

# Degrading Penal Populism Through Alternative Sanctions in The Indonesian Penal Code

Ahwan<sup>1</sup>, Ika Yuliana Susilawati<sup>1</sup>

<sup>1</sup> Universitas Mataram, Indonesia

---

## ARTICLE INFO

### *Keywords:*

Penal Populism;  
Alternative Sanctions;  
New Penal Code;  
Purposes of Punishment;  
Sentencing Guidelines

---

### *Article history:*

Received 2025-04-11  
Revised 2026-05-15  
Accepted 2026-06-19

---

## ABSTRACT

The enactment of the Penal Code (Law No. 1/2023) marks a historic shift in national penal policy, revealing a complex dualism between retributive penal populism and modern sentencing moderation. This paper aims to analyze the structure of penal policy within the Penal Code to examine how alternative sanctions are normatively designed to control, limit, and degrade the expansive destructive power of penal populism. Employing a doctrinal legal research method with legislative, conceptual, and legal-historical approaches, this study examines how the New Penal Code exhibits a “Janus-faced penal policy.” On one hand, this codification accommodates public punitive sentiment through the retention of the death penalty, the expansion of overcriminalization in public spaces, and intervention in the private sphere. On the other hand, however, it institutionalizes balancing mechanisms through the incorporation of new alternative sanctions, namely probation and community service. Guided by the “Principle of Balance” enshrined in the sentencing guidelines (Articles 51–54), these alternative sanctions function as a safety valve. This study concludes that the convergence of these two opposing paradigms is not merely a forced pragmatic political compromise, but rather a systemic normative design intended to curb the public’s punitive zeal while simultaneously preventing the judicial system from collapsing due to prison overcrowding. The success of this de-escalation of penal populism ultimately rests on the standardization of judicial risk assessment tools and a progressive shift in the mindset of law enforcement officials.

*This is an open access article under the [CC BY](https://creativecommons.org/licenses/by/4.0/) license.*



---

### **Corresponding Author:**

Ahwan

Universitas Mataram, Indonesia; [ahwan@staff.unram.ac.id](mailto:ahwan@staff.unram.ac.id)

---

## 1. INTRODUCTION

The enactment of the new Indonesian Penal Code (Law No. 1/2023) has been widely hailed as the dawn of the decolonization of Indonesian criminal law, a systematic effort to sever the ties with the colonial Dutch heritage of the *Wetboek van Strafrecht* (WvS). However, beneath this romanticized nationalist narrative, the text of the national criminal law codification, which is now fully implemented,

reveals a portrait of doctrinal ambivalence. Contemporary Indonesian criminal law institutions appear to stand at a crossroads between maintaining an aggressive retributive character and adopting modern penal moderation. The formative policies within the New Penal Code exhibit what critical penology conceptualizes as a *Janus-faced penal policy* (Barker 2012; Dagan 2020). On one hand, the state maintains a firm allegiance to the rationale of penal populism through the retention of the death penalty and the continued dominance of lengthy prison sentences. Conversely, the incorporation of novel sanctions, such as probationary sentences (*pidana pengawasan*) and community service (*pidana kerja sosial*) as alternative sanctions, signals a deceleration of the hegemony of custodial sentences.

This paradigmatic clash is not an accidental legislative oversight, but rather a deliberate criminal policy design (*strafrechtsbeleid*) that demands a critical doctrinal reading to uncover its ideological roots. Penal populism, as genealogically identified by John Pratt, represents a condition where the formulation of criminal law gradually sidelines the scientific rationality of academics or the technocratic calculations of law enforcement, becoming instead driven by public sentiment, electoral anxieties, and popular political discourse (Pratt 2007). The dominant assumption of this concept refers to a moral alliance between politicians and the “public voice” demanding harsher punishments (the punitive turn) as an instantaneous instrument to resolve social pathologies (Pratt 2007). In Indonesia, the manifestation of this penal populism, which exploits mass sentiment, is clearly documented in official legislative drafts, particularly the Academic Draft of the Penal Code Bill (Naskah Akademik Rancangan Undang-Undang Hukum Pidana—NA RUU HP). The document explicitly states that the formulation of national criminal law cannot disregard the living values of justice within Indonesian society, which sociologically remain retributive, communal, and moralistic (Badan Pembinaan Hukum Nasional Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia 2015). It is this punitive sociological demand that is exploited during the codification process to legitimize expansive criminalization and maintain draconian punishments.

The political accommodation of these public punitive demands carries perilous logical consequences for law enforcement institutions. If penal populism is left to hegemonize the codification space unchecked, the Indonesian criminal justice system will verge on collapse due to a correctional capacity crisis (*overcrowding*). Recognizing this threat of systemic paralysis, the urgency to examine the position of alternative sanctions as a salvaging instrument becomes inevitable. As the antithesis to penal populism, alternative sanctions are rooted in modern utilitarianism, restorative justice, and human rights discourse, positioning imprisonment as an *ultimum remedium* (last resort) due to its destructive nature (*carceral harm*). Julian V. Roberts et al. remind us that the essence of alternative sanctions is to curb the expansion of the penal network (the net-widening effect) by providing space for the moderation of offenders who pose no danger to society (Roberts et al. 2003). The presence of this concept of moderation triggers a fundamental theoretical question: how can two diametrically opposed concepts—one moving toward harsher sanctions for public punitive satisfaction, and the other toward leniency for humanity—coexist within the same house of codification?

To answer this paradox, attention must be directed toward how the statutory text literally formulates this dualism of sanctions. One instantiation of this conceptual clash is manifested in the dualism of punishment types under Article 65 of the Penal Code, where the state still retains the death penalty as a special punishment (Article 67 of the New Penal Code). The gatekeeper of this populist rationale is encapsulated in the general explanation of the NA RUU HP, which asserts that the absolute abolition of the death penalty would injure the transcendental philosophy of justice held by the Indonesian people (Badan Pembinaan Hukum Nasional Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia 2015). This penal populism regime, anchored in transcendental morality, operates alongside the expansion of criminalization over moral and ideological offenses, leading to the encroachment of criminal law into the private sphere (Simbolon 2025).

The legal doctrine employed by the drafters to bridge this diametral clash is the “Idea of Balance” (*Ide Keseimbangan*). The tangible manifestation of this idea of balance is embedded in Chapter II regarding Sentencing Guidelines, specifically Articles 51 through 54 of the New Penal Code. These

articles act as a safety valve, instructing judges to refrain from imposing prison sentences if other more beneficial alternative sanctions are available, while mandating consideration of factors such as forgiveness, remorse, and the social impact of the offense. However, given that the implementation of the New Penal Code is still in its infancy in this year of 2026, conducting an empirical evaluation of the effectiveness of alternative sanctions in courts would be a premature and speculative academic endeavor, as law enforcement realities have not yet yielded comprehensive statistical data. Therefore, the urgent research gap to fill at present is not to measure field effectiveness, but to examine the aspects of doctrinal coherence and the criminal policy rationality behind this dual orientation. We must critically question: is the convergence of penal populism and alternative sanctions in the New Penal Code a form of sophisticated systemic harmonization, or merely a forced pragmatic compromise to secure a political consensus for codification?

Departing from these doctrinal problematics, this study focuses on a criminal law policy analysis to dismantle the anatomy of the paradox within the body of the Penal Code. This focus is vital to ensure the paper remains strictly within the corridors of penal policy studies. This paper does not scrutinize whether alternative sanctions effectively reduce crime rates in practice, but instead dissects how the normative architecture of alternative sanctions is designed to domesticate, limit, and control the expansive destructiveness of penal populism. A case study of this national criminal law architecture is crucial for mapping the future direction of penology in Indonesia, ensuring that future legal dynamics do not become trapped in either punitive totalitarianism or a utopian vacuum.

## 2. METHODS

This study is doctrinal legal research, which is classically identified as normative legal research (Fuady 2018). This approach was selected considering that the primary focus of this study is to dissect, analyze, and examine the internal coherence and rationality of criminal policy (*strafrechtsbeleid*) regarding the convergence of two conflicting paradigmatic currents within the codification of the new Indonesian Penal Code (Law No. 1/2023). This study refrains from conducting a premature empirical evaluation of sanction effectiveness, focusing instead on a textual critique of alternative sanctions as instruments to restrict penal populism. To sharply dissect this normative paradox, this study employs three analytical approaches, namely *the statutory approach*, *the conceptual approach*, and *the historical approach* (Marzuki 2016). *The statutory approach* is used to systematically examine the articles within the New Penal Code, particularly those concerning sentencing guidelines (Articles 51–54), the modification of the death penalty (Article 67, Article 100), and alternative sanctions such as probationary sentences (Article 75) and community service (Article 85). Meanwhile, *the conceptual approach* is utilized to dissect the anatomy of penal populism by referencing the perspectives of John Pratt, Anthony Bottoms, and Malcolm Dean, which are then juxtaposed with alternative sentencing doctrines and the "Idea of Balance" (*ide keseimbangan*). Furthermore, the historical approach is employed to trace the genealogy of the punitive turn within national legal documents, such as the Academic Draft of the Criminal Code Bill (NA RUU HP) and historical public perception survey data that have shaped the retributive characteristics of Indonesian criminal law. The legal materials utilized include primary legal materials, namely Law No. 1/2023 on the Penal Code, relevant Constitutional Court Decisions, and official legislative academic drafts. Secondary legal materials consist of penology textbooks, national and international scientific journals, and research reports from legal research institutes (Amiruddin and Asikin 2014). All collected legal materials are subsequently analyzed using a descriptive-qualitative method through deductive syllogism reasoning to draw coherent, focused, and constructive scientific conclusions regarding the future of penology in Indonesia.

### 3. FINDINGS AND DISCUSSION

#### 3.1 Penal Populism and Alternative Sanctions within Doctrinal Discourse

To clearly dissect the characteristics of this *Janus-faced policy*, the genealogy of the concept of penal populism must be situated within an established conceptual framework. In Malcolm Dean's view, penal populism emerges as a concept that labels the activities of politicians who begin utilizing the issue of criminality as a political tool to garner votes, a momentum that is strongly intertwined with the influence of mass media in shaping public opinion (Dean 2012). Sociologically, this concept illustrates that the public possesses a high thirst for harsh punishments for wrongdoers. Aligned with Dean, the term penal populism—often referred to as “populist punitiveness”—was first introduced by Anthony Bottoms in 1995 to describe the phenomenon of politicians exploiting what they perceive as public demands for punishment to achieve electoral gains (DauryCesarFabriz1 2024; Dzur 2010; Pratt 2007). This concept refers to the enactment of harsh punitive policies that merely follow popular trends and mass anxieties, rather than being grounded in rational considerations or penological effectiveness (Anggara et al. 2019). Consequently, in practice, penal populism consistently prioritizes short-term political gains over substantive justice (Roberts et al. 2003), thereby birthing policies that appear to satisfy the public's punitive desires but remain sterile in resolving the root causes of social pathologies.

The phenomenon of public emotion dominating legal rationality is an anomaly when examined through the historical development of modern criminal law policy. Historically, the issue of law and order was not a partisan matter that could be politicized during the first seventy years of the twentieth century; there was a solid bipartisan consensus between politicians and legal experts during an era frequently coined as “penal modernism” (Dean 2012). However, since the collapse of the penal modernism era in the 1970s, a fundamental shift occurred when control over penal policy began migrating from professional bureaucracies and academics to politicians who relied heavily on public sentiment and the media (Pratt 2007). This phenomenon marked the fall of the “platonic guardians”—the legal experts and academics whose role was previously to isolate penal policy from the volatile waves of mass emotion—and replaced them with a penal discourse that is more emotional, symbolic, and irrational (Dzur 2010).

This transfer of authority from experts to the hands of popular political actors did not occur in a vacuum; rather, it was triggered by structural transformations in late-modern society. Various intersecting factors catalyzed the rise of this penal populism, including the erosion of public trust in modern governmental institutions and the heightening of ontological insecurity among late-modern citizens (Pratt 2007). In this climate of radical insecurity, mass media—particularly the press and novel information technologies—played a crucial role by framing crime as a terrifyingly omnipresent threat, despite statistical evidence showing that crime rates in many Western nations were actually declining (Dean 2012). Politicians subsequently responded to this media-manufactured anxiety with “tough on crime” rhetoric to provide a deceptive, symbolic certainty amid the disintegration of social and moral cohesion (Pratt 2007).

The reactive responses of politicians to public anxiety, in turn, generated a new global and repressive standardization of penal policy. The proliferation of penal populism gave birth to various iconic policies that spread globally, such as “three strikes” laws, “zero tolerance” policies, and mandatory sentencing (Shammas 2016). These policies are often highly reactive to specific tragic cases that are hyperbolically publicized by the media, causing criminal law reforms to be rushed through without deep consultation with experts (Roberts et al. 2003). The tangible impact of this global trend is a prison population explosion or mass incarceration, which in countries like the United States and the United Kingdom has reached historically unprecedented levels, triggering a new humanitarian crisis in the form of correctional overcrowding (Copson 2014).

The crisis of prison overcrowding resulting from populist policies has sparked theoretical resistance movements seeking to redefine the position of the public in lawmaking. This fact introduces a new synthesis within the study of penal populism, as if isolating policy formulation by involving only

legal intellectuals were the most compatible resistance movement. Conversely, Lynne Copson rejects this legal elite isolation; in her view, expanding the arena for public engagement through deliberative mechanisms is the democratic solution that ought to be reinforced (Copson 2014). The critique by Copson and other scholars against penal populism highlights that these punitive policies are often predicated on the erroneous assumption that the public is inherently and perpetually thirsty for harsh punishments. Empirical research demonstrates that when the public is provided with comprehensive legal information and the actual facts of a case, they tend to be less punitive compared to the results of simplistic, biased opinion polls (Green 2014).

Furthermore, the rejection of penal populism has also birthed the doctrine of “penal elitism”, which argues that criminal policy authority must be returned absolutely to experts to evade the “tyranny of the majority”, although this elitist stance has also faced criticism for restricting the democratic participation of citizens in determining their own legal destiny (Shammas 2016). Nonetheless, behind these theoretical debates, the dominant understanding remains that penal populism is a manipulative instrument deployed by politicians to exploit societal fears in order to legitimize hyperbolic carceral policies (Gelb 2008).

The relevance and destructive force of this political manipulation of penal policy are no longer confined to Western nations but have evolved into a global phenomenon permeating other jurisdictions. The currency of penal populism remains highly striking, as evidenced by its application in various developing nations such as Indonesia and Brazil (DauryCesarFabrizz1 2024). In Indonesia, this phenomenon is characterized by the retention of extreme punitive policies such as the death penalty, overcriminalization within the Penal Code, and the practice of extra-judicial killings to project an illusion of security. Meanwhile, in Brazil, penal populism continues to be utilized as a crime control ideology that politicizes legal issues to garner popular support. The most contemporary manifestation of this populism also leverages social media algorithms and “reality TV” programs that increasingly blur the boundaries between legal facts and entertainment, thereby reinforcing the public perception that citizen security can only be achieved through mass incarceration (Roberts et al. 2003).

To understand why public perception is so easily manipulated by media broadcasts and political interests, we must dissect the validity of the data often claimed to represent the “will of the people”. An intriguing fact in practice reveals that the public opinion serving as the bedrock for policy formulation is fundamentally not pure, but rather a biased construction. Aggregate figures utilized in opinion polls suffer from high levels of bias due to political intervention in statistical data collection, which exacerbates information polarization. Research conducted by Liz Turner indicates that public participation is occasionally manipulated to extremes by elites, rendering the concept of a “hypothetical public” overly abstract and unreflective of actual sociological reality. Consequently, active public engagement, formulated in Turner's conception as the “deliberative method”, must become the mainstream mechanism to gather rational and objective public aspirations (Turner 2014).

When this biased public opinion data is forced into statutory formulation, the destruction of the correctional system becomes a terrifying sociological inevitability. The impact of penal populism is never far removed from the crises of sentencing, and the United States stands as the epicenter with the most palpable consequences of this policy. Over a 40-year span of exploiting penal populism, the prison population in the United States skyrocketed by 705 percent, from nearly 175,000 inmates in 1972 to 1.4 million inmates as of January 1, 2012. With a ratio of more than one in every 104 American adults behind bars, the United States held the record for the highest incarceration rate in the world, at 716 per 100,000 residents, with a fiscal burden reaching \$53.5 billion to fund the correctional system in fiscal year 2012 (Shames 2014).

The financial and humanitarian failures resulting from mass incarceration in the United States served as a turning point for legal thinkers to seek a counter-paradigm that is more humanistic and efficient. The derivative consequences of penal populism—whether in the form of mass incarceration or increased budget investments in correctional facilities—have proven ineffective at enhancing security, a fact underscored by high recidivism rates that hover around 40%. This destructive empirical

reality forms the foundational basis for ideas regarding alternative sanctions. This concept emerged as a logical response to remedy the impacts of the excessive use of imprisonment. The structural derivation of this school of thought does not merely touch upon the issue of escalating budgetary costs, but also references the phenomenology of inmates, which reveals that carceral experiences are frequently negative, stigmatizing, and damaging to the human personality (Ashworth 1992). This awakening of penological consciousness led the use of alternative sanctions to mainstream in several advanced jurisdictions, such as Minnesota, Canada, Australia, and the United Kingdom during the 1980s and 1990s through gradual sentencing policy reforms, one form of intervention being the reduction of maximum prison sentences.

Although the urgency for alternative sanctions is supported by valid penological data, the policy transition process has never been smooth, as it continuously collides with the thick wall of penal populism. In research conducted by Ashworth, it was revealed that the decision to reform sentencing structures from carceral to alternative is not something that easily garners political majority support. This policy obstacle synthesis is evident even in countries like the United States where overcrowding has reached critical thresholds, yet political elites remain reluctant to pivot to alternative sanctions. This fact demonstrates yet again that penal populism is deeply rooted in the minds of politicians as the premier instant response to crime, despite factual conditions showing that crime victims and the wider public often favor constructive and restitutive measures (Ashworth 1992). Amid these political tensions, legal reformers successfully introduced alternative sanctions or alternative sentencing into a variety of practices, such as drug rehabilitation centers, home confinement, community service (Hoelter 2009), corporal punishment, shaming sanctions, parole, and financial sanctions such as fines and restitution (Newton 2010).

Theoretically, if a legal infraction is deemed more compatible with alternative sanctions, this non-custodial sentencing model is fundamentally far superior due to its multidimensional advantages. Apart from being less intrusive to the offender's fundamental liberty, alternative sanctions do not fracture social relations or the offender's familial responsibilities, and most importantly, they are far less costly in terms of state operational expenditures. The superiority of alternative sanctions is also bolstered by public safety arguments; for if offenders are supervised within the community through consistent, evidence-based practices to reduce recidivism, community sentencing actually protects the public and future victims more effectively from the risks of reoffending (Warren 2015).

However, the path toward mainstreaming alternative punishments within modern criminal law is not devoid of theoretical challenges and social resistance. These challenges simultaneously expose internal weaknesses and critiques regarding the efficacy of alternative sanctions themselves when confronted with mass psychology. From a public perspective, Dan M. Kahan posits that punishment must not be understood merely as a mechanical instrument of crime deterrence, but must be capable of reflecting a proportionate moral condemnation from society toward a legal breach. Punishment, in its expressive function, must be able to articulate collective moral outrage. Conversely, in conventional alternative punishments, this moral expression appears ambiguous. For instance, the payment of a fine, when utilized as a substitute for imprisonment, is frequently perceived by the public as a erroneous message that society forgives crime provided the offender has the financial means. The same is observed in community service, where certain segments of society fail to perceive a sufficient burden of suffering to signal that the offender is truly being morally censured (Kahan 1996).

It is crucial to note that Kahan's critique does not aim to dismantle the existence of alternative sentencing, but is rather an effort to deconstruct alternative sanctions that are overly conventional and monotonous. In the subsequent part of his thesis, Kahan instead proposes the concept of "shaming" as a modern form of alternative punishment deemed capable of accurately expressing public moral condemnation without incarcerating the offender (Kahan 1996). Extending Kahan's analysis, public resistance toward alternative sanctions fundamentally stems from the failure of democratic politics to educate its citizens. Laypersons generally lack knowledge regarding the availability, feasibility, and efficacy of alternative sanctions; consequently, they become easy targets for pragmatic politicians who

exploit their fear of crime by continuously pushing for harsher prison sentences. Therefore, the singular solution to overcome this obstacle is to engage in massive public education regarding the superiorities of alternative sanctions over imprisonment (Kahan 1996).

Scepticism toward alternative sanctions does not only affect the lay public but also permeates legislative policy-making arenas. Similar to Kahan, Warren reveals that one factor generating a reluctance to adopt alternative sentencing is high scepticism among policymakers that non-carceral punishments are incompatible for handling high-risk profile crimes. To a certain extent, this sceptical perception is well-founded, and within the architecture of the Indonesian Penal Code, alternative punishments are intentionally designed restrictively, applicable only to crimes within specific sentencing thresholds. However, this scepticism has been debunked by extensive contemporary scientific research showing that the implementation of evidence-based alternative punishments has proven effective in reducing recidivism rates by 10% to 20% (Warren 2015). This affirms that the successful utilization of alternative punishments is a systematic endeavour that cannot stop at merely listing sanction types within statutory texts, but relies heavily on the precision of data-driven implementation mechanisms in the field.

As an answer to the need for such precise and scientific implementation, modern states have begun adopting advanced assessment instruments within the judicial process. One method of alternative punishment implementation practiced widely in the United States is through risk assessment. This method, utilized extensively in the US, was born out of fundamental questions regarding the objective prerequisites and parameters to determine which subjects are eligible to receive alternative punishments. Legal reformers view this science-based risk analysis as a politically acceptable to the public and fiscally conservative way for the state to reduce mass incarceration, while simultaneously maintaining citizen safety without overstepping required boundaries (Lewis 2022). Furthermore, provisions for utilizing risk analysis should ideally be integrated with plea bargain mechanisms to expedite more meaningful resolutions (Metz 2020).

We can witness the institutionalization of this risk assessment in legal reforms at the state level in the United States. One state that employs strict risk assessment is Virginia, where the judiciary establishes specific eligibility measures to screen offenders. Empirical data indicates that in 2015, approximately 49% of offenders in Virginia were categorized as low-risk offenders, providing a scientific justification for judges to impose alternative sanctions. However, the report also notes a crucial finding: one of the primary reasons judges failed to divert low-risk offenders to community programs instead of prison was that the availability of supportive program facilities (such as drug rehabilitation centers or social institutions) was non-existent within the offender's home community (Monahan 2017). The entire theoretical and comparative exposition in this sub-discussion clearly demonstrates how the normative discourse and implementation realities of penal populism and alternative sentencing lock into one another, a dialectic that will serve as the primary analytical tool to dissect the legal characteristics within the new Indonesian Penal Code.

### **3.2 Penal Populism and Alternative Sentencing within the Penal Code**

The tension-filled paradigmatic intersection between penal populism and alternative sentencing, as observed on the global stage, is now tangibly manifested within the legal discourse accompanying the enactment of the National Penal Code. On one hand, public pressure influenced by penal populism is strongly recorded through a wave of criticism against the reduction of sentencing thresholds in the incorporation of core crimes, such as corruption, into the Penal Code. Indonesia Corruption Watch (ICW), for instance, fiercely criticized the government's perceived weakening commitment to corruption eradication within the formulation of Article 603 of the New Penal Code; this article replicates the substance of Article 2 paragraph (1) of the Anti-Corruption Law but reduces the minimum prison sentence from 4 years to 2 years, and lowers the minimum fine from IDR 200 million to Category II, which is equivalent to IDR 10 million (Indonesian Corruption Watch 2022).

This public resistance against the reduction of corruption sanctions demonstrates how deeply the punitive perspective is entrenched in our society, which views severe imprisonment as the sole mechanism of justice. The majority public view toward corruption, which aligns with the rationale of penal populism, found its legal stage in the judicial review petition submitted to the Constitutional Court under Case Number 28/PUU-XXIV/2026 on January 26, 2026, which specifically challenged the constitutionality of Articles 603 and 604 of the New Penal Code for failing to include the death penalty as part of the sanctions (Mahkamah Konstitusi 2026). The destructive impact of corruption on state finances and the governmental system has constructed a collective opinion that corruption, as an extraordinary crime, necessitates extraordinary measures. The manifestation of such extraordinary measures, in the populist public mind, is simplistically understood as an enthusiasm for imposing the death penalty. This phenomenon runs parallel to Dan M. Kahan's aforementioned thesis that severe and extreme punishments are deemed more capable of expressing the depth of public anger and moral condemnation toward a serious crime (Kahan 1996).

The legislature's accommodative stance toward these public punitive demands has become the primary entry point for the legalization of penal populism within our national codification. When examined from the perspective of critical penology, the policy to retain the existence of the death penalty within the New Penal Code represents a form of concession and a tangible manifestation of such penal populism pressures. Within the dichotomy of sentencing objectives adopted by the New Penal Code, the threat of the death penalty is intentionally maintained to accommodate the function of social defense and to prioritize the collective interest of the public (Badan Pembinaan Hukum Nasional Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia 2015). This regressive policy choice was adopted as a form of legitimization for the punitive stance of the majority of Indonesian society toward the death penalty, wherein survey data conducted by the Attorney General's Office in collaboration with the Faculty of Law, Universitas Diponegoro in 1981/1982 continues to serve as the primary reference for the Penal Code drafting team to demonstrate absolute public approval, as summarized in the following table:

**Table 1**

**Public Approval Rates on the Retention of the Death Penalty (1981/1982 Data)**

Response	LE	C	GA	I	Total	
					N	%
Approve	27	88	10	-	125	81.70
Disapprove	2	20	-	3	25	16.34
Others	1	2	-	-	3	1.96
Total	30	110	10	3	153	100%

Note: LE: Law Enforcers; C: Citizens; GA: Government Officials; I: Inmates.

Although these data indicate massive approval, modern penology reminds us that society's sociological perception of the death penalty is fundamentally dynamic and never influenced by a single variable. The characteristics of the crime, the profile of the offender, the background and motive, and the vulnerability of the victim are case-specific elements that heavily influence fluctuations in public opinion. This is evident in a recent comprehensive study on public views in Indonesia toward the death penalty conducted by Carolyn Hoyle and Diana Batchelor. The report illustrates that although initially more than two-thirds of respondents expressed support for retaining the death penalty because they believed the sanction effectively provided a deterrent effect (Batchelor 2021), this punitive stance shifted drastically when presented with alternative rational choices.

This dramatic shift was recorded when public support for execution plummeted to a mere 25% once respondents were offered an alternative sentencing option in the form of life imprisonment without parole. The level of support also dwindled to 38% when the death penalty was juxtaposed with specific case characteristics, such as robbery offenses that did not result in fatalities, or if the offenders

belonged to vulnerable groups and women (Batchelor 2021). The study by Hoyle and Batchelor uncovers the substantive reality that the high public punitive stance thus far has been caused by a lack of legal literacy, where only 2% of respondents truly understood the execution process and only 4% paid serious attention to the issue. This reality proves that public opinion survey data regarding law in Indonesia possesses a high potential for bias; yet unfortunately, this space of low-literacy bias is frequently exploited by political elites to generate populist legislative policies. Retaining the death penalty within the New Penal Code—despite being claimed as the highest point of compromise—is a clear confirmation of law succumbing to the currents of penal populism.

The symptom of overcriminalization resulting from the penetration of penal populism does not stop at the reduction of human life through the death penalty, but also extends to the reinstatement of offenses that restrict citizens' constitutional rights in the public sphere. Another facet of penal populism within the New Penal Code is clearly captured in the criminalization policy that stubbornly retains the offense of insulting the President and Vice President. Historically, this provision has undergone a very lengthy and exhaustive legal debate within the horizon of national criminal law, culminating in 2006 when the Constitutional Court issued Decision Number 013-022/PUU-IV/2006, which declared Articles 134, 136 bis, and 137 of the old Penal Code (WvS) unconstitutional and legally non-binding. However, to satisfy the political interests of the ruling class, the legislature bypassed these constitutional limitations by reviving the substance of the presidential insult offense in the New Penal Code, now encapsulated in Articles 218, 219, and 220, using the justifying argument that the offense has been modified into an absolute complaint-based offense (*delik aduan absolut*) and its sentencing weight has been reduced (Mahkamah Konstitusi Republik Indonesia 2006).

If dissected honestly, this justification by the legislature represents a denial of the Court's rationality. The argument of the New Penal Code drafters merely extracted a specific part of the dissenting opinion of one constitutional justice while disregarding the Court's *ratio decidendi*, which explicitly prohibits the exclusivity of legal addressees for the President and Vice President within a democratic constitutional state. If the objective were purely to protect individual reputations from defamation (Eddy O.S. Hiariej dan Topo Santoso 2025), such legal interests have honestly been perfectly accommodated through the formulation of the offense of insulting "public officials" in Article 154 of the New Penal Code. The maintenance of this exclusive article reflects a symptom of overcriminalization driven by a desire for power to unilaterally restrict freedom of expression. This phenomenon aligns with Nicola Lacey's theory, which states that overcriminalization is a product of macro-economic, social, and political power conspiracies that give birth to penal populism itself (Lacey 2019).

The aggressive expansion of criminal law as the legitimate offspring of penal populism subsequently moves beyond the boundaries of the public sphere and begins to invade the most intimate domains of citizens' personal lives. A tangible form of this expansion of punitive power can be observed in the institutionalization of the offenses of adultery and cohabitation (living together) regulated under Articles 411 through 413 of the New Penal Code. The formulation of these private offenses has triggered an intense discursive upheaval because the sociological reality of Indonesian society possesses non-uniform local moral standards. In communal regions like West Sumatra, the formulation of this offense, which is constructed as a complaint-based delict, is deemed too weak, prompting demands for unconditional total criminalization to preserve public moral purity. Conversely, in pluralistic regions like North Sulawesi, this provision is viewed as a threat of state totalitarianism that excessively encroaches upon individual private spheres (Eddy O.S. Hiariej dan Topo Santoso 2025).

This horizontal conflict between local moralities indicates that forcing criminal law to regulate private morality is an irrational policy of overcriminalization. The negative implications of this policy not only create a potential for arbitrary enforcement by apparatuses and narrow civil liberties, but also exhibit the lawmakers' blindness to the acute crisis of overcrowding that is currently paralyzing our judicial system (Simbolon 2025). In addition to the correctional capacity burden, at the level of law enforcement implementation in the field, the existence of these populist private offenses is highly vulnerable to triggering clashes with local customary laws (*hukum adat*) and legitimizing acts of

persecution and vigilantism (*eigenrichting*) by moralistic mass groups (Yudiani, Hartono, and Suastika 2026).

Faced with an accumulation of punitive regulations laden with the destructive power of penal populism, the architecture of the Penal Code is fortunately not designed entirely as a destructive instrument. As a form of scientific accountability, the legislature inserted a compromise clause within this codification, the function of which is manifested through the institutionalization of alternative sentencing as a regulatory counter-weight. The presence of these alternative sanctions marks a paradigm shift in national criminal law, moving from the colonial legacy of pure retribution to a modern criminal law paradigm oriented toward corrective, restorative, and rehabilitative justice (Eddy O.S. Hiariej dan Topo Santoso 2025). It is this modern paradigm that reconstructs the face of the Penal Code so that it is no longer perceived as a rigid, draconian law, but rather as a humanistic and balanced legal instrument protecting the interests of the state, the victim, and the offender.

The touch of compromise moderating this paradigm tension can be traced, among other things, to the radical reformulations applied to the institution of the death penalty. While in the old Penal Code (WvS) the death penalty was positioned as an absolute principal punishment, within the system of the New Penal Code, its status has been degraded to a special punishment that is alternative in nature and positioned as a last resort (*ultimum remedium*) (Republik Indonesia 2023). This structural alteration carries highly progressive operational consequences in the field; death row inmates no longer face the firing squad immediately, but are mandated to undergo a probationary period of 10 years (Republik Indonesia 2026). This decade-long waiting period functions as a penological laboratory to assess changes in the inmate's attitude, character, and physical repentance. If the convict demonstrates significant moral improvement, the state is automatically obligated to commute the death penalty into life imprisonment or a maximum of 20 years imprisonment, while concurrently maintaining avenues for the convict to obtain legal pardon through presidential clemency (Republik Indonesia 2026).

Apart from the modification of the death penalty, the primary anchor ensuring that this compromise mechanism does not deviate from the path of humanity is the explicit institutionalization of the "Sentencing Objectives" and "Sentencing Guidelines" within the statutory text. These two new instruments act as a safety valve providing a guide for judges in adjudicating cases. Certainly, the institutionalization of these guidelines must be theoretically monitored with strict scrutiny, for the history of penology in the United States, as warned by Herbert Hoelter, demonstrates that the sentencing guidelines implemented in 1987 were instead misappropriated into new punitive instruments triggering mass incarceration (Hoelter 2009). Furthermore, several substances within both instruments exhibit contradictions and inconsistencies and tend to grant broad discretion to judges (Assegaf 2016). However, the Penal Code is deemed to possess a more advanced filtration system because the values of balance within the Penal Code's Sentencing Guidelines are positioned as an imperative obligation binding upon the judge's conscience. The reinforcement of the importance of these guidelines in substituting sanctions from carceral to alternative is explicitly stated in the formulation of Article 71 paragraph (1) of the New Penal Code as follows:

*"If a person commits a Criminal Offense that is only threatened with imprisonment under 5 (five) years, while the judge is of the opinion that it is unnecessary to impose a prison sentence after considering the sentencing objectives and sentencing guidelines as referred to in Article 51 through Article 54, that person may be sentenced to a fine."*

This normative formulation proves that the objectives and guidelines of sentencing are doctrinal anchors designed to degrade the absolutism of punitive formalism toward a sociological-utilitarian framework. The formative policy of Article 71 paragraph (1) of the New Penal Code provides a powerful discretionary weapon for judges to perform judicial substitution, whereby short-term prison sentences can be converted into fines after filtering through the social and psychological indicators of the offender as regulated in Articles 51 through 54. This legal construction acts as a robust institutional brake to halt the expansion of penal populism, which has hitherto consistently demanded incarceration without considering the detrimental impacts on penology.

Not stopping at the substitution of fines, the protective compromise to domesticate penal populism is structurally expanded through the institutionalization of two new types of alternative sanctions: probationary sentences (Article 75) and community service (Article 85). The presence of these two new sanctions must not be overlooked merely as normative decoration, but rather as a strategic, restrictive penological design. Community service, for instance, is explicitly formulated as a substitute for offenders facing prison sentences under one year or Category II fines, with an obligation for the judge to first evaluate the absence of danger to society as well as the offender's social integrity. The institutionalization of these alternative sanctions doctrinally confirms that Indonesian criminal law has stepped into a modern penological era prioritizing restorative justice and the minimization of carceral harm. This is also aligned with the mission of the Penal Code formulation, which encompasses decolonization, democratization, adaptation, and harmonization (Badan Pembinaan Hukum Nasional Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia 2015).

Ultimately, however, the efficiency of alternative sanctions as a balancing instrument against penal populism will heavily rely on how law enforcement apparatuses—particularly judges—operate this discretion in practice. Given that the implementation age of the Penal Code is still very nascent, making comprehensive empirical data unavailable, the greatest challenge now shifts from the domain of statutory formulation to the level of standardizing the legal reasoning of judges. Without a scientific and strict risk assessment instrument, it is feared that the dualism of paradigms between satisfying public punitiveness and penal moderation within the New Penal Code will become trapped in transactional pragmatic compromises in court, rather than producing a sophisticated systemic harmonization. Therefore, the idea of balance underlining this Penal Code must be closely guarded through progressive judicial policies so that alternative sanctions can execute their genetic function: degrading the hegemony of penal populism to safeguard the future of the Indonesian criminal justice system.

#### 4. CONCLUSION

Based on the analysis and discussion presented above, this study concludes two fundamental points: First, the architecture of the New Penal Code (Law No. 1/2023) exhibits a Janus-faced penal policy, reflecting a paradigmatic clash between public retributive satisfaction (penal populism) and the modernization of criminal law. The manifestation of penal populism is clearly recorded in the policy of retaining the death penalty, the expansion of criminalization into the private sphere (such as adultery offenses), and overcriminalization within the domain of freedom of expression (the offense of insulting the president). These policies were adopted as a political compromise to accommodate the sociological demands of a society that remains communal-moralistic. Second, the normative construction of alternative sanctions, manifested through probationary sentences and community service, is structurally designed as a regulatory counter-weight to domesticate and control the expansive destructiveness of penal populism. Through the compromise instruments in Chapter II concerning Sentencing Guidelines (Articles 51–54) as well as the judicial substitution mechanism (Article 71), the New Penal Code successfully degrades punitive absolutism into a more moderate, utilitarian, and humanistic framework, while concurrently barricading the criminal justice system against the threat of overcrowding.

#### REFERENCES

- Amiruddin, and Zainal Asikin. 2014. *Pengantar Metode Penelitian Hukum*. 1st ed. Jakarta: Rajawali Pers.
- Anggara, Erasmus A.T Napitupulu, Genoveva Alicia K.S. Maya, Iftitahsari, Maidina Rahmawati, and Sustira Dirga. 2019. *Kebangkitan Penal Populism Di Indonesia: Catatan Situasi Reformasi Kebijakan Pidana Di Indonesia Tahun 2018*. Jakarta: Institute for Criminal Justice Reform.
- Ashworth, Andrew J. 1992. "Sentencing Reform Structures." *Crime and Justice* 16(181–241).
- Assegaf, Rifqi S. 2016. "Analisis Dan Rekomendasi Terkait Pengaturan Pedoman Pemidanaan Dalam

- RKUHP." *LeIP*.
- Badan Pembinaan Hukum Nasional Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia. 2015. "Naskah Akademik Rancangan Undang-Undang Tentang Kitab Undang-Undang Hukum Pidana (KUHP)."
- Barker, Vanessa. 2012. "Theoretical Criminology Penal Regime Penal Regime." *Theoretical Criminology* 12(1): 5–25. doi:10.1177/1362480612468935.
- Batchelor, Carolyn Hoyle and Diana. 2021. *Investigating Attitudes to the Death Penalty in Indonesia Part II Public Opinion : No Barrier to Abolition*. Newman Street, London: The Death Penalty Project.
- Copson, Lynne. 2014. "Penal Populism and the Problem of Mass Incarceration : The Promise of Utopian Thinking." *The Good Society* 23(1): 55–72.
- Dagan, Netanel. 2020. "The Janus Face of Imprisonment : Contrasting Judicial Conceptions of Imprisonment Purposes in the European Court of Human Rights and the Supreme Court of the United States." *Criminology & Criminal Justice*: 1–17. doi:10.1177/1748895820911967.
- Daury Cesar Fabrizi, Gabriel Silveira de Queiro's Campos and. 2024. "Is ' ' Penal Populism ' ' Really Populist ? Evaluating Penal Legislation In." *Sage Open* 14(4): 1–15. doi:10.1177/21582440241297444.
- Dean, Malcolm. 2012. "The Origins of Penal Populism." *Criminal Justice Matters* 87(October 2014). doi:10.1080/09627251.2012.671022.
- Dzur, Albert W. 2010. "The Myth of Penal Populism: Democracy, Citizen Participation, and American Hyperincarceration." *The Journal of Speculative Philosophy* 24(4): 354–79.
- Eddy O.S. Hiariej dan Topo Santoso. 2025. *Anotasi KUHP Nasional*. Depok: Rajawali Pers.
- Fuady, Munir. 2018. *Metode Riset Hukum Pendekatan Teori Dan Konsep*. 1st ed. Depok: Rajawali Pers.
- Gelb, Arie Freiberg and Karen. 2008. "Penal Populism, Sentencing Councils and Sentencing Policy." In *Penal Populism, Sentencing Councils and Sentencing Policy*, ed. Arie Freiberg and Karen Gelb. United Kingdom: Willan Publishing, 1–14.
- Green, David A. 2014. "Penal Populism and the Folly of ' Doing Good by Stealth .'" *The Good Society* 23(1): 73–86.
- Hoelter, Herbert J. 2009. "Sentencing Alternatives—Back to the Future." In *Alternative Sanctions, Diversion, and Other Models*, University of California Press on behalf of the Vera Institute of Justice.
- Indonesian Corruption Watch. 2022. *Siaran Pers Pasal Korupsi Dalam KUHP: Menjauhkan Efek Jera Dan Menguntungkan Koruptor*. Jakarta.
- Kahan, Dan M. 1996. "What Do Alternative Sanctions Mean?" *The University of Chicago Law Review* 63(2): 591–653.
- Lacey, Nicola. 2019. "Populism and the Rule of Law." *Annual Review of Law and Social Science* 15. doi:DOI:10.1146/ANNUREV-LAWSOCSCI-101518-042919.
- Lewis, Christopher. 2022. "Risk-Based Sentencing and The Principles of Punishment." *The Journal of Criminal Law and Criminology* 112(2).
- Mahkamah Konstitusi. 2026. "Mahasiswa Hukum Uji Pasal Tindak Pidana Korupsi Dalam KUHP." *Mahkamah Konstitusi Republik Indonesia*.
- Mahkamah Konstitusi Republik Indonesia. 2006. "Putusan Mahkamah Konstitusi Nomor 013-022/PUU-IV/2006."
- Marzuki, Peter Mahmud. 2016. *Penelitian Hukum*. Edisi Revi. Jakarta: Kencana.
- Metz, Anne. 2020. "A Qualitative Perspective on Alternative Sentencing Practices in Virginia." *Federal Sentencing Reporter: State Prosecutors: Their Impact on Mass Incarceration and Criminal Justice Reform* 32(4).
- Monahan, John. 2017. *Risk Assessment in Sentencing Academy for Justice, a Report on Scholarship and Criminal Justice Reform*. Virginia.
- Newton, Michael. 2010. *Criminal Justice: Prison and The Penal System*. New York: Chelsea House Publisher.
- Pratt, John. 2007. *Penal Populism: Key Ideas in Criminology Series*. London: Routledge.
- Republik Indonesia. 2023. "Undang-Undang Republik Indonesia Nomor 1 Tahun 2023 Tentang Kitab

- Undang-Undang Hukum Pidana.”
- Republik Indonesia. 2026. “Undang-Undang Nomor 1 Tahun 2026 Tentang Penyesuaian Pidana.”
- Roberts, Julian V., Loretta J. Stalans, David Indermaur, and Mike Hough. 2003. *Penal Populism and Public Opinion: Lessons Form Five Countries*. New York: Oxford University Press.
- Shames, Ram Subramanian and Alison. 2014AD. “Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States (Vera Institute of Justice, October 2013).” *Federal Sentencing Reporter: Ideas from Abroad and Their Implementation at Home (October 2014)* 27(1): 33–45.
- Shammas, Victor L. 2016. “Who ’ s Afraid of Penal Populism ? Technocracy and ‘ the People ’ in the Sociology of Punishment.” *Contemporary Justice Review* 2580(May). doi:10.1080/10282580.2016.1185946.
- Simbolon, Feliks Amos Pangihutan. 2025. “Problematika Kriminalisasi Kohabitasi Dalam KUHP Baru.” *Lembaga Bantuan Hukum Pengayoman Universitas Katolik Parahyangan*.
- Turner, Liz. 2014. “Penal Populism , Deliberative Methods , and the Production of ‘ Public Opinion ’ on Crime and Punishment.” *The Good Society* 23(1): 87–102.
- Warren, Roger K. 2015. “Evidence-Based Sentencing in the State Courts.” *Federal Sentencing Reporter: The Risk Assessment Era: An Overdue Debate* 27(4): 248–51.
- Yudiani, Komang, Made Sugi Hartono, and I Nengah Suastika. 2026. “Kriminalisasi Kohabitasi : Tantangan Penegakan Hukum Dalam Keberagaman Budaya Indonesia.” *Perspektif Administrasi Publik dan hukum* 3(1).

