

Visibility of the Death Penalty in Indonesia: From Levy to Restoration

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Abstract

In Indonesia, the death penalty is regulated in Article 10 letter a number 1 of the old Criminal Code and is placed as the main crime. The death penalty is a classic criminal law product which emphasizes that punishment must contain retribution or appropriate reward. Meanwhile, after the new Criminal Code was passed, the death penalty was made more flexible. There is a kind of paradigm shift in punishment from the old Criminal Code which was retaliatory in nature to the new Criminal Code which is restorative and rehabilitative in nature. The death penalty is made a special punishment and is threatened alternatively with other types of punishment, for example imprisonment for 20 years or life imprisonment. The death penalty can also be carried out through a probationary period.

I. Introduction

Commenting on the death penalty, it cannot be separated from the crime and the punishment itself. The oldest crime was introduced in the time of Hammurabi (1792-1750 BC) a 6th king of Babylonia who created a set of written laws, most famously in the ancient world, the Code of Hammurabi.¹

Substantively, the Hammurabi Code emphasizes a system of crime and punishment based on physical retaliation: "an eye for an eye or a tooth for a tooth." In essence, in Hammurabi's time, punishment was synonymous with physical retaliation, for example, an eye for an eye or a tooth for a tooth. In ancient Roman law around the 5th century BC, the Code of Hammurabi, referred to as Lex talionis, states that the punishment fit the crime.²

If you look at the ancient Babylonian and Roman periods, the penalty is synonymous with retribution. A person who commits murder, for example, will be subject to the death penalty. Similarly, for those who commit persecution, the perpetrator will be punished with the same type of injury, while the thief will have his hand cut off.³ In that context, criminalization can be seen as a relic of barbarism or a legacy of the culture of bars that tend to be less civilized.⁴

In the theory of criminal purpose, the idea that crime is a retaliation departs from the absolute theory. The essence of this theory is as said by Vos, *die misdaad op zich zelf is voldoende grond om de dader te bestraffen* which means that crime is seen as the basis for the perpetrator to be convicted.⁵ That means that the more serious a person's crime, the heavier the crime will be.

So that the provision of criminal sanctions is always commensurate with the crime that occurred. At that point, the crime was considered as just deserts. Ohlin calls it with the sentence, punishment is permitted simply because wrongdoers deserve to suffer for their wrongdoing.⁶ In other words, the state takes revenge on the perpetrator through a crime.

In the context of Indonesia, a description of retributive crime can be found in Law No.

¹ B. Dunér and H. Geurtsen, "The Death Penalty and War," *The International Journal of Human Rights* 6, no. 4 (December 2002): 1-28, doi:10.1080/714003775.

² A Wilson, *Criminal Law: Doctrine and Theory* (London: Pearson Longman, 2013).

³ Richard Ronay and Adam D. Galinsky, "Lex Talionis: Testosterone and the Law of Retaliation," *Journal of Experimental Social Psychology* 47, no. 3 (May 2011): 702-5, doi:10.1016/j.jesp.2010.11.009.

⁴ Ergün Cakal, "Torture and Progress, Past and Promised: Problematising Torture's Evolving Interpretation," *International Journal of Law in Context* 19, no. 2 (June 23, 2023): 236-54, doi:10.1017/S1744552323000010.

⁵ M Reksodiputro, *Sistem Peradilan Pidana* (Jakarta: PT RajaGrafindo Persada, 2020).

⁶ D J Ohlin, *Criminal Law: Doctrin, Aplication and Practice* (New York: Wolters Kluwer, 2016).

1 of 1946 concerning Criminal Law Regulations. It should be noted that referring to Article 4 of the “*a quo*” regulation, the term *Wetboek van Strafrecht voor Nederlandsh-Indie* was changed to *Wetboek van Strafrecht* and then read to become the Criminal Code (KUHP). Since then, the nomenclature of the Criminal Code has been used in Indonesia's criminal law both at the theoretical and practical levels. To make it easier to understand, in this manuscript, the author will use the term old Criminal Code to refer to the Netherlands Heritage Criminal Code.

Returning to the issue of retributive crimes, Gunarto stated that there is no doubt that in criminalization—the old Criminal Code has a face that tends to be retaliatory. This can be seen from the emergence of several articles in the Criminal Code that threaten with the death penalty or life imprisonment.⁷ This is natural because the old Criminal Code was basically influenced by the doctrine of classical criminal law when it was drafted in the Netherlands in 1881.⁸ The characteristic of the classical school, said Sudarto, is retributive and repressive towards criminal acts.⁹

On that basis, classical criminal law recognizes the principle of secular retaliation. That the penalty imposed must be commensurate with the severity of the act committed. The logical consequence is that the Criminal Code introduces more criminal sanctions than action sanctions. As a result, when applied by the court, it can be said that criminal sanctions are *primadona*. This is natural because criminal sanctions are considered the only way to eradicate crime.¹⁰

Over time, the old Criminal Code, made during the classical criminal law period, was felt to have many weaknesses, such as high recidivism and prison overcapacity. Another weakness, as Douglas Husak said, is too much punishment and too many crimes (2004). In other words, the more criminal sanctions are imposed, the higher the growth in the crime rate.

In the old Criminal Code, the theory of retribution or retribution can be seen in its normative formulation in Article 10 letter a point 1 regarding the death penalty. Then in Article 1 of Law No. 2/PNPS/1964 concerning Presidential Decree No. 2 of 1964 concerning Procedures for the Implementation of the Death Penalty Imposed by Courts in the General and Military Courts, it is stated that the execution of the death penalty is carried out by being shot to death, without exception.

⁷ Marcus Priyo Gunarto, “Asas Keseimbangan Dalam Konsep Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana,” *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 24, no. 1 (July 27, 2012): 83, doi:10.22146/jmh.16143.

⁸ Roby Anugrah and Raja Desril, “Kebijakan Formulasi Pidana Mati Dalam Pembaharuan Hukum Pidana Indonesia,” *Jurnal Pembangunan Hukum Indonesia* 3, no. 1 (January 30, 2021): 80–95, doi:10.14710/jphi.v3i1.80-95.

⁹ Sudarto, *Hukum Dan Hukum Pidana* (Bandung: Alumni, 2007).

¹⁰ M. dan Efendi Sholehuddin and J., “Criminal Policy in Law Enforcement Related to Malpublic Administration,” *Ius Positum Journal Of Law Theory And Law Enforcement* 1, no. 1 (2022): 1–7, <https://journal.jfppublisher.com/index.php/jlte>.

The face of the criminal law that is retributive is considered one of the weaknesses in the old Criminal Code. To cover this, in 2023 the government passed Law No. 1 of 2023 concerning the Criminal Code (new Criminal Code). Santoso stated that the new Criminal Code is a product of modern criminal law that views criminal law not only as retaliation but also accommodates other sanctions, for example: social work crimes and the fulfillment of customary obligations. The last two types of crimes are more inclined to the concept of restorative justice (2023).

As an affirmation that the face of the new Criminal Code is more oriented towards the concept of restorative justice, the provisions regarding the death penalty – which are no longer placed as the principal crime as stipulated in Article 10 of the old Criminal Code. For example, the provisions in Article 100 paragraph (1) of the new Criminal Code, that the death penalty can be changed to a probation penalty for 10 years by paying attention that the defendant has a sense of remorse and there is hoped to improve himself. The construction of such a death penalty norm indicates that there is a change in the face of the crime from the old Criminal Code which is retributive to the new Criminal Code which is restorative and rehabilitative.

2. Research Method

This study is a *normative juridical*¹¹ legal research using two legal approaches, namely the statute approach¹² to analyze the accuracy of the application of law to cases handled by judges and the case approach¹³ to provide analysis of legal considerations by judges in examining and deciding cases that are the object of research.

3. Results and Discussion

Death Penalty

Robinson and Moody, consider the death penalty as an inheritance of an absolute or retributive criminal purpose. This school believes that severe punishment is considered a retribution that is appropriate to the perpetrator for his evil deeds.¹⁴ The emergence of such thinking is motivated by the ethical assumption conveyed by Spinoza that no one should benefit from an evil deed that he has committed.¹⁵ On that basis, Immanuel Kant

¹¹ Hudah, Komsih, Ahmad Rustan, and Irwansyah Irwansyah. "Enigma of the Idea from Extending the Village Head Period: Orientation and Implications in a Constitutional Perspective." *SASI* 29.4 (2023): 743.

¹² Rustan, Ahmad, Ju Lan Hsieh, and Wahyudi Umar. "Maladministration on Mining Business Licenses: Case Study "Mining Business License Production Operation PT. Aneka Tambang, Tbk."." *Varia Justicia* 17.3 (2021): 246-257.

¹³ Hargono, H., Rustan, A., Jambak, F., & Rahman, R. A. (2024). Dynamics and Challenges of Democracy in Local Elections in Indonesia and the Netherlands. *SASI*, 30(1), 111-118..

¹⁴ M. dan Moody Robinson and L., "Capital Punishment, International Law, and Human Rights," *International Journal of Criminal Justice Science* 14, no. 2 (2019): 298-319, doi:10.5281/zenodo.3723480.

¹⁵ T Sellin, *The Penalty of Death* (London: Sage Publication, 2013).

called the death penalty an ethical demand.¹⁶ This idea was then concretized by Sellin, by stating that the suffering it inflicts on offenders satisfies the community's demand.¹⁷

In Muladi's reading, the death penalty cannot be separated from the retribution theory is motivated by the felicific calculus theory developed by Jeremy Bentham (1748-1832), that human beings are rational beings who will consciously choose pleasure and avoid distress (Santoso & Satria). On that basis, a severe penalty must be given to every perpetrator of a crime so that the hardship will be heavier than the pleasure caused by the crime.

Given the cruelty and seriousness of the death penalty, in penitentiary law it is known as the postulate ultimum supplicum, which means that the death penalty is the ultimate penalty. The derivation of the postulate is *mors dicitur ultimum supplicium*, which means that the death penalty is the heaviest penalty. Often also known as the postulate *ultimum supplicium esse mortem solam interpreta- myrrh*, meaning that the death penalty is the most extreme punishment. It is said to be extreme because, according to the postulate of *mortis momentum est ultimum vitae momentum*, meaning that the moment of death is the last moment of life. So, crime can be destroyed by the death penalty (*crimina morte extinguuntur*). From some of these Latin postulates, it can be understood that the death penalty is a severe or extreme punishment as an embodiment of the retributive theory.

Indonesia, as a former colony of the Netherlands, has a different regulatory dimension regarding the death penalty. If in the Netherlands the death penalty has been abolished since 1870 in Wetboek van Strafrecht¹⁸ in Indonesia in the old Criminal Code¹⁹ its existence is still clearly regulated in Article 10 of the old Criminal Code. So the death penalty will deviate from the principle of concordance (*concor dantil-beginse*) in Article 75 of the RR jo Article 131 IS. Given the cruelty of the death penalty, not a few people criticize it.

The earliest sharp criticism of the death penalty was made by Beccaria in his manuscript entitled *Dei Delitti E Delle Pene* (1764), stating the excess of punishment which has never made men better. Beccaria further said that the death penalty is really useless and unjust.¹⁸ That means he questioned the benefits and value of justice from the death penalty.

Benjamin Rush also rejected the death penalty. He considers it an improper punishment for any crime.¹⁹ To strengthen his argument, Rush states that the punishment of murder by death is contrary to reason and the order and happiness of society.²⁰ In short, Rush

¹⁶ Topo Santoso and Hariman Satria, "Sexual-Violence Offenses in Indonesia: Analysis of the Criminal Policy in the Law Number 12 of 2022," *Padjadjaran Jurnal Ilmu Hukum* 10, no. 1 (2023): 59–79, doi:10.22304/pjih.v10n1.a4.

¹⁷ Sellin, *The Penalty of Death*.

¹⁸ Lisa Ferrari, "Transnational Advocacy against Capital Punishment: A Role for the Holy See," *The International Journal of Human Rights* 7, no. 2 (August 2003): 28–41, doi:10.1080/13642980308629707.

¹⁹ Mugambi Jouet, "Death Penalty Abolitionism from the Enlightenment to Modernity," *The American Journal of Comparative Law* 71, no. 1 (August 29, 2023): 46–97, doi:10.1093/ajcl/avad011.

²⁰ Ibid.

considers the death penalty to be contrary to common sense and people's happiness.

In fact, long before Beccaria and Rush opposed the death penalty, Voltaire had already questioned it. Voltaire expressed his disagreement with the death penalty because of *considéré comme cruel et barbare, ainsi que totalement inefficace en tant que moyen de dissuasion du crime*.²¹ In other words, the death penalty is considered cruel and barbaric and completely ineffective as a means of preventing crime.

In its development, most countries in the world have abolished the death penalty. Ankar divides four categories of countries that have abolished the death penalty, namely as follows:²² (1) countries that are abolitionists for all crimes. This category includes a country whose laws do not provide for the death penalty for any crime. (2) countries that are abolitionists for extraordinary crimes only. Countries whose laws provide for the death penalty only for extraordinary crimes, such as crimes under military law (3) countries that are de facto abolitionist. Countries that retain the death penalty for ordinary crimes are considered abolitionists because they have not executed anyone for the last ten years (4) countries that are retentionist. This category includes countries that maintain and use the death penalty for common crimes for having carried out executions over the past ten years.

In Indonesia, some people who reject the death penalty choose to conduct a judicial review to the Constitutional Court (MK) on the grounds that the death penalty is contrary to the right to life guaranteed in Article 28I paragraph (1) of the 1945 Constitution (1945 Constitution). There are at least 3 Constitutional Court decisions that affirm that the death penalty is not contrary to the 1945 Constitution, namely: (a) the Constitutional Court's decision Number 2/PUU-V/2007. (b) the decision of the Constitutional Court Number 3/PUU-V/2007 and (c) the decision of the Constitutional Court Number 15/PUU-V/2007.

Some submitted a judicial review to the Constitutional Court by questioning the procedures for carrying out the death penalty, which they consider cruel and inhumane. The Constitutional Court then decided the legal issue in decision Number 21/PUU-VI/2008. The Constitutional Court argues that the measure in determining whether a procedure for carrying out the death penalty is something cruel, inhumane, and unusual can be judged from the implementation, namely: (1) if the method carried out causes long and unnecessary suffering in causing death; (2) contrary to the measure of decency embraced in society; and (3) not maintaining and maintaining the dignity of the convict as a human being.

Attributive and Restorative Criminal Objectives

Remmelink reminds us that retributive theory is a characteristic of classical criminal law.²³ This theory has been developed since ancient Roman times. As Seneca said, *nemo prudens*

²¹ Ibid.

²² C Ankar, *Determinants of Death Penalty: A Comparative Study of The World* (London & New York: Routledge Taylor and Francis Group, 2004).

²³ J Remmelink, *Pengantar Hukum Pidana Material 1* (Yogyakarta: MaHaRSa Publishing, 2014).

punit, quia peccatum sed ne peccetur means that a sage does not punish for sin but so that sin no longer occurs.

For criminal purposes, several theories are known, including absolute/retributive theory, relative/objective, combined and contemporary theories, such as deterrent effect theory, social control, and education.²⁴ In addition to these theories, Clarkson et al. added two more theories, namely incapacitation and rehabilitation.²⁵ Meanwhile, Wayne R. Lafave added the theory of restorative justice as one of the criminal objectives.²⁶ However, of the many theories of criminal intent, in this section, the author will only describe two theories, namely the theory of retribution and the theory of retributive justice.

It should be noted that in criminal law literature, the absolute theory is often referred to as the theory of retribution or retribution. Arnold H. Loewy stated retribution as a legitimate purpose of punishment.²⁷ To strengthen its legitimacy, retributive adherents introduce two basic principles in criminalization: first, that a criminal sentence can only be imposed fairly on a person who deserves or deserves to be punished. Second, the level of the crime must also reflect his irresponsible attitude.²⁸

When viewed from the objective, the retributive crime is backward-looking because it looks back at the crime that has occurred, and the perpetrator is punished for having committed the crime.²⁹ In that perspective, it can be said that the provision of criminal punishment by the state is justified because there has been a crime that disturbs public order, so the perpetrator is punished in retaliation for his actions.³⁰ Hugo Grotius then said *natura ipsa dictat, et qui malum fecit, malum ferat*, means nature teaches that whoever commits evil will suffer.³¹

According to Verhagen, the retribution theory views crime in three parts, namely crime as vengeance or retribution, expiation, or penance and just deserts or commensurate rewards.³² In terms of vengeance, criminality is considered as retaliation by the state to the perpetrators of crimes. Expiation is interpreted that only through severe punishment, the perpetrator can atone for his crime. Then, just deserts means that the criminal pays

²⁴ Ibid.

²⁵ Keating dan Cunningham Clarkson, *Criminal Law: Text and Material* (London: Thomson Sweet & Maxwell, 2007).

²⁶ W R LaFave, *Principle of Criminal Law* (New York: West A Thomson Reuters Bussines, 2003).

²⁷ A H Loewy, *Criminal Law* (New York: West Thomson Bussines, 2009).

²⁸ Wilson, *Criminal Law: Doctrine and Theory*.

²⁹ Gunarto, "Asas Keseimbangan Dalam Konsep Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana."

³⁰ T Santoso, *Asas-Asas Hukum Pidana* (Jakarta: PT RajaGrafindo Persada, 2023).

³¹ Remmelink, *Pengantar Hukum Pidana Material 1*.

³² G Verhagen, "Brothers in Arms? The Selection and Prioritisation of Core International Crimes and Terrorism in the Netherlands," *International Criminal Law Review* 23, no. 4 (2023): 522-551, <https://brill.com/view/journals/icla/23/4/icla.23.issue-4.xml>.

commensurate for the losses he has caused.³³

Vos divides retaliation into two forms: subjective retaliation is retaliation for the wrongdoing of the reprehensible perpetrator, and objective retaliation is retaliation for the deeds that the perpetrator has committed.³⁴ In its development, the theory of retaliation is considered less successful in reducing the crime rate. More than that, crime as retaliation is unable to repair the losses suffered by the victims. Cragg then explained that there is an effort to change the paradigm of punishment from retribution to restorative.³⁵ In the end, in the last decade—most countries in the world have directed their criminal goals to the restorative justice paradigm. The following review will provide a perspective on restorative justice.

The person who can be said to have first introduced the term restorative justice was Albert Eglash. At that time, Eglash divided into three categories of criminal objectives, namely retributive justice, distributive justice, and restorative justice.³⁶ John Braithwaite emphasized that restorative justice was initially expected as an alternative model of criminal purposes as retaliation because this model focuses on rehabilitation and restoration by perpetrators.³⁷ The doctrine is that giving a criminal sentence to the perpetrator is an effort to improve or rehabilitate his mentality. Based on this idea, Kathleen Daly calls restorative justice a set of ideals about justice that assumes a generous, emphatic, supportive, and rational human spirit.³⁸

According to Pavlich and Thorlakson, restorative justice contains values that are different from ordinary justice because it focuses on restoration, not retribution.³⁹ Thus, restorative justice contains different values from ordinary justice because it focuses on restoration rather than retribution. In essence, the value contained in restorative justice focuses more on the mental recovery of the perpetrator so that he is expected to become a better person when he has completed his crime.

However, recovery must also be directed towards the victim, as said by Wayne R. Lavafe,⁴⁰ creates an avenue to bring criminals and their victims together rather than keep them apart. Through restorative justice, legal protection of individuals against unwarranted state action will also be obtained.⁴¹ In such a case, the crime against the perpetrator can no

³³ B Arrigo, *Encyclopedia of Crime and Justice Ethics* (London: Sage Publication, 2014).

³⁴ E O S Hiariej, *Prinsip-Prinsip Hukum Pidana* (Yogyakarta: Cahya Atma Pustaka, 2016).

³⁵ Jennifer J. Llewellyn, "Transforming Restorative Justice," *The International Journal of Restorative Justice* 4, no. 3 (November 2021): 374–95, doi:10.5553/TIJRJ.000096.

³⁶ Hariman Satria, "Restorative Justice: Paradigma Baru Peradilan Pidana," *Jurnal Media Hukum* 25, no. 1 (2018): 111–123, doi:10.18196/jmh.2018.0107.111-123.

³⁷ Ibid.

³⁸ J. Llewellyn, "Transforming Restorative Justice."

³⁹ George Pavlich and Lori Thorlakson, "Recalibrating Victimhood in the European Union and Canada," *Restorative Justice* 5, no. 3 (September 2, 2017): 345–51, doi:10.1080/20504721.2017.1391002.

⁴⁰ LaFave, *Principle of Criminal Law*.

⁴¹ G.Ness Johnstone and V Daniel W, *Handbook of Restorative Justice* (New York: Willian Publishing, 2007).

longer be seen as a retribution for his actions but instead becomes a momentum to improve his mentality through criminalization.

According to Hiariej, one of the advantages of restorative justice is that criminal punishment is not only used to cause pain to the perpetrator but is more directed at efforts to recover, restore, empathize, accountability and prevention.⁴² The hope is that the interests of victims and the public through criminal justice can be protected while the perpetrators can still be held accountable more rationally and humanely.⁴³

Normatively, restorative justice can be found in Law No. 11 of 2012 concerning the Juvenile Criminal Justice System (*UU SPP Anak*). In Article 1 number 6, it is defined that restorative justice is the settlement of criminal cases by involving the perpetrator, victim, family, perpetrator/victim, and other related parties to jointly seek a fair settlement by emphasizing restoration to the original state and not retaliation.

At the technical level, restorative justice is regulated in the Attorney General's Regulation No. 15 of 2020 concerning the Termination of Prosecution Based on Restorative Justice. The definition of restorative justice in the "*a quo*" regulation is the same as the definition mentioned in Article 1, number 6 of the Children's Tuition Law. Within the Supreme Court, there is also the Decree of the Director General of the General Judiciary of the Supreme Court of the Republic of Indonesia Number 1691/DJU/SK/PS.00/12/2020 concerning the Implementation of Guidelines for the Implementation of Restorative Justice. In the decree, it is emphasized that the principle of restorative justice is one of the principles of law enforcement in case settlement that can be used as an instrument of recovery.

Death Penalty in the Old Criminal Code

When referring to Article 11 of the old Criminal Code, it can be seen that the death penalty is carried out by snaring a rope tied to a gallows on the neck of the convict, and then the executioner drops the board where the convict stands. However, the formulation of Article 11 of the Criminal Code has been amended in *Staatblad* Number 123/1945 that the death penalty is carried out by shooting the convict to death. This provision was further clarified in Presidential Decree No. 2 of 1964, which was stipulated as Law No. 5 of 1969 concerning Procedures for the Implementation of the Death Penalty Imposed by Courts in the General and Military Courts. In the "*a quo*" regulation, it is emphasized that the death penalty is carried out by shooting the convict to death. At the technical level, the implementation of the death penalty is regulated in more detail in the Regulation of the National Police Chief No. 12 of 2010 concerning Procedures for the Implementation of the Death Penalty.

Normatively, the death penalty is regulated in 9 types of criminal codes, namely as follows: a) Article 104; b) Article 111 paragraph (2); c) Article 124 paragraph (1); d) Article 124 bis; e) 140 paragraphs (3); f) Article 340; g) Article 365 paragraph (4); h) Article 444; i)

⁴² Hiariej, *Prinsip-Prinsip Hukum Pidana*.

⁴³ Satria, "Restorative Justice: Paradigma Baru Peradilan Pidana."

Article 479k paragraph (2) and Article 479o paragraph (2). In Article 4 of the Regulation of the National Police Chief, it is stated that the procedure for the implementation of the death penalty consists of four stages, namely: preparation, organization, implementation, and termination.

In addition to the old Criminal Code as a general criminal law (*ius commune*), the death penalty is also regulated in legislation outside the Criminal Code as a special criminal law (*bijzonder strafrecht*), among others: 1) Law No. 12 of 1951 concerning Firearms and Explosives; 2) Law No. 20 of 2001 concerning Amendments to Law No. 31 of 1999 concerning the Eradication of Corruption; 3) Law 5 of 1997 concerning Psychotropics; 4) Law No. 35 of 2009 concerning Narcotics. 5) Law No. 26 of 2000 concerning Human Rights Courts; 6) Law No. 5 of 2018 concerning Amendments to Law No. 15 of 2003 concerning the Stipulation of Government Regulations in Lieu of Law No. 1 of 2002 concerning the Eradication of Terrorism Crimes into Law. In addition, the death penalty is also listed in the Military Criminal Code, among others, it is regulated in the following articles: Articles 64-65, Articles 67-68, Articles 73 1 to 4, Article 74 1 and 2, Article 76 paragraph (1), Article 82, Article 89 1 and 2, Article 109 1 and 2, Article 114 paragraph (1), and Article 133 paragraphs (1) and (2).

Death Penalty in the New Criminal Code

In the new Criminal Code, the death penalty began to be regulated in Article 64 letter c by using the term "special crime". Then, in Article 67, it is concreted that the special crime is the death penalty, which is always threatened assertively. Why is it built like that? This question is answered in Article 98 of the new Criminal Code, that the purpose of the death penalty is threatened alternatively due to two things, namely: first, as a last resort to prevent the commission of criminal acts. Second, to protect the community.

The interesting thing is that in the new Criminal Code, the death penalty is no longer placed as a principal crime as in the old Criminal Code. What is the reason? The answer to this question can be seen in the explanation of Article 98 of the new Criminal Code, that the death penalty is determined in a separate article to show that this type of crime is special as a last resort to protect society. The death penalty is the most severe crime and must always be threatened alternatively with a life sentence or a maximum prison sentence of 20 (twenty) years. The death penalty is imposed with a probation period so that during the probation period, the convict is expected to improve himself so that the death penalty does not need to be carried out and can be replaced with life imprisonment.

From the explanation of Article 98, there are four important points when talking about the death penalty in the new Criminal Code, namely as follows: first, the death penalty is not placed as a principal crime but as a special crime. Based on this specificity, the death penalty is regulated outside the main criminal article. Second, the death penalty is specifically intended as a last resort to protect the community. Third, because the death penalty is the most severe crime, it is threatened alternatively with a life sentence or a maximum prison sentence of 20 years. Fourth, the death penalty is imposed through a

probation period. The hope is that during the probation period, convicts are expected to improve themselves so that the death penalty does not need to be carried out or replaced with a life sentence.

The probation period of the death penalty is then emphasized in Article 100 paragraph (1), which reads: the judge imposes the death penalty with a probation period of 10 (ten) years by considering: a) the defendant's remorse and there is hope for self-improvement, or b) the role of the defendant in the criminal act. The death penalty with the probation period must be included in the court decision [Article 100 paragraph (2)]. Furthermore, in Article 100 paragraph (4), it is stated that if the convict during the probation period shows a commendable attitude and deeds, the death penalty can be changed to life imprisonment by Presidential Decree after obtaining the consideration of the Supreme Court.

Although the death penalty is made flexible by using the concept of probation, it may not be applied to a death row inmate for the reason, as mentioned in Article 100 paragraph (6), that if the convict during the probation period does not show commendable attitudes and deeds and there is no hope for improvement. If observed, this numerical formulation places the execution of the death penalty as the last option when, during the probation period, the convict does not show a change in attitude for the better. In that context, if the death row inmate can show a better attitude, the death penalty can be changed or replaced with other types of crimes.

Starting from the normative description of the death penalty in the new Criminal Code, then correlated with restorative criminal objectives, it can be said that the death penalty is slowly shifting to be more flexible. For example, it can be placed as a special crime, threatened alternatively with other types of crimes, and imposed as a probationary crime. A legal issue that further emphasizes that the death penalty is flexible made by the framers of the new Criminal Code is the regulation of probation periods for death row inmates.

When death row inmates can improve themselves, it is possible that the death penalty will not be carried out or replaced with another type of crime, namely life imprisonment. The flexibility of the death penalty arrangement further emphasizes that the new Criminal Code implicitly adopts restorative or rehabilitative criminal objectives. In this case, the emphasis is on the improvement or mental recovery of death row inmates. According to Hiarij, such a criminal character is in line with the doctrine of modern criminal law, which does not want or even want to abolish the death penalty.⁴⁴

4. Conclusion

Based on the description above, the death penalty is a product of classical criminal law, which requires that every criminal act be commensurate with the crime or punishment so that the penalty is synonymous with retribution. In the old Criminal Code, the retributive crime was clearly seen through the arrangement of the death penalty as the main crime in

⁴⁴ Hiarij, *Prinsip-Prinsip Hukum Pidana*.

Article 10. The death penalty is even regulated in various laws outside the old Criminal Code.

After the passage of the new Criminal Code, the death penalty was made more flexible. There is a kind of shift in the criminal paradigm from the old Criminal Code which is retaliatory to the new Criminal Code which is restorative and rehabilitative. The death penalty is used as a special crime and is threatened alternatively with other types of crimes, such as imprisonment for 20 years or life imprisonment. The death penalty can also be carried out through probation.

References

- Anckar, C. *Determinants of Death Penalty: A Comparative Study of The World*. London & New York: Routledge Taylor and Francis Group, 2004.
- Anugrah, Roby, and Raja Desril. "Kebijakan Formulasi Pidana Mati Dalam Pembaharuan Hukum Pidana Indonesia." *Jurnal Pembangunan Hukum Indonesia* 3, no. 1 (January 30, 2021): 80–95. doi:10.14710/jphi.v3i1.80-95.
- Arrigo, B. *Encyclopedia of Crime and Justice Ethics*. London: Sage Publication, 2014.
- Cakal, Ergün. "Torture and Progress, Past and Promised: Problematising Torture's Evolving Interpretation." *International Journal of Law in Context* 19, no. 2 (June 23, 2023): 236–54. doi:10.1017/S1744552323000010.
- Clarkson, Keating dan Cunningham. *Criminal Law: Text and Material*. London: Thomson Sweet & Maxwell, 2007.
- Dunér, B., and H. Geurtsen. "The Death Penalty and War." *The International Journal of Human Rights* 6, no. 4 (December 2002): 1–28. doi:10.1080/714003775.
- Ferrari, Lisa. "Transnational Advocacy against Capital Punishment: A Role for the Holy See." *The International Journal of Human Rights* 7, no. 2 (August 2003): 28–41. doi:10.1080/13642980308629707.
- Gunarto, Marcus Priyo. "Asas Keseimbangan Dalam Konsep Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana." *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 24, no. 1 (July 27, 2012): 83. doi:10.22146/jmh.16143.
- Hiariej, E O S. *Prinsip-Prinsip Hukum Pidana*. Yogyakarta: Cahya Atma Pustaka, 2016.
- J. Llewellyn, Jennifer. "Transforming Restorative Justice." *The International Journal of Restorative Justice* 4, no. 3 (November 2021): 374–95. doi:10.5553/TIJRJ.000096.
- Johnstone, G.Ness, and V Daniel W. *Handbook of Restorative Justice*. New York: Willian Publishing, 2007.
- Jouet, Mugambi. "Death Penalty Abolitionism from the Enlightenment to Modernity." *The American Journal of Comparative Law* 71, no. 1 (August 29, 2023): 46–97. doi:10.1093/ajcl/avad011.
- LaFave, W R. *Principle of Criminal Law*. New York: West A Thomson Reuters Bussines, 2003.
- Loewy, A H. *Criminal Law*. New York: West Thomson Bussines, 2009.
- Ohlin, D J. *Criminal Law: Doctrin, Aplication and Practice*. New York: Wolters Kluwer, 2016.
- Pavlich, George, and Lori Thorlakson. "Recalibrating Victimhood in the European Union and Canada." *Restorative Justice* 5, no. 3 (September 2, 2017): 345–51. doi:10.1080/20504721.2017.1391002.
- Reksodiputro, M. *Sistem Peradilan Pidana*. Jakarta: PT RajaGrafindo Persada, 2020.

- Remmelink, J. *Pengantar Hukum Pidana Material 1*. Yogyakarta: MaHaRSa Publishing, 2014.
- Robinson, M. dan Moody, and L. "Capital Punishment, International Law, and Human Rights." *International Journal of Criminal Justice Science* 14, no. 2 (2019): 298–319. doi:10.5281/zenodo.3723480.
- Ronay, Richard, and Adam D. Galinsky. "Lex Talionis: Testosterone and the Law of Retaliation." *Journal of Experimental Social Psychology* 47, no. 3 (May 2011): 702–5. doi:10.1016/j.jesp.2010.11.009.
- Santoso, T. *Asas-Asas Hukum Pidana*. Jakarta: PT RajaGrafindo Persada, 2023.
- Santoso, Topo, and Hariman Satria. "Sexual-Violence Offenses in Indonesia: Analysis of the Criminal Policy in the Law Number 12 of 2022." *Padjadjaran Jurnal Ilmu Hukum* 10, no. 1 (2023): 59–79. doi:10.22304/pjih.v10n1.a4.
- Satria, Hariman. "Restorative Justice: Paradigma Baru Peradilan Pidana." *Jurnal Media Hukum* 25, no. 1 (2018): 111–123. doi:10.18196/jmh.2018.0107.111-123.
- Sellin, T. *The Penalty of Death*. London: Sage Publication, 2013.
- Sholehuddin, M. dan Efendi, and J. "Criminal Policy in Law Enforcement Related to Malpublic Administration." *Ius Positum Journal Of Law Theory And Law Enforcement* 1, no. 1 (2022): 1–7. <https://journal.jfpublisher.com/index.php/jlte>.
- Sudarto. *Hukum Dan Hukum Pidana*. Bandung: Alumni, 2007.
- Verhagen, G. "Brothers in Arms? The Selection and Prioritisation of Core International Crimes and Terrorism in the Netherlands." *International Criminal Law Review* 23, no. 4 (2023): 522–551. <https://brill.com/view/journals/icla/23/4/icla.23.issue-4.xml>.
- Wilson, A. *Criminal Law: Doctrine and Theory*. London: Pearson Longman, 2013.