

Research Article

Paradigm Shift of Death Penalty Regulation in the New Criminal Code (KUHP) of Indonesia

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ABSTRACT: The arrangement of death penalty in the new Criminal Code (KUHP) raises two different views between those who defend and reject death penalty. In this regard, this paper aims to find the reasoning for the retention of death penalty in the new Criminal Code, which was passed in 2022. This paper will also discuss what has caused the shift of death penalty allocation, from its position as a main to an alternative punishment with ten years' probation period. The death penalty regulation in the Dutch Criminal Code is no longer in accordance with the development of punishment, so it requires a renewal. In the new KUHP, death penalty is the last resort and is imposed alternatively with a ten-year probation period. If the convict shows a good and commendable attitude during the imprisonment, then the death penalty can be changed into life imprisonment or imprisonment for a maximum of twenty years. The arrangement of a ten-year probation period is a middle way to accommodate views that reject and support the death penalty, which demonstrates the essence of shifting the allocation of death penalty to an alternative punishment in Indonesia.

KEYWORDS: Paradigm shift, Criminal Punishment, Death Penalty, Legal Reasoning, Indonesia.

I. INTRODUCTION

The effort to realize a New Criminal Code in Indonesia has come a long way, as the Draft Criminal Code (RKUHP) was postponed several times from 1999 to 2022. One reason is the criticism from various circles in the community regarding fourteen problematic articles, including the formulation of the death penalty. In recognition of these criticisms, President Joko Widodo requested for the Ministry of Law and Human Rights to review the RKUHP.¹ The enactment of the death penalty raises various responses and views from the community;

¹ Ihsanuddin & Krisiandi, "Jokowi Sebut Ada 14 Pasal Bermasalah di RKUHP", *KOMPAS.com* (20 September 2019), online: <<https://nasional.kompas.com/read/2019/09/20/15411811/jokowi-sebut-ada-14-pasal-bermasalah-di-rkuhp>>.

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from views that reject the punishment as inhumane and contrary to human rights,² to opinions that approve of the death penalty for sadistic crimes to minimize their recurrence. The classical paradigm believes that the death penalty is in accordance with the objectives of general criminal law: namely, to prevent crime, to protect individual interests, and to create a deterrent effect on society.

In this regard, Amnesty International responded that death sentences have usually been imposed in Indonesia's legal system for deliberate intent of murder, drug crimes, and terrorism.³ The first two years of Joko Widodo's Presidency saw 18 death executions – indicating that Indonesia still maintains a conservative approach of death penalty, as a deterrent to drug traffickers, sadistic killers, and terrorists. Deterrence theorists believe that this approach can create fear in the community from committing crimes punishable by death. Thus, the death penalty can also be considered as a social control.⁴ The imposition of death penalty in Indonesia is intended to maintain legal order in eradicating serious crimes as immoral acts.⁵

The question becomes whether the application of the death penalty can truly reduce or eliminate crimes of terrorism, drugs, and sadistic killings. A study conducted by Kasmanto and Rio found that there were at least 71 death row prisoner for drug crimes in 2018, or around 58% of the total death penalty defendants in Indonesia that year.⁶ However, the fact is that in several national regulations, drug crimes punishable by death penalty are still high, and tend not

² Issha Harruma & Nibras Nada Nailufar, “Pro Kontra Hukuman Mati”, *KOMPAS.com* (30 April 2022), online: <<https://nasional.kompas.com/read/2022/04/30/22300021/pro-kontra-hukuman-mati>>; Ni Komang Ratih Kumala Dewi, “Keberadaan Pidana Mati dalam Kita Undang-Undang Hukum Pidana (KUHP)” (2020) 6:1 *Jurnal Komunikasi Hukum (JKH)* 104–114 at 106.

³ Amnesty International Australia, “Indonesia: Time to Establish a Moratorium on Executions and Deview all Death Penalty Cases as First Steps Towards Abolition”, (9 October 2016), online: *Amnesty Int* <<https://www.amnesty.org.au/indonesia-time-to-take-steps-towards-abolishing-death-penalty/>>.

⁴ Kasmanto Rinaldi & Rio Tutrianto, “Polemik Pengendalian Sosial, Kejahatan dan Hukuman Mati (Studi pada Diskursus Pemberlakuan Penghukuman Mati terhadap Pengedar Narkotia di Indonesia, *Jurnal Pembangunan Hukum Indonesia*)” (2023) 5:3 *Jurnal Pembangunan Hukum Indonesia* 523–536 at 524.

⁵ Dewi, *supra* note 2.

⁶ Rinaldi & Tutrianto, *supra* note 4 at 530.

to decrease.⁷ Kompas noted that there are 49 drug networks still operating in Indonesia: with around 1,184 suspects, and around 1.9 trillion in assets secured by BNN in 2021.⁸

Questions related to the effectiveness of the death penalty to eliminate terrorism are also worth asking. A study by Manotar Tambulon indicated that death sentence and strict regulations are less effective to eliminate terrorism in Indonesia, as the nation's rate of terrorism in the recent decade remains high.⁹ Recent terrorist attacks have indeed decreased, but the decline is not due to the death penalty; rather, it is due to an integrated approach of various efforts. These include cooperation between countries, economic development, military and police involvement, community empowerment, and massive deradicalization programs carried out by the government. The cooperation scheme between countries to fight terrorism is also more effective than cooperation between countries in the field of handling drug crimes due to the international agreement on terrorism as an extra ordinary crime that requires special instruments and policies to tackle this crime.¹⁰

Death penalty in Indonesia is still valid and maintained its existence based on the Constitutional Court (MK) Decision Number 2-3/PUU-V/2007. The Constitutional Court's decision stated that death penalty is still maintained in Indonesia, and is not contrary to Article 28A and Article 28I paragraph (1) of the Constitution.¹¹ In its decision, the MK cited the provisions of the article in the International Convention on Narcotics and Psychotropic Substances (ratified by Indonesia in 1997). The convention states that state parties can maximize the effectiveness of law enforcement related to narcotics crimes,

⁷ See 'Undang-Undang No. 35 Tahun 2009 Tentang Narkotika'; 'Undang-Undang Nomor 5 Tahun 1997 Tentang Psikotropika'.

⁸ Cindy Mutia Annur, "Jumlah tersangka narkoba menurun dalam 3 tahun terakhir", (2022), online: *Databoks* <<https://databoks.katadata.co.id/datapublish/2022/05/26/jumlah-tersangka-narkoba-menurun-dalam-3-tahun-terakhir>>.

⁹ Manotar Tampubolon, "Why Terrorism Undeterred by Death Penalty?" (2021) 3:1 *Asian J Law Gov* 85–97 at 85.

¹⁰ Ardli Johan Kusuma et al, "Indonesia dan Ancaman Terorisme: dalam Analisis Dimensi Imaterial, Sosiohumaniora: Jurnal Ilmu-Ilmu Sosial dan Humaniora" (2019) 21:3 *Sosiohumaniora* 333–341 at 333.

¹¹ The articles being tested are Article 80 paragraph (1) letter a, paragraph (2) letter a, paragraph (3) letter a; Article 81 paragraph (3) letter a; Article 82 paragraph (1) letter a, paragraph (2) letter a, and paragraph (3) letter a in the Narcotics Law.

including harsh measures (which the MK interpreted as the death penalty).¹² The Court's opinion does not contradict Article 6 of the ICCPR, which asserts that the sentence of death may be imposed only for the most serious crimes, which must be carried out by a judgment rendered by a competent court. This assertion applies to Indonesia as a state party which has not abolished the death penalty.

The above opinions show that the death penalty will always face two views, namely those that agree or disagree with the application of the death penalty. The polemic on the implementation of death penalty in Indonesia has existed for years a long time and caused several defendants to undergo execution. Some examples include Kusni Kasdut (1960) and Karta Cahyadi/Tugiman (1990) for sadistic murder, Ayodhya Prasad (2004) for drug offences, and Fabianus Tibo (2006) for terrorism.¹³ However, the MK Decision No. 2-3/2007 legitimized the implementation of death penalty in Indonesia including in the new KUHP. In this context, both supporters and opponents of death penalty must pay attention to the context of the imposition of death penalty. Although the right to life is a constitutional rule, the imposition of death penalty must still be applied to certain criminal offenses that are classified as very serious criminal offenses, including narcotics crimes.¹⁴

Controversial views on the death penalty do not only occur in Indonesia, but also in the United States, as observed in a study by Raj Sethuraju, Jason Sole, and Brian E. Oliver.¹⁵ According to them, a number of polls reveal that the majority of Americans have supported the death penalty for more than 40 years. This is although a 2013 Gallup poll's results showed the lowest support for the

¹² Adem Deni & Abdur Rahim, "Analisis Putusan Hukuman Mati menurut Mahkamah Konstitusi Nomor 2-3/PUU-V/2007 dan Fiqih Siyasah" (2022) 1:3 J Penelit Multidisiplin Ilmu 397–414 at 404.

¹³ M Abdul Kholiq, "Kontroversi Hukuman Mati dan Kebijakan Regulasinya dalam RUU KUHP (Studi Komparatif menurut Hukum Islam)" (2007) 14:2 J Huk IUS QUIA IUSTUM at 185–186.

¹⁴ Adi Saputra & Febrian Jadug Santoso, "Death Penalty, Right to Life, and Various Controversies in Human Rights" (2019) 5:1 Unnes Law Journal 1–8 at 7.

¹⁵ Raj Sethuraju, Jason Sole & Brian E Oliver, "Understanding Death Penalty Support and Opposition Among Criminal Justice and Law Enforcement Students" (2016) 6:1 Sage Open, online: <<https://journals.sagepub.com/doi/pdf/10.1177/2158244015624952>>.

death penalty since 1972, at around 53 percent.¹⁶ Some literature and research from the past 40 years provide information regarding the American public's support for the death penalty. For example: white people, men, Republicans, and people with less education generally express greater support for the death penalty than non-white people, women, Democrats, Independents, and people with higher education. However, Raj Sethuraju et al. said that there are still few studies that look at the similarities and differences in the reasons that underlie these peoples' support or opposition for the death penalty in America.

In Indonesia, studies related to death penalty have been conducted by several researchers. For example, Titin Nurfatlah et al examined the death penalty from when its formulation in the Criminal Code as the main punishment for certain crimes, until its formulation into an alternative punishment.¹⁷ The authors stipulate that the shift in the view of the criminal system, which no longer views criminal justice as a means of retaliation, is a new face of the Indonesian criminal law system.¹⁸ However, they also stated that the existence of death penalty in KUHP draft is like a “dubious middle way”, because it still considers that criminals cannot have the right to repent. On the other hand, the drafters believe that the new form of death penalty in the KUHP is the middle ground between abolitionists and retentionists.¹⁹

The discussion of the new KUHP which contains death sentences has undergone dynamic changes and improvements. Therefore, the death penalty as a “middle way”, and “paradigm shift” proposed by Titin Nurfatlah et al., is still not final. Indeed, during the drafting of Criminal Code in 2019 the government called the death penalty as a middle way. However, the opinion was expressed when the Criminal Code was still in its draft stage. The final version of the KUHP draft, which supports the idea towards the “middle way”, has been refined. Thus, the meaning of “death penalty” in the KUHP draft is

¹⁶ Gallup, “Death Penalty”, (24 October 2006), online: <<https://news.gallup.com/poll/1606/Death-Penalty.aspx>>.

¹⁷ Titin Nurfatlah, Amiruddin Amiruddin & Ufran Ufran, “The Shift Paradigm of the Death Penalty in the Draft Criminal Code” (2020) 4:1 Unram Law Rev 54–63 at 55–56.

¹⁸ Jan Rummelink, *Hukum Pidana: Komentar Atas Pasal-Pasal Terpenting Dari Kitab Undang-Undang Hukum Pidana Belanda Dan Padanannya Dalam Kitab Undang-Undang Hukum Pidana Indonesia* (Gramedia Pustaka Utama, 2003), 458. According to Jan Rummelink, retaliation is conceived as an effort to maintain peace or security and better control of society.

¹⁹ Nurfatlah, Amiruddin & Ufran, *supra* note 17 at 56.

different from what is contained in the new KUHP, which more accurately reflects the novelty and paradigm shift of death penalty regulation.

The novelty of the death penalty formulation in the new KUHP aligns with the results of a study by Joko Cahyono and Faisal Santiago. This discusses that legal reform in Indonesia is shown through the preparation of the new Criminal Code – as a law envisioned by the Indonesian people (*ius constituendum*), not a colonial legacy.²⁰ The values adopted by the Dutch during the colonial period were the values of liberalism, non-religion, racial discrimination, respect for unlimited human rights, individualism, and rigid state absolutism. These values are not in line with the values of the Indonesian nation: divinity, cooperation, respect for the public interest, and deliberation for consensus.

Based on these issues, this paper will examine the paradigm shift of death penalty regulated in the new KUHP, especially related to the retention of death penalty, but its application must be selective and careful because it involves the right to human life. On that basis, the provision of death penalty in the new KUHP has shifted from those Article 10 of the old KUHP, which placed death penalty as the primary means to tackle crime. The philosophical foundations for this were influenced by classical criminal thought of the 18th century, where the attention of criminal law was focused on criminal acts or offenses. The author believes that the philosophy of death penalty in the new KUHP is based on neo-classical school of thought that maintains a balance between objective factors and subjective factors.

A compromise in the form of a middle ground does not abolish the death penalty, but is determined in a separate article as proof that this type of punishment is truly special as a last resort. The policy is to show that death penalty is the most severe punishment, and must always be threatened alternatively with life imprisonment or imprisonment for a maximum of twenty years. In addition, death penalty is imposed conditionally by providing a probation period of ten years. Within the probation period, the convict is expected to be able to improve themselves so that the death penalty does not need to be executed, and can be replaced with imprisonment. Thus, the

²⁰ Joko Cahyono & Faisal Santiago, “Reconstruction of Conditional Death Penalty Norms In the Perspective of Renewing Indonesian Criminal Law” (2023) 2:1 *Edunity Kaji Ilmu Sos Dan Pendidik* at 47–55.

existence of “conditional capital punishment” intends for the punishment system in Indonesia to not confront the international legal instruments that it ratified, which in principle prohibit the death penalty.

II. ABOLITIONIST AND RETENTIONIST VIEW OF DEATH PENALTY

The debate on the existence of death penalty has yet to subside due to the existence of two mainstream schools of thought: the abolitionist, which wants to abolish death penalty in its entirety; and the retentionist, which seeks to maintain the existence of death penalty based on the provisions of the prevailing positive law.²¹ The debate is not only among the general public, but also in the judicial institutions. For example, disagreements related to the implementation of death penalty occurred in the MK in 2007, upon examination of the material related to death penalty stipulated in Article 59(2) of Law Number 5 on Psychotropic (1997) and Article 80, Article 81, Article 82 of Law Number 22 on Psychotropic (1997).²² The judicial review of the two laws were submitted by two Indonesian citizens, Rani Andriani and Edith Yunita Sianturi, and two Australian citizens, Myuran Sukumaran and Andrew Chan. Ultimately, it was rejected by the Court. However, the Court's decision to maintain the death penalty was not absolute, because there were dissenting opinions from four judges: Maruarar Siahaan, Laica Marzuki, Achmad Roestandi, and Harjono.²³

Maruarar Siahaan stated that the substance of the judicial review should be accepted because the right to life is a right of every person regulated in the Indonesian constitution and international law that has been ratified by Indonesia, such as the International Covenant on Civil and Political Rights (ICCPR) in 2005. Laica Marzuki also stated that the right to life is non-derogable and cannot be restricted in any situation, so the death penalty should not be necessary, as it is irreversible and contrary to God's will.²⁴ An almost identical opinion was also

²¹ Baren Sipayung, Sardjana Orba Manullang & Henry Kristian Siburian, “Penerapan Hukuman Mati Menurut Hukum Positif di Indonesia ditinjau dari Perspektif Hak Asasi Manusia” (2023) 7:1 J Kewarganegaraan 134–142 at 134.

²² Republic of Indonesia, *Constitutional Court Decision Number 2-3/PUU-V/2007*, at 21–22.

²³ *Ibid* at 433-451.

²⁴ *Ibid* at 444.

submitted by Achmad Roestandi, who stated that the death penalty is contrary to the ICCPR and the seven human rights stipulated in Article 28I of the Constitution, which are non-derogable. Although he believes that death penalty for murder and robbery crimes is allowed in Islam as the last alternative punishment (*qisas*, or the retaliatory principle),²⁵ Indonesia as a pluralist country must use the Constitution as the highest positive law.²⁶

The existence of dissenting opinions shows that contestations about the death penalty also occur within the MK. With the recognition of death penalty as stated in the Court Decision Number 2-3/PUU-V/2007, it means that Indonesia is officially among the group of countries that still maintains death penalty in its national law, even though the principle of death penalty implementation no longer aligns with the Criminal Code's philosophical foundations. Death penalty in Indonesia is also different from *qisas* in Islamic law, which is imposed on the perpetrator as a punishment for his crime.²⁷

Dissenting opinions related to death penalty in the MK can be interpreted as the existence of democratic process in the judicial institution room, even though death penalty in Indonesia is still maintained. Dissenting opinions can refer to the practice of the South African Constitutional Court. Lucky Mathebe argued that the Constitutional Court is one of the most important new democratic institutions in South Africa in shaping and realizing the country as a constitutional democracy, upholding the values of South African people's struggle.²⁸ Mathebe used the example of the court's decision in *Makwanyane* as the first court decision in South Africa to abolish the death penalty. According to this, the judicial institutions employed a more activist approach to constitutional interpretations.²⁹ The *Makwanyane* case in 1995 surrounded the two defendants who were found

²⁵ Islamic law provides for retaliation against the individual who commits the crimes of murder or bodily injury but also expresses a preference for forgiveness. Elizabeth Peiffer, "The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria" (2005) 11:3 *William Mary J Race Gend Soc Justice* at 516.

²⁶ *Ibid* at 439–440.

²⁷ Roni Efendi, "Pidana Mati dalam Perspektif Hukum Pidana dan Hukum Pidana Islam" (2017) 16:1 *JURIS J Ilm Syariah* 125–143 at 126.

²⁸ Lucky Mathebe, "The Constitutional Court of South Africa: Thoughts on its 25-Year-Long Legacy of Judicial Activism" (2021) 56:1 *J Asian Afr Stud* 18–33.

²⁹ *Ibid* at 22.

guilty and sentenced to death by the Local Division of the Supreme Court. The two were punished based on the Criminal Procedure Act 51/1977, which sanctions capital punishment for murder.³⁰ By annulling the death sentence in the Makwanyane case, the Constitutional Court of South Africa is seen as progressive and receptive to broader-based historical arguments about the living constitution. The Court stated:

“The death sentence constitutes inhuman punishment because it irreversibly invades the humanity of the offender ... by impermissibly degrading the humanity inherent in his right to dignity...”³¹

The constitutional court decision to abolish death sentences in South Africa ended the long history of the capital punishment in the country, bringing about hundreds of the inmates. Research by Chris Derby Magobotiti shows that from 1950s to 1960s, there were more than 1000 death sentences imposed for murder cases.³²

The decision of the South African Constitutional Court shows that the Court considers social context to abolish death sentences. Death penalty in Indonesia historically does not originate from religious doctrine, but a series of democratization processes that are agreed upon in legislation.³³ In the midst of this process, there are two competing opinions in responding to death penalty in Indonesia: namely, retentionist and abolitionist groups. Different approaches to the death penalty, whether imposed or abolished, produce conflicting perspectives and arguments on issues of regulation and practice, both on a national and international scale. Abolitionists believe that the death penalty violates the human right to life, and are also concerned about potential errors in the application of the death penalty against a person who has been sentenced.³⁴ Additionally, the death penalty does not give any chance for the accused to

³⁰ *Ibid* at 24.

³¹ *Ibid* at 25.

³² Chris Derby Magobotiti, “Historical reflections on the deterrent effect of the death penalty on capital crimes in South Africa: Lessons from 1917–1995” (2022) 50:3 *Sci Mil South Afr J Mil Stud* 103–119 at 105.

³³ Abdul Jalil Salam & Zahlul Pasha Karim, “Death Penalty in Indonesia: Revisiting the Debate Between the Retentionist and the Abolitionist” (2021) 8:1 *Lentera Huk* 115–150.

³⁴ Ajie Ramdan, Rully Herdita Ramadhani & Mei Susanto, “Kebijakan Pidana Mati dalam RKUHP Ditinjau dari Aspek Politik Hukum dan HAM” (2018) 11:3 *Arena Huk* 600–617 at 601.

repent, because their life has been taken by the court. This, in turn, also asserts that the death sentence does not represent the guilt of the accused.³⁵ This means that death penalty deliberately deprives someone's life through legal procedure as an authority of the state. Over the last four decades, the number of abolitionist countries reached 112, including four countries that abolished the death penalty by 2022 for all crimes (Kazakhstan, Papua New Guinea, Sierra Leone and the Central African Republic).³⁶

In contrast, retentionists believe that the application of the death penalty will be able to provide a deterrent effect and prevent the recurrence of the same crime.³⁷ In Southeast Asia, Indonesia is among the retentionist countries with Myanmar,³⁸ Vietnam, Singapore, Malaysia, Brunei Darussalam, and Thailand. All impose the death penalty, which brings about ASEAN as one of the stronghold regions on death penalty.³⁹ Amnesty International noted that although the number of abolitionist countries increased, the number of executions in 2022 also increased by 53 percent; compared to 2021 in 52 countries, with Singapore as the country that executed 11 prisoners.⁴⁰ Amnesty also noted that although Indonesia did not carry out any executions in 2022, the country still has around 452 death row prisoners, some of whom received pardons for their death sentences.⁴¹

The enactment of the new Criminal Code, to be effective in 2026, is expected to reduce the number of death penalty applications because the Criminal Code allows the implementation of death penalty after 10 years of imprisonment as long as certain requirements have been met.⁴² The imposition of death penalty in

³⁵ Tongat, “Death penalty in Indonesia: between criminal law and Islamic law perspectives” (2024) 32:1 Leg J Ilm Huk 90–104 at 90–91.

³⁶ Amnesty International suspected that Vietnam has executed death penalty for narcotics and other serious crimes in recent years. See Laporan Global Amnesy International: Hukuman Mati dan Eksekusi 2022., by Amnesty International (Jakarta: Amnesty International, 2023) at 4.

³⁷ Ramdan, Ramadhani & Susanto, *supra* note 34 at 601.

³⁸ Amnesty International suspects that Vietnam has executed death penalty for narcotics and other serious crimes in recent years. See Amnesty International, *supra* note 36 at 4.

³⁹ Sriprapha Petcharamee, Raine Boonlong & Danthong Breen, “ASEAN and the Death Penalty: Theoretical and Legal Views and a Pathway to Abolition” in Sriprapha Petcharamee, Mark P Capaldi & Alan Collins, eds, *Unpacking Death Penal ASEAN* (Singapore: Springer Nature, 2023) 157 at 171.

⁴⁰ Amnesty International, *supra* note 36 at 5–7.

⁴¹ *Ibid* at 9–12.

⁴² *Ibid* at 13.

the new Criminal Code intends to create a balance between the demands of society in crime prevention efforts with severe sanctions for the protection of society.⁴³

The provision of conditional capital punishment in the new Criminal Code has received support from Abdul Jalil and Zuhlul Pasha Karim⁴⁴. Research from the two authors shows that death penalty is still relevant in Indonesia despite the long struggle in its rejection. However, this is with a caveat: the application of death penalty must be maintained by being more specific and selective for certain crimes such as corruption, drugs, terrorism, gross human rights violations, and premeditated murder. Selective application means that a convict sentenced to death must be proven in court with a level of rigor that is considered and accepted by law.

Irvino Rangkuti also examines the death penalty related to corruption.⁴⁵ According to him, various countries in the world have reasons for not applying or implementing the death penalty against corruptors and one of the main reasons is that the punishment is considered to violate human rights. The implementation of the death penalty for corruptors can be an important preventive effort. Indonesia, together with Vietnam, Laos, Iran, and Iraq, still imposes the death penalty for corruption in its legislation. China and Indonesia also have death penalty regulations, but it does not decrease the number of corruptions in the two countries.⁴⁶ The absence of indications of a decrease in corruption levels shows that the current punishment does not have a deterrent effect on the perpetrators.

In Indonesia, the death penalty for corruption crimes is regulated in Article 2 of Law No. 31/1999 concerning the Eradication of Corruption. This states that corruption committed under certain circumstances is punishable by death. The elucidation of Article 2 paragraph (2) explains "certain circumstances" as corruption committed when the state is in a state of danger –such as natural

⁴³ Ramdan, Ramadhani & Susanto, *supra* note 34 at 610.

⁴⁴ Salam & Karim, *supra* note 33 at 135.

⁴⁵ Irvino Rangkuti, "Formulation of Death Penalty for Criminal Act of Corruption in China, Vietnam, and Thailand" (2023) 14:2 *Dialogia Iurid* 044–069 at 48–49.

⁴⁶ Rodes Ober Adi Guna Pardosi & Yuliana Primawardani, "The Legitimacy Death Penalty Application of Certain Conditions in the Anti-Corruption Law" (2022) 19:3 *J Konstitusi* 673 at 685.

disasters, as a repetition of corruption crimes, or when the state is in a state of economic and monetary crisis". The application of the "certain circumstances" clause can actually be used to impose the death penalty: as would have been valid in the case of Juliari Batubara, who was proven to have committed corruption in Covid-19 social assistance. However, the Central Jakarta District Court in 2021 sentenced Juliari Batubara to 12 years imprisonment, a fine of 500,000,000 rupiah, an additional penalty of 14,597,450,000, and revocation of political rights for four years.⁴⁷ The judge stated that Juliari Batubara's corruption during the Covid-19 pandemic had actually fulfilled the elements of corruption under certain circumstances, but the judge did not impose the death penalty because the defendant had never been convicted before and he had faced public scorn and reproach which made him suffer even though there was no permanent decision from the court.⁴⁸

The imposition of a 12-year sentence and fine to Juliari Batubawa shows that the formulation of the death penalty stipulated in Article 2 paragraph (2) of the Corruption Crime Law is conditional,⁴⁹ and that it is not the main punishment, because other punishments coexist with the death penalty. In addition, the death penalty in the Corruption Crime Law is imposed in certain circumstances such as a disaster emergency, a country in a state of danger, repeated corruption, or a country in a state of monetary crisis. The absence of the imposition of the death penalty on Juliari Batubara who committed corruption during the "national disaster" of Covid-19 proves that the "conditional conditions" were not taken into consideration by the court to impose the death penalty on him.⁵⁰ In fact, Juliari Batubara's case fulfilled the conditional conditions that justify the death

⁴⁷ Decision of the Central Jakarta District Court Number 29/Pid.Sus-Tpk/2021/PN.Jkt.Pst.

⁴⁸ Adinda Anisa Putri Noor Oetari & Ade Mahmud, "Kebebasan Hakim dalam Penjatuhan Pidana terhadap Pelaku Tindak Pidana Korupsi Bantuan Sosial Covid-19 Dikaitkan dengan Asas Keadilan dan Dasar Pemberatan Penyalahgunaan Kewenangan" (2021) 1:2 J Ris Ilmu Huk 96–103 at 101.

⁴⁹ Furthermore, see Constitutional Court Decision Number 157/PUU-XXI/2023 in a case regarding the judicial review of Law Number 31 of 1999 concerning the Eradication of the Criminal Acts of Corruption as amended by Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of the Criminal Acts of Corruption.

⁵⁰ BBC News Indonesia, "Eks Mensos Juliari Batubara divonis 12 tahun, korban terpaksa memasak bansos tak layak", (23 August 2021), online: <<https://www.bbc.com/indonesia/indonesia-58301733>>.

penalty, similarly to the corruption case of the Governor of Bank Indonesia in the Sukarno era, Jusuf Muda Dalam. Jusuf was proven to have committed corruption worth 97 billion rupiah at a time during Indonesia's economic crisis in the 1960's, and was sentenced to death in 1966.⁵¹ Although Harold Crouch believes that Jusuf's death sentence was more politically motivated due to his position as a Minister loyal to Sukarno,⁵² the death sentence should be similarly considered by the judge for Juliari Batubara.

The death penalty in other Asian countries is familiar to Indonesia, as many still apply it. One such country is Vietnam. The question becomes: what are the differences and similarities between the death penalty arrangements in Vietnam and in Indonesia? According to Irvino Rangkuti, death penalty provisions in Vietnam apply to serious crimes against the state, corruption, and drug trafficking.⁵³ The Vietnam Criminal Law of 1985 regulates 40 crimes that can be sentenced to death, one of which is the crime of corruption. This is regulated in Vietnam's Article 132 paragraph (3) on stealing property.⁵⁴ A clearer regulation regarding the death penalty related to corruption crimes is regulated in Article 278 paragraph (4) of the 1999 Vietnamese Criminal Law on embezzling property, and Article 353 paragraph (4) of the 2015 Vietnamese Law.⁵⁵

Regarding the crime of corruption, Irvino Rangkuti did not provide an explanation whether the State of Vietnam has ever applied the death penalty as threatened. However, Irvino Rangkuti explained that the absence of the classification of corruption crime perpetrators would make it more difficult to impose the death penalty on corruption.⁵⁶ Secondly, Vietnam's policy to keep executions secret makes it difficult for the public to access original data related to the effectiveness of the punishment. Every person who intentionally or unintentionally discloses information on that matter shall be condemned by

⁵¹ Martin Sitompul, "Sidang Terbuka Jusuf Muda Dalam" *Historia* (29 November 2022), online: <<https://historia.id/politik/articles/sidang-terbuka-jusuf-muda-dalam-vg8yZ>>.

⁵² See Martin Sitompul, "Hukuman Mati bagi Menteri Korup" *Historia* (19 February 2021), online: <<https://historia.id/politik/articles/hukuman-mati-bagi-menteri-korup-PzWg0>>.

⁵³ Rangkuti, *supra* note 45 at 49.

⁵⁴ Kien Tran & Cong Giao Vu, "The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry" (2019) 9:3 *Societies* 56 at 11.

⁵⁵ *Ibid.*

⁵⁶ Rangkuti, *supra* note 45 at 49.

criminal penalties of up to 15 years in prison.⁵⁷ However, several estimates conducted by mass media and researchers state that around 429 executions have been carried out between August 2013 and June 2016, which attracted criticism from the international community.⁵⁸

Developments related to the death penalty policy in China are slightly different from Vietnam. The Chinese government has suspended the death sentence in Chinese law to give the accused a two-year reprieve from being executed, after which it is automatically converted to life imprisonment, or only rarely, fixed-term imprisonment.⁵⁹ Kandiss Scott in his research shows that since 2007, China has given the death penalty only to a very small number of serious offenders, and extremely vile criminals who posed a grievous treat to society.⁶⁰ After China updated the regulations related to the death penalty, the government executed fewer death penalty prisoners. Based on this research, there are international forces and domestic factors that influence changes in China's death penalty policy, such as the media, changing circumstances, and politics.⁶¹ Although there is no fundamental reason for the seemingly non-transparent change in death policy in China, Kandis Scott predicts that such changes will be made soon before the United States does.⁶²

As reported by The Guardian, Amnesty International had previously strongly criticized China for continuing to hide the number of people sentenced to death.⁶³ However, in 2016 there was a decrease in the number of executions globally. This was conveyed by Amnesty International's report that the number of executions worldwide fell by more than a third: from 1,634 in 25 countries in

⁵⁷ Tran & Vu, *supra* note 54 at 20.

⁵⁸ *Ibid* at 21.

⁵⁹ Laurie Chen, "Yang Hengjun: What is a suspended death sentence in China?", Reuters (5 February 2024), online: <<https://www.reuters.com/world/asia-pacific/what-is-chinas-suspended-death-sentence-verdict-2024-02-05/>>.

⁶⁰ Kandis Scott, "Why Did China Reform Its Death Penalty?" (2010) 19:1 Pac Rim Law Policy J Assoc.

⁶¹ *Ibid* at 69.

⁶² *Ibid* at 65.

⁶³ Benjamin Haas, "Amnesty criticises 'rogue state' China as global death penalty toll falls", The Guardian (10 April 2017), online: <<https://www.theguardian.com/world/2017/apr/11/amnesty-criticises-rogue-state-china-as-global-death-penalty-toll-falls>>.

2015, to 1,032 in 23 countries in 2016.⁶⁴ Iran, Saudi Arabia, Iraq and Pakistan were the countries that carried out the most executions. Beijing is suspected of executing thousands of people, but it does not release death penalty statistics under its consideration as a state secret. Amnesty East Asia Director Nicholas Bequelin said that it is time for China to stop being a “rogue state” in the international community regarding the death penalty.⁶⁵

In 2017, Benjamin Haas brought up a public trial conducted in one of Southern China's sports stadiums in Lufeng. At that time, thousands (including school children) crowded into the stadium to watch 10 people be sentenced in a public trial.⁶⁶ Haas reported that the accused were taken away and predicted to be executed immediately. Court trials on death sentence may be accessed by the public, but the execution is always a mystery. This indicates that the application of death sentence in China may be savage and places China as the country which might execute more people than other countries.⁶⁷

In looking at the development of the death penalty in Vietnam and China, it seems that the arrangements in each country are still maintained. This is corroborated by Amnesty International's annual report, which states that executions around the world increased to the highest number in five years in 2022.⁶⁸ In 2021, there were at least 883 executions recorded worldwide, up 53% from 579 the previous year. These numbers do not include China, which Amnesty says it believes has executed and sentenced to death "thousands" of people. The world's three largest executioner nations – Egypt, Iran and Saudi Arabia – carried out around 90% of the recorded executions in 2022. The Saudi government responded to Amnesty international's annual report by saying that

⁶⁴ Amnesty International, “The Death penalty in 2016: Facts and figures”, (11 April 2017), online: <<https://www.amnesty.org/en/latest/news/2017/04/death-penalty-2016-facts-and-figures/>>.

⁶⁵ Haas, *supra* note 63.

⁶⁶ Benjamin Haas, “Public death sentences for 10 people show China’s desperation”, *The Guardian* (19 December 2017), online: <<https://www.theguardian.com/world/2017/dec/19/public-death-sentences-people-china-desperation>>.

⁶⁷ *Ibid.*

⁶⁸ Cora Engelbrecht, *The Japan Times*, Global executions highest in five years, Amnesty International says, Cora Engelbrecht, “Global executions highest in five years, Amnesty International says”, *Jpn Times* (17 May 2023), online: <<https://www.japantimes.co.jp/news/2023/05/17/world/death-penalty-amnesty-survey/>>.

like many other countries, it includes the death penalty as a form of punishment for the most egregious crimes.⁶⁹

The Amnesty report also noted significant increases in the number of executions in Kuwait, Myanmar and the Gaza Strip. However, the global increase was matched by growing signs that governments around the world are moving away from the death penalty. For example, the aforementioned four countries (the Central African Republic, Kazakhstan, Papua New Guinea and Sierra Leone) abolished the death penalty for all crimes. However, the United States, for the 14th consecutive year, was the only country to execute, with 18 executions, the least number of executions in the country since 1991.

Referring to the Amnesty International report, many countries in the world still retain the death penalty in their positive laws, even though some of them have reformed it gradually. For example, Malaysia through the Dewan Negara (Upper House of Parliament) passed two bills in 2023 reforming the death penalty, and sent them to the king to be signed into law.⁷⁰ According to Elaine Pearson, Asia director at Human Rights Watch, “The abolition of the death penalty brings Malaysia closer to the majority of countries that have abolished the death penalty altogether.”⁷¹ Pearson added that Malaysia's next step should be to end the application of the penalty completely and commute the sentences of the 1,320 people on death row. The new law will give hope and legal assistance for the accused to appeal for judicial reviews of their cases within the first 90 days of enactment.⁷² Malaysia previously applied the death penalty for 33 types of offenses including drug trafficking, murder, treason, and terrorism.⁷³ The Death Penalty Abolition Bill 2023 abolishes the death penalty for 12 offenses such as

⁶⁹ Amnesty International, *supra* note 36 at 6–7.

⁷⁰ Beatrice Siviero, “Malaysia repeals mandatory death penalty and life-imprisonment sentence”, (4 April 2023), online: Southeast Asia Globe <<https://southeastasiaglobe.com/malaysia-mandatory-death-penalty/>>.

⁷¹ Elaine Pearson, “Malaysia Repeals Mandatory Death Penalty, Meaningful Move Should Pave Way to Full Abolition”, (11 April 2023), online: Hum Rights Watch <<https://www.hrw.org/news/2023/04/11/malaysia-repeals-mandatory-death-penalty>>.

⁷² Siviero, *supra* note 70.

⁷³ Pearson, *supra* note 71.

murder, treason, and terrorism; however, it still retains the death sentence for drug trafficking.⁷⁴

The bill eliminates the death penalty as an option for seven offenses, including attempted murder and kidnapping. Natural life imprisonment, which incarcerates prisoners until death, would be replaced by 30 to 40 years in prison.⁷⁵ Human Rights Watch urged the Malaysian Government to immediately abolish the death penalty as a sentencing option for all crimes that do not meet the threshold of the “most serious crimes” under international law. According to Amnesty International, in recent years, there have been important reforms that have brought Malaysia closer to the complete abolition of the death penalty.⁷⁶

The movement towards the abolition of the death penalty continues to reverberate globally, as demonstrated by the scientific meeting held in Addis Ababa, Ethiopia.⁷⁷ Although 27 countries in Africa have abolished the death penalty by December 2023, other countries still use it for crimes such as murder, terrorism, and drug trafficking. The death penalty cannot be separated from the issue of human rights violations and the inhumane nature of the death penalty, because its application cannot be changed. It is said to be inhumane because when a person is executed, there is no way to correct the wrongful punishment. Research also shows that some victims are found innocent after being executed. For example, Glynn Simmons was convicted and sentenced to death by Oklahoma Court in 1975 due to his alleged crime of murdering a liquor store worker. Ultimately, his death penalty was reduced to life imprisonment and then

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Amnesty International, “Current Status of the Death Penalty in Malaysia (as of 10 October 2023)”, (2023), online: Amnesty Malays <<https://www.amnesty.my/abolish-death-penalty/>>.

⁷⁷ Florence Venunye Ayivor-Vieira & Hervé Nsambimana, “Advocating for the Adoption of the Draft Protocol by the African Union: A Step in the Right Direction for Abolition in Africa”, (15 December 2023), online: WCADP <<https://worldcoalition.org/2023/12/15/advocating-for-the-adoption-of-the-draft-protocol-by-the-african-union-a-step-in-the-right-direction-for-abolition-in-africa/>>.

was declared innocent of the crime and released in July 2023 or after he spent 48 years in prison.⁷⁸

It is worth noting that there are still 56 countries that still apply the death penalty around the world.⁷⁹ These countries have different legal systems and cultural contexts and the death penalty is used for a variety of offenses, including murder, drug trafficking, and treason against the state. Belgium still has regulations governing the death penalty, but it is not included in the list.⁸⁰ This is because even though the death penalty is still maintained, Belgium is recorded as having never applied the death penalty. Thus, the provision of death penalty in accordance with the legal interests of each country varies greatly in its implementation.

In Indonesia, the death penalty was originally regulated in the Dutch Criminal Code as the primary punishment, which led to many executions. Subsequently, a study conducted by Melbourne Law School reported that Indonesia has been criticized nationally and internationally for its application of the death penalty.⁸¹ Many argue that the death penalty does not deter crime, and that there has never been strong empirical evidence showing that it can do so. They say the purpose of punishment should be to re-educate and rehabilitate offenders, and give them the opportunity to reintegrate into society. Globally, only a small number of

⁷⁸ Simon Hattenstone, “I spent 48 years in prison for a murder I didn’t commit. Here’s how I fought my way to freedom”, *The Guardian* (28 February 2024), online: <<https://www.theguardian.com/us-news/2024/feb/28/sentenced-to-die-innocent-man-spent-48-years-in-prison-for-murder-glynn-simmons>>.

⁷⁹ e.g. Afghanistan, Antigua dan Barbuda, Bahrain, Bangladesh, Barbados, Belarus, Belize, Botswana, Komoro, Kuba, Republik Demokratik Kongo, Republik Dominika, Mesir, Guinea Khatulistiwa, Ethiopia, Guyana, India, india , Iran, Irak, Yordania, Kuwait, Lebanon, Jamaika, Jepang, Lesotho, Libya, Malaysia, Nigeria, Korea Utara, Oman, Pakistan, Palestina, Republik Rakyat Tiongkok, Puerto Riko, Qatar, Saint Kitts dan Nevis, Saint Lucia, Saint Vincent dan Grenadines, Arab Saudi, Singapura, Somalia, Sudan Selatan, Sudan, Suriah, Taiwan, Thailand, Bahama, Gambia, Trinidad dan Tobago, Uganda, Uni Emirat Arab, Amerika Serikat, Vietnam, Yaman, and Zimbabwe. See Wisevoter, “Countries with Death Penalty 2023”, online: <<https://wisevoter.com/country-rankings/countries-with-death-penalty/>>.

⁸⁰ Jan Remmelink, *Hukum pidana: komentar atas pasal-pasal terpenting dari Kitab Undang-Undang Hukum Pidana Belanda dan padanannya dalam Kitab Undang-Undang Hukum Pidana Indonesia* (Gramedia Pustaka Utama, 2003) at 460.

⁸¹ Philippa Davies, “Death Penalty in Indonesia”, (22 December 2022), online: Melb Law Sch <<https://law.unimelb.edu.au/centres/alc/research/publications/alc-briefing-paper-series/death-penalty-and-the-road-ahead-a-case-study-of-indonesia>>.

countries still implement this policy. The study also suggests that domestic support for the death penalty in Indonesia still appears to be overwhelming.

Parliamentarians for Global Action (PGA) has been watching developments in Indonesia, especially when Indonesia ended its five-year unofficial moratorium that began in 2008.⁸² After the moratorium, Indonesia resumed the execution of the death penalty in 2013 on behalf of Suryani Swabhuana, Jurit, and Ibrahim. These three were sentenced to death for premeditated murder.⁸³ After the executions, Indonesia still imposed the death penalty in 48 cases in 2018 although no executions were carried out. In addition, there are more than 308 people still on death row. Although Indonesia has ratified the ICCPR in 2006, it has not ratified the Second Optional Protocol aimed at the abolition of the death penalty (ICCPR-OP2). Then, from November 10 to 13, 2019, PGA conducted consultations with Indonesian parliamentarians and policymakers on criminal justice reform; in particular, how the death penalty is addressed in the ongoing revision of the Criminal Code (Reform process).

Death penalty in Indonesia is no longer the main punishment in Law No. 1 Year 2023, because it is stipulated in a separate article to show that this type of punishment is really special as a last resort to protect the society. Slamet Tri Wahyudi stated that Indonesia still maintains and recognizes the legality of death penalty as one way to punish criminals, although the pros and cons regarding death penalty have long been recorded in the country.⁸⁴

It is argued that the death penalty in Law No. 1/2023 should have shifted because the Netherlands (as the party that inherited the old KUHP) abolished the death penalty in their criminal code since September 17, 1870.⁸⁵ According to J.E. Sahetapy, the state has all the authority to maintain public order, and therefore the application of death penalty must be seen in the context of a necessity.⁸⁶ For

⁸² Parliamentarians for Global Action (PGA), "Indonesia and the Death Penalty", (2019), online: <<https://www.pgaction.org/ilhr/adp/idn.html>>.

⁸³ BBC NEWS Indonesia, "Indonesia kembali eksekusi terpidana mati", (17 May 2013), online: <https://www.bbc.com/indonesia/berita_indonesia/2013/05/130517_eksekusi_napi>.

⁸⁴ Slamet Tri Wahyudi, "Problematika Penerapan Pidana Mati Dalam Konteks Penegakan Hukum di Indonesia" (2012) 1:2 J Huk Dan Peradil 207–234.

⁸⁵ Rummelink, *supra* note 80 at 459.

⁸⁶ Jacob Elvinus Sahetapy, *Ancaman Pidana Mati terhadap Pembunuhan Berencana* (Bandung: Alumni, 1979) at 37.

the public interest, the death penalty can and should be applied, although only as a last resort and when absolutely necessary in extraordinary circumstances. Therefore, from public dialogue in various regions in Indonesia, the majority of people support the maintenance of the death penalty under the New Criminal Code – under the condition that it does not become the main punishment.

III. THE POLITICS OF DEATH PENALTY IN THE NEW CRIMINAL CODE/KUHP

The political law placed in the New Criminal Code (Law No. 1/2023), one of which appears in the Consideration letter c, reads:

"... national criminal law must also regulate the balance between public or state interests and individual interests, between protection of perpetrators and victims of criminal acts, between elements of actions and mental attitudes, between legal certainty and justice, between written law and laws that live in society, between national values and universal values, and between human rights and human obligations;"

The formulation is in accordance with the MK Decision No.2-3/PUU-V/2007.⁸⁷ Mudzakir argued that in the development of death penalty discussion, there are at least three opinions. First, death penalty is abolished. Second, death penalty remains one of the main criminal sanctions. Third, death penalty is maintained as one form of criminal sanction, which is a special criminal sanction.⁸⁸ The formulation of death penalty in the new KUHP takes the third position, which is a compromise between the two streams that approve and reject death penalty. The new KUHP regulates death penalty as an alternative punishment and as a last resort to protect society. For pregnant women or mentally ill people, death penalty is postponed until the woman gives birth or the mentally ill person recovers, and the death penalty can only be executed after the clemency request of the convict is rejected by the President.⁸⁹ Mudzakir said the basis for death penalty imposition in the new Criminal Code is to place the penalty as a special

⁸⁷ Constitutional Court Decision Number 2-3/PUU-V/2007, *supra* note 22 at 229–242.

⁸⁸ *Ibid* at 235.

⁸⁹ *Ibid* at 287.

punishment. This is because death penalty can be changed into life imprisonment, or imprisonment for a certain period of time, after a ten year probation period.⁹⁰

Nyoman Serikat Putrajaya testified as an expert in the MK trial related to the judicial review of the death penalty in the Criminal Code. Here, he stated that the death penalty in the KUHP is removed from the main criminal package, as in Article 10 of the KUHP, and becomes an alternative criminal sanction as a last resort to protect the community.⁹¹ The death penalty sanction is still maintained, albeit specifically to provide a channel for people who want revenge. This is so that it can be said that the purpose of the death penalty sanction is to prevent people from taking vigilante action.⁹²

Observing the Court Decision Number 2-3/PUU-V/2007, Ajie Ramdan et al. argued that death penalty has been declared constitutional in the Indonesian legal system. However, according to them, the debate on whether or not death penalty should be retained in the national punishment system remains prominent.⁹³ For example, the issue of death penalty in relation to human rights has not been resolved. This is because the punishment is closely related to the right to life, which is protected by Article 28I paragraph (1) of the Indonesian Constitution. The right to life is included in the category of rights that cannot be reduced under any circumstances (non-derogable rights). However, the Court through Decision No. 2-3/ PUU-V/2007 is of the opinion that respect for human rights, including the right to life stipulated in Article 28I, cannot be separated from and must also be subject to the provisions of Article 28J paragraph (2) of the Indonesian Constitution regarding restrictions on human rights. The article states that a person's rights and freedoms are not unlimited, but must be subject to restrictions stipulated by law. Therefore, according to Ajie Ramdan et al., no human rights stipulated in the Indonesian Constitution are absolute, including the right to life stipulated in Article 28I paragraph (1).

Based on the consideration of the Constitutional Court, which refers to the testimony of Nyoman Serikat Putrajaya and Mudzakir, the formulation of death

⁹⁰ *Ibid* at 237.

⁹¹ *Ibid* at 230.

⁹² *Ibid* at 231.

⁹³ Ramdan, Ramadhani & Susanto, *supra* note 34 at 601-612.

penalty in the New Criminal Code has a basis of legitimacy. This is additionally stated in Court Decision No. 2-3/PUU-V/2007. The MK also emphasized that death penalty in Indonesia violates neither human rights, nor international legal instruments that have been ratified by Indonesia (such as ICCPR).⁹⁴

An important moment for the Indonesian people in ending the existence of the Criminal Code was when the Indonesian Parliament approved the RKUHP on Tuesday, December 6, 2022 – to be passed into law to replace the Dutch-derived Criminal Code, which had been in effect in Indonesia since 1918. Many believe that the 100 years of the Criminal Code in Indonesia has expired, and therefore requires revision and adjustment. Currently, Indonesia already has Law No. 1 of 2023 on the Criminal Code. This has 624 articles, was passed on January 2, 2023, and will take effect in three years in 2026.

One novelty of the new KUHP is that it regulates the imposition of death penalty conditionally as a middle ground between abolitionist and retentionist positions. The middle ground shows that the new KUHP is compiled through a participatory process, with substance that is responsive to both the punishment needs, and social aspirations towards human rights development.⁹⁵ Article 98 on death penalty states:

“...death penalty is imposed alternatively as a last resort to prevent criminal offenses and protect the community.”

The Elucidation of Article 98 explicitly states that death penalty is not the main punishment, but is regulated in a separate article to show that it is truly special as a last resort to protect the community. The death penalty is the most severe punishment and must always be imposed alternatively with life imprisonment, or a maximum imprisonment of twenty years. As an alternative punishment, the death penalty will not be imposed under the condition that the convict can improve themselves during the ten-year detention period. In this case, life imprisonment would be imposed instead.

⁹⁴ Mahkamah Konstitusi Republik Indonesia, “MK: Hukuman Mati Tak Melanggar Konvenan Internasional Hak Sipil dan Politik”, (2015), online: <<https://www.mkri.id/index.php?page=web.Berita&id=10521>>.

⁹⁵ Lily Faizal, “Problematika Hukum Progresif di Indonesia” (2017) 9:2 *Ijtimaiyya J Pengemb Masy Islam* 1–24 at 18.

The provisions of Article 98 and its elucidation further show that the philosophies of justice and human values underlie the death penalty, even when the perpetrator is a criminal who has taken the life of another person (victim). The placement of “humanity” and “justice” as the basis for imposing the death penalty shows the existence of progressive thinking in the new KUHP. This is because the interests of punishment do not only focus on crimes, but also the perpetrators of crimes and other dimensions of humanism. The formulation of the death penalty in the new KUHP is a combination of classical criminal law, which aims to create legal certainty and public order, with modern criminal law, which aims to protect society from crime.⁹⁶ This humanist dimension can be seen from Article 51 of the new KUHP, which states that the purposes of punishment are: to prevent the recurrence of criminal acts, guide convicts to become good and useful people, to resolve conflicts, to create a sense of security and peace in society, and to foster remorse in the perpetrators.

In relation to this, Jan Rummelink argues that criminal law is not an end in itself. Instead, it has a service function (or social function), so it is possible that the punishment model will be accepted by multiple jurists in Indonesia.⁹⁷ The political law stipulated in Article 98 places the death penalty as a special punishment that is regulated separately, and is not part of the main punishment. This would contrast the old KUHP, which emphasizes retaliation as the main means.

Amnesty International stated that Indonesia must not miss this update of the KUHP to significantly reduce the application of the death penalty, after years of very high death penalty rates.⁹⁸ Amnesty International also notes that the adjustments made by Indonesia are not enough and that it is arguably too late to declare an official moratorium on executions and abolish the death penalty completely. This argument speaks to the unlikelihood that an abolition would end

⁹⁶ Abdul Azis Muhammad, “Ancaman Pidana Mati Dalam Prespektif Tujuan Pemidanaan” (2023) 7:1 Al-Qisth Law Rev 1–19 at 5.

⁹⁷ Rummelink, *supra* note 80 at 15.

⁹⁸ Amnesty International, “Death penalty reforms bring hope amid resumption of executions across Southeast Asia”, (16 May 2023), online: <<https://www.amnesty.id/death-penalty-reforms-bring-hope-amid-resumption-of-executions-across-southeast-asia/>>.

the suffering of at least 452 people on death row, who often suffer in isolation for years.⁹⁹

Amnesty International's view must be able to respond to the new KUHP, which is considered by the government to emphasize humanitarian aspects. This assumption is based on the change in criminal sanctions from death penalty to life imprisonment, as stipulated in Article 100 of the new KUHP. This article shows the principle of legal certainty for death convicts. As written by Humberto Avila, the law can be considered certain if it can be known in a manner that is clear, reliable, and calculable.¹⁰⁰ The ability to know in law must involve two different problems. The first is the ability to know the normative text. The second is for the text to be understood for its exact or unambiguous meaning as adopted in the Lex Certa principle.¹⁰¹ The Lex Certa principle means that the wording of “death sentence” and the offense in criminal law (regulated in the new KUHP) cannot be foreseen by the court, because the punishable act must be clearly defined.

The formulation of these articles shows the direction of Indonesian criminal law. It realizes the decolonialization mission by eliminating colonial nuances in the substance of the Criminal Code, namely realizing corrective-rehabilitative-restorative justice. According to the Deputy Minister of Law and Human Rights, at the Kumham Goes to Campus Program at Nusa Cendana University (Undana) Kupang 2022,¹⁰² the “The KUHP draft is no longer oriented towards retributive justice as justice that prioritizes revenge, but is oriented towards the modern criminal law paradigm.” The mentioned paradigm includes corrective justice, restorative justice, and rehabilitative justice. Corrective justice aims to prevent criminals from committing repeated criminal offenses in the future. Meanwhile,

⁹⁹ Jentera, “Usman Hamid , Profil”, (15 March 2019), online: <<https://www.jentera.ac.id/staf/usman-hamid>>.

¹⁰⁰ Humberto Avila, *Certainty in Law* (Switzerland: Springer International Publishing, 2016) at V.

¹⁰¹ Aryadi Simanjuntak, “Empat Prinsip Dasar Asas Legalitas”, (16 January 2023), online: <<https://id.linkedin.com/pulse/4-empat-prinsip-dasar-asas-legalitas-aryadi-simanjuntak>>.

¹⁰² Wakil Menteri Hukum dan HAM (Wamenkumham), Edward O. S. Hiariej on Biro Humas, Hukum dan Kerjasama, “RUU KUHP Tinggalkan Paradigma Hukum Pidana Sebagai Alat Balas Dendam”, (4 November 2022), online: web.kemenkumham.go.id <<https://www.kemenkumham.go.id/berita-utama/ruu-kuhp-tinggalkan-paradigma-hukum-pidana-sebagai-alat-balas-dendam>>.

restorative justice focuses on the recovery of victims from crime," Then, rehabilitative justice means that criminals are not only sanctioned, but also repaired in their actions. Likewise, victims of crime are not only restored, but also rehabilitated.

Through this modern paradigm, the Criminal Code does not only focus on correcting the behavior of criminals, but also looks at fulfilling the rights of crime victims to support their recovery. Thus, corrective justice is for the accused, restorative justice for the victim, and rehabilitative justice for the accused and victim. Thus, the view of retributive, retaliatory, *lex talionis* must be abandoned. This mission is in accordance with the General Elucidation of Book I of the new KUHP, which states that the preparation of this Law is intended to replace the *Wetboek van Strafrecht*, or the Criminal Code, as stipulated by Law Number I/1946 concerning Criminal Law Regulations. This law has been amended several times as an effort in the framework of national criminal law development.

IV. CONCLUSION

The maintenance of death penalty in the new Criminal Code has a basis of legitimacy, as seen in the MK Decision No. 2-3/PUU-V/2007. This states that death penalty is not contrary to human rights, because it is carried out only for certain types of crimes and certain requirements. This shift is different from the formulation of articles that regulate death penalty in the Indonesian old KUHP of the Dutch legacy. The new KUHP relies on the principle of corrective-rehabilitative-restorative justice. Where the corrective principle of the death penalty is designed to deter offenders with ten years of probation sentence (with the hope of improved behavior during this time), the new KUHP also seeks to promote healing for the victim through restorative principle. The other fundamental idea in the new KUHP is rehabilitation principle, which focuses on the positive change of the offenders to reintegrate them into society. The rehabilitation principle aims to enhance public safety by reducing recidivism, and promoting social integration of the offenders into society.

These three principles in the new KUHP shows a paradigm shift in the politics of death penalty law in Indonesia. By introducing ten years of probation for

offences with a death penalty, it is no longer relevant to persevere with a view that rejects death penalty in the new KUHP. The process of campaign and the preparation for full application of the new KUHP has been conducted in almost all regions of Indonesia, through socialization and dialogue. However, it is still necessary for the new KUHP to employ technical guidance: to avoid disparities among law enforcement officers, and to interpret the application of death penalty.

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COMPETING INTEREST

The authors declared that they have no competing interests.

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