



## Law number 1 of 2023's ratio of the death penalty sanction based on the punishment purpose

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### Abstract

The implementation of Law No. 1 of 2023 on the Criminal Code aims to resolve a significant and intricate issue in Indonesia, encompassing political, cultural, and religious dimensions, as well as addressing the plight of death row inmates who remain incarcerated while awaiting execution that is perpetually delayed. Nonetheless, several legal viewpoints contend that the National Criminal Code continues to provide legal challenges. The implementation of the death penalty in Article 100 generates legal ambiguity over the timing of its execution, so affecting the enforcement of death sentences pending trial. This results in protracted criminal proceedings within the court process, lacking confidence regarding the verdict and devoid of explicit regulations on the time frame for the issue of a presidential decree, taking into account the Supreme Court's considerations.

This research employs a normative juridical method, utilizing both a regulatory approach and a conceptual approach. The study's findings indicate that the death penalty, now supplanted by the primary form of punishment, is predicated on the notion that it is not the principal method for rehabilitating individuals or society. Furthermore, the protracted and unknown duration of execution induces compounded distress for convicts, including psychological and mental strain. Law Number 1 of 2023 establishes an alternative death sentence framework featuring a 10-year probationary period, designed to reconcile the interests of offenders, victims, and the community. This affords the condemned individual the chance to assert their right to life as stipulated by the 1945 Constitution and Human Rights Law, while simultaneously ensuring justice for the victims and society

**Keywords:** Ratio legis, death penalty, purpose of punishment

### Introduction

Hans Kelsen posits that the objective of law is to realize social justice, which he characterizes as the endeavor to reach the maximum level of satisfaction within society. In this setting, criminal law functions as a mechanism that governs the conduct of individuals within a societal framework. The primary aims of criminal law are to establish justice, assure legal certainty, and provide advantages for the broader society and the state in the public domain, while simultaneously preserving equilibrium in the execution of social control. Consequently, criminal legislation aim to maximize societal happiness, consistent with Kelsen's theories. The principle of *nestapa* ensures that every individual who engages in a certain act will be held legally accountable by the state, contingent upon the activity satisfying certain predefined criteria<sup>[1]</sup>.

Sanctions, which take various forms depending on the type of violation, often arise as a result of tensions or conflicts within society. Punishment, which takes the form of physical or psychological suffering, is imposed by the state on perpetrators found guilty thru a judge's decision. Every verdict has a specific purpose directed toward the perpetrator, namely to uphold judicial authority by considering various aspects so that the decision provides maximum benefit for both the individual and society at large. Therefore, this concept of punishment is rich in educational values aimed at shaping behavior. In the process of sentencing, it is necessary to consider the severity of the punishment, the purpose of the sentencing, and the method of execution<sup>[2]</sup>.

Various forms of punishment and criminal threats serve as instruments for upholding legal order. The death penalty, considered the most severe form of punishment in the criminal justice system, is carried out by taking the life of

someone who has violated legal provisions. The application of the death penalty is based on the principle of "an eye for an eye, a tooth for a tooth" (*lex talionis*), which emphasizes that punishment must be proportionate to the evil deeds that have been committed.

The initial enactment of the death sentence was instituted by King Hammurabi through the Code of Hammurabi, which emerged in Babylonia in the 19th century BC, signifying the commencement of its historical use. In Indonesia, the legal and historical implementation of the death sentence was officially established on January 1, 1918, as outlined in the Criminal Code (*Wetboek van Strafrecht*). This decree was promulgated by the Dutch colonial government via K.B. of October 15, 1915, No. 33. S. 15-732 JIS. 17-497, 645, which encompasses provisions of the *W.v.S* previously executed in the Dutch East Indies<sup>[3]</sup>.

Speaking about the death penalty essentially boils down to the main issue: whether its application can be considered legitimate or illegitimate. In this context, two large groups with opposing views emerged. The first group consists of those who oppose the death penalty, known as Abolitionists, who call for the complete abolition of capital punishment from legal systems in various countries. Meanwhile, the second group is the supporters of the death penalty, called Retentionists, who believe that capital punishment is still worthy of being maintained as an effective legal tool to combat crime<sup>[4]</sup>.

Various reasons are often cited by those who support the death penalty. Some of these arguments stem from theories of punishment, while others relate to moral considerations, religious teachings, and even economic aspects. Some of the main reasons commonly cited by supporters of the death

**penalty include**

1. The death penalty completely removes the most dangerous criminals from society (incapacitation of the criminal);
2. This punishment contains an element of retribution (retributive effect) which is believed to satisfy the sense of justice for both the victims and their families;
3. The application of the death penalty is believed to have a deterrent effect (deterrent effect) that can prevent other members of society from committing similar crimes;
4. The death penalty is also considered not to contradict the core teachings of major religions around the world<sup>[4]</sup>.

On the other hand, those who oppose the death penalty also presented various strong reasons to strengthen their position. Some of the main arguments frequently put forward by groups opposing the death penalty include:

1. The death penalty stems from the assumption that humans are incapable of change, thus placing less emphasis on the possibility that a criminal might one day regret their actions and repent;
2. The criminal justice process is not always perfect, leaving room for errors that could ensnare innocent people. Given the potential for errors in the legal system, the implementation of the death penalty carries a tragic risk, where the lives of innocent people could be lost;
3. Furthermore, the death penalty inflicts unnecessary additional suffering on others, particularly the families of those sentenced to death, who must bear a heavy psychological burden during the waiting period until the execution is carried out.

As law develops, there is a strong tendency in international law for the death penalty to become increasingly undesirable. From an international human rights perspective, the death penalty violates the right to life, which is a fundamental right inherent in every human being from birth. The right to life is enshrined in Article 3 of the Universal Declaration of Human Rights (UDHR), which states that "everyone has the right to life, liberty and security of person." Additionally, the right to life is also protected by Article 6 of the International Covenant on Civil and Political Rights (ICCPR) and the Second Optional Protocol to the International Covenant on Civil and Political Rights 1989<sup>[5]</sup>.

Conversely, opponents of the death sentence have articulated some compelling arguments to bolster their stance<sup>[6]</sup>. Key reasons commonly presented by organizations opposing the death penalty include:

1. The death penalty is predicated on the belief that individuals are immutable, thereby diminishing the consideration that a criminal may eventually experience remorse and seek atonement;
2. The criminal justice system is not infallible, allowing for mistakes that could implicate the innocent. The implementation of the death penalty poses a significant risk of wrongful convictions, potentially resulting in the loss of innocent lives. Additionally, it imposes undue suffering on the families of the condemned, who endure a profound psychological burden during the prolonged wait for execution.

As legal frameworks evolve, there is a pronounced inclination in international law for the death sentence to become progressively less acceptable. From an international human rights standpoint, the death sentence infringes against the right to life, a fundamental right intrinsic to every individual from birth. Article 3 of the Universal Declaration of Human Rights (UDHR) enshrines the right to life, asserting that "everyone has the right to life, liberty and security of person." Moreover, the right to life is safeguarded by Article 6 of the International Covenant on Civil and Political Rights (ICCPR) and the Second Optional Protocol to the ICCPR of 1989<sup>[6]</sup>.

For a long time, Indonesia has still been enforcing the Criminal Code (KUHP), which originated as a legal product created by the Dutch colonial government during the occupation<sup>[7]</sup>. However, a number of articles in the book have been deleted or changed to better align with Dutch colonial interests when applied in Indonesia<sup>[8]</sup>. In its implementation, the Criminal Code is often considered inadequate because the provisions and sanctions it contains tend to favor one-sided interests and do not provide clear legal certainty, thus opening the door to various interpretations<sup>[9]</sup>. Considering the interpretational problems that have occurred over the years, the Indonesian government's efforts to draft a new Criminal Code as a replacement for the colonial-era Criminal Code have become an urgent need, so that it can be adapted to the values, characteristics, and current socio-cultural conditions of the Indonesian nation.

Finally, Law Number 1 of 2023 concerning the Criminal Code was enacted, becoming a new regulation in Indonesia's sentencing system. The purpose of this law is to ensure the protection and fulfillment of rights for individuals, communities, and the state, without causing harm to others<sup>[10]</sup>. Considering that law is dynamic, legislation must always be aligned with the times and changes in societal conditions, especially in the realm of public law, which has a broad impact on people's lives and serves as the highest guideline binding on all Indonesian citizens<sup>[11]</sup>.

This new Criminal Code (KUHP) consists of 624 articles divided into 2 (two) books: the first and second books. The first book contains 6 (six) chapters, while the second book has 37 chapters. The first book serves as a guide for applying the provisions found in the second book. The second book discusses various criminal acts and formulates three types of punishment: imprisonment, fines, and the death penalty.

In the new National Criminal Code (KUHP), the rules regarding the death penalty have undergone several adjustments. This is due to the fact that the Indonesian Criminal Code has historically been a direct adoption of the Dutch *Wetboek van Strafrecht* (WvS), which is no longer aligned with the legal ideals of the Indonesian nation. Furthermore, it should be noted that the Netherlands itself officially abolished the death penalty for all crimes in 1982, and for "customary crimes" in 1870.<sup>(12)</sup>Therefore, Indonesia is making changes to the death penalty sanctions, as outlined in the following articles.

**Article 67**

“The special penalties referred to in Article 64 letter c are death penalties that are always threatened alternatively. Article 98 The death penalty is threatened alternatively as a last resort to prevent the commission of Criminal Acts and to protect society”.

**Article 100**

1. The judge imposes the death penalty with a probationary period of 10 (ten) years, taking into consideration: a. the defendant's remorse and the hope for self-improvement; or b. the defendant's role in the Criminal Act.
2. The death penalty with a probationary period as referred to in paragraph <sup>[1]</sup> must be stated in the court's decision.
3. The probationary period of 10 (ten) years begins 1 (one) day after the court's decision becomes legally binding <sup>[4]</sup>. If the convict, during the probationary period as referred to in paragraph <sup>[1]</sup>, demonstrates commendable attitudes and actions, the death penalty may be commuted to life imprisonment by Presidential Decree after considering the Supreme Court's opinion. <sup>[5]</sup> Life imprisonment as referred to in paragraph <sup>[4]</sup> is calculated from the date the Presidential Decree is issued <sup>[6]</sup>. If the convict, during the probationary period as referred to in paragraph <sup>[1]</sup>, does not demonstrate commendable attitudes and actions and there is no hope for improvement, the death penalty may be carried out by order of the Attorney General.

Based on the provisions outlined in the articles of the new Criminal Code, the death penalty, which was previously categorized as a principal punishment, has now changed status to an alternative punishment. Additionally, in the application of the death penalty according to the latest National Criminal Code, the execution must be delayed for the first ten years. This regulation regarding the delay has been officially established in the new Criminal Code, which states that the execution of the death penalty is suspended for 10 years, considering two important aspects: the remorse and self-improvement efforts of the convict, and the extent of the convict's involvement in the crime committed. The enactment of Law Number 1 of 2023 concerning the Criminal Code is expected to resolve significant and complex issues in Indonesia, which are not only political but also closely related to cultural and religious dimensions. Furthermore, this update aligns with the goals of punishment in the national legal system, which not only serves to deter criminals but is also aimed at rehabilitating them to become better individuals. The intended deterrent effect is not only for the perpetrators but also serves as a warning to the general public not to commit similar crimes. Additionally, this sentencing system also aims to guide offenders so they can be reintegrated into society as changed individuals. This legal update is also expected to address the long-standing issue of the fate of death row inmates who have had to wait for execution without clarity for years behind bars.

However, this latest national criminal law book also contains legal issues. Because the death penalty is stipulated in Article 100, there is legal uncertainty about when the death penalty will be carried out, which impacts the execution of the death penalty awaiting probation. This

causes criminal cases to take too long in the judicial process, with no certainty about what decision will be reached <sup>[13]</sup>.

Therefore, in order to solve the difficulties surrounding the death sentence and the dilemma raised—that is, what is the ratio legis of the death penalty under Law No. 1 of 2023—a thorough and concrete investigation must be conducted.

**Research Methods**

The research method applied is normative research. To find a solution to the issues raised, the author applied two types of problem-solving approaches: the statute approach and the conceptual approach.

**Results and Discussion****Ratio Legis of the Application of the Death Penalty**

Criminal law reform at the regulatory level has been attempted by the law-making body since 1963, with the drafting of the Criminal Code Bill (hereinafter referred to as the KUHP Bill) based on the values contained in Pancasila and the Preamble to the 1945 Constitution. This is because the Criminal Code (KUHP) is a legacy of the Dutch East Indies government, which has obviously been left behind by the progress that has occurred in society. In an effort to update criminal law, it is only right to consider the views previously expressed at the UN Congress regarding the application of foreign law or imported law in a country. At the UN Congress discussing "The Prevention of Crime and The Treatment of offenders," it was emphasized that the criminal justice systems implemented in various countries, particularly those derived from foreign legal heritage during the colonial era, need to be re-evaluated.

Criminal law reform is an integral part of criminal law policy. The essence and meaning of this criminal law reform are closely related to the fundamental reasons and urgent needs that underlie the implementation of these changes. The reasons and urgency for this renewal can be analyzed from various perspectives, such as socio-political, socio-philosophical, socio-cultural aspects, as well as from the perspective of public policy, especially concerning social policy, criminal policy, and law enforcement policy. In the context of criminal law reform, the purpose of punishment is no longer solely to inflict suffering on the perpetrator of a criminal act.

The essence of criminal law is as a means to achieve a greater purpose, which must be carefully designed in the form of concepts or norms in the law, which its creators hope can be enforced with the support of criminal sanctions. Beside serving as a law enforcement tool, criminal law also contains the mission and purpose of punishment, as well as the prerequisites for punishment. This purpose of punishment encompasses two main aspects: protecting society and rehabilitating and protecting the offender themselves <sup>[14]</sup>.

The fundamental justifications for the necessity to amend the Indonesian Criminal Code encompass

**a. Philosophical Foundation**

The philosophical foundation of each independent and sovereign nation must encompass its own laws aligned with its objectives; Indonesia exemplifies this with the goals articulated in the Preamble of the 1945 Constitution, particularly in the fourth paragraph, which serves as a criterion for the execution of this reform. This statement articulates that the objective of establishing the government

of the Indonesian State is to safeguard all Indonesian citizens and promote their welfare, enhance national education, and contribute to global order founded on independence, perpetual peace, and social justice. The Indonesian National Independence is enshrined in the Indonesian State Constitution, which delineates the sovereign Republic of Indonesia, grounded in the principles of Almighty God, Just and Civilized Humanity, Indonesian Unity, and People's Sovereignty, guided by deliberative wisdom and the realization of social justice for all Indonesian citizens.

Criminal law reform must serve as the primary mechanism for safeguarding all Indonesian citizens and their nation, enhancing collective welfare, educating the populace, and fostering a global order grounded in the principles of independence, perpetual peace, and social justice. The essence of national criminal law must align with legal policy, factual circumstances, and the changing dynamics of national and state existence, with the objective of upholding and implementing human rights.

#### **b. Sociological Basis**

From a sociological perspective, legal reform emerges as a response to the demands of fulfilling the legal needs of society, which have been pursued for over 46 years. This need is rooted in the cultural values of an independent and sovereign nation (latency). This is becoming increasingly important for countries that were once under colonial rule and are still overshadowed by the legacy of their former colonizers' legal systems – whether thru the principle of concordance, jurisprudential decisions, or doctrines that were once instilled but are no longer fully understood by the nation's succeeding generations. Therefore, legal reform has become an unavoidable necessity for the country in order to realize a national criminal justice system that aligns with its own national identity.

The rapid developments in the internal dynamics of Indonesian society, which are in line with changes on the international stage, coupled with a strong demand for legal certainty and a sense of justice, have rendered a number of criminal provisions in the current Criminal Code no longer adequate as a legal basis to address the challenges of contemporary crime. Therefore, a comprehensive update of criminal law has become an urgent need. This update must be able to create a balance between the public and state interests and individual rights, maintain justice for both perpetrators and victims of criminal acts, balance the elements of actual actions with intent or inner attitude, and bridge the gap between legal certainty and the values of justice that live within society. In addition, this update must also harmonize written laws with the norms that have grown within society, unite national values with universal principles, and balance human rights with fundamental human obligations. All of this must be realized immediately so that the Indonesian criminal justice system can meet the needs of the times.

#### **c. Legal Basis Legally**

There is often a lack of synchronization or overlap between the criminal law provisions contained in the Criminal Code (KUHP) and the criminal norms regulated in various laws and regulations outside the Criminal Code. This situation creates the impression that there are two streams of criminal law systems running side by side but separately: one system

built upon the provisions of the Criminal Code, and another system based on special laws scattered outside the Criminal Code. This phenomenon gives rise to dualism in the face of national criminal law, which needs to be addressed carefully. Therefore, synchronization is needed, in the form of recodifying the National Criminal Code.

The exclusion of the death penalty from principal punishments is predicated on the argument that, from the standpoint of punishment's objectives, it is fundamentally an ineffective primary mechanism for regulating, structuring, or rehabilitating individual conduct or societal order. Moreover, the death sentence, derived from the Dutch-era Criminal Code, presents impediments within the criminal judicial system. The extensive duration of incarceration for numerous death row inmates, notwithstanding their sentencing, is indicative of the fact that their executions are frequently not conducted. This circumstance induces delays in the judicial process and engenders ambiguity in the implementation of criminal justice.

#### **Alternative Death Penalty Sanctions Support the Purpose of Punishment**

By quoting the opinion of March Ancel, who stated that the sentencing system is not the only best way to deal with crime, that crime does not occur before the criminal justice system but is a result of the implementation of that system, and that criminals are not beings isolated and different from other members of society. Jeremy Bentham stated that punishment should not be applied or used if it is groundless, needless, unprofitable, or inefficient<sup>[15]</sup>.

In the Indonesian legal system, particularly in the Criminal Code (KUHP), various ideas can be found that reflect the purpose and objectives of punishment, namely:

- a. First, criminal punishment is intended to prevent the occurrence of criminal acts in order to protect the state, society, and citizens.
- b. Second, punishment aims to rehabilitate the convicted person so that they are aware of their mistakes and are able to return to being useful and morally upright members of society.
- c. Third, the imposition of punishment is also directed at erasing the negative traces caused by the crime.
- d. Fourth, punishment should not be intended as a form of torture or suffering for the perpetrator, and it is forbidden to degrade their human dignity.

Furthermore, the purpose of this punishment is still maintained in the National Criminal Code in Article 51, which states that punishment aims to:

- a. prevent the commission of criminal acts by upholding legal norms for the protection and care of society;
- b. rehabilitate convicts by providing guidance and training to become good and useful people;
- c. resolve conflicts arising from criminal acts, restore balance, and bring a sense of security and peace to society; and
- d. foster a sense of remorse and free the convict from guilt.

The formulation of the four objectives of punishment in the Criminal Code reflects a view that emphasizes the protection of society (social defense) while also adopting a rehabilitation and resocialization approach toward convicts. This line of thinking is further emphasized by the assertion that punishment is not intended to increase suffering or

degrade the human dignity of the perpetrator. Overall, this perspective boils down to two main focuses: maintaining public order and rehabilitating criminals.

Based on the description, the purpose of punishment in law enforcement in Indonesia, in addition to deterring someone who commits a crime, is also to educate the perpetrator to become a better person. The intended deterrent effect is not only for the perpetrator of the crime, but also to prevent others from committing similar acts. Additionally, punishment also aims to educate the perpetrator to become a better person and be accepted in the social environment.

### Conclusion

The elimination of the death penalty as the predominant form of punishment is predicated on the assertion that it does not serve as the primary mechanism for enhancing individuals or society. The prolonged and uncertain execution waiting system inflicts dual agony on the condemned, encompassing psychological and mental distress. The National Criminal Code establishes an alternative capital sentence system featuring a 10-year probationary period, which reconciles the interests of the offender, the victim, and society. This affords the offender the option to uphold their right to life as stipulated by the 1945 Constitution and Human Rights Law, while also ensuring that justice is preserved for the victim and society.

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