the state. It requires definite, written rules (*lex scripta*), unambiguous provisions (*lex certa*), and confidence in judicial fairness. The principle assumes that individuals are autonomous, capable of self-governance, and responsible for the consequences of their actions; without such legal constraints, the law loses its normative meaning.[12]

The Principle of Legality is interpreted in three key ways: (1) the prohibition of analogy in criminal law (non-analogy principle); (2) the obligation to apply criminal laws in effect at the time of the offence (*lex temporis delicti*), prohibiting retroactive application; and (3) the use of legal sanctions to safeguard individuals by limiting the discretionary power of authorities, including judges.[13]

The theory of psychological coercion (*psychologische dwang*) further underlines the principle, asserting that criminal statutes and attached penalties should generate sufficient deterrent effect to prevent criminality. Functional criminal policy therefore requires clear, precise laws that define crimes and prescribe proportional punishments, enabling individuals to understand the consequences of their conduct, reflecting the rationality inherent in the principle of legality.

From a pragmatic perspective, however, strict adherence to the principle of legality can sometimes constrain law enforcement, leaving certain criminal acts unpunished. Within the criminal justice system, the principle is expected to guide courts in the consistent and fair application of sanctions. The judiciary thus occupies a central role in operationalising legality. In this regard, the death penalty, as defined in law, exemplifies a sanction that must be applied in full accordance with the Principle of Legality (see Article 1 paragraph 1 of the Criminal Code), ensuring that the labeling and enforcement of criminal acts remain legally and normatively sound.

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[11] Joko Sriwidodo and M.S. Tumanggor, *Regulation of Corporate Criminal Liability According to Law Number 1 Year 2023 on The Criminal Code*, Krtha Bhayangkara, 2024, Vol. 18, No. 1 (2024), 198

[12] Roeslan Saleh, *Beberapa Asas-Asas Hukum Pidana Dalam Perspektif,* Jakarta: AksaraBaru 1981, 12-13

[13] Tonggo Sitorus and others, 'Development of the Principle of Legality in Indonesian Criminal Law' (2024) 2 International Journal of Multidisciplinary Approach Research and Science 278 <https://risetpress.com/index.php/ijmars/article/view/418/328>.

The death penalty is widely understood as a principal form of punishment, occupying the position of the most severe sanction within the criminal justice system (see Article 10 of the Criminal Code). Support for the death penalty is primarily grounded in the concepts of retribution and deterrence, which remain central to classical criminal theory. Retribution functions as a key component of the criminal justice framework, reflecting the state's commitment to delivering justice for victims in response to acts deemed morally reprehensible, while simultaneously holding perpetrators accountable.[14]

The Indonesian criminal law system, influenced by a legalistic orientation, relies heavily on a normative and doctrinal approach. As Modderman observes, the principle of criminal law requires that only violations of the law may be punished, a sine qua non condition. Punishment should be a last resort, applied only when other means fail to prevent wrongdoing. Criminal sanctions must balance the need for justice with the dignity of offenders, guided by the principle of "law for humans, not humans for law." In this view, even the threat of the death penalty must be critically examined, weighing its advantages and disadvantages in achieving justice, protecting victims, and utilising punishment efficiently as a means to societal ends. Critics such as Bennet argue that retribution, being backward-looking, offers no substantive social benefit, thereby calling for consideration of utilitarian perspectives in sentencing.[15]

In essence, every threat of punishment must invite protests, especially the threat of the death penalty. Nonetheless, this does not mean that one's sentencing should be ignored. On the contrary, one must assess the advantages and disadvantages by considering the victim, by changing the notion of retributionism towards the concept of utilitarianism, and by using the principle of the efficiency of the application of punishment between the end and the means of achieving the goal through punishment. According to Bennet, critic often objects to retribution as a rationale because it does not bring about any good. It relates to its backwards-looking orientation.[16]

From the perspective of criminal policy and penal reform, the selection of sanctions may evolve in response to social change. Criminality is not static; it shifts with societal development. Consequently, alternative forms of punishment extend beyond imprisonment to include the most severe sanctions, including life imprisonment and the death penalty. As Sudarto notes, the definition of crime and the appropriate form of punishment have evolved historically, reflecting changes in societal norms and expectations.[17] Indonesia's criminal law reform demonstrates this adaptive approach, incorporating living laws and societal realities into formal criminal regulations to ensure that punishment is both effective and just.[18]

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[14] Eddy O.S Hiareij, Loc.cit
[15] Romli Atmasasmita, *Hukum dan Penegakan Hukum*, Jakarta: Kencana, 2021, hlm. 104
[16] CD Bennett, 'Retributivist Theories' in (eds.) Bruinsma, G. and Weisburg, D. (ed), *Encyclopedia of Criminology and Criminal Justice* (Springer 2013).
[17] Sudarto, Loc.cit
[18] Muchlas Rastra Samara Muksin, 'Tujuan Pemidanaan dalam Pembaharuan Hukum Pidana Indonesia', *Jurnal Sapientia et Virtus* 8, No. 1 (2023): 237.

The penal system, especially the execution of the death penalty, as intended previously and regulated in various regulations, does not seem to be in line with the purpose of punishment, as well as the philosophy or spirit of the punishment itself. However, from a functional and operational perspective, the implementation of the death penalty in several criminal acts is a series of processes that include the simulation stage, which is a legislative policy regulated in the law, the implementation stage, which is the judicial authority, and the execution stage, which is an executive policy that integrates the penal system.[19]

The execution of the death penalty from the point of view of human rights, as shown by Article 67 of the National Criminal Code and the 1945 Constitution of the Republic of Indonesia (the special penalty in Article 64 letter c is referred to as an alternative death penalty), is not contradictory at all. The death penalty is used for extraordinary crimes that disrupt the lives of people across the nation and country. Objective criteria about how serious the crime is and subjective criteria about who the perpetrator is or the legal subject, such as recidivism, organised perpetrators of international-calibre narcotics, and terrorism, should be considered when using the death penalty as an exceptional measure.

Regarding the execution stage of the death penalty as part of executive policy, the procedures undertaken by the Attorney General's Office to carry out sentences on death row inmates are legally valid and, once implemented, are no longer subject to legal challenge. This finality is justified for two main reasons:

1. The position of the convict can no longer be directly associated with the judicial process under the Criminal Code once a sentence has acquired permanent legal force. At this stage, the convict's status becomes part of executive policy, encompassing investigation, prosecution, and court proceedings, which concretises the principle of legality as applied in judicial policy.

2. The definition of extraordinary crimes under criminal law principles applies exclusively to criminal acts that have undergone the full four stages of the *pro justitia* process, with detention serving a repressive purpose. The legal process is considered complete once a court decision has obtained permanent legal force against the defendant's actions. This principle is analogous to the execution of a prison sentence within a correctional institution, which constitutes the stage of convict rehabilitation and coaching. At this point, no authority, including investigators, prosecutors, or judges, may subject convicts to further judgment. Serving a sentence is understood as the process by which the offender atones for the crime committed; the State no longer possesses the right to modify, delay, or otherwise interfere with the punishment. Criminal law recognises certain specificities only in relation to particular legal subjects, such as individuals with psychiatric disorders or minors.

[19] Barda Nawawi Arief, *Perkembangan Asas-Asas Hukum Pidana Indonesia*, Semarang: Badan Penerbit UNDIP, 2014, 20-22

Related to the legal problems, it will be necessary to be precisely guide on which crimes shall be taken as a crime with the possibility of implementing capital punishment, which leads to its implementation, without the 10-year probation period.

Inconsistency in the Formulation of Articles of the National Criminal Code Related to the Death Penalty

The fundamental difference between *Wetboek van Strafrecht* interrelated Law No. 1 of 1946 and Law No. 1 of 2023 lies in the underlying philosophy. *Wetboek van Strafrecht*, interrelated to Law No. 1 of 1946, was based on the classical school of thought that was developing at that time on criminal acts. The National Criminal Code is based on the neo-classical school, which seeks to harmonise objective and subjective elements. This school not only handles criminal acts that have occurred but also investigates the personal dimension of the perpetrator. The evolution of victimology, which focuses on ensuring fair treatment for victims of crime, is an integral aspect of this approach. Based on this, the philosophy *of "daad-dader-victim-strafrecht"* emerged. This philosophy affects the formulation of three main problems of criminal law, namely the formulation of unlawful acts, criminal liability or mistakes and criminal sanctions and actions that can be imposed, along with the underlying principles of criminal law. As it remains in debate, the death sentence constitutes a more severe form a crime than other forms, as it results in the irrevocable loss of human lives, which are inherently the most valued. Furthermore, human rights advocates for the sanctity of every life. [20]

Then, to maintain a balance between objective and subjective factors, the National Criminal Code has various express and implicit regulations, including the purpose of the penalty, the conditions of the penalty, the double track system, and the guidelines or rules of the penalty. The death penalty is not included in the rules of the primary criminal type because it is a special crime that is always alternated with life imprisonment, or imprisonment for a specific period for a maximum of twenty years. The death penalty itself is determined in a separate article, which shows that this type of crime is special as a last resort to protect the community.

General rules that contain the concept of the penal system are formulated explicitly, including the purpose as well as guidelines in punishment (vide Articles 51 to 54 of the National Criminal Code). Because it is the philosophy of the penal system, the purpose and guidelines for the punishment must be formulated explicitly. It is done because each system has a purpose called the purposive system, to justify the existence of crimes, including the death penalty. The selection of the death penalty as a method to eradicate crime is basically a policy decision. One can argue both the pros and cons of the death penalty when the policy is enacted. However, after the decision on the death penalty, and formulated in a law, in this case, the National Criminal Code, made the policy a legislative policy with the death penalty in the National Criminal Code. Then it continues at the application stage as a judicial policy

[20] Tedy Nopriandi and Risky Fany Ardhiansyah, 'Paradigm Of Death Penalty (Comparative Study In Indonesia , Saudi Arabia And China)' (2020) 2 Lampung Journal of International Law (LaJIL) 57 <https://jurnal.fh.unila.ac.id/index.php/lajil/article/view/2032/1567>.

(concretising the principle of legality) through a judge's decision. Doesn't the principle of legality not only apply to criminal acts but also to criminal sanctions listed in Article 1 paragraph 1 of the Criminal Code, in *"Nullum delictum, nulla poena sine praevia lege poenali"*? From a functional or operational point of view, the execution of the death penalty is carried out after the application aspect as a judicial policy contained in a court decision that has permanent legal force *(in kracht van gewijsde).*

The problem issues analysed in this article are based on the position of capital punishment in the 2023 National Criminal Code itself. On the one hand, all the extraordinary crimes are put death penalty as the ultimate sanction. It means the death penalty is the heavier sanction. On the other hand, the executions need special treatment by putting them on 10-year probation. Ultimately, through Article 101, if the pardon from the President is not granted or during the 10-year probation the execution is not implemented, then the punishment for the defendant shall be changed into life imprisonment.

The death penalty, as stated in Article 67 of the National Criminal Code, determines: "A special crime as referred to in Article 64 letter c, is a death penalty that is always threatened alternatively". It is emphasised by the provisions of Article 98 of the National Criminal Code: "The death penalty is threatened alternatively as a last resort to prevent the commission of criminal acts and protect the community".

Basically, Article 67 of the National Criminal Code emphasises that the application of the death penalty can only be carried out for special crimes, namely, serious or extraordinary criminal acts, such as terrorism, corruption, narcotics, and gross violations of human rights. Thus, the death penalty is included in a special subsection to show that this type of crime is genuinely unique. The death penalty is the most severe type of punishment compared to others. Therefore, it must be threatened with alternative punishment such as life imprisonment or a maximum of twenty years.

Nevertheless, Article 98 of the National Criminal Code basically shows that the death penalty/capital punishment is no longer included in the basic criminal system but is designated as a special type of crime intended to act as a last resort to protect the community. The death penalty/capital punishment is the most severe crime that is threatened alternatively. Therefore, the death penalty/capital punishment is imposed with a probationary period, with the aim that the convict can make self-improvement so that the death penalty does not need to be carried out.

The probation period is stated in the provisions of Article 100 of the National Criminal Code. According to Article 100 paragraph (1), the judge imposes the death penalty with a probation period of 10 years by considering: a. The role of the defendant in the crime, or b. The defendant's remorse and hope to improve himself. Furthermore, paragraph (2) emphasises that the court decision must include the death penalty with probation. Furthermore, in paragraph (3), if the convict during the probation period behaves in a commendable attitude and act, and there is hope for improvement, the death penalty is changed to life imprisonment by the President's decision after obtaining the consideration of the Supreme Court (vide paragraph (6)).

The provisions of Article 100 paragraph (6) concerning the probation period in its implementation still refer to the provisions of Article 99 paragraph (1) of the National Criminal Code which states "The death penalty can be carried out after the application for clemency for the convict was rejected by the President" Furthermore, paying attention to the provisions of Article 100 of the National Criminal Code paragraph (1) point b "the role of the defendant in the criminal act" is there a correlation with the provisions of Article 67 of the National Criminal Code, especially the explanatory part with the statement of profound or extraordinary criminal acts aimed at Narcotics, Terrorism, Corruption and Serious Crimes against Human Rights that can be qualified as *extra ordinary crimes*.

In response to the probation period related to the provisions of Article 100 paragraph (6) of the National Criminal Code interrelated Article 67 explanation related to extra ordinary crimes, it is necessary to state that: first; the position of the convict is as a special convict where the position of the convict is at the stage of execution of a verdict that has been inkracht which can no longer be connected with the criminal justice process based on the Criminal Code; Second, the definition of an extraordinary crime in four forms of criminal acts in accordance with the principles of criminal law, is only aimed at criminal acts *(daad-strafrecht)* and not against the subject of the perpetrator. The focus on criminal acts must be seen after going through the four stages of the pro-justisia process through a repressive approach. It must be considered complete when a court decision is issued that is in line with the defendant's actions and continues with the execution stage in accordance with the provisions of the criminal sanctions imposed, including the death penalty or alternatives. In essence, the judge has the right of priority to choose him based on his or her merit, so it can be concluded that the pro-justitia stage, which is the stage of the judicial process at that time, has ended. There is no authority for the prosecutor and the judge to still judge special convicts with postponement or probation periods for those convicted of extraordinary crimes instead of serving the death penalty.

To create a value system in giving meaning to the legal system, judges are needed who are not only the legal funnel, but also interpreters, as well as judges of legislators. Has not the judge been given normative guidelines that have been regulated in the Law on Judicial Power? This provision is strengthened by Bentham's opinion, which states that there are 4 (four) threshold parameters for the application of criminal law functions, including sanctions as *"ultimum remedium"*, namely: if the punishment is unreasonable; ineffective; financially unprofitable; and unnecessary. Through a normative guideline of imposing the death penalty will be beneficially to give certainty to the defendant. It does not depend on the favour of the judge whether the defendant needs to be imposed with the death penalty or life imprisonment.

Conclusion

In the National Criminal Code, the death penalty is primarily formulated as a legislative policy, with its application guided by Articles 67, 98, 99, 100, and 101. These provisions are intended to regulate the use of capital punishment for extraordinary crimes that threaten society and the state. However, the inclusion of a probation period and overlapping or inconsistent provisions

creates significant practical challenges, making the execution of the death penalty as an executive policy difficult, if not impossible. This situation highlights a fundamental tension between the principle of legality, which guarantees legal certainty and protects individuals from arbitrary punishment, and the operational enforceability of capital punishment. The legal framework for extraordinary crimes is therefore incoherent, undermining both the objectives of criminal policy and the pragmatic implementation of law.

This study contributes to criminal law scholarship by demonstrating that the current formulation of the death penalty in the National Criminal Code fails to reconcile legislative intent with judicial practice and practical enforceability. It emphasizes the need to integrate legal, political, and pragmatic dimensions to ensure that capital punishment can be applied consistently, lawfully, and in alignment with the principle of legality. By clarifying these gaps, the study provides a foundation for criminal law reform, ensuring that the death penalty, if maintained, functions effectively as a legitimate sanction while respecting human rights, upholding justice, and strengthening the predictability and coherence of Indonesia's criminal justice system.

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