

CRIMINAL LIABILITY OF A MOTHER FOR THE MURDER OF HER CHILD: A COMPARATIVE PERSPECTIVE BETWEEN THE OLD CRIMINAL CODE AND THE NEW CRIMINAL CODE (LAW No. 1 Of 2023)

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Abstract

This study aims to analyze the criminal liability of a biological mother who commits the murder of her child, as well as to compare the regulation and sentencing approaches between the former Criminal Code (KUHP) and the new KUHP under Law No. 1 of 2023. The research questions include: first, how criminal liability for a biological mother who kills her child is assessed from the elements of fault (*mens rea*) and capacity for responsibility (*toerekeningsvatbaarheid*) under Indonesian criminal law; and second, what are the differences in regulation and sentencing approaches for the crime of child murder by a biological mother in the former and new KUHP. The research method used is normative legal research with a comparative approach, through the study of statutory regulations, legal literature, and jurisprudence. The results show that the criminal liability of a biological mother who commits child murder is highly influenced by the analysis of the elements of fault and capacity for responsibility, including considerations of psychological disorders and social factors. The new KUHP under Law No. 1 of 2023 provides significant changes in the classification of offenses, sentencing limits, and a restorative justice approach that emphasizes the protection of children and victim recovery, compared to the former KUHP, which is more formalistic and retributive. Thus, this study emphasizes the need for a comprehensive understanding of the psychological aspects of the perpetrator and the harmonization of the application of criminal law in the context of child protection in Indonesia.

Keywords: *Biological mother, Child murder, Criminal liability.*

INTRODUCTION

Criminal law is one of the main instruments within the National Legal System that functions to maintain public order, protect societal interests, and uphold the values of justice. National legal policy is grounded in the ideals of the nation, the objectives of the state, and the foundational principles of the state to realize a legal system that is just and protects the people, through fundamental rules that serve as guidelines in the formation of laws and regulations from their inception through to their implementation (Ismaidar and Annur). Through the regulation and enforcement of criminal sanctions, criminal law plays a role in providing a deterrent effect for perpetrators of crimes while also serving as a means of prevention so that similar acts do not recur in the future. One criminal offense that receives special attention because it concerns the most fundamental human right is murder, which is defined as an act committed to unlawfully take the life of another person. The criminal offense of murder is an act that violates the values of the second principle of Pancasila, as murder constitutes an arbitrary act against others, fails to regard human beings in accordance with their inherent dignity and worth, and constitutes a serious violation of human rights because it deprives the victim of the right to life (Sthasia et al.).

The right to life is a fundamental right inherent in every human being and is guaranteed by the Constitution, namely Article 28A of the 1945 Constitution of the Republic of Indonesia, which states that every person has the right to live and to defend his or her life. Therefore, any form of violation of the right to life, including murder, is regarded as a serious crime that not only violates positive law but also moral, religious, and humanitarian norms. A child is a generation born from a relationship between a woman and a man, regardless of whether the parents have entered into marriage, and such a person is still referred to as a child. Children are the nation's future generation and constitute human resources essential for the development of the nation (Laxsmi et al.). In social reality, a distressing

phenomenon has emerged in which the perpetrator of murder is not a stranger, but the victim's own biological mother. Cases of child murder committed by biological mothers often shock society because they contradict the natural values of motherhood, where a mother is expected to provide love, protection, and life for her child. Such actions raise profound questions from legal and moral perspectives as to how a mother who gives birth to and nurtures her child could instead become the perpetrator of taking the life of her own flesh and blood.

The 1945 Constitution of the Republic of Indonesia regulates Human Rights, as stated in Article 28D paragraph (1) of the 1945 Constitution, which provides that every person has the right to recognition, guarantees, protection, and fair legal certainty, as well as equal treatment before the law. Decision Number 388/Pid.Sus/2024/PN.Mdn serves as a concrete example of a court case and judgment in which a biological mother killed her own child during childbirth. In this case, a criminal act occurred in which a biological mother killed a child born from her illicit relationship with a man. A mother who, in order to carry out a predetermined intention due to fear of being discovered that she would give birth to a child, at the time the child was born or shortly thereafter deprived the child of life, is threatened with punishment for committing the planned murder of her own child. The form of fault in the criminal offense of taking another person's life may be intentional or unintentional, where intent refers to an act that may be premeditated or not premeditated; however, the essential element of such an event is the existence of "intent," which is manifested through actions carried out to completion (Mangare). Strengthening the protection of children and women is necessary in handling cases of sexual violence in Indonesia in order to ensure victim recovery, the enforcement of justice, and the prevention of the recurrence of violence (Sitorus et al.).

This phenomenon cannot be understood in a simplistic manner, as it is usually rooted in various complex underlying factors. Common contributing factors may include psychological conditions such as severe depression, mental disorders, or postpartum depression that impair a mother's ability to think rationally. Economic factors are also significant, including the pressures of poverty, difficulties in meeting basic living needs, or fear of being unable to raise a child, which can become major triggers. Social and environmental factors, such as social stigma toward pregnancy outside of marriage or pressure from family and society, also play a role. Family relationship factors may further influence the situation, including domestic violence, lack of support from a partner, or disharmonious relationships. These factors can give rise to certain psychological conditions that affect a mother's ability to distinguish between right and wrong, thereby creating a dilemma in determining the fairest form of criminal liability.

In the Indonesian Criminal Code (the former KUHP), murder is regulated from Article 338 to Article 340, while the criminal offense of infanticide committed by a biological mother is specifically regulated under Articles 341 and 342 of the KUHP. Article 341 of the KUHP governs the killing of a child by the mother at the time of or shortly after childbirth due to fear that the birth would be discovered. Article 342 of the KUHP regulates the killing of a child by the mother with prior planning. This special regulation indicates that the legislators have taken into account the psychological condition of the mother at the time of childbirth, resulting in lighter criminal sanctions compared to ordinary murder. This constitutes a form of recognition of special circumstances (*lex specialis*) in the context of criminal liability. Along with the development of the times, the social, cultural, and moral values of Indonesian society have changed significantly, while many provisions in the former Criminal Code (KUHP) are considered no longer relevant to present-day conditions (Widyaastuty et al.). The Government of Indonesia carried out the codification of National Criminal Law through Law Number 1 of 2023 concerning the Criminal Code (the new KUHP), which was promulgated on January 2, 2023. This new Criminal Code marks a historic milestone in the reform of criminal law in Indonesia, as it not only replaces the colonial-era Criminal Code but also introduces a legal paradigm that is more humanistic, just, and oriented toward the protection of human rights.

In the new Criminal Code (KUHP), the provisions concerning the criminal offense of murder and infanticide committed by a biological mother have undergone revisions in terms of the formulation of offenses, the forms of culpability, and the regulation of sanctions. The new KUHP seeks to adapt to developments in criminal psychology and to take into account the special conditions of offenders, including women experiencing psychological pressure. Accordingly, there is a possibility of changes in how the law views the criminal liability of mothers who commit the killing of their children compared to the former KUHP. A comparison between these two criminal law systems is therefore important to understand the shift in paradigm in determining criminal liability and the imposition of sanctions on perpetrators of child murder by biological mothers. Through this comparative study, it can be analyzed whether the new KUHP provides legal protection that is more just, humane, and consistent with the principles of restorative justice than the former KUHP (Gea). Based on the explanation above, it is clear that the issue of child murder committed by a biological mother is not merely a legal problem, but also a complex social, psychological, and moral issue. Therefore, this research is important to be conducted in order to comprehensively analyze how criminal liability for such perpetrators is regulated under the former Criminal Code (KUHP) and the new Criminal

Code, as well as how the development of National Criminal Law seeks to present balanced justice between law enforcement and humanitarian considerations.

LITERATURE REVIEW

Criminal liability refers to a person's capacity to be held legally responsible for a criminal act they have committed, which can only be imposed when there is fault in the form of intent or negligence. Punishment is not based solely on the unlawful act itself, but also on the mental condition of the perpetrator at the time the act was committed. Therefore, a person cannot be punished if they lack the capacity for responsibility, such as due to mental disorders or severe psychological pressure. In cases of child murder committed by a biological mother, this aspect is crucial because the psychological condition following childbirth can affect the element of culpability of the perpetrator (Haifa and Syaafi). Murder is an act that intentionally takes the life of another person and is classified as a crime against life as regulated in Chapter XIX of Book II of the Criminal Code (KUHP). The main elements of murder consist of an act that causes death and the intent of the perpetrator directed toward that result. Thus, the criminal offense of murder requires a causal link between the perpetrator's act and the victim's death, accompanied by the perpetrator's intent or will.

Infanticide committed by a biological mother is a criminal offense with special characteristics because it is carried out under particular conditions, especially those related to the mother's physical and psychological state after childbirth. In the former Criminal Code (KUHP), this act is regulated under Articles 341 and 342, which distinguish between unpremeditated and premeditated killing. This special regulation indicates that criminal law takes into account the mother's psychological pressure, such as fear of being discovered to have given birth, as a factor influencing her actions. The criminal liability of a mother who kills her child must be assessed by taking into account the perpetrator's capacity for responsibility as regulated in Article 44 of the former Criminal Code (KUHP) and Article 54 of Law No. 1 of 2023 (Ida and Suryawati). This assessment includes the mother's mental condition at the time the act was committed, including the presence of depression, panic, or severe psychological pressure. The provisions of Articles 341 and 342 of the KUHP indicate that the law provides special treatment for mothers as perpetrators by considering their psychological condition, resulting in lighter criminal sanctions compared to ordinary murder.

METHOD

This study is a normative legal research that employs a normative juridical approach, which views law as a set of written norms that are legally binding and serve as the basis for resolving legal issues. This approach emphasizes the study of statutory regulations, legal principles, legal theories, and expert doctrines related to the main issues of the research. The study focuses on analyzing positive law provisions regarding criminal liability for perpetrators of child murder committed by a biological mother, as regulated in the former Criminal Code (KUHP), the new Criminal Code under Law Number 1 of 2023, as well as relevant court decisions, particularly Decision Number 388/Pid.Sus/2024/PN Mdn. The types of data used consist of primary legal materials and secondary legal materials. Primary legal materials include statutory regulations and court decisions, while secondary legal materials consist of legal textbooks, scholarly journals, academic works, and legal articles related to the research topic. Data collection was conducted through library research by reviewing and examining various relevant legal literatures. Furthermore, the collected data were analyzed qualitatively by organizing, interpreting, and systematically describing the legal materials in order to comprehensively address the research problems.

RESULTS AND DISCUSSION

Forms of Criminal Liability for Biological Mothers Who Commit Murder of Their Child Viewed from the Elements of Fault (Mens Rea) and Capacity for Responsibility (Toerekeningsvatbaarheid) in Indonesian Criminal Law

In Indonesian criminal law, criminal liability is based not only on the commission of a prohibited act but also on the fulfillment of subjective elements, namely the perpetrator's fault (mens rea) and the perpetrator's capacity to be held responsible psychologically (toerekeningsvatbaarheid). The principle of "geen straf zonder schuld" or "no punishment without fault" emphasizes that the mental element of the perpetrator must be present in order to impose a criminal penalty. This element includes the mental state of the perpetrator at the time the criminal act was committed, demonstrating either intent (dolus) or negligence (culpa), in accordance with general criminal law doctrine.

The form of criminal liability for a biological mother who commits the murder of her child examines how criminal responsibility is established and imposed on the mother based on the elements of fault and capacity for responsibility, with the analysis grounded in Indonesian criminal law, including the former Criminal Code under Law No. 1 of 1946 and the new Criminal Code under Law No. 1 of 2023. This study is important because, although both legal regimes are part of Indonesia's positive law, there are differences in the normative approach to understanding fault and the capacity for responsibility. The element of fault (*mens rea*) is an essential part of criminal liability because it reflects the mental state of the perpetrator at the time the act was committed. In the context of child murder by a biological mother, judges must assess whether the perpetrator had malicious intent or was aware that her actions would result in fatal consequences for her child. This intent includes knowledge of the act being carried out and the will to bring about that consequence through her actions. To ensure justice for the child, where justice aims to create a balance of rights and obligations so that every person is treated properly, equally, and with dignity (Fikri et al.).

In the former Criminal Code (KUHP), criminal liability is implicitly based on the principle of *geen straf zonder schuld*, even though this principle is not explicitly stated in the main body of the law. This principle is reflected in the requirement of intent or negligence in the formulation of offenses, including the criminal act of child murder by a biological mother as regulated in Article 341 of the KUHP. The use of the phrase "intentionally" indicates that the legislators required the presence of fault in the form of the perpetrator's will and awareness of the consequences of their actions, namely the loss of the child's life. However, the intent in Article 341 of the KUHP cannot be separated from the specific motive of fear that others would discover that the perpetrator had given birth. This motive indicates that even in the former KUHP, Indonesian criminal law recognized the existence of an abnormal mental state as the background for the act. Nevertheless, the former KUHP still framed intent in a relatively formalistic manner, meaning that as long as the perpetrator knew and willed the consequence, the element of fault was considered fulfilled, without further explanation regarding the quality or nature of that intent.

Unlike the former KUHP, the new KUHP (Law No. 1 of 2023) explicitly affirms the principle of fault in the First Book by stating that a criminal penalty can only be imposed if there is fault on the part of the perpetrator. This clarification implies that intent is no longer understood merely as the will to bring about a consequence, but must be assessed contextually by taking into account the personal and psychological condition of the perpetrator at the time the act was committed. In the context of child murder by a biological mother, this allows for a more in-depth evaluation of the form and intensity of intent, including whether the intent was formed under conditions of severe psychological pressure. This also aligns with the regulation of abortion in Indonesia, which is considered ambiguous due to conflicts between the KUHP and the Health Law, deemed ineffective, widening gaps in access to services, and necessitating a policy shift from a punitive approach to one based on public health, human rights, and gender justice (Gultom et al.).

In addition to the element of fault, criminal liability also requires the capacity for responsibility, *toerekeningsvatbaarheid*. In the former KUHP, the capacity for responsibility is regulated negatively through Article 44, which emphasizes mental conditions that are defective from birth or impaired due to illness as grounds for exemption from criminal liability. This provision positions the capacity for responsibility as an absolute boundary determining whether a person can be punished or not, making the assessment dichotomous, either capable or incapable of responsibility. In practice, this approach under the former KUHP often created difficulties when the perpetrator, particularly a biological mother in cases of child murder, was in a mental state that was not entirely normal but also did not meet the criteria for a mental disorder as defined in Article 44. As a result, criminal liability was often imposed in full, even when significant psychological disturbances were present.

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punishment imposed (Muladi and Arief). Thus, the capacity for responsibility is no longer understood in a black-and-white manner but as a spectrum that must be assessed concretely. In cases where a mother kills her biological child, criminal liability involves two main analyses: whether the element of mens rea is fulfilled, meaning that intent or deliberation is present in the perpetrator, and whether the perpetrator has the capacity for responsibility psychologically. If both elements are fulfilled, a criminal penalty can be imposed in accordance with the KUHP provisions for the crime of murder. Conversely, if the capacity for responsibility is absent due to mental disorder, the perpetrator may be exempt from formal criminal liability or directed toward treatment measures. In my view, criminal liability for a biological mother who commits the murder of her child cannot be equated directly with perpetrators of murder in general. The element of fault, mens rea, is indeed the primary basis for determining the existence of criminal liability, but the assessment must be conducted carefully by taking into account the mental and psychological condition of the perpetrator at the time of the act. In many cases, the mother is under severe mental pressure, such as a mental disorder or postpartum condition, which affects her capacity for responsibility, toerekeningsvatbaarheid. Therefore, in my opinion, punishment is only appropriate if it is proven that the perpetrator was truly able to understand and control her actions.

Differences in Regulation and Sentencing Approaches for the Crime of Child Murder by a Biological Mother in the Former KUHP Law No. 1 of 1946 and the New KUHP Law No. 1 of 2023

This section focuses on the differences in normative regulation and sentencing approaches for the crime of child murder by a biological mother between the former KUHP and the new KUHP. In the former KUHP, child murder by a biological mother is specifically regulated in Article 341, with a lighter penalty compared to ordinary murder. This regulation indicates that the former KUHP recognized a differentiation of offenses based on the perpetrator's condition, yet its approach to sentencing remained retributive. Imprisonment remained the main instrument, and the purpose of punishment was primarily directed toward retribution for the unlawful act, albeit with a reduced penalty (Soesilo).

The legal basis for regulating the crime of child murder by a biological mother in the former KUHP is found in Articles 341 and 342, which govern the act of a mother who intentionally takes the life of her own child at the time of or shortly after childbirth, motivated by fear that her actions would be discovered by others (Sekoh). Article 341 threatens the perpetrator with imprisonment for a maximum of seven years. Meanwhile, if the act is carried out with prior planning, as regulated in Article 342 of the KUHP, the penalty is heavier, with imprisonment for a maximum of nine years. This provision in the former KUHP is known as *kinderdoodslag*.

The former KUHP (Law No. 1 of 1946) emphasized a traditional retributive approach, focusing on the imposition of punishment as a response to the violation of legal norms. The Criminal Code indicates that the act of a mother killing her child is considered a crime against life that must be met with a significant prison sentence as a form of retribution and prevention. The former KUHP also did not explicitly formulate the objectives of punishment, so sentencing tended to be oriented toward formal legal certainty. In the context of child murder by a biological mother, this resulted in limited discretion for judges to consider non-legal factors in depth, such as the psychological condition of the perpetrator and the social background of the act.

In contrast, the new KUHP brings a paradigm shift by explicitly formulating the objectives of punishment in the First Book. The new KUHP positions sentencing as a means to protect society, restore balance, and rehabilitate the offender, rather than merely as retribution (Arief). This approach directly impacts how the state responds to the crime of child murder by a biological mother. In the new KUHP, regulations on offenses against life still recognize the seriousness of the act, but the approach to sentencing is more flexible and contextual. Judges are given broader authority to impose penalties that are proportional by taking into account the personal condition of the perpetrator, including their mental state and the circumstances underlying the act. Thus, sentencing is no longer solely oriented toward the severity of the consequence but also considers the level of fault and the capacity for responsibility of the perpetrator.

With the enactment of the new KUHP (Law No. 1 of 2023), the substantive regulation concerning child murder by a biological mother essentially remains, but the wording and structure of the articles have been simplified. Article 460 paragraph (1) of the new KUHP regulates a matter similar to Article 341 of the former KUHP, stating that a mother who takes the life of her child out of fear that the birth will be discovered by others is threatened with imprisonment for a maximum of seven years. Both Article 341 of the former KUHP and Article 460 paragraph (1) of the new KUHP regulate the crime of child murder by a biological mother due to fear of being discovered to have given birth, but they differ in the formulation of the norms, the structure of the articles, and the legal phrasing used (Ramdani). The changes in phrasing and structure are intended to clarify the elements of the offense without altering

the main substance of the punishment. In principle, Article 341 of the former KUHP and Article 460 paragraph (1) of the new KUHP do not undergo substantive changes, as the differences lie only in the improved wording and sentence structure to clarify the legal norm, while the penalty remains the same, namely imprisonment for a maximum of seven years.

From a legal element perspective, the new KUHP eliminates the phrase “intentionally” that was explicitly stated in the former KUHP, but the element of intent is still considered implied in the act of taking a life. This change reflects the tendency of the new KUHP to use more concise and systematic legal language without diminishing the essence of criminal liability. Although the maximum prison sentence remains the same at seven years, the new KUHP exists within the context of a broader shift in the penal system, adopting a more humanistic and restorative law enforcement paradigm, allowing space for alternative approaches such as supervisory sanctions and restorative justice through mediation for certain criminal acts (Permadi). This concept is reflected in the principles of the KUHP, which promote victim recovery and offender reintegration as part of modern penal policy. The difference between the former KUHP and the new KUHP in this context demonstrates a shift from a retributive approach to punishment toward a corrective and humanistic approach. This shift reflects the development of Indonesian criminal law, which increasingly emphasizes a balance between legal certainty, substantive justice, and the protection of human rights.

The new KUHP is part of the national criminal law reform aimed at updating Indonesia’s criminal law system to align with the developments of modern law. Although, substantively, the regulation regarding the crime of child murder by a biological mother has not undergone significant changes compared to the provisions in the former KUHP, there is an emphasis on a more systematic formulation of norms and clearer legal language (Oktavira). In addition, the sentencing system in the new KUHP is designed to be more responsive to the characteristics of the act and the social conditions of society, thereby influencing the judge’s considerations in delivering a verdict. The difference between the former KUHP and the new KUHP in this context shows a shift from a retributive approach to punishment toward a corrective and humanistic approach. This shift reflects the development of Indonesian criminal law, which increasingly emphasizes a balance between legal certainty, substantive justice, and the protection of human rights.

Although the primary penalty for child murder by a biological mother in the former KUHP and the new KUHP is relatively comparable (still imprisonment for up to seven years), the main differences lie in the wording of the articles, the structure of their organization, and the more modern and humanistic approach to sentencing in the new KUHP. In other words, the new KUHP maintains the substance of criminal liability while aligning its legal formulation with a more flexible and restorative criminal justice paradigm in accordance with the demands of contemporary legal developments. In my view, the differences in regulation between the former KUHP and the new KUHP (Law No. 1 of 2023) reflect the development of Indonesian criminal law thinking toward a more humane and just approach. The former KUHP tended to place a biological mother who commits child murder within a rigid sentencing framework, focusing primarily on the act itself. In contrast, the new KUHP provides judges with broader discretion to consider the background, psychological condition, and special circumstances surrounding the act. In my opinion, this is a positive step because it allows for the application of more proportional sentencing without neglecting the protection of the child’s right to life.

CONCLUSION

Criminal liability for a biological mother who commits the murder of her child under Indonesian criminal law is based on the fulfillment of the elements of fault (*mens rea*) and the capacity for responsibility (*toerekeningsvatbaarheid*). In the former KUHP, fault was understood in a relatively formalistic manner through the element of intent, as reflected in Article 341 of the KUHP, while the capacity for responsibility was assessed dichotomously under Article 44 of the KUHP. In contrast, the new KUHP explicitly affirms the principle of fault and views intent and the capacity for responsibility in a more contextual and individualized manner, taking into account the psychological condition of the perpetrator as well as the purpose of sentencing. Thus, in cases where a biological mother kills her child, judges not only assess the presence or absence of the perpetrator’s intent and awareness but also the degree of her capacity for responsibility, allowing sentencing to be carried out in a more fair, proportional, and humane manner in accordance with the development of Indonesian criminal law. The main difference in the regulation and sentencing approach for the crime of child murder by a biological mother between the former KUHP and the new KUHP lies in the sentencing paradigm. The former KUHP specifically regulated this offense through Articles 341 and 342 with a retributive approach that emphasized imprisonment as a form of retribution, while providing limited scope to consider the psychological and social conditions of the perpetrator. In contrast, the new KUHP, through Article 460 paragraph (1), essentially maintains the same substance and penalty,

but presents a more systematic formulation of norms, clearer legal language, and a sentencing approach that is more humanistic, contextual, and flexible. This shift reflects the reform of Indonesian criminal law, which emphasizes a balance between legal certainty, substantive justice, and the protection of human rights.

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