



Received: 07-11-2025
Accepted: 17-12-2025

ISSN: 2583-049X

The Death Penalty in the Latest Indonesian Criminal Code

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Abstract

Law Number 1 of 2023 concerning the Criminal Code will come into effect in January 2026. The new Criminal Code replaces the old Dutch-made Criminal Code. Both the old and new Criminal Codes still regulate the death penalty, although in different ways. Arguments supporting the death

penalty include that it is seen as a form of justice for victims and the community affected by serious crimes, and as an effort to prevent similar crimes by deterring criminals. This research aims to understand and analyze the death penalty in the new Criminal Code.

Keywords: Death Penalty, Indonesia, New Penal Code

Introduction

The revised Criminal Code designates the death penalty as a secondary option, applicable solely to exceptional offences. This policy exemplifies a legislative compromise that fosters the advancement of social and humanitarian principles in Indonesia, addresses international criticism, and matches standards with global norms. The death penalty in Indonesia is a multifaceted subject shaped by legal, cultural, and philosophical considerations. This punishment, albeit entrenched in the legal system, continues to incite vigorous debate at both national and international levels. The constitutional legitimacy remains contentious; five constitutional judges endorsed it, although four rejected it, reflecting ongoing debate among legal scholars.¹

The death penalty in Indonesia is regulated in the Criminal Code and is applied to certain offenses, particularly premeditated murder and drug crimes. Article 10 of the Criminal Code stipulates the death penalty as the most severe crime prevention measure, emphasizing the role of the legal system in protecting public morals and maintaining order. Historically, the death penalty was prioritized for drug cases, reflecting a legal and social consensus regarding the need for strict sanctions in that context.²

In a cultural context, the death penalty aligns with the Indonesian view of justice, which is influenced by both secular and Islamic legal principles, where Islamic law considers the death penalty appropriate for serious crimes. There are two narratives: the first assesses that the death penalty is necessary as a deterrent, while the other criticizes its moral impact, creating debate among the public and academics. There are striking differences in the application of the death penalty, with courts tending to process drug cases faster than murder cases, raising ethical issues about legal equality. This inconsistency highlights the challenges within the legal framework, indicating potential biases that might arise from public sentiment and government policy preferences.³

The impact of the death penalty on human rights discourse adds another layer of complexity. The Indonesian Constitution enshrines the right to life, leading to ongoing discussions about whether the death penalty violates this fundamental right. Critics argue for abolition or reform, supporting a restorative justice approach that emphasizes rehabilitation over retributive justice. This position contradicts their perspective, which holds that the death penalty remains essential for deterring crime and

¹ Agrarini, L. S. P. (2025). Dinamika Pidana Mati Dalam Kuhp Baru: Pembaruan Hukum Pidana dan Tantangan Implementasi. *Jurnal Ilmiah Advokasi*, 13(2), 509-527, p.512.

² Sianturi, M., Endri, E., & Syahputra, I. (2024). *Tinjauan Yuridis Perkembangan Pidana Mati Dalam Kuhp Lama Dengan Kuhp Baru* (Doctoral dissertation, Universitas Maritim Raja Ali Haji).

³ Widayati, L. S. (2017). Pidana Mati Dalam Ruu Kuhp: Perlukah Diatur Sebagai Pidana Yang Bersifat Khusus? (Death Penalty in the Bill of Criminal Code: Should Regulated as a Special Punishment?). *Negara Hukum: Membangun Hukum Untuk Keadilan dan Kesejahteraan*, 7(2), 167-194, p.180.

ensuring societal order.

Methodology

The method used is normative juridical with a statutory approach. The Indonesian Criminal Code serves as the primary reference or primary data, supplemented by relevant literature as secondary data. The library data obtained will be analyzed qualitatively.

Discussion

Types of Criminal Penalties in the New Indonesian Criminal Code

The provisions in Law Number 1 of 2023 concerning the Criminal Code regulate the types of punishment, which include principal punishments, additional punishments, and special punishments (death penalty) for certain criminal acts specified in the Law. The provisions for principal punishments consist of imprisonment, confinement, supervision, fines, and community service. The principal punishments include new types of punishment, such as supervision and community service. Supervision, fines, and community service need to be developed as alternatives to short-term deprivation of liberty that will be imposed by the judge, because by implementing these three types of punishment, the convict can be helped to free themselves from feelings of guilt.⁴

Likewise, society can engage and actively contribute to assisting convicts in leading conventional social lives by undertaking productive activities. The hierarchy of these principal categories of criminal sanctions dictates the intensity of the penalty. The judge may select from five categories of punishment, despite only three being delineated in Book Two of this Law: imprisonment, fines, and the death penalty. Punishment kinds such as confinement, supervision, and social work serve as alternatives to incarceration.

The death sentence is excluded from the classification of primary forms of punishment. The death penalty is addressed in a distinct article to emphasise that this kind of punishment is exceptional and serves as a final measure to safeguard society. The death sentence is the most severe form of punishment and should consistently be considered, alongside life imprisonment or a maximum of twenty years of incarceration. The death penalty is enacted with a probationary period. It is anticipated that the criminal will demonstrate self-improvement during the probationary period, so rendering the death penalty unnecessary and allowing for a substitution with life imprisonment or a maximum sentence of twenty years. The legislation of the death penalty in a country encompasses three interrelated concerns. The constitution, or supreme law, is established by a nation, along with the governmental structure it has chosen. The dynamics of international social, political, and legal institutions that shape societal thought and interactions. The significance of traditional values in the progression of more advanced eras. Consequently, it may be asserted that the control of the death penalty's application encompasses not only beliefs, perspectives, personal experiences, or legal norms, but also its contextual

significance. The discourse regarding the advantages and disadvantages of upholding the death sentence is not a novel concern.

This matter has been contested for an extended period. This problem is typically examined and disputed within the context of theories on barriers to acquisition and the enforcement of criminal penalties or sanctions. Countries that continue to enforce the death penalty possess many justifications, including: The death penalty serves as a mechanism of legal certainty, instilling fear in potential offenders and deterring their illegal intentions. Consequently, the crime rate will diminish, thereby safeguarding a greater number of individuals' right to life. The death penalty is not applied indiscriminately; it is reserved for perpetrators of severe crimes, whose actions indicate they are exceptionally dangerous individuals, necessitating their incapacitation through capital punishment. The death penalty is the definitive instrument of justice.

The Death Penalty in the Latest Indonesian Criminal Code

The death penalty, as stipulated in Law Number 1 of 2023 about the Criminal Code, is articulated in Article 98 of said law. The text asserts that the death penalty is jeopardised as a potential alternative, serving as a final measure to deter criminal activity and safeguard society. The implementation of the death penalty is governed by Article 99 of Law Number 1 of 2023. The article has four paragraphs. The death penalty may be executed following the President's denial of the convict's clemency petition. The death penalty mentioned in paragraph (1) shall not be executed publicly. The death penalty shall be carried out by shooting the convict to death by a firing squad or by other means determined by law. The execution of the death penalty against pregnant women, women who are breastfeeding their babies, or persons with mental illness shall be postponed until the woman gives birth, the woman is no longer breastfeeding her baby, or the person with mental illness recovers.⁵

The death penalty is a special punishment and can be changed. "This indicates that if an inmate exhibits good behaviour, their sentence may be commuted to life imprisonment or twenty years of incarceration." The death sentence is not a primary form of punishment, but rather a specialised one. Inmates in Correctional Institutions and State Detention Centres receive independent training (mental-spiritual) and skills training. Exemplary conduct while incarcerated may serve as a basis for sentence reductions or parole applications. From an international legal and human rights perspective, the death penalty contradicts international human rights provisions, particularly Article 3 of the Universal Declaration of Human Rights, which is the right to life. Nonetheless, an exemption exists within Article 4, paragraph (1) of the ICCPR, which stipulates that the death penalty may be imposed if the offence poses a threat to public safety. The primary stipulation on the death penalty is governed by Law Number 1 of 2023 about the Criminal Code.

⁴ Alex, L. (2024). Juridical Review on Death Penalty in Indonesia (A Critical Review of the New Criminal Code) Tinjauan Yuridis tentang Pidana Mati di Indonesia (Tinjauan Kritis Atas KUHP Baru).

⁵ Lubis, M. R., & Syaputra, M. Y. A. (2023). Kedudukan Hukuman Mati Dalam KUHP Baru Perspektif Hak Asasi Manusia. *Jurnal Ilmiah Penegakan Hukum*, 10(2), 113-120.

The death penalty is jeopardised as a viable possibility, serving as a final recourse. The implementation of the death penalty in legislation is governed by Articles 100 and 101. Here is the text: Article 100 of Law Number 1 of 2023 stipulates that the judge shall impose the death penalty with a probationary period of ten years, considering: a. the defendant's remorse and potential for rehabilitation; b. the defendant's involvement in the criminal act; or c. the existence of mitigating circumstances. The death punishment accompanied by a probationary period, as mentioned in paragraph (1), must be explicitly articulated in the court ruling. The probationary period of ten years commences one day after the court ruling attains permanent legal force. (4) If the convict, during the probation period as referred to in paragraph (1), demonstrates commendable attitudes and actions, the death penalty may be commuted to life imprisonment by Presidential Decree after obtaining the consideration of the Supreme Court. (5) If the convict, during the probation period as referred to in paragraph (1), does not demonstrate commendable attitudes and actions and there is no hope for improvement, the death penalty may be carried out upon the order of the Attorney General.⁶

If a convict's clemency petition is denied and the death penalty is not executed for ten years from the date of rejection, not due to the convict's escape, the death penalty may be commuted to life imprisonment by Presidential Decree, thereby providing clarity for the convict. The Explanations of Law Number 1 of 2023 about the Criminal Code indicate that the death sentence is excluded from the primary penal system. This is the explanation of Article 98 of Law Number 1 of 2023 on the death sentence, which is imposed as a last resort to deter illegal behaviour. Article 98 of Law Number 1 of 2023 clarifies that the death penalty is excluded from the primary criminal framework. The death penalty is addressed in a distinct article to emphasise that this kind of punishment is exceptional and serves as a final measure to safeguard society. The death sentence is the most severe form of punishment and should always be considered, alongside life imprisonment or a maximum of 20 years of incarceration. The death sentence is enacted with a probationary period, during which the criminal is anticipated to rehabilitate, potentially leading to the substitution of the death penalty with life imprisonment. Anticipating the future, various significant modifications concerning the death penalty, especially the reforms that have been enacted, are evident. The Criminal Code, enacted on December 6, 2022, allows courts to impose the death penalty with a 10-year probationary period.

This is articulated in Article 100 of Law Number 1 of 2023 on the Criminal Code. Article 100, Paragraph 1 of the illegal Code mandates that the judge shall impose the death penalty with a 10-year probationary period, considering the defendant's sorrow, potential for rehabilitation, and involvement in the illegal conduct. Article 100, Paragraph 2 stipulates that the death penalty with a probationary period, as mentioned in Paragraph 1, must be incorporated into the court's ruling. Consequently, if he exhibits exemplary conduct throughout the probationary period, the death penalty may be reduced to life imprisonment. Specifically,

⁶ Ardiansyah, D., Adiaat, M., Cahyani, A. I., & Rahmawati, N. (2024). Eksistensi Hukuman Pidana Mati dalam Undang-Undang Nomor 1 Tahun 2023 tentang KUHP. *Rampai Jurnal Hukum (RJH)*, 3(1), 1-18, p.13.

through a Presidential Decree following consultation with the Supreme Court. Article 100, paragraph 5 of the Criminal Code states, "Life imprisonment as mentioned in paragraph 4 shall commence from the date the Presidential Decree is issued." If the offender fails to demonstrate admirable conduct during the probationary period specified in paragraph 1, and there is no prospect for rehabilitation, the death penalty may be executed at the directive of the Attorney General, as stated in Article 100, paragraph 6 of the Criminal Code.

The National Criminal Code is acknowledged; however, it has faced criticism, especially concerning Article 100, which stipulates a 10-year probationary term for the death penalty, permitting its conversion into a life sentence. The death sentence provision was revisited during a focus group discussion (FGD) entitled "Bridging the Gap of Death: Protecting the Right to Life through Interim Policies," conducted in Bandung on Friday, May 19, 2023. This discourse includes participants from civil society and legal scholars who will present their viewpoints on the regulation of the death penalty in Law 1/2023. This conversation is a continuation of prior dialogues due to the perceived legal vacuum in the regulation of the death sentence under this new Law.

The 10-year probationary period for death row inmates under such Law represents a compromise between the abolitionist perspective advocating for the elimination of the death penalty and the retentionist viewpoint supporting its continuation. He asserts that the implementation of a probationary term in capital punishment embodies the principles of Pancasila by striving to reconcile individual and societal interests. This principle is jeopardised by the stipulation in Article 100, paragraph (2) of Law 1/2023, which requires the incorporation of a probationary period in the court's ruling. The academic draft of the new Criminal Code clearly indicates that this probationary time is conferred automatically. Article 100, paragraph (2) of the Law now requires its inclusion in the ruling. Does this imply that the absence of a probation time in the judgment order indicates there is no probation period? "This is what must be avoided," he elucidated. In addition to the establishment of the probationary term, which necessitates the formulation of regulations, there is a proposal emphasising the significance of enacting regulations for the prosecutor's office and courts to administer the death penalty following the passing of the Law.

The new Criminal Code designates the death sentence as a distinct kind of punishment. This indicates that it need to be utilised minimally. Criteria applicable to judges include the absence of discriminatory imposition, the lack of evidence suggesting infringement of the defendant's legal rights during the criminal proceedings, and the application solely to recidivists (repeat offenders) of crimes subject to incarceration for a specified duration. The updated National Criminal Code includes revisions to the death penalty clauses. The death penalty, initially a primary sentence, has evolved into an alternative sentence. Furthermore, the death penalty may only be executed after a ten-year postponement. The postponement of the death sentence execution is documented in Article 100 of the National Criminal Code. Article 100, paragraph (1) of the National Criminal Code stipulates that the execution of the death penalty is subject to a ten-year postponement, contingent upon two criteria: expressions of regret and attempts at self-rehabilitation, as

well as the defendant's involvement in the criminal offence. Moreover, Article 100, paragraph (4) of the National Criminal Code stipulates that if the convict exhibits good behaviour, the death penalty may be reduced to life imprisonment by presidential decree, subject to the Supreme Court's review.

A decade-long postponement of the death penalty serves as a solution that reconciles both proponents and opponents of capital punishment. The death penalty elicits divergent opinions among proponents and opponents. Each perspective possesses distinct justifications: deterrence for the affirmative stance and human rights violations for the opposing stance. Indonesia is a nation that continues to enforce the death sentence, despite the abolition of this practice in several other countries. Indonesia seeks to uphold the death penalty to safeguard public safety and interests, while also adhering to international human rights standards. This corresponds with the initiation of reform in Indonesian criminal law with the implementation of Law Number 1 of 2023 on the Criminal Code, which established the National Criminal Code, resulting in revisions to the death sentence regulations in Indonesia. The recent National Criminal Code includes revisions to the death penalty laws, specifically regarding the death sentence as an alternative sanction and the deferral of execution.

The recent restrictions on the death penalty in Indonesia, particularly regarding its postponement, aim to provide a compromise between opposing perspectives on the issue. Consequently, during this socialisation phase, the Constitutional Court ought to commence adjudication of the provisions in the new Criminal Code promptly, so that if deemed unconstitutional, they can be immediately disseminated, thereby obviating the necessity to await three years for constitutional validation followed by additional socialisation. The Court faces no impediments in asserting its jurisdiction to evaluate both the new Criminal Code and the old Criminal Code, provided that individuals remain impacted by the provisions of the latter, as the subjects of both codes differ; one pertains to Law Number 1 of 2023, while the other pertains to Law Number 1 of 1946. Moreover, if we adhere to the reasoning that the new Criminal Code cannot be evaluated before its enactment, then subsequently, when the new Criminal Code is operational, and an individual is prosecuted under the old Criminal Code, this reasoning implies that the Constitutional Court would lack the jurisdiction to assess the old Criminal Code.

Where can an individual challenge the validity of the item from the old Criminal Code applied to them in pursuit of justice? No information provided. This reasoning is fundamentally incorrect since it fails to deliver justice for persons whose constitutional rights have been infringed, regardless of the Criminal Code in question. Based on the aforementioned explanation, if the Constitutional Court maintains its role as the guardian of the Constitution, it must possess the authority to accept, examine, evaluate, and adjudicate the case a quo, encompassing both the new Criminal Code and the old Criminal Code, provided there are individuals impacted by the provisions of the old Criminal Code. This is in line with the adage that prevention

is better than cure, where the Constitutional Court's decision is the cure for the dying Petitioner.⁷

But if the medicine is given too late, and the applicant also dies, what's the use of the medicine? That the regulations regarding the exercise of public expression can be subject to criminal penalties as stipulated in Article 256 of Law Number 1 of 2023 concerning the Criminal Code, which states: "Any person who, without prior notification to the authorities, holds a parade, demonstration, or public demonstration on public roads or in public places that disrupts public interests, causes unrest, or riots in society, shall be punished with imprisonment for a maximum of 6 (six) months or a fine of up to category II." That the article in question has the potential to criminalize members of the public because there is no further explanation regarding who or what is meant by "prior notification to the authorities".⁸ It is worth questioning what is meant by "notification" in the article in question. Is it merely a notification to the relevant authorities, coordination with the authorities, or is it necessary to request and obtain permission from the authorities? If "notification" means having written permission from the police or relevant officials, this could potentially lead to arbitrary decisions not to issue such permission, including without a clear reason. Conversely, if the "notification" does not require written permission, it creates an open loophole for the police or relevant officials to carry out repression on the grounds of not receiving notification or not knowing about the demonstration.⁹

The applicability of Article 100 of the Criminal Code is considered a loophole to avoid the death penalty. Therefore, considering the applicability of the probation period found in Article 100 of the new Criminal Code to death row inmates in the Ferdi Sambo (FS) case is essentially based on the principle of legality in criminal law contained in Article 1 of the Criminal Code. Article 1, paragraph (1) states that an act cannot be punished unless it is based on the force of existing criminal legislation. In this verse, the principle of legality becomes clear, which states that a person cannot be subjected to a criminal sanction unless the offense has a legally binding force. Generally speaking, legal principles are the fundamental principles that serve as the *ratio legis* for the formation of law. In this context, the function of legal principles is to maintain the consistency of a legal system. Therefore, the principle of legality plays a very fundamental role in the application of criminal law, with the aim of providing legal certainty and preventing arbitrariness by the authorities. Unlike other legal principles that are abstract, the principle of legality is explicitly stated in the Criminal Code. Usually, abstract legal principles only serve as a background in the formation of concrete rules.¹⁰

⁷ Lubis, M. R., & Syaputra, M. Y. A. (2023). Kedudukan Hukuman Mati Dalam KUHP Baru Perspektif Hak Asasi Manusia. *Jurnal Ilmiah Penegakan Hukum*, 10(2), 113-120, p. 117.

⁸ Manoppo, G. A. (2023). Analisis Pidana Mati Berdasarkan Pasal 100 Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana. *Lex Administratum*, 12(1).

⁹ Ludiana, T. (2020). Eksistensi Pidana Mati Dalam Pembaharuan Hukum Pidana (Kajian Terhadap Pidana Mati Dalam RUU KUHP). *Litigasi*, 21(1), 60-79, p.65.

¹⁰ Humas FHUI, "Topo Santoso (Media Indonesia): Menyoal Hukuman Mati," <https://law.ui.ac.id/topo-santoso->

The principle of legality in criminal law serves as the primary regulator in the enforcement of criminal law. The characteristic of legal certainty inherent in the principle of legality makes criminal law clear and precise, and an instrument in the application of concrete cases. However, the reality of the principle of legality in Indonesia is not adhered to absolutely. One of the things in the application of criminal law that cannot be applied retroactively. As for ensuring legal certainty, criminal provisions regarding a new criminal act must be established first, and only then can violations of those provisions be subject to criminal sanctions as a logical consequence of the legal subject's free choice to commit a prohibited act. This is also in line with the general principle that every person is bound by a law from the moment that law is declared to be in force and has been promulgated in the State Gazette.

Conclusion

The death penalty remains governed by Law Number 1 of 2023, which can be normatively enforced for criminal offences that mandate the death penalty for offenders who have been conclusively adjudicated by a legally binding judicial decision. Exceptions to this principle are delineated in Article 1, paragraph (2) of the Criminal Code, which stipulates that if legal modifications occur after the commission of the act, the most advantageous provisions shall be applied to the defendant. This is substantiated by a stipulation in the new Criminal Code that explicitly supersedes the principle of non-retroactivity, specifically Article 3 paragraph (1), which asserts that if an individual commits an offence and a new regulation pertains to it, the new regulation shall apply, regardless of its disadvantageous nature to the offender. Consequently, should the legal actions initiated by Mr. FS and his legal representatives remain unresolved during the forthcoming three years, the new legislation may be invoked. Upon completion, the legal proceedings will adhere to the previous Criminal Code.

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