Differences in Regulation and Approaches to the Criminalization of Mothers for Filicide in the Old and New Penal Codes

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Abstract

The criminal act of a child's murder by a biological mother is a form of crime that raises social concern and requires serious legal attention. This study aims to analyze the differences in regulation and penal approaches to this crime between the old Criminal Code (KUHP) and the new Criminal Code as regulated in Law Number 1 of 2023. The research method used is normative juridical, with statutory and literature study approaches. The results of the study indicate that the old KUHP focused more on general provisions regarding the crime of murder without considering familial relationships as a special factor, resulting in standard sentencing. Meanwhile, the new KUHP adopts a more humanistic and restorative approach, providing possibilities for sentence reductions or alternative approaches for biological mothers by taking into account the perpetrator's motives, psychological state, and socio-economic conditions. Thus, the new KUHP offers flexibility in sentencing, making it more responsive to the complexity of cases involving child murder by biological mothers. This study is expected to serve as a reference for policymakers and legal practitioners in ensuring fair and proportionate law enforcement.

Keywords: Biological Mother, Criminal Code, Child murder

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Introduction

The old Indonesian Criminal Code (KUHP) originates from the Dutch colonial legacy and was later enacted under Law No. 1 of 1946 concerning the Criminal Code, serving as the basis for criminal law enforcement in Indonesia for more than 80 years. This KUHP regulates criminal acts against life, including murder and the killing of a child by a biological mother, categorized as part of the crime of "destroying another person's life."Criminal law is one of the important instruments in the national legal system, functioning to maintain order, protect public interests, and uphold the principle of justice. The national legal policy is based on the ideals of the nation, the objectives of the state, and the state's foundation, aiming to create fair laws that protect the people through fundamental rules that serve as guidelines in the drafting and implementation of legislation [1]. Through the regulation and enforcement of criminal sanctions, criminal law plays a role in creating a deterrent effect for offenders while also functioning as a preventive tool to ensure similar actions do not occur in the future. One criminal act that receives special attention due to its violation of the most fundamental human rights is murder, which is the unlawful act of taking another person's life. The crime of murder contradicts the values of the second principle of Pancasila, as it constitutes an arbitrary act that does not respect human dignity and is a serious violation of human rights by depriving the victim of their right to life.

The right to life is the most fundamental right possessed by every human being and is guaranteed by the constitution, as stipulated in Article 28A of the 1945 Constitution, which affirms that everyone has the right to live and to defend their life. Therefore, any violation of the right to life, including murder, is regarded as a serious crime because it contravenes the law, moral norms, religion, and the principles of humanity. Children are the generation born from the union of a man and a woman. Even if a child is born before marriage, they are still recognized as a child and constitute an important part of the nation's generation, as well as a human resource that serves as a vital asset for national development and progress [2]. In social reality, there are tragic cases in which the perpetrator of a murder is the child's biological mother. This act is shocking because it contradicts the natural role of a mother, who is supposed to provide love and protection for her child, and it also raises serious legal and moral questions about how a mother could take the life of her own child.

Under the old Criminal Code (KUHP), the killing of a child by the biological mother shortly after birth is specifically regulated in Articles 341 and 342. Article 341 governs unplanned murder, while Article 342 governs premeditated murder. Both articles provide the legal basis for criminal liability for mothers who take the life of their own child at or immediately after birth due to being "afraid of being discovered" or for other reasons [3].

The concept of punishment in the old Criminal Code (KUHP) places greater emphasis on a retributive approach, which is the idea of retaliation or imposing a penalty for acts that harm society. Criminal sanctions are imposed based on the act itself and the offender's culpability, with little flexibility for judges to consider individual factors beyond the elements of the crime [4]. The main challenges in the old Criminal Code (KUHP) include the lack of provisions that provide special protection for children as victims, as well as the absence of integrated principles of restitution or rehabilitation for the families of both victims and perpetrators. The provisions regarding criminal acts remain general, and traditional criminal law norms have often been criticized for being inconsistent with humanitarian values and current social dynamics. In the old Criminal Code (KUHP), the crime of murder is regulated from Articles 338 to 340. Meanwhile, murder of a child by a biological mother is specifically addressed in Articles 341 and 342. Article 341 governs the killing of a child by a mother at or immediately after childbirth due to fear of being discovered to have given birth, while Article 342 regulates premeditated killing of a child by a mother. The existence of these specific provisions indicates that the lawmakers considered the psychological condition of the mother at the time of childbirth, which is why the criminal penalties are made lighter compared to general murder cases.

Law Number 1 of 2023 concerning the Criminal Code (the new KUHP) is a comprehensive recodification that replaces the old KUHP and will come into full effect in

January 2026, reflecting a more modern and contextual philosophy of criminal law in Indonesia. This law establishes new criminal provisions, including the division of principal penalties, additional penalties, as well as special penalties that take a broader approach to the purposes of sentencing.

A mother who, out of fear of being discovered to have given birth, deliberately takes the life of her child at birth or immediately afterward can be held accountable for committing murder of her own child with premeditation. The culpability in the act of taking another person's life can be either intentional or unintentional. An intentional act may occur with prior planning or without planning, but the core of the act lies in the presence of "intent", which is realized through the execution of the act to its completion [5]. In the new Criminal Code (KUHP), murder in general, including the killing of a child, is regulated in the provisions concerning crimes against life. For example, Article 458 of the new KUHP stipulates criminal penalties for anyone who takes the life of another person, including aggravated penalties if the act is committed against close family members, such as one's own child. This provision reflects a shift in emphasis from a purely retributive approach to a combination of retributive measures and special protection for victims, particularly children [6].

The shift in the sentencing approach in the new Criminal Code (KUHP) carries significant implications for cases of child murder by a biological mother, including increased criminal penalties, clarification of the elements of the crime, and adjustment of sanctions based on the family relationship and the circumstances of the perpetrator. This approach is expected to provide stronger legal protection for children as the most vulnerable party, while also taking into account a more measured and fair approach to sentencing.

Research Methodology

This study uses a normative legal research method, which focuses on the analysis of legislation, legal doctrines, and related legal literature. This approach was chosen because the research aims to analyze the differences in regulation and sentencing approaches for the crime of child murder by a biological mother between the old Criminal Code (KUHP) and the new Criminal Code (Law No. 1 of 2023). The primary data sources of this study consist of the old KUHP (Law No. 1 of 1946), particularly Articles 338, 341, and 342, as well as the new KUHP (Law No. 1 of 2023), especially Article 458 and other provisions related to child protection. In addition, the study also uses secondary legal sources such as criminal law textbooks, scholarly journals, online legal articles, and tertiary legal sources from official government websites or trusted legal portals. Data collection was conducted through library research and legal documentation, by examining official legislative documents, legal literature, and relevant academic publications. Data analysis was carried out qualitatively, starting with a descriptive analysis to explain the legal provisions in the old and new KUHP, followed by a comparative analysis to identify similarities and differences in sentencing approaches, while considering factors of child protection and the objectives of criminal law. Subsequently, a legal synthesis was conducted to conclude the implications of these differences for legal practice and legal certainty for both victims and perpetrators. The validity of the data was ensured through crosschecking among official documents and academic literature. Using this method, the study is expected to provide a comprehensive understanding of the changes in the philosophy of sentencing and legal protection for children in the new KUHP compared to the old KUHP.

Results

In Indonesian criminal law, the murder of a child by a biological mother falls under the category of crimes against life, which are specifically regulated in the Criminal Code (KUHP). The old KUHP contains provisions on the killing of a child by a mother in Articles 341 and 342, which distinguish between unplanned and premeditated murder, with penalties of up to seven to nine years of imprisonment, depending on whether the act was planned. Under the old KUHP, Article 341 states that a mother who, out of fear of being discovered to have given birth, deliberately takes the life of her child at or shortly after birth, is subject to a maximum

imprisonment of seven years. Article 342 governs the killing of a child by a mother with premeditation, with a maximum penalty of nine years in prison. These provisions reflect the old legal approach, which emphasizes intent and planning in determining criminal sanctions. To ensure justice for children, where justice aims to create a balance between rights and obligations so that every individual is treated properly, equally, and with dignity [7].

The old Criminal Code (KUHP) emphasizes a traditional retributive approach, which views punishment as a form of retaliation for legal violations. In this code, the murder of a child by a mother is regarded as a crime against life that warrants a relatively severe prison sentence, both as retribution and as a deterrent. The old KUHP does not explicitly regulate the objectives of sentencing, so the imposition of punishment focuses more on formal legal certainty. As a result, in cases of child murder by a biological mother, judges have limited discretion to consider non-legal factors, such as the psychological condition of the perpetrator or the social background of the act. Furthermore, the ambiguous regulation of abortion in Indonesia, resulting from conflicts between the Criminal Code (KUHP) and the Health Law, is considered ineffective, widens gaps in access to services, and calls for a policy shift from a punitive approach toward a public health, human rights, and gender justice–based approach [8]. Legal policy becomes a key factor in the development of the legal system, realized through laws and regulations that govern criminal acts [9].

The new Criminal Code (KUHP), enacted through Law Number 1 of 2023 concerning the Criminal Code, constitutes a comprehensive reform of the old Criminal Code and will come into effective force on 2 January 2026. This law codifies and updates various criminal law provisions, including those related to homicide, and seeks to reflect modern national legal values. Through this comparative study, it can be analyzed whether the new Criminal Code provides legal protection that is more just, humane, and consistent with the principles of restorative justice compared to the old Criminal Code [10].

Substantively, Article 341 of the old KUHP and Article 460 paragraph (1) of the new KUHP share similarities in regulating infanticide (the killing of a child by a biological mother), as both stipulate that a mother who takes the life of her child at or shortly after birth out of fear of being discovered is subject to a maximum imprisonment of seven years. The main differences between the two lie primarily in the wording and sentence structure, rather than in the substantive severity of the penalty [11]. The old Criminal Code (KUHP) emphasizes a traditional retributive approach, in which the elements of premeditation and intent often determine the severity of the punishment, as seen, for example, in Article 342 concerning premeditated murder. The old KUHP tends to regard criminal penalties primarily as a form of retribution for violations of legal norms committed by the offender [12]. This approach places greater value on formal legal certainty and the explicit differentiation of criminal elements in each article.

In contrast, the new Criminal Code (KUHP), enacted through Law Number 1 of 2023, demonstrates a normative shift in the formulation of criminal acts. In this code, the wording of articles regarding criminal acts is formulated more concisely and generally, without always explicitly specifying the mental elements, yet still encompassing the notion of culpability in actions such as “taking a life.” This approach reflects the spirit of criminal law reform oriented toward justice and the integration of national socio-cultural values, emphasizing not only classical retributive elements but also the contextual and individual circumstances of the offender [13]. Such changes in wording indicate a paradigm shift from merely imposing retaliatory punishment toward creating a criminal law system that is more responsive to societal developments and contemporary legal needs.

In addition, the new Criminal Code (KUHP) also expands the general regulation regarding perpetrators of child murder (including biological parents) through Article 458, which provides for aggravated penalties if the offender is a parent or close family member. This demonstrates a reformist tendency to strengthen protection for the most vulnerable victims. These provisions are particularly relevant when the killing of a close family member is viewed as an affront to the moral and social values of the family under national law. Although, substantively, the rules

regarding the murder of a child by a biological mother have not changed significantly compared to the old KUHP, the new KUHP emphasizes a more systematic formulation of norms and the use of clearer legal language [14].

Overall, the differences in regulation and sentencing approaches between the old and new Criminal Code (KUHP) lie in the drafting of the law and the expansion of child protection provisions in the new KUHP. Although the criminal basis for the murder of a child by a biological mother in the new KUHP is not substantially different from the old KUHP, the more modern wording and the approach of aggravating penalties for perpetrators who are close family members reflect Indonesia's criminal law reform efforts, which are more responsive to the need for child protection and contemporary social dynamics.

Conclusion

The regulation of child murder by a biological mother in both the old and new Criminal Code (KUHP) imposes the same criminal penalties, but differs in approach. The old KUHP is retributive, emphasizing intent and premeditation, which leaves judges with limited discretion to consider non-legal factors. In contrast, the new KUHP is more modern and contextual, using systematic wording and providing for aggravated penalties for perpetrators who are close family members, reflecting a reform of criminal law that is more responsive to child protection and contemporary social dynamics. The implication of this reform is that it strengthens child protection and the social relevance of criminal law norms, while further research can be directed toward the integration of psychological, social, and rehabilitative factors in sentencing, as well as the evaluation of the effectiveness of aggravated penalties for family members.

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