

# ICLU

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Criminal Law  
Update

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## NEW DEATH PENALTY LAW IN INDONESIA



INSTITUTE FOR  
CRIMINAL JUSTICE  
REFORM

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# New Death Penalty Law in Indonesia

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## About ICJR

Since its establishment in 2007, the Institute for Criminal Justice Reform (ICJR) has committed to take the initiative in supporting overall criminal justice reform. ICJR was formed to support collective actions honoring the Rule of Law and realizing a criminal justice system with strong human rights protection.

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## Introduction

This edition of ICLU discusses the regulation in Indonesia regarding the Death penalty in the new Criminal Code, Law No. 1 of 2023. The death penalty provisions in the New Criminal Code provide more mitigating for defendants when compared to the current Criminal Code because the death penalty in the New Criminal Code is no longer categorized as a main criminal punishment but a special punishment. The death penalty in the new Criminal Code is automatically imposed with ten years probation and then subject to commutation assessment to life imprisonment. After the sentence, execution must be delayed.

Happy reading,

**Erasmus A.T. Napitupulu**  
*Editor-in-Chief/Executive Director*

## I. The current implementation of the death penalty in Indonesia

Indonesia still applies the death penalty for certain criminal acts under the Criminal Code (Kitab Undang-Undang Hukum Pidana) and outside the Criminal Code. The Ferdy Sambo<sup>1</sup> case, which got public attention, is one of the examples where a death penalty provision in the Criminal Code was used. Practically, indictment with the death penalty could also be derived from criminal provisions outside the Criminal Code, specifically in Narcotics Law (Law No. 35 of 2009), which Institute for Criminal Justice Reform (ICJR) research shows that 93% of death penalty cases are narcotics cases.<sup>2</sup>

Globally, a perception of the death penalty as a deterrent effect on convicts is no longer considered, so most states have abolished the death penalty in their legal system, including neighboring state Malaysia, which has just abolished the mandatory death penalty.<sup>3</sup> In 2016, the Secretary General of the United Nations stated that in the context of terrorism, the death penalty has no place in the 21st century, considering it is ineffective and violates human rights.<sup>4</sup> Though the death penalty is deemed irrelevant and useless in international scope, it shows an increasing trend of death penalty cases in Indonesia between 2019-2021 compared to previous years. There were 126 death penalty cases in 2019 and 173 cases in 2020, showing that there were increasing cases even during the COVID-19 pandemic.<sup>5</sup> Though 2021 shows a decrease compared to previous years, 146 cases with 171 accused are still higher than in 2019.<sup>6</sup> Similarly, every year, crimes related to narcotics are still dominating death penalty cases compared to other crimes.

In 2021, most death penalty prosecutions came from Aceh, Sumatra is-

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- 1 Promoninet case that captured the public's attention where high rank police official conducted premeditated murder. Indicted with Article 340 of the Criminal Code subsidiary Article 338 juncto Article 55 paragraph (1) of the Criminal Code. Sentenced with death penalty in the first degree court.
  - 2 Institute for Criminal Justice Reform, *Laporan Situasi Kebijakan Pidana Mati di Indonesia 2022: Tak Ada yang Terlindungi*, Institute for Criminal Justice Reform, Jakarta, 2023.
  - 3 HRW, 'Malaysia Mencabut Perintah Hukuman Mati Wajib' Bangkok, 20 April 2023, accessed on 23 August 2023 <https://www.hrw.org/id/news/2023/04/20/malaysia-repeals-mandatory-death-penalty>
  - 4 UN News, "On World Day against Death Penalty, Ban says practice 'has no place in the 21st century.'" <https://news.un.org/en/story/2016/10/542302-world-day-against-death-penalty-ban-says-practice-has-no-place-21st-century>. UN News, diakses pada tanggal 23 Agustus 2023
  - 5 Institute for Criminal Justice Reform, *Laporan Situasi Kebijakan Pidana Mati di Indonesia 2022: Tak Ada yang Terlindungi*, Institute for Criminal Justice Reform, Jakarta, 2023.
  - 6 Institute for Criminal Justice Reform, *Laporan Situasi Kebijakan Pidana Mati di Indonesia 2021 "Ketidakpastian Berlapis: Menanti Jaminan Komutasi Pidana Mati Sekarang!"*, Institute for Criminal Justice Reform, Jakarta, 2022.

land. As many as 46 were indicted, and in North Sumatra, as many as 28 were indicted, with death penalty verdicts in first-degree court. As many as 27 were accused in Aceh, and 32 were indicted in North Sumatra. The fact that prosecution and rulings<sup>7</sup> with the death penalty were still happening increased the number of convicts on death row yearly. There were 49 inmates from 355 in the previous year to become 404 on death row. Based on data from the Directorate General of Corrections in 2021, crimes related to narcotics were still in the first position in the total number of convicts who were on death row, as many as 269 persons (66%), compared to other crimes as many as 118 persons (29%). These convicts were placed in correctional institutions across Indonesia because there is no particular place for convicts on death row.<sup>8</sup> Class II A Besi Nusakambangan has the highest number of death row inmates, 49 people or as much as 12% of all death row inmates.<sup>9</sup> ICJR recorded 1,105 cases and 1,242 defendants in death penalty cases from 1969 to 2022, of which 520 defendants had status as a death row inmate awaiting execution based on the latest court verdict.<sup>10</sup>

## II. Legitimacy and advocacy for the total abolition of the death penalty

A legal step was conducted in 2007 to abolish the death penalty through Judicial Review in the Constitutional Court. Constitutional examination of death penalty provisions in narcotics law with the 1945 Constitution was being heard in Constitutional Court Decision Number 2/PUU-V/2007 and Number 3/PUU-VI/2007. Some death penalty inmates requested a judicial review from the constitutional court to examine constitutional rights violated by narcotics law. The applicant argued that the provisions in narcotics law had violated the rights provided in Article 28A, which states “every person shall have the right to live and to defend his/her life and existence.” and Article 28I paragraph (1) which states “right to, freedom from torture, freedom of thought and con-

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7 *Ibid.*

8 Institute for Criminal Justice Reform, *Laporan Situasi Kebijakan Hukuman Mati di Indonesia 2021: Ketidakpastian Berlapis: Menanti Jaminan Komutasi Pidana Mati Sekarang!*, Institute for Criminal Justice Reform, Jakarta, 2022. Page15

9 *Ibid.*

10 Institute for Criminal Justice Reform, *Laporan Situasi Kebijakan Hukuman Mati di Indonesia 2020: MenCabut Nyawa di Masa Pandemi*, Institute for Criminal Justice Reform, Jakarta, 2020.

science, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under law with retrospective effect are all human rights that cannot be limited under any circumstances.<sup>11</sup> In the end, the request was rejected by the Constitutional Court because they argued that a crime as stipulated under the Narcotic Law Article 80 paragraph (1) (a), paragraph (2) (a), and paragraph (3) (a); as well as Article 82 paragraph (1) (a), paragraph (2) (a), and paragraph (3) (a), are considered a serious crime and considered qualified as “the most serious crime” which stipulated under the Article 6 of International Covenant on Civil and Political Rights (ICCPR). The Constitutional Court argued that Indonesia, as a state party of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, is allowed to apply strict criminal provisions as stipulated in Article 24 of the convention: “A party may adopt more strict or severe measures than those provided by this Convention if, in its opinion, such measure is desirable or necessary for the prevention or suppression of illicit traffic.”<sup>12</sup> The Constitutional Court also argued that Article 28I of UUD 1945, which was examined, recognizes limitations stipulated in Article 28A until Article 28I of UUD 1945.<sup>13</sup> With Article 28J paragraph (2), human rights provided in the UUD 1945 are not absolute and subject to limitations regulated in the law, including the right to life provided in Article 28I of UUD 1945. The Constitutional Court also argued that Article 28I paragraph (1) stated a phrase of human rights that cannot be limited in any circumstances. Still, it must be read along with Article 28J, which defines the restriction of human rights.<sup>14</sup>

Though the Constitutional Court has such a perception towards narcotics crime, they argued that in assessing a narcotic case, it must be carefully observed because the death penalty is only given to the producer and distributor who conduct it illicitly, not to the abuser or offenders of Narcotic Law formally and to perpetrator related to group I narcotics.<sup>15</sup> The death penalty must be given with minimal special criminal punishment, where if the judge is unsure due to other factors, then the death penalty must not be imposed. One of the judges, H. Achmad Roestandi, had a dissenting opinion in that Constitutional

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11 Article 28I paragraph (1) of the Indonesian Constitution.

12 Constitutional Court of Republic of Indonesia Decision Number 2-3/PUU-V/2007, page. 427.

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*, page. 428.

Court Decision, which argued that Article 28I paragraph (1) of UUD 1945 contained the phrase “cannot be limited under any circumstances” is absolute. It cannot be limited, cannot be diminished, and cannot be delayed.<sup>16</sup> Therefore, Article 28J paragraph (2) cannot limit any human rights stipulated under Article 28I paragraph (2). Furthermore, the judge also compared the similarity of limitation clauses in Article 4 of ICCPR. In contrast, those human rights considered absolute or non-derogable rights are not subject to limitations, as should be interpreted in Articles 28I and 28J of UUD 1945.

Based on General Comment No.35 in Article 6 of ICCPR, “the term “the most serious crime” must be read restrictively and appertain only to crimes of extreme gravity involving intentional killing.”<sup>17</sup> Furthermore, it is stated that crime that does not have a direct effect and has an intention to kill, such as murder attempt, kidnap, corruption, economic crime and political crime, armed robbery, hijack, narcotic and sexual crimes, cannot become a basis to enforce the death penalty. The term the most serious crime is also found in several international conventions and consists of various crimes. In paragraph 91, Report of Special Rapporteur (E/CN.4/1997/60) International Human Rights Committee dated 24 December 1996 stated, “the scope of crimes subject to the death penalty should not go beyond intentional crimes with lethal or other extremely grave consequences.”<sup>18</sup> With the Constitutional Court assuming that narcotic crimes are included as the most serious crime, it needs to be carefully observed since usually, the convicted in narcotic cases were only a middleman, not the masterminds of a transaction on a serious scale. Such convicted still got a death penalty sentence, and his rights cannot be regained.

With a new mechanism, a ten-year probation period for death-sentenced inmates in the New Criminal Code, some groups worry that the mechanism opens a collusion practice in correctional facilities. This issue made some people file a judicial review to the Constitutional Court. The request stated in Constitutional Court Number 36/PUU-XXI/2023 was inadmissible since Article 100 of the New Criminal Code was not yet applicable,<sup>19</sup> so the loss of constitu-

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16 *Ibid.*, page.436.

17 General Comment 35.

18 Sefriani, “Karakteristik The Most Serious Crime Menurut Hukum Internasional dalam Putusan Mahkamah Konstitusi: Kajian Putusan Mahkamah Konstitusi Nomor 15/ PUU-X/2012”, *Jurnal Yudisial*, Vol. 6 No. 2 Edisi Agustus, Fakultas Hukum Universitas Islam Indonesia, Yogyakarta, 2013, page. 99.

19 Closing Provision of the New Criminal Code mandates the enforcement of this regulation three years



tional rights was not a casualty.<sup>20</sup>

### III. Death penalty in the New Criminal Code

The existence of Law No.1 of 2023 as the New Criminal Code could become a middle ground for two perceptions between retentionists who argue the death penalty must be retained and abolitionists who support total abolishment.<sup>21</sup> There is a fundamental change in death penalty provisions where the death penalty changes from main punishment to alternative punishment. Also, there is a postponing execution mechanism until ten years through the probation period.<sup>22</sup> This process has been through discussion of the New Criminal Code draft since 2015,<sup>23</sup> which ensured that the death penalty became an alternative punishment and no longer became the main punishment based on the spirit of the drafting team of the New Criminal Code. In the New Criminal Code, new criminal provisions are subject to the death penalty, which is treason stipulated under Articles 191 and 192.<sup>24</sup> Seeing that there is a fundamental change towards the death penalty may change the public view that the death penalty is irrelevant to eradicating crimes.

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after it is promulgated. See: Article 621 Law No. 1 of 2023 on Criminal Code

20 Constitutional Court of Republic of Indonesia Decision Number 36/PUU-XXI/2023, page.30.

21 Institute for Criminal Justice Reform, *Laporan Situasi Kebijakan Pidana Mati di Indonesia 2022: Tak Ada yang Terlindungi*, Institute for Criminal Justice Reform, Jakarta, 2023.

22 The Criminal Code, Law No. 1 of 2023 on The Criminal Code, Article 67 and 100.

23 Institute for Criminal Justice Reform, *Laporan Situasi Kebijakan Pidana Mati di Indonesia 2022: Tak Ada yang Terlindungi*, Institute for Criminal Justice Reform, Jakarta, 2023.

24 *Ibid.*

## Comparison Table between the current Criminal Code and the New Criminal Code

<b>Type of Crime</b>	<b>The current Criminal Code</b>	<b>The New Criminal Code</b>
The attempt undertaken with the intent to deprive the President or Vice President of his life or his liberty or to render him unfit to govern	Article 104	Article 191
Any person who in time of war renders assistance to the enemy or prejudices the state against the enemy	Article 124 paragraph (3)	Article 212 paragraph (3)
Theft results in a serious physical injury or death committed by two or more persons	Article 365 paragraph (4)	Article 479 paragraph (4)
Premeditated murder	Article 340	Article 459
Crimes in aircraft. If such actions result in the death of a person or the destruction of an aircraft	Article 479o paragraph (2)	Article 588 paragraph (2)
Colluding to cause hostilities between countries	Article 111 paragraph (2)	-
The attempt on the life of the neighboring Head of State undertaken with premeditation, results in death	Article 140 paragraphs (2) and (3)	-
Crime related to shipping resulting in death	Article 444	-
Treason with the intent of half/entirely territory of the Republic of Indonesia falling into foreign power or separate	-	Article 192
Genocide	-	Article 598
Crimes against humanity	-	Article 599
Violence or violence threat which results in a terror atmosphere or fear towards people widely/terrorism	-	Article 600
Without the right to produce, export, import, or distribute class 1 and 2 narcotics	-	Article 610 paragraph (2) (a) and (b)

In the New Criminal Code, the death penalty is no longer a main punishment but an alternative. As stipulated in Article 65, the main sentence consists of imprisonment, custody, supervision, and social work punishment.<sup>25</sup> Compared to the current Criminal Code within Article 10 (a), the death penalty is no longer stated as the main punishment. Provisions on the death penalty are regulated within Articles 100 and 101 of the New Criminal Code. When imposing the death penalty, the judge must consider the defendant’s regret and hope to improve themselves or the defendant’s role. The probation period of 10 years starts from the day after the verdict has binding power. Suppose the death row during probation does not show a good attitude, and there is no hope to improve. In that case, the death penalty may be executed based on the Attorney General’s order.<sup>26</sup>

<b>Draft on 5 June 2015</b>	<b>Draft on 15 September 2019</b>	<b>Draft on 9 November 2022</b>	<b>Law No. 1 of 2023</b>
<p>Article 91 (1) The execution of the death penalty may be postponed with a probation period of 10 years if:</p> <ul style="list-style-type: none"> <li>a. The public reaction towards inmates is not vast;</li> <li>b. Inmate shows regret, and there is hope to improve;</li> <li>c. The inmate’s stand on committing a crime is insignificant, and</li> <li>d. There are extenuating reasons.</li> </ul>	<p>Article 100 (1) The judge may impose the death penalty with a probation period of 10 years if:</p> <ul style="list-style-type: none"> <li>a. The defendant shows regret, and there is hope to improve;</li> <li>b. The defendant’s role in the crime is insignificant; or</li> <li>c. There are extenuating reasons.</li> </ul>	<p>Article 100 (1) The judge may impose the death penalty with a probation period of 10 years by considering:</p> <ul style="list-style-type: none"> <li>a. The regret of the defendant and their hope for self-improvement, or</li> <li>b. The role of the defendant in the crime.</li> </ul>	<p>Article 100 (1) The judge imposes the death penalty with a probation period of 10 years by considering:</p> <ul style="list-style-type: none"> <li>a. The regret of the defendant and their hope for self-improvement, or</li> <li>b. The role of the defendant in the crime.</li> </ul>

25 The Criminal Code, Law No. 1 of 2023 on The Criminal Code, Article 65.  
 26 The Criminal Code, Law No. 1 of 2023 on The Criminal Code, Article 100 paragraph (6).

The draft on the death penalty with a probation period has existed since 2015 within the formulation of Article 91, which allows the probation period if some of the requirements are fulfilled, as mentioned in the table above. With such formulation, the death penalty with a probation period was optional for the judge and not automatically imposed.<sup>27</sup> Due to critics from civil society arguing such requirements are a requirement not to impose the death penalty, the draft of 9 November 2022 changed with 2 points, which were the defendant's regret and hope for improvement or the defendant's role in the crime.<sup>28</sup> Furthermore, the phrase "may" in the draft of 9 November 2022 was also discussed in the Legislative because it allows the judge to select whether to impose the death penalty with a probation period or without. With such conditions, it is considered contrary to the spirit of Article 67 that the death penalty is no longer a main punishment but an alternative with special characteristics.<sup>29</sup> In the end, the phrase "may" was deleted, which changed the concept of the death penalty to become the death penalty with a probation period.

The punishment of inmates on death row may be replaced with life sentences later in 2026 since Article 100 paragraph (4) in the New Criminal Code allows commutation from the death penalty to a life sentence through Presidential Decree.<sup>30</sup> Furthermore, Article 101 regulates that inmates whose clemency has been rejected are subject to be given commutation "if the clemency request of the inmates is rejected and the death penalty is not executed during 10 (ten) years since the clemency was rejected not because inmates escape, the death penalty may be changed into life sentences through Presidential Decree".<sup>31</sup>

In socialization at the University of Syah Kuala Banda Aceh dated 28 February 2023, Prof. Eddy O. S. Hiariej, as Vice Minister of Law and Human Rights Republic of Indonesia, explained Article 3 paragraph (1) of the New Criminal Code, if there is a change in statutory regulations, the convict must benefit from the law.<sup>32</sup> Article 3, paragraph (1), which stated, "If there is a change in legislation after the act occurs, new laws and regulations apply, except the old

27 Institute for Criminal Justice Reform, *Laporan Situasi Kebijakan Pidana Mati di Indonesia 2022: Tak Ada yang Terlindungi*, Institute for Criminal Justice Reform, Jakarta, 2023, page. 29

28 Article 100 of Draft of Criminal Code version 9 November 2022

29 Institute for Criminal Justice Reform, *Laporan Situasi Kebijakan Pidana Mati di Indonesia 2022: Tak Ada yang Terlindungi*, Institute for Criminal Justice Reform, Jakarta, 2023, page. 29

30 The Criminal Code, Law No. 1 of 2023 on The Criminal Code, Article 100.

31 The Criminal Code, Law No. 1 of 2023 on The Criminal Code, Article 101.

32 Institute for Criminal Justice Reform, <https://icjr.or.id/icjr-sepakat-dengan-pemerintah-pengundangan-kuhup-baru-wajib-menunda-eksekusi-pidana-mati-saat-ini/>, accessed on 8 August 2023

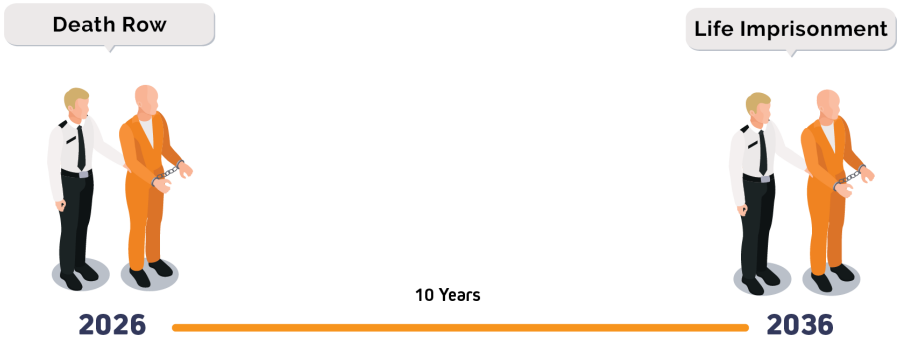
statutory provisions benefit perpetrator and accomplice crime,” also recognizes the principle of *lex favor reo* in the New Criminal Code. The question is how to calculate inmates who have been on death row for ten years but are yet to be executed and whether they will get a direct assessment in 2026 when the New Criminal Code is enforced so that they will get commutation, especially for inmates who did not request clemency.

If it is compared between the current and the New Criminal Code, it consists of 2 types of crimes threatened with the death penalty. One of the types is treason with an intent that half or entirely of the Republic of Indonesia fell to a foreign power or to separate themselves from the Republic of Indonesia, which was regulated under Article 192 of the New Criminal Code. Other consequences are the inclusion of provisions in the special criminal offenses in the New Criminal Code, such as genocide, crimes against humanity, terrorism, and narcotics. There are ten types of acts in the current Criminal Code, while in the New Criminal Code, there are 12. and narcotics. There are ten types of acts in the existing Criminal Code, while in the New Criminal Code, there are 12.

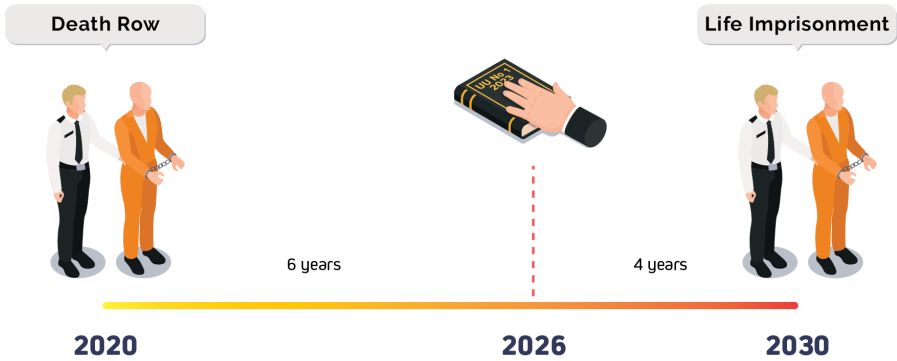
A change from life sentences to 20 years imprisonment is also possible in the New Criminal Code, where Article 69 paragraph (1) states, “if inmates who have to undergo life sentence at minimum 15 (fifteen) years, life sentences may be replaced to 20 (twenty) years imprisonment through Presidential Decree after receiving considerations by Supreme Court.”<sup>33</sup> The existence of such an article enables death penalty inmates to be changed to life sentences and changed again to 20 years imprisonment. However, the mechanism of change is yet further regulated. In paragraph (2), it is stated that such a mechanism of change is further regulated in the Government Regulation. Death penalty inmates before the New Criminal Code have different psychological effects, with the ones who are during the New Criminal Code knowing there is a probation period of 10 years.

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33 The Criminal Code, Law No. 1 of 2023 on The Criminal Code, Article 69.



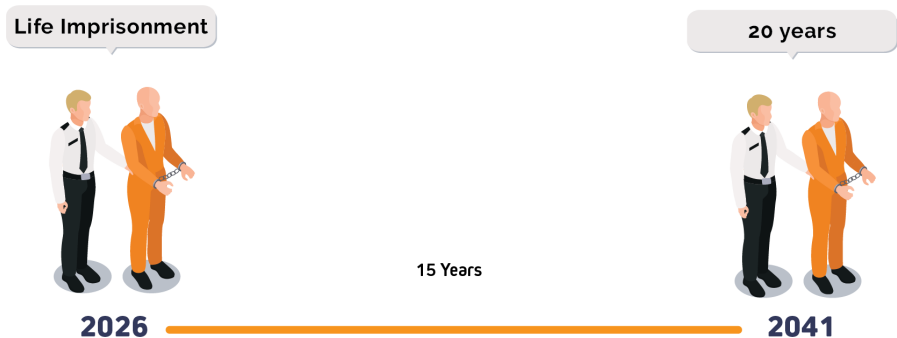
If a person is imposed with the death penalty in 2026 when the New Criminal Code is applied, they will undergo a probation period of 10 years. In 2036, they will get an assessment. If the assessment shows that the inmate is having good behavior, the inmate may be given a commutation to life sentence.



Suppose a person has been sentenced to death in a final and binding ruling in 2020 when the current Criminal Code is applied. In 2030, they will get an assessment because, in 2026, a provision regarding the probation period came into force. So, a probation period of 10 years will be counted from 2020 when they are on death row. Because there is a lighter provision in 2026, the execution cannot be carried out before assessment.



Suppose a person is imposed with the death penalty in 2015 and has been on death row for ten years. Then, in 2026, when the New Criminal Code was applied, that person has a right to be assessed because they have been delayed for more than ten years. If the commutation is given, the death penalty may change to a life sentences. Because there is a lighter provision in 2026, the execution cannot be carried out before assessment.



Suppose a person is imposed with life imprisonment in 2026. In that case, that person has an opportunity for 15 years to change their punishment to 20 years imprisonment based on article 69 of the New Criminal Code.

#### IV. Conclusion

The new death penalty provision, which becomes the middle ground between abolitionists and retentionists, gives implications specifically to inmates on death row who have not been executed. The death penalty is no longer the main punishment within the New Criminal Code but an alternative punishment, and convicts must undergo a probation period of 10 years. Then, they will receive an assessment after ten years whether the punishment changes to a life sentence or not. However, mechanisms related to assessing the probation period need to be further regulated so that it would not be misinterpreted, especially in Article 101, which limits the subject to persons whose clemency is rejected. The New Criminal Code also adds two types of crimes that have not been regulated before in the current Criminal Code: treason in Article 192 in the New Criminal Code and special types of crime such as genocide, crimes against humanity, terrorism, and narcotics.

Inmates on death row for ten years or more are entitled to be assessed whether the punishment will be changed or not in 2026. The *Lex Favor Reo* principle in Article 3 paragraph (1) supposedly gives beneficial provisions stipulated in the New Criminal Code for inmates. Eventually, in the New Criminal Code, if a person is sentenced to the death penalty, they will have a chance to be commuted to life imprisonment and a second commutation to 20 years of imprisonment.



# About

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Gunnar Kasim, an intern at ICJR law graduate from Universitas Gadjah Mada, is interested in criminal law, specifically narcotics law and reformative criminal justice. He has had internships at a few NGOs in Indonesia.

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