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New Criminal Code Capital Punishment Execution Viewed From Legality Principle

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 overlapping and inconsistent provisions on the implementation of the death penalty execution are found in several articles of the 2023 Penal Code (Indonesian Criminal Code). It creates uncertainty in its implementation. The fundamental thing to note is that the principle of legality, as one of the criminal law pillars, clearly underlies criminal offences along with criminal sanctions, in this case, including capital punishment, in the National Criminal Code. The problem formulation is how the implementation of Capital Punishment under the KUHP Nasional is from the perspective of the legality principle. This article is a conceptual piece that employs a normative juridical approach, with the primary legal source being KUHP Nasional. As a result, it says that the execution of capital punishment is impossible to implement with the existence of a probation period, while this criminal code will be fully implemented on January 2, 2026, as referred to in Article 624. The Legality principle should be implemented in the pragmatic dimension. In this case, it is focused on the criminal court as the application stage of the judicial policy to play a positive role in the death penalty sanction, which is contained in the legal definition of the sanction itself.*

Keywords : *Principle of Legality, Capital Punishment Execution, Quo Vadis, Last Resort*

Abstrak : Ketentuan dalam Kitab Undang-undang Hukum Pidana Tahun 2023 (KUHP Nasional) dirasakan tumpang tindih dan tidak konsisten terkait dengan pelaksanaan eksekusi pidana mati. Hal mendasar yang diperhatikan adalah dengan mengingat bahwasanya asas legalitas sebagai salah satu pilar hukum pidana jelas melandasi tindak pidana beserta dengan sanksi pidana, dalam hal ini termasuk pula Pidana mati. Permasalahan yang hendak dibahas adalah bagaimana kepastian pelaksanaan pidana mati dalam KUHP agar sesuai dengan asas legalitas. Artikel ini akan melakukan analisis atas rumusan ketentuan tentang pelaksanaan pidana mati di dalam KUHP Nasional. Artikel ini adalah merupakan artikel konseptual, dengan menggunakan pendekatan yuridis normatif, dengan bahan hukum primer adalah KUHP Nasional. Pada akhirnya yang pelaksanaan eksekutrial pidana mati tidak mungkin dapat dilaksanakan dengan keberadaan masa percobaan. Asas Legalitas hendaknya dilaksanakan dalam dimensi

pragmatik, dalam hal ini difokuskan pada pengadilan pidana sebagai tahap aplikasi kebijakan yudikatif untuk berperan positif atas sanksi pidana mati yang tertuang secara *legal definition of sanction*.

Kata kunci : Asas Legalitas, Eksekusi Pidana Mati, *Quo Vadis*, *Ultimum Remedium*

Introduction

The discourse on the harshest crime, namely the death penalty/capital punishment, is debatable (vide Article 10 of the Criminal Code). One of the main arguments underlying the emergence of the death penalty is considered "retribution" or "retribution and entrapment". It places retribution as an important component related to the death penalty, especially in the traditional penal system. The death penalty is intended for serious crimes committed by the state on behalf of the victim/community, as well as for perpetrators who have bad morals.[1]

The policy of choosing or imposing the death penalty is one of the strategies to eradicate crime. It has led to the emergence of pros and cons to the existence of the death penalty. When a policy has been established and promulgated into a law, the formulation of the punishment must ensure that it is implemented at the implementation stage. This perspective can be analysed through the lens of criminal law policy itself. According to Article 1, paragraph (1) of the Criminal Code, the principle of legality not only underlies criminal acts, but also includes criminal acts or sanctions. It is based on the principle of "*nullum delictum, nullum poena sine praevia lege poenali*".

In the context of the legality principle, Hartoyo et.al explain that the concept of legality, as defined within the penal code or constitution of a nation, serves as a crucial principle necessary for ensuring legal certainty. In the field of law enforcement and justice, the principle of legality requires careful interpretation. Considering the context that led to the formation of the concept of legality, the classical school posits that the primary objective of criminal law is to safeguard individual interests.[2] The principle of legality took an important role in the criminal law of every nation. Bruce Chen[3] comments on the legality principle in the context of common law, as the principle of legality serves as an interpretive guideline within common law, positing that it is doubtful for Parliament to revoke or limit essential standard law protections without explicit and unequivocal wording. It represents the foundational reasoning behind the principle.

The Constitutional Court of the Republic of Indonesia has conducted a material test of the death penalty/capital punishment because human rights do not allow the death penalty/capital punishment. In its decision No.

[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' (2023) 6 ENDLESS: International Journal of Futures Studies 254 <https://endless-journal.com/index.php/endless/article/view/174/170>.

[3] Bruce Chen, 'The Principle Of Legality : Issues Of Rationale And Application' (2015) 41 Monash University Law Review 329.

23/PUU-V/2007, the Constitutional Court basically rejected the application and declared the death penalty to be legal in Indonesia.

In response to the petitioners' statement that the death penalty is contrary to human rights, it is important to note that, at first glance, the death penalty appears to violate the provisions stipulated in Article 28 A interrelated Article 28 i of the Constitution of the Republic of Indonesia and Article 9 paragraph (1) inter-related to Article 4 of Law No. 39 of 1999 concerning Human Rights, which essentially explains that everyone has the right to life, which is a principle that is violated when the death penalty is applied. It is in line with the provisions of Article 6, paragraph (1) of the ICCPR, which states that everyone has the right to life. However, Article 6 paragraph (1) of the ICCPR, the statement continues with the firm sentence that "no one shall be arbitrarily of his life", continued in Article 6 paragraph 2 of the ICCPR: "in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and the Covention on the Prevention and punishment of the crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court."

Furthermore, the provisions in the Human Rights Law, namely Article 73, mean the death penalty (capital punishment) with limited application, namely "Rights and freedoms regulated in this Law can only be limited by and based on the Law, solely to ensure the recognition and respect for human rights as well as the basic freedoms of others, decency, public order and the interests of the nation." Thus, in essence, the death penalty/capital punishment can be carried out with restrictions as stated in the Human Rights Law.

The development of criminal policy has influenced the types of sanctions and methods used to combat crime. Crimes are not always permanent or irreversible. Crime can evolve in response to the development of society itself. Alternative forms of punishment include not only imprisonment but also other severe punishments such as life imprisonment and the death penalty. In this case, Sudarto said, "Does the crime have to be a prison sentence? History shows that what is called evil changes, as does what is called criminal. It is a matter of "Law Enforcement" (legal certainty). As for the way in which the law is enforced, it is a matter of choosing what means are seen as the most effective and useful to achieve the goal."[4]

Stating the provisions mentioned above, the author has the purpose of thinking whether the execution of the death penalty that is already *in kracht* (with permanent legal enforce) in the period of 2026, when the National Criminal Code is promulgated and constitutionally binding in Indonesian territory, can still be implemented executively.

In substance, the National Criminal Code, especially articles 67, 98, 99, 100 and 101 of the National Criminal Code, shows that there is an overlapping formulation and inconsistency between the provisions of Article 98 versus Article 100 and Article 99 versus Article 101. Article 67 mentioned that capital punishment is a specific criminal sanction that must be sanctioned alternatively. Article 98 then mentioned that it is an alternative criminal

[4] Sudarto, *Kapita Selekta Hukum Pidana*, Bandung: Alumni, 1981, 106.

sanction as the last resort to prevent a criminal act and to protect society. While Article 99 mentions that the capital punishment will be executed after the President refuses to give a pardon. Article 100 mentioned that it will lead to a 10-year probation period with all the requirements. Then Article 101 said that in case the President refuses to give a pardon, and during the 10-year probation period, the execution has not yet been implemented, then the sanction for the defendant shall be changed to life imprisonment. It leads to predictions of the end of the execution of the death penalty, which is impossible and can never be carried out. The next juridical impact needs to question the benefits and functionalisation of the Principle of Legality, which symbolises legal certainty in realising law enforcement. The overlapping comes when, in the end, through Article 101, the defendant shall be sentenced to life imprisonment after 10 years' probation if he/she has not executed. It is a double or even triple punishment for him/her. It resulted in the occurrence of a "twisting of the provisions of the law (the National Criminal Code)", which is only to meet the interests of a particular group, with the theme of the origin of the goal achieved. In essence, respecting not only human rights, but also the upholding of the State of Law must be prioritised. Given that the execution of a death row inmate is a valid legal action that is the authority of the prosecutor's office, and must be considered completed after the court's verdict, it has permanent legal force for the defendant's actions. Guided by criminal policy or legal political doctrine that realises legal certainty (principle of legality) for the achievement of retributive justice, distributive justice, commutative justice and restorative justice.

Reforms in the criminal law must be carried out continuously to improve the existing penal system. For this reason, it is crucial to reform the structural penal system. Criminal law must be total and structural, not just fragmentary, in the criminal or criminal law enforcement system. Criminal law reform is considered a new element in the criminal process.[5] One of these reforms is the death penalty. The reform in the National Criminal Code is related to the death penalty provisions, including the application of the death penalty/capital punishment as an alternative penalty and the postponement of the execution of the death penalty/capital punishment.[6]

In addition, the death penalty is the harshest type of punishment in the penal system. A person's life in society is closely related to the problem of criminality; in this regard, it is related to a person's life and their independence.[7] According to the Institute for Criminal Justice Reform (or ICJR), according to the Criminal Code, the death penalty functions as a deterrent to criminal sanctions in several ways:

a. As the most severe form of punishment;

[5] Michael Adhyaksa Padang, Billi J. Siregar & Rosmalinda, *Keberpihakan Pemidanaan Dalam Undang-undang Nomor 1 Tahun 2023*, Locus: Jurnal Konsep Ilmu Hukum, 2024, Volume 4, Nomor 2, 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, 2024, Volume 6, Issue 2, 516 – 530

[7] Ni Komang Ratih Kumala Dewi, *Keberadaan Pidana Mati Dalam Kitab Undang-Undang Hukum Pidana (KUHP)*, Jurnal Komunikasi Hukum, 2020, Volume 6, No. 1, 108

b. The death penalty has consistently been intended as the most severe punishment for serious offences; and

c. The death penalty is often threatened as an alternative to life imprisonment and a maximum of twenty years.[8]

More modern theories about punishment influence the changes regarding the death penalty provisions. The shift from a retributive justice perspective towards restorative justice is one of the triggers. The criminalisation is then directed to provide a balance for the existence of the perpetrator, the community, and the victim, who must both be protected. This balance changes the perspective of the death penalty, which must be applied with more humane principles of justice. Regarding this, Muhammad Idris et.al emphasised that the punishment now protects both victims and perpetrators.[9] The four goals of punishment are summarised in the framework of *social defence*, rehabilitation and resocialisation of convicts. It is emphasised by the inclusion of an explanation that punishment is not intended to hurt or degrade the dignity of the convict. Thus, there is protection for the community, as well as guidance for the perpetrators.[10]

In retrospect, during the discussion of the Bill of the National Criminal Code *(RKUHP)*, Lidya Suryani Widayati provided comments and reviews on the death penalty. Legal experts, philosophers, and social scientists are still debating the pros and cons of the death penalty. The social and legal acceptance of capital punishment has changed significantly across countries and beyond state jurisdiction. Some countries abolish the death penalty for all types of crimes, but some retain it for certain crimes. Some countries are members of the movement to abolish the death penalty in practice because they have not carried out executions within a specific time.[11]

The results of the analysis from various authors, as stated in the state of the art above, are the basis for drawing the legal gap in this article. The death penalty will be one of the central things that will be discussed throughout the time, regardless of a pro or con argument. Overall, it must be seen whether this death penalty serves a function in the punishment or not. Thus, the problems raised in this paper are related to the direction of the execution of the death penalty in the National Criminal Code, which does not contradict the Principle of Legality itself. It is the novelty value of this article by emphasising the need for certainty of execution of the death penalty in the National Criminal Code, through the need to re-establish the principle of legality.

[8] Anggara, Supriyadi Widodo, Ajeng Gandini Kamilah, *Distribusi Ancaman Dalam RKUHP dan Implikasinya,* Jakarta: Institute For Criminal Justice (ICJR), 2016, 3

[9] 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

[10] Noveria Devy Irmawanti, Barda Nawawi Arief, *Urgensi Tujuan Dan Pedoman Pemidanaan Dalam Rangka Pembaharuan Sistem Pemidanaan Hukum Pidana*, Jurnal Pembangunan Hukum Indonesia, 2021, Volume 3, No. 2, 222.

[11] Lidya Suryani Widayati, *Pidana Mati Dalam Ruu Kuhp: Perlukah Diatur Sebagai Pidana Yang Bersifat Khusus?*, Jurnal Negara Hukum, 2016, Vol. 7, No. 2, 167.

Methods

The research method used in this writing is a normative juridical law research method, in this case, conducting research on the applicable laws and regulations. The primary legal source of this article is the 2023 Criminal Code, also known as the National Criminal Code, followed by the secondary legal sources in the form of literature related to criminal law, the death penalty, the Criminal Code, and other related matters. This research uses a conceptual approach and a legislative approach, which are analysed descriptively and analytically. The analysis process started by putting the issue of principle of legality that should be granted by the National Criminal Code as the main characteristic in the case of the capital punishment issues that are now being put as an alternative sanction. Then it is corrected and interpreted by the conceptual approach from legal scholars, and analysed, until it comes to a conclusion.

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." The dialectic of criticism and criticism of criticism shows its truth, one of which is related to the crucial question: "What does the ruler want with states that it is possible to sentence a criminal act to death and punish the perpetrator? What measures are used to declare a criminal act by measuring the punishment and the execution of the punishment? Nevertheless, the Criminal Code and the National Criminal Code are significant for the judiciary, even though the questions asked to have a distinctive actual value, especially in relation to the increasingly modern level of legal advancement, such as the National Criminal Code. These things are part of the political constitution of the people's holiness that determines whether the ruler succeeds in entering people's lives in any way and under any conditions.

In this case, the Principle of Legality begins to play a role as one of the fundamental principles of criminal law to limit arbitrariness and limit the exercise of that power, in other words, to normize the supervisory function of criminal law. As understood, this principle of legality is the basis of criminal acts/criminal acts. Regarding this criminal act, Joko Sriwidodo and M.S. Tumanggor reminded that generally criminal acts occur because of the element of the perpetrator's intention, the element of the perpetrator's opportunity, and the element. The formulation is that the absence of one of these elements results in the absence of a criminal act.[12]

The principle of legality, or the principle of "*Nullum delictum nulla poena sine lege"*, historically shows that a law must confirm all criminal law issues. From a legal political perspective, the principle of legality suggests that only the law has the authority to define what can be punished, determine the applicable

[12] 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

sanctions, and establish criminal justice procedures. In the political sense of the law, this condition clearly protects individuals from the arbitrary actions of the ruler. Therefore, what is needed is a definite rule that is based on the principle of *lex scripta*, unambiguous, namely *the lex Certa* principle and believes in justice in the judiciary. Thus, the Principle of Legality is related to the normative meaning of the law.[13] Human beings are seen as individuals and autonomous and are free to control themselves in determining their behaviour, choosing their own direction and consequences, as well as determining their fate. As a result, the person is also responsible for the consequences of his actions. Logically, the person should be convicted, so the law loses its meaning. It shows that freedom is a right to crime.

The principle of legality has three interpretations. First, the prohibition on analogies (non-analogy principle); second, the obligation to apply the criminal laws in effect at the time of the offence occurred (*lex temporis delicti* or prevailing criminal laws). The retroactive application of criminal legislation is prohibited. It is a logical result of the fundamental concept of the legality principle. It aims to safeguard persons by constraining the power of authorities, including judges, through the utilisation of criminal law instruments.[14]

The theory of psychological coercion, known as *psychologische dwang,* states that the formulation of delinquency in the law and the criminal threats attached must cause psychological coercion to prevent criminality. It is the basis for the legality of the criminal political dimension.[15] A functional criminal policy requires clear laws, and one that expressly defines crimes and appropriate punishments. It shows that there is a desire to apply clear principles of legality, which allow people to assess all the consequences that such crimes entail. It is a type of knowledge known as rationality. On the other hand, the principle of legality is expected to be a system which can be used for previously known behaviours.

Based on a pragmatic dimension, the principle of legality effectively reduces the strict restrictions on power in criminal law, resulting in many crimes that are not punished, and even more crimes that go unpunished. Regarding the criminal court, the principle of legality is expected to play a broader role, as well as play a positive role specifically in the application of sanctions. The judiciary is the main centre of attention, and it is felt to be serious in terms of the principles of legality. The death penalty, as stated in the provisions of the law, is a legal definition of a sanction which leads to a form of criminal act labelling by prioritising the Principle of Legality (vide Article 1 paragraph 1 of the Criminal Code).

It has been understood that the death penalty is a type of principal crime with the position of being the heaviest punishment (vide Article 10 of the Criminal Code). The main reasons that support attitudes towards the death penalty revolve around the concept of retribution or deterrence. Levy serves as an

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

[14] 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>.

[15] *Ibid*, 33

important component of the criminal justice framework, especially in relation to classical theory. The death penalty functions as a punitive measure for cruel acts, which reflects the state's attitude towards justice for victims in the face of immoral acts committed by the perpetrators.[16]

Observing why the Indonesian criminal law system is pushed towards legalism by relying on a "normative legalistic" approach, as revealed from Modderman's view, among other things, states the following: "The principle of criminal law requires that what can be punished first of all is the violations of the law. It is a *sine qua non conditio*. Secondly, it is that what is punished is transgressions of the law, which, according to experience, cannot be eliminated by other means. The punishment shall be a last resort. Any criminal threat must raise objections. However, this does not mean that one should be negligent when determining the appropriate punishment; Instead, one should weigh the advantages and disadvantages and ensure that the punishment works to heal and not make the situation worse. It is known as "law for human beings and not human beings for law", while still considering the dignity of criminals as subjects of law.[17]

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.[18]

From the perspective of criminal policy and penal policy, the policy of determining the type of sanctions/criminal means to eradicate crime may change. Crime is not something definite and cannot change, but it can change along with the development of society. Initiatives aimed at alternative forms of punishment are not limited only to imprisonment, but also include the most severe punishments, including death and life imprisonment. According to Sudarto, should the criminal be sentenced to prison? Throughout history, the definitions of crime have evolved. It is an issue related to law enforcement.[19] In this regard, it is important to understand that Indonesia's criminal law reform conducts criminal politics by incorporating living laws into criminal law regulations.[20]

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

[16] Eddy O.S Hiareij, Loc.cit
[17] Romli Atmasasmita, *Hukum dan Penegakan Hukum*, Jakarta: Kencana, 2021, hlm. 104
[18] CD Bennett, 'Retributivist Theories' in (eds.) Bruinsma, G. and Weisburg, D. (ed), *Encyclopedia of Criminology and Criminal Justice* (Springer 2013).
[19] Sudarto, Loc.cit
[20] Muchlas Rastra Samara Muksin, *Tujuan Pemidanaan dalam Pembaharuan Hukum Pidana Indonesia*, *Jurnal Sapientia et Virtus, 2023,* Volume 8 Nomor 1, 237.

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.[21]

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.

Discussing the execution stage of the death penalty as an executive policy, the steps taken by the Attorney General's Office to execute death row inmates are legally valid, so they cannot be challenged anymore. It is based on two reasons, namely:

1. The position of the convict can no longer be associated with the judicial process according to the Criminal Code because this position is an executive policy that has acquired permanent legal force, including investigation, prosecution, and court examination (concretisation of the principle of legality) as a stage of judicial policy application.

2. The definition of extraordinary crimes according to the principles of criminal law is only aimed at criminal acts and focuses on criminal acts that have gone through the four stages of the pro-justitia process above, with a repressive approach as the purpose of detention. It must be considered complete when a court decision is issued that has acquired permanent legal force against the acts committed by the defendant. It is the same as the execution stage of serving a prison sentence in a correctional institution, which is the stage of coaching criminal prisoners that has begun to be carried out. There is no authority for anyone, including investigators, prosecutors and judges, to "still judge" convicts in prisons. Serving a sentence for a convicted person is a process of repentance for the crime that has been committed, so that there is no longer the right of the State to add, limit, delay and so on. Criminal law recognises that specificity is only related to legal subjects/perpetrators who have psychiatric disorders or are minors.

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.

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

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. [22]

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 (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

[22] 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>.

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 formulated as a legislative policy. In the implementation of the applicative stage as a judicial policy, guidelines are determined as stated in Article 67, Article 98, Article 99, Article 100 and Article 101 of the National Criminal Code. Considering the provisions of the article, especially the existence of a probation period, the death penalty is executed as an executive policy, difficult or impossible to implement, including for Crimes classified as serious crimes or extraordinary crimes as stated in the explanation of Article 67 of the National Criminal Code. In sentencing a defendant, the judge must consider the legality principle which underpins all criminal acts and their associated consequences—the death penalty provisions within the 2023 National Criminal Code present significant

issues. The foundation lies in the operation functionalisation of legality across legal politics, criminal policies, and pragmatic dimensions. The requirements for extraordinary crime execution are deemed irrelevant and incoherent.

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