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The Evolving Legal Framework of Capital Punishment in Indonesia: A Post-Law No. 1 of 2023 Analysis from a Human Rights Perspective

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Abstract

The legitimacy of capital punishment remains one of the most contentious subjects within contemporary international human rights discourse and national legal politics. This study investigates the comprehensive legal transformation of the death penalty under Law No. 1 of 2023 concerning the Indonesian Criminal Code (KUHP) and evaluates its execution within the national legal order from a human rights perspective. Utilizing a normative-juridical research methodology, this paper examines primary legal materials—including statutory regulations, constitutional provisions, and landmark Constitutional Court decisions—alongside secondary legal doctrine. The findings demonstrate that while Indonesia retains capital punishment in its positive law, Law No. 1 of 2023 fundamentally reclassifies the death penalty from a primary sanction (pidana pokok) to an exceptional capital sanction (pidana khusus) reserved exclusively for extraordinary crimes such as narcotics trafficking, terrorism, corruption, and grave human rights violations. Crucially, the introduction of a mandatory 10-year probationary period (masa percobaan) establishes an operational compromise between absolute retentionism and full abolitionism, marking a progressive paradigm shift toward penal reform, restorative justice, and structural compliance with human rights principles.

Keywords: *Capital Punishment; Criminal Law Reform; Law No. 1 of 2023; Human Rights; Probationary Period; Monodualistic Philosophy.*

1. Introduction

Law enforcement is a foundational state process designed to internalize and enforce legal norms as binding guidelines for social, political, and civic conduct (Apeldoorn, 2000; Nonet & Selznick, 2007). In a formal sense, law enforcement encapsulates statutory enforcement mechanisms executed by authorized legal actors to maintain public order and secure institutional integrity. In a broader socio-legal context, statutory frameworks govern the delicate equilibrium between individual liberties, community welfare, and state sovereignty (Apeldoorn, 2000). Statutory codification, while providing legal certainty (rechtssicherheit), must remain dynamic to accommodate the evolving moral standards and socio-political realities of a developing society (Arief, 1996).

Within criminal jurisprudence, capital punishment has historically functioned as an extreme instrument of state power aimed at social defense (défense sociale), serving both retribution (punitur quia peccatum est) and general deterrence (punitur ne peccetur) (Arief, 2020; Saleh, 1978). Indonesia stands among the retentionist sovereign states that continue to recognize capital punishment within its positive legal system. Capital sanctions are primarily threatened for extra-ordinary offenses, including transnational drug trafficking, premeditated murder, terrorism, corruption, and genocide (Harkrisnowo, 2022).

Philosophically, the pursuit of criminal justice relies on equitable principles. Aristotelian justice theory establishes that legal policy must deliver a proportional sense of fairness to individuals and society alike (Aristotle, 350 B.C.E./1999). In penal philosophy, justice requires placing equal value on the reaction to an offense as the harm caused by that offense. When applied to capital crimes—such as terrorism, grave human rights violations, systemic corruption, and illicit drug manufacturing—the death penalty has historically been defended as a proportional legal consequence for acts that inflict irreversible mass destruction or plunder public rights (Arief, 2020; Djoko Prakoso & Suroto, 1987).

However, the intersection between the death penalty and human rights guarantees generates severe doctrinal debates globally and domestically (Amnesty International, 2023; Hood & Hoyle, 2015). Opponents argue that state-sanctioned execution directly contradicts the absolute, non-derogable right to life guaranteed under international human rights instruments and Article 28A of the 1945 Constitution of Indonesia (Putra, 2011). Furthermore, critics contend that the capital sentence fails to demonstrate statistical deterrence

superior to life imprisonment and presents an unacceptable risk of judicial error (Hamzah & Sumangelipu, 1984; Hood & Hoyle, 2015). Conversely, retentionists emphasize the duty of the state to safeguard the collective right to life of its citizenry against catastrophic offenses, invoking constitutional limitations grounded in public order and morality under Article 28J of the Constitution (Constitutional Court of the Republic of Indonesia [MK], 2007).

With the enactment of Law No. 1 of 2023 concerning the Criminal Code (the new KUHP), Indonesia introduced a compromise model. This paper examines two core research problems:

1. What is the statutory arrangement and procedural mechanism governing capital punishment under Law No. 1 of 2023 on the Criminal Code?
2. How is the retention and execution of capital punishment in Indonesia evaluated from a comprehensive human rights perspective?

2. Research Methods

This study utilizes a normative-juridical legal research methodology, examining the coherence of statutory norms, legal principles, and judicial doctrines (Marzuki, 2007; Zed, 2008). The research relies primarily on qualitative analysis of legal texts and doctrinal commentary (Mustofa, 2016).

2.1 Legal Materials

The data collection was conducted via library research focusing on primary, secondary, and tertiary legal sources (Zed, 2008):

- **Primary Legal Materials:** The 1945 Constitution of the Republic of Indonesia; Law No. 1 of 2023 on the Criminal Code (KUHP); Law No. 39 of 1999 on Human Rights; Law No. 26 of 2000 on Human Rights Courts; Law No. 35 of 2009 on Narcotics; Law No. 15 of 2003 Jo. Law No. 5 of 2018 on Counter-Terrorism; Law No. 31 of 1999 Jo. Law No. 20 of 2001 on Corruption Eradication; and Constitutional Court Decision No. 2-3/PUU-V/2007.
- **Secondary Legal Materials:** Textbooks, peer-reviewed legal journals, academic treatises, and expert opinions on criminal policy, human rights, and penal reform (Marzuki, 2007).

2.2 Analytical Approaches

This study employs three analytical legal approaches:

1. **Statutory Approach (Statute Approach):** Examining the formulation, structure, and legislative intent of Law No. 1 of 2023 and sectoral legislation containing capital threats (Marzuki, 2007).
2. **Conceptual Approach (Conceptual Approach):** Deconstructing the legal concepts of human rights, the ultimum remedium principle, monodualistic balance, and restorative justice (Arief, 2020).
3. **Analytical Deductive Reasoning:** Synthesizing general legal doctrines and statutory norms to address the specific research questions regarding death penalty application in Indonesia (Mustofa, 2016).

3. Results and Discussion

3.1 Historical Context and Legal Evolution of Capital Punishment in Indonesia

Capital punishment within the Indonesian archipelago carries a long historical trajectory dating back to pre-colonial customary laws and colonial rule under the Dutch East Indies (Hamzah & Sumangelipu, 1984). In 1808, Governor-General Herman Willem Daendels utilized capital execution as an instrument of colonial authority, routinely imposing death sentences on indigenous populations who disobeyed administrative mandates or revolted against forced labor systems (Hamzah & Sumangelipu, 1984). Following the codification of the Wetboek van Strafrecht voor Nederlandsch-Indië (WvS) in 1915, which became the national Criminal Code post-independence via Law No. 1 of 1946, capital punishment was embedded as the severity benchmark within the primary criminal hierarchy (pidana pokok) (Arief, 1996; Putra, 2011).

Under the legacy WvS system, capital punishment was listed at the top of Article 10 as a primary sanction. The fundamental critique of this colonial paradigm was its absolute retributive nature; once executed, an irrevocable sentence left zero recourse in the event of subsequent judicial errors or wrongful convictions (Hamzah & Sumangelipu, 1984; Saleh, 1978). For decades, human rights advocacy groups, academics, and civil society organizations demanded either total abolition or structural reform of capital punishment (Putra, 2011).

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3.2 Statutory Re-arrangement of Capital Punishment under Law No. 1 of 2023

Law No. 1 of 2023 fundamentally overhauls the system of criminal sanctions. The legislative reform moves away from pure retribution toward a criminal policy that balances justice, deterrence, public protection, and offender rehabilitation (Arief, 2020; Harkrisnowo, 2022).

Reclassification of Penal Sanctions

Under Article 65 of Law No. 1 of 2023, the primary principal penalties (pidana pokok) are explicitly limited to:

1. Imprisonment (pidana penjara);
2. Confinement (pidana tutupan);
3. Supervision (pidana pengawasan);
4. Fines (pidana denda); and
5. Community service (pidana kerja sosial).

Crucially, the death penalty has been completely removed from the primary list of principal criminal sanctions (pidana pokok). Under Article 67 and Articles 98 through 102 of the new KUHP, capital punishment is established as a special, alternative criminal sanction (pidana khusus yang selalu diancamkan secara alternatif). Article 98 explicitly outlines that capital punishment functions as an exceptional measure of last resort (ultimum remedium) intended to protect society.

Classification	Statutory Basis	Penalties Included
Principal Penalties	Article 65	Imprisonment, Confinement, Supervision, Fines, Community Service
Additional Penalties	Article 66	Revocation of rights, Forfeiture, Restitution, Disqualification
Special Penalty	Articles 67 & 98	Capital Punishment (Always threatened alternatively as ultimum remedium)

Theoretical Foundations of the New Framework

This statutory shift rests upon three core philosophical arguments (Arief, 2020; Harkrisnowo, 2022):

1. **The Principle of Medical Analogy (Amputation Theory):** Capital punishment is no longer treated as a standard instrument of penal governance. Instead, it is conceptualized as an extreme legal operation analogous to medical amputation. Just as a surgeon performs amputation only as a final measure when all medical interventions fail to save a patient, the state imposes capital punishment strictly as an exceptional resort when social rehabilitation is demonstrably impossible (Arief, 1996; Saleh, 1978).
2. **The Monodualistic Balance Concept:** Indonesian criminal law philosophy adopts a monodualistic approach that seeks equilibrium between collective protection (public interest) and individual rights protection (individual interest) (Arief, 2020). While the state retains the sentence to safeguard public security, it incorporates humanitarian safeguards for the individual offender. Examples include mandatory stays of execution for pregnant women, nursing mothers, and individuals suffering from severe mental illnesses (Article 99(4)), alongside the conditional probation system (Article 100).
3. **Prevention of Extra-Legal Retribution:** Retaining capital punishment within statutory limits prevents vigilante justice, blood feuds, and extra-legal retaliation. By codifying a legal response to catastrophic crimes, the state manages societal outrage while subjecting punishment to strict judicial oversight (Manullang, 2019).

3.3 The 10-Year Probationary Framework (Masa Percobaan)

The operational mechanism of Law No. 1 of 2023 lies in the conditional execution model governed by Articles 100 to 102.

Judicial Discretion and Conditions

Under Article 100(1), a sentencing judge is empowered to impose a capital sentence accompanied by a mandatory 10-year probationary period (masa percobaan), provided the judgment considers:

- The convict's genuine remorse and realistic expectation of moral improvement;
- The convict's secondary or mitigated role in the commission of the crime; or
- Specific mitigating circumstances surrounding the offense.

The 10-year probationary timeline begins officially on the day following the issuance of a final, legally binding court decision (inkracht van gewijsde).

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Procedural Phases of Sentence Execution and Commutation

The practical implementation of the conditional death sentence follows three distinct procedural stages:

1. **Phase One (Sentence Avoidance via Primary Alternatives):** Judicial authorities are mandated to prioritize alternative principal sanctions—specifically life imprisonment or maximum fixed-term imprisonment of up to 20 years—where statutory criteria permit (Article 98).
2. **Phase Two (Conditional Probationary Delay):** During the 10-year probation period, the convict's conduct and attitude are subjected to continuous administrative and psychological monitoring by correctional agencies under the Ministry of Law and Human Rights. If the convict demonstrates significant behavioral reformation, genuine remorse, and adherence to institutional regulations, the death sentence shall be commuted to life imprisonment via a Presidential Decree (Keputusan Presiden) following formal legal consideration from the Supreme Court (Mahkamah Agung) (Article 101). Conversely, if the convict shows no moral rehabilitation or actively resists reformation, the Attorney General orders the execution.
3. **Phase Three (Clemency and Statutory Safeguards):** Execution cannot be conducted while a petition for Presidential Clemency (Grasi) is pending. Under Article 102, if a clemency request is formally rejected by the President, but the execution is subsequently delayed for 10 consecutive years for reasons not caused by the convict's escape, the capital sentence automatically converts to life imprisonment via executive decree.

Mandatory Stays of Execution

Pursuant to Article 99(4), the execution of capital punishment must be suspended under specific humanitarian conditions:

- Pregnant women, until giving birth;
- Nursing mothers, until the infant is weaned; and
- Mentally ill individuals, until full medical recovery.

3.4 Human Rights Evaluation of Capital Punishment in Indonesia

Constitutional Framework and Article 28J

The compatibility of capital punishment with human rights must be analyzed through the constitutional text of the 1945 Constitution of the Republic of Indonesia. Amendments to Chapter XA (Articles 28A through 28J) establish statutory protections for fundamental human rights. Article 28A explicitly states that every person has the right to live and defend their life and existence (hak untuk hidup dan mempertahankan kehidupan).

However, the Indonesian constitutional framework does not view human rights as absolute or unconstrained by social obligations. Article 28J(2) establishes a constitutional limitation clause:"In exercising their rights and freedoms, every person shall be subject to limitations established by law solely for the purpose of guaranteeing recognition and respect for the rights and freedoms of others and meeting just demands based on considerations of morality, religious values, security, and public order in a democratic society."

This constitutional limitation was tested before the Constitutional Court of the Republic of Indonesia in Decision No. 2-3/PUU-V/2007 regarding the judicial review of capital punishment in Law No. 22 of 1997 on Narcotics. The Court ruled that the right to life under the Indonesian Constitution is a limited constitutional right (derogable right) when confronted by the state's obligation to protect the fundamental rights of its broader populace against extra-ordinary crimes (MK, 2007). The Court emphasized that human rights guarantees must operate reciprocally; the rights of perpetrators cannot override the rights of victims and society to safety, health, and survival.

Capital Threats in Sectoral Legislation

Outside the general Criminal Code, capital punishment is maintained across several special statutes designed to combat extraordinary crimes:

1. **Narcotics Eradication (Law No. 35 of 2009):** Statutory capital threats are explicitly restricted to illicit manufacturers, kingpins, and large-scale syndicate distributors of Class I narcotics (e.g., heroin, methamphetamine). Simple drug users, addicts, and victims of abuse are strictly exempted from capital liability and channeled toward medical rehabilitation (Law No. 35 of 2009).

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2. **Counter-Terrorism (Law No. 15 of 2003 Jo. Law No. 5 of 2018):** Terrorism is categorized as an extraordinary crime against humanity that destabilizes national security, economic infrastructure, and public safety. Capital threats serve as a state defense mechanism against mass-casualty acts (Djoko Prakoso & Suroto, 1987).
3. **Corruption Eradication (Law No. 31 of 1999 Jo. Law No. 20 of 2001):** Article 2(2) permits capital punishment for corrupt acts committed under specific aggravating circumstances, such as during national economic crises, natural disasters, or widespread social emergency.
4. **Human Rights Courts (Law No. 26 of 2000):** Law No. 26 of 2000 explicitly accommodates capital punishment under Articles 36 and 37 for systemic international crimes, specifically genocide and crimes against humanity. The legislative rationale establishes that acts aimed at exterminating national, racial, ethnic, or religious groups threaten civilization itself, thereby justifying extreme statutory deterrence (Effendi, 2005; Harkrisnowo, 2022).

Synthesis of the New Indonesian Penal Compromise

From a socio-legal perspective, Law No. 1 of 2023 accomplishes a historical synthesis between retentionist demands and international human rights principles (Harkrisnowo, 2022; Manullang, 2019). Rather than adhering to an uncompromising retentionist model or enacting an immediate abolition that contradicts prevailing public legal consciousness, Indonesia has established a middle path (via media):

1. **Procedural Humanization:** By conditioning execution upon a 10-year probationary period, the state eliminates the arbitrary and immediate termination of human life, providing a real pathway to sentence commutation (Arief, 2020).
2. **Alignment with Constitutional Jurisprudence:** The framework incorporates the recommendations set forth in Constitutional Court Decision No. 2-3/PUU-V/2007, which advocated for conditional capital punishment as a human-rights-compliant reform.
3. **Protection of Collective Rights:** The state retains the deterrent symbol of capital punishment to protect victims and society from catastrophic harm, while upholding individual human dignity through statutory opportunities for redemption (Effendi, 2005; Harkrisnowo, 2022).

4. Conclusion

Law No. 1 of 2023 concerning the Criminal Code introduces a transformative legal paradigm regarding the position and execution of capital punishment in Indonesia. The new Code removes the death penalty from its century-old classification as a primary principal penalty (pidana pokok), repositioning it as an exceptional, alternative penalty (pidana khusus) reserved exclusively for extraordinary offenses.

The core innovation of this criminal law reform is the institutionalization of the mandatory 10-year probationary period (masa percobaan) under Article 100. This mechanism bridges the divide between retribution and rehabilitation, granting convicts who demonstrate genuine remorse and moral reformation the statutory right to have their death sentences commuted to life imprisonment. This framework effectively harmonizes state defense obligations with constitutional human rights mandates under Articles 28A and 28J of the 1945 Constitution.

Recommendations

To ensure the effective, objective, and transparent implementation of Law No. 1 of 2023, the following policy measures are recommended:

1. **Independent Evaluation Bodies:** The Ministry of Law and Human Rights should establish an independent, multi-disciplinary evaluation board—comprising criminologists, forensic psychologists, human rights scholars, and correctional officers—to assess convict behavior during the 10-year probationary period without administrative bias.
2. **Clear Judicial Guidelines:** The Supreme Court (Mahkamah Agung) should issue detailed judicial guidelines (Surat Edaran Mahkamah Agung) standardizing the evidentiary criteria required for judges to apply the 10-year probationary clause during trial proceedings.
3. **Strengthening Correctional Rehabilitation:** The Directorate General of Corrections must enhance rehabilitative infrastructure within correctional facilities to ensure death row inmates are provided structured pathways for psychological recovery and social reformation.

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