

## CONDITIONAL DEATH PENALTY POLICY UNDER LAW NUMBER 1 OF 2023 ON THE CRIMINAL CODE: A LEGAL CERTAINTY PERSPECTIVE

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### Abstract

The conditional death penalty, as regulated in Article 100 of Law Number 1 of 2023 concerning the Criminal Code, reflects a shift toward a more humanistic and rehabilitative approach to capital punishment in Indonesia. This policy aims not only to provide convicts with an opportunity for reform but also to minimize the risk of wrongful execution and accommodate divergent public opinions on the death penalty. This study employs normative legal research with a focus on the principle of legal certainty. The analysis explores how the conditional nature of capital punishment aligns with or challenges the principle of legal certainty as a core value in Indonesian legal doctrine. The findings contribute to a deeper understanding of the coherence between penal policy and fundamental legal principles in the context of the new Criminal Code.

**Keywords:** Conditional Death Penalty; Law Number 1 of 2023; Legal Certainty Principle

### I. INTRODUCTION

The death penalty has long been a contentious issue in global and national legal systems, sparking an enduring debate between two opposing camps: retentionists and abolitionists. Retentionists argue that capital punishment serves as a legitimate tool to deliver justice, deter serious crimes such as murder, terrorism, and drug trafficking, and uphold state sovereignty in law enforcement.<sup>1</sup> They view the death penalty as the ultimate punishment that ensures retributive justice for victims and promotes public security. In

contrast, abolitionists maintain that the death penalty violates the fundamental right to life, as protected by international human rights instruments.<sup>2</sup> They further argue that capital punishment is often implemented unfairly, ineffectively deters crime, and risks the irreversible error of executing innocent individuals.

Indonesia remains one of the countries that retain the death penalty despite mounting criticism from international human rights organizations and abolitionist states.<sup>3</sup> However, recent legal reforms have attempted

<sup>1</sup><https://nasional.sindonews.com/berita/965922/18/abolitionist-atau-retentionist/> accessed on January 20, 2024, 23.35 WIB .

<sup>2</sup> <https://lk2fhui.law.ui.ac.id/moratorium-pidana-mati-dalam-kuhp-jalan-tengah-kontroversi-abolisionis-dan-retensionis/> accessed on January 20, 2024, 23.35 WIB .

<sup>3</sup><https://www.kompasiana.com/sitinurhaliza2214/62a6ef0df5f3293ea572a3d2/politik-regula-ruu-kuhp-terhadap-kontroversi-dunia-mati/> accessed on January 20, 2024, 23.35 WIB .

to strike a middle ground between both perspectives through the introduction of a conditional death penalty in Law Number 1 of 2023 concerning the Criminal Code (KUHP). This new provision represents a significant shift in Indonesia's penal philosophy. Article 100 of the new Criminal Code allows courts to impose the death penalty with a 10-year probationary period, during which the convict's conduct and rehabilitation potential will be evaluated. If the convict demonstrates good behavior, the death sentence may be commuted to life imprisonment by Presidential Decree based on the recommendation of the Supreme Court.<sup>4</sup>

The differences of opinion between *Retentionists* and *Abolitionists* on the death penalty have caused long controversies and debates, both nationally and internationally. Indonesia itself is still a country that implements the death penalty, despite facing pressure and criticism from various parties, especially countries that have abolished the death penalty.<sup>5</sup>

One of the middle ways in the debate between the *Abolitionists* and *Retentionists* on the view of the death penalty is to implement the conditional death penalty. The conditional death penalty is the death penalty imposed with a probationary period of 10 years, which

can be changed to life imprisonment if the convict shows commendable attitudes and actions during the probationary period.<sup>6</sup> However, in the Criminal Code (KUHP) which is currently in force, there is no regulation regarding the conditional death penalty and only regulates the Death Penalty, this has caused pros and cons where humanitarian activists want the death penalty to be abolished because it is contrary to Human Rights, namely the right to life, but Indonesia still needs the implementation of the death penalty because of the many forms of crime and the development of crime.<sup>7</sup>

With the legitimization of the conditional death penalty in Law Number 1 of 2023 concerning the Criminal Code (KUHP), this Law regulates the conditional death penalty as an alternative to the absolute death penalty. The conditional death penalty aims to provide an opportunity for convicts to rehabilitate themselves and change for the better, reduce the risk of execution of innocent people, demonstrate a humanist attitude and respect for human rights, and accommodate various conflicting views and interests regarding the death penalty in Indonesia.<sup>8</sup>

Law Number 1 of 2023 concerning the Criminal Code (KUHP) has several changes, including those concerning the death

<sup>4</sup> <https://www.viva.co.id/berita/politik/1554255-menkumham-yasonna-balas-kritikan-hotman-paris-soal-surat-kelakuan-baik-kalapas-di-kuhp-baru/> accessed on January 20, 2024, 23.35 WIB .

<sup>5</sup> Ade Mahmud, 2020, The Problem of the Death Penalty for Narcotics Offenders in the Indonesian Legal System, *Journal of Law & Development* Vol. 51 No. 2, Faculty of Law, University of Indonesia, p. 456.

<sup>6</sup> Sholehuddin , *Sanctions System in Criminal Law* , Jakarta: Raja Grafindo Persada, 2004, p. 71.

<sup>7</sup> <https://www.hukumonline.com/berita/a/kuhp-baru-diconsider-phase-menuju-pengcepatan-jiwaan-mati-lt6437a77f82cac/> accessed on October 31, 2023, 14.41 WIB

<sup>8</sup> *Ibid.*

penalty, the basic difference is that the death penalty was initially the main punishment changed to a special punishment as stated in Article 64 of Law Number 1 of 2023 concerning the Criminal Code (KUHP), which is threatened alternatively and imposed with a probationary period of ten years as stated in Article 100 paragraph (1) "The judge imposes the death penalty with a probationary period of 10 (ten) years by taking into account: a. the defendant's sense of regret and there is hope to improve himself; or b. the defendant's role in the Criminal Act".

Conditional death penalty law has several advantages and disadvantages, including Advantages Conditional death penalty law provides an opportunity for convicts to rehabilitate themselves and change for the better. Convicts can improve their behavior and attitudes, and develop skills and knowledge that can be useful to society if they are later released. Conditional death penalty reduces the risk of execution of innocent people. Convicts still have the right to file legal remedies, including requests for clemency, revision, or judicial review. If proven innocent, the convict can be released or receive compensation and Conditional death penalty law shows a humanistic attitude and respects human rights. Conditional death penalty law recognizes that every human being has the potential to change and repent. Conditional

death penalty law also avoids the physical and mental suffering caused by absolute death penalty law.<sup>9</sup>

However, behind these advantages, there are also disadvantages of implementing the conditional death penalty, namely that the conditional death penalty does not provide legal certainty for convicts, victims, and the community. The conditional death penalty depends on criteria and a process for changing sentences that are not yet clear and transparent. Convicts do not know whether their sentences will be changed or not, victims do not feel they have received justice, and the community does not feel safe.<sup>10</sup> The conditional death penalty is not effective in preventing or reducing serious crimes. The conditional death penalty does not provide a deterrent effect for convicts or potential perpetrators. Convicts still have the possibility of committing other serious crimes inside or outside prison. Potential perpetrators are not afraid of sentences that can be changed and the conditional death penalty creates a high cost burden for the state. The conditional death penalty requires large costs to guard, supervise, and provide facilities for convicts during their detention. These costs can be used for things that are more beneficial to society, such as education, health, or infrastructure.<sup>11</sup>

While this development may be seen as progressive and more humane, it also raises serious legal and ethical questions—

<sup>9</sup> <https://connectusfund.org/16-advantages-and-disadvantages-of-the-death-penalty-and-capital-punishment> accessed on September 11, 2023, 11.31 WIB

<sup>10</sup> <https://deathpenalty.procon.org/top-10-pro-con-arguments/> accessed on September 11, 2023, 11.31 WIB

<sup>11</sup> *Ibid.*

particularly regarding the principle of legal certainty, a fundamental pillar of the rule of law. The use of discretionary language in Article 100 paragraph (4), specifically the phrase “*may be commuted*”, introduces interpretative ambiguity. The absence of a clear mechanism or timeframe for issuing the Presidential Decree potentially leads to uncertainty not only for the convict but also for victims and society at large. Moreover, the process may be vulnerable to political interference, given that the decision ultimately rests with the President, whose term and legal orientation may vary.

From the article, if examined there is a phrase “can”, this phrase has a broad interpretation. This will provide an opportunity for the provision of a conditional death penalty that does not provide legal certainty. Because, there is no time limit in waiting for the president's decision on whether or not the sentence for the accused can be changed. Moreover, the implementation of conditional punishment is suspended by the Presidential Decree. This is a problem, because the President's term of office in granting a change in the status of the death penalty to life imprisonment is limited, which changes every 5 (five) years or 10 (ten) years if he returns to power, then when the decision is given, this is if the change of president will be his political decision and not based on a decision based on law.

The purpose of this study is to determine the urgency of the conditional death

penalty in Law Number 1 of 2023 concerning the Criminal Code and to determine how the provision of the Conditional Death Penalty in Law Number 1 of 2023 concerning the Criminal Code is related to the principle of legal certainty. The research method used is normative legal research that examines the principles of law. In this case, research is conducted on the principles of law, namely regarding the Application of the Conditional Death Penalty in Law Number 1 of 2023 concerning the Criminal Code in the Perspective of Legal Certainty.

Research related to this research is This research discusses How the regulation of the waiting period for the execution of the death penalty for death row convicts in Indonesia is reviewed from the perspective of legal certainty, to examine the implementation of the Death Penalty in Indonesia in national criminal law, and to examine the government's efforts in solving the waiting period for the execution of the death penalty, while the author discusses the Legal Certainty of the Conditional Death Penalty in Article 100 Paragraph 4 of Law Number 1 of 2023 concerning the Criminal Code. And in this study the author uses two theories, namely the theory of criminal law policy and the theory of law enforcement.

Thus. the trial period and waiting for the decision of the president, the possible negative impact will result in a hidden prison sentence and there is an unimportant role in the crime can be sentenced to death. With the

existence of the conditional death penalty, the concern in the future is the arbitrariness of the office holders regarding the reduction or change of the death penalty.

## II. RESEARCH METHODS

This research employs a normative legal research method focusing on the study of legal principles, particularly the principle of legal certainty in the context of the conditional death penalty as regulated in Law Number 1 of 2023 concerning the Criminal Code. From a methodological perspective, normative legal research involves the examination of statutory provisions, doctrinal interpretations, and scholarly opinions. The sources of legal material in this study consist of primary legal materials (such as the 1945 Constitution, Law No. 1 of 2023, and relevant jurisprudence) and secondary legal materials (including legal literature, journals, and expert commentaries). The analysis is carried out through a conceptual and statutory approach, using a descriptive-analytical method to assess whether the conditional death penalty aligns with the principle of legal certainty in Indonesia's criminal justice system.

## III. RESEARCH RESULTS AND DISCUSSION

### 3.1 Urgency of Conditional Death Penalty in Law Number 1 of 2023 Concerning the Criminal Code

The death penalty remains a highly debated and controversial issue in Indonesia, both domestically and internationally. While opponents of the death penalty argue that it violates human rights and moral principles, supporters maintain that it is a necessary form of retribution for severe crimes such as murder, terrorism, and drug trafficking. The diverging views have prompted the development of a middle-ground policy in the form of a conditional death penalty, which represents what has been termed the "Indonesian way."<sup>12</sup>

The conditional death penalty offers convicts on death row a chance to rehabilitate and potentially receive a pardon from the President, contingent upon good behavior during a 10-year probationary period.<sup>13</sup> This model aligns with restorative justice principles and attempts to bridge the philosophical divide between abolitionists and retentionists. It has been formally introduced in Law Number 1 of 2023 on the Criminal Code (KUHP) as part of broader efforts to reform Indonesia's criminal justice system.<sup>14</sup>

The conditional death penalty reflects a more humane approach to criminal punishment. It is based on the belief in human capacity for change, emphasizing

<sup>12</sup>

<https://nasional.kompas.com/read/2022/04/07/02000061/jiwa-an-mati-di-indonesia--dasar-Hukum-pelaksanaan-dan-kontroversi/> accessed on January 22, 2024, 14.38 WIB .

<sup>13</sup>

<https://news.detik.com/berita/d-6568217/how-cepatan-dunia-di-indonesia-begini-aturnannya/> accessed on January 22, 2024, 14.39 WIB .

<sup>14</sup>

<https://www.Hukumonline.com/berita/a/jalan-tengah-jiwaan-pidana-mati-ala-profesor-muladi-lt5f8cdd3c7c243/> accessed on January 22, 2024, 14.40 WIB .

rehabilitation over retribution. This approach aligns with restorative justice, which seeks to restore relationships and reintegrate offenders into society. It also resonates with Pancasila's humanitarian principles, particularly belief in the dignity of every person.

Sociologically, the death penalty has also drawn much criticism and controversy, especially from a human rights perspective. Many parties consider the death penalty to be a cruel, inhumane punishment that violates the right to life. In addition, the death penalty also has the potential for error, abuse, discrimination, and violation of legal procedures.<sup>15</sup> According to Amnesty International data in 2020 there were 117 cases sentenced to death in Indonesia, while in 2021 there were 114 cases, while in 2022 there were 112 cases and in 2023 there were 105 sentenced to death in Indonesia. Of this number, drug crimes dominated with 97 cases in 2020, followed by murder with 18 cases in 2023, and terrorism with 8 cases in 2022.<sup>16</sup>

Legally, the conditional death penalty is grounded in Article 100 of Law Number 1 of 2023, which allows the court to impose a death sentence with a 10-year probationary period. If the convict demonstrates remorse and has the potential for reform, the sentence may be commuted to life imprisonment by Presidential Decree, following the consideration of the Supreme Court. This provision marks a shift

from the old Criminal Code, where the death penalty was strictly a principal punishment with no formal mechanism for probation.<sup>17</sup>

From a sociological perspective, the death penalty has faced increasing criticism for its perceived cruelty and irreversible nature. Data from Amnesty International (2020–2023) reveals consistent use of the death penalty in Indonesia, predominantly for drug-related offenses. Critics point to the risk of wrongful execution and discriminatory application. The conditional death penalty seeks to mitigate these concerns by allowing for correction and review.

A comparative review highlights substantial differences between the old Criminal Code and the new KUHP. The new code reclassifies the death penalty as a special punishment, imposed alternatively rather than mandatorily. It also introduces postponements for vulnerable groups, such as pregnant women and the mentally ill, aligning more closely with international human rights standards.

**Table 1.**  
**Comparison of the Number of Death Penalty Regulations in the Old Criminal Code and the National Criminal Code**

No	Old Criminal Code	National Criminal Code
1	Article 104: Treason against the Head of State.	Article 191: Treason against the President and/or Vice President.
2	Article 111 paragraph (2): Establishing	Article 192: Treason against the Unitary State

<sup>15</sup> *Ibid.*

<sup>16</sup> Amnesty International, *Death Penalties and Executions in 2023*, Amnesty International Report, p. 16

<sup>17</sup> <https://nasional.tempo.co/read/1043555/muladi-jiwaan-mati-bercondition-jalan-tengah-polemik-pidana-mati/> accessed on January 22, 2024, 14.43 WIB.



	Relations with the State Foreigners Cause War.	of the Republic of Indonesia
3	Article 124 paragraph (1): Treason Notifying the Enemy in Time of War.	Article 212 paragraph (3): Sabotage and Criminal Acts in Time of War.
4	Article 124 paragraph (2): Inciting and Facilitating Riots.	Article 459: Premeditated Murder
5	Article 140 paragraph (3): Treason against the life of the Head of a Friendly State.	Article 479 paragraph (4): Criminal Act of Aggravated Theft.
6	Article 340: Premeditated Murder.	Article 588 paragraph (2): Acts that Endanger Aviation Safety.
7	Article 365 paragraph (4): Theft with Collaborative Violence Resulting in Serious Injury or Death.	Article 598: Serious Crimes Against Human Rights Concerning Genocide.
8	Article 368 paragraph (1) and (2): Aggravated extortion.	Article 599: Serious Criminal Offenses Against Human Rights Concerning Murder, extermination, deportation or forced transfer of population, deprivation of liberty or other severe deprivation of physical freedom in violation of basic rules of international law or the crime of apartheid.
9	Article 444: Piracy at Sea Resulting in Death.	Article 600: Criminal Acts of Terrorism.
10	Article 479 k paragraph (2): Crimes against Aviation and Facilities Flight.	Article 610 paragraph (2 ): Narcotics Crimes.
11	Article 479 paragraph (2): Crimes involving Aviation and Aviation Facilities.	

Source: Academic Manuscript of Law Number 1 of 2023 concerning the Criminal Code

The table illustrates the broader range of capital offenses under the new code, some of which may not align with international norms that restrict capital punishment to the "most serious crimes."

Despite its humanistic intent, the conditional death penalty introduces legal uncertainties. The discretionary nature of the phrase "may be commuted" in Article 100(4) creates ambiguity, especially regarding the timeframe and process for Presidential decisions. This raises concerns over legal certainty and potential political influence.

Additionally, the mechanism for evaluating "commendable behavior" lacks clear standards, risking inconsistent application. The financial burden of monitoring and rehabilitating death row inmates over a decade is another critical issue. Moreover, the current framework does not resolve inconsistencies with international human rights law, which limits capital punishment to crimes involving intentional killing.

In Article 100 paragraph (1) of Law Number 1 of 2023 concerning the Criminal Code, the panel of judges will impose the death penalty with a probationary period of 10 (ten) years if the defendant has:

1. The defendant's sense of regret and hope for self-improvement; or
2. The role of the accused in the crime.

Due to such regret, the conditional death penalty must be stated in the court decision, according to paragraph (2).

Furthermore, paragraph (3) explains that when a conditional death penalty is given with a probationary period of 10 (ten) starting 1 (one) day after the court decision has permanent legal force. Furthermore, paragraph (4) states that if the probationary period is given, and the convict shows commendable attitudes and actions, the death penalty can be changed to life imprisonment.

By explaining about the conditional death penalty in accordance with the Criminal Code Law, when someone is sentenced to death, it can be expected that the person will behave well. This is in accordance with the objectives of the correctional system which aims to provide guidance to prisoners based on Pancasila. This guidance is carried out to improve the quality of inmates, make them realize their mistakes, and improve themselves. By giving the death penalty, convicts are expected to prepare themselves to face death. This preparation includes repentance, getting closer to Allah SWT, and asking for spiritual guidance or advice from religious leaders in correctional institutions.<sup>18</sup>For example, the case of Freddy Budiman, who is known as a big-time drug lord, shows that even when filing a Judicial Review (PK), Freddy expressed his repentance at the Cilacap

District Court. In his statement, Freddy hopes that the PK he filed can be granted.<sup>19</sup>

Consideration for this change is given in accordance with Article 28 paragraph (1) letter c of Law Number 14 of 1985 concerning the Supreme Court ("MA Law"). The Supreme Court has the duty and authority to examine and decide various matters, including cassation applications, disputes over the authority to try, and applications for judicial review of Court decisions that have obtained permanent legal force.<sup>20</sup>In this explanation, the meaning of the phrase "obtaining consideration from the Supreme Court" still raises questions. This is due to the lack of clarity regarding the Supreme Court's consideration process in changing the death penalty to life imprisonment or 20 years. This process is expected to take quite a long time, considering that the Supreme Court's authority is limited to the three matters that have been mentioned based on the Supreme Court Law.

Therefore, changes to the death penalty should be attempted during the trial and adjusted to the facts that emerge in the trial. Thus, the Panel of Judges can provide considerations in accordance with positive law, whether the death penalty, life imprisonment, or several years in accordance with the facts revealed in the trial.

<sup>18</sup><https://nasional.kompas.com/read/2023/10/06/20375871/freddy-budiman-awalnya-napi-kas-kejahatan-jalanan-besar-lapas-jadi-bandar/> accessed on January 22, 2024, 16.45 WIB .

<sup>19</sup> <https://nasional.tempo.co/read/1753851/kilas-baik-eksekusi-mati-freddy-budiman-7-tahun-lalu/> accessed on January 22, 2024, 16.40 WIB .

<sup>20</sup><https://nasional.kompas.com/read/2023/07/14/13000661/setahun-kas-ferdy-sambo-saat-kemunculan-sang-jenderal-berujung-bui-belasan/> accessed on January 22, 2024, 16.48 WIB .



Using the lens of criminal law policy theory, the conditional death penalty can be analyzed through three key perspectives:

- 1 **Utilitarian Perspective:** The penalty should aim to prevent crime and enhance public safety. The effectiveness of a conditional approach in achieving deterrence remains debatable.
- 2 **Deontological Perspective:** Emphasizes moral duty and respect for human dignity. Conditional death penalty reflects this by recognizing the potential for personal transformation.
- 3 **Restorative Perspective:** Aims for reconciliation and social healing. The probationary system allows space for reform and reduces the irreversibility of state punishment.

In conclusion, while the conditional death penalty in Law Number 1 of 2023 presents a progressive and reconciliatory approach, it requires further refinement to ensure procedural clarity, consistency with international law, and alignment with the principle of legal certainty. This aligns with the broader objectives of criminal law policy in balancing justice, deterrence, and human rights.

### 3.2 The Imposition of Conditional Death Penalty in Law Number 1 of 2023 Concerning the Criminal Code is Linked to the Principle of Legal Certainty

Criminal sanctions represent state-imposed consequences on individuals who have violated criminal laws. These sanctions serve two principal purposes: crime prevention and retribution.<sup>21</sup> Crime prevention can be both specific (preventing the offender from repeating crimes) and general (detering the public from committing similar offenses).<sup>22</sup> The objectives of crime prevention can be divided into two, namely direct prevention ( *special prevention* ) and indirect prevention ( *general prevention* ).

Direct prevention aims to prevent the perpetrator of the crime from committing the same or worse act in the future, by providing a deterrent effect, educating, or rehabilitating the perpetrator. Indirect prevention aims to <sup>23</sup>prevent society from committing crimes, by providing a warning effect, instilling fear, or raising legal awareness. Retribution may be based on the offender's culpability (proportional justice) or the social necessity of punishment (utilitarianism).<sup>24</sup>

Under Law Number 1 of 2023 on the Criminal Code, the death penalty is no longer classified as a principal punishment but as a

<sup>21</sup>Tri Andrisman , Principles and Basis of Indonesian Criminal Law Rules, Bandar Lampung: Unila , 2009, p.8

<sup>22</sup>Adam Chazawi , *Criminal Law Lesson I* , Jakarta, Raja Grafindo Persada, 2011, p. 81

<sup>23</sup> <https://www.hukumonline.com/berita/a/sanksi-pidana-dan-contohnya-lt63227a2102445/> accessed on January 25, 2024, 11.02 WIB

<sup>24</sup> <https://www.hukumonline.com/klinik/a/mengenal-sanksi-hukum-pidana--perdata--dan-administratif-lt4be012381c490/> accessed on January 25, 2024, 11.03 WIB

special punishment that must be considered alongside life imprisonment or a maximum of 20 years' imprisonment.<sup>25</sup> This introduces the concept of the conditional death penalty, in which a convict sentenced to death is granted a 10-year probationary period. If the convict demonstrates commendable conduct during this time, the death sentence *may* be commuted to a lesser sentence by Presidential Decree after consideration from the Supreme Court.

Changes to the death penalty in the Law Number 1 of 2023 concerning the Criminal Code is intended to reduce the application of the death penalty in Indonesia, as well as provide an opportunity for convicts to improve themselves and receive pardon. This change is also in line with the direction of international policy, which tends to abolish or reduce the death penalty, because it is considered ineffective, inhumane, and inconsistent with legal principles.

The changes as explained in Law Number 1 of 2023 concerning the Criminal Code are explained in Article 100 which reads:

- (1) The judge sentenced him to death with a probationary period of 10 (ten) years, taking into account:
  - a. the defendant's sense of regret and hope for self-improvement; or
  - b. the role of the accused in the crime.

- (2) The death penalty with a probationary period as referred to in paragraph (1) must be stated in the court decision.
- (3) The 10 (ten) year probationary period begins 1 (one) day after the court decision has permanent legal force.
- (4) If the convict during the probation period as referred to in paragraph (1) shows commendable attitudes and actions, the death penalty can be changed to life imprisonment by Presidential Decree after obtaining consideration from the Supreme Court.
- (5) The life imprisonment sentence as referred to in paragraph (4) is calculated from the date the Presidential Decree is issued.
- (6) If the convict during the probation period as referred to in paragraph (1) does not demonstrate commendable attitudes and actions and there is no hope of improvement, the death penalty can be carried out on the orders of the Attorney General.

Based on Article 100 of Law Number 1 of 2023 concerning the Criminal Code, the conditional death penalty must be stated in the court decision, by including a probationary period of 10 years since the decision has permanent legal force. The probationary period is a period of time given to the convict to prove that he deserves pardon or a change of

<sup>25</sup>Alvia Syahrin , et.al, Basics of Criminal Law: An Introduction (Book One of Law Number 1 of 2023 concerning the Criminal Code,

sentence. During the probationary period, the convict will not be executed, but must undergo a strict coaching and supervision process.<sup>26</sup>

From the article, if examined there is a phrase "can", this phrase has a broad interpretation. This will provide an opportunity for the provision of a conditional death penalty that does not provide legal certainty. Because, there is no time limit in waiting for the president's decision on whether or not the sentence for the accused can be changed. Moreover, the implementation of conditional punishment is suspended by the Presidential Decree. This is a problem, because the President's term of office in granting a change in the status of the death penalty to life imprisonment is limited, which changes every 5 (five) years or 10 (ten) years if he returns to power, then when the decision is given, this is if the change of president will be his political decision and not based on a decision based on law.<sup>27</sup>

If seen from the principle of legal certainty which states that the law must be clear to its subjects so that they can adjust their actions to existing rules and so that the state is not arbitrary in exercising power. This principle also means that the law must be able to provide definite behavioral guidelines for

society, as well as provide protection and justice for all parties involved in the law.<sup>28</sup> From the perspective of the principle of legal certainty, Article 100 paragraph 4 of the new Criminal Code can be criticized for the phrase "can", which creates uncertainty. It could be that the phrase "can" indicates that changing the death penalty to life imprisonment is not a definite right for the convict, but rather a discretionary authority for the President, who can grant or not grant the change in sentence. The phrase "can" also indicates that changing the death penalty to life imprisonment is not a definite consequence of the commendable attitude and actions shown by the convict, but rather a subjective consideration for the Supreme Court, which can or cannot provide considerations that are beneficial to the convict.

The consequence of the phrase "can" is that convicts sentenced to death have no legal certainty about their fate, because they do not know whether they will get a change of sentence or not, even though they have done good in prison during the probation period. The<sup>29</sup> phrase "can" can also cause injustice and inequality for convicts, because they can be treated differently by the President and the Supreme Court, without clear and objective

<sup>26</sup> <https://www.hukumonline.com/berita/a/menilik-mekanisme-pidana-mati-dalam-kuhp-baru-lt63915b3ba44b7/> accessed on January 25, 2024, 21.04 WIB .

<sup>27</sup> Gabrielle Aldy Manoppo , et.al, Analysis of the Death Penalty Based on Article 100 of Law Number 1 of 2023 Concerning the Criminal Code, Journal of the Faculty of Law, Sam Ratulangi University Lex Administratum Vol. XIII / No. 1 / Sept / 2023, Faculty of Law, Unsrat , p. 3.

<sup>28</sup> Aryadi The late Dudy, Suheflihusnanini Ashady , Position and Construction of the Death Penalty in Law No. 1

of 2023 concerning the Criminal Code (KUHP), Journal of Social Science Research Volume 3 Number 5 of 2023, Faculty of Law, University of Mataram, West Nusa Tenggara, p . 3462.

<sup>29</sup> Anarki, Azzahra Sifa, 2023, Death Penalty Policy in the Reform of the National Criminal Code Reviewed from the Principles of Justice and Legal Certainty, Bachelor's Thesis, Sultan Agung Islamic University Semarang, p. 50.

criteria. The phrase “can” can also cause distrust and dissatisfaction for the community, because they can doubt the integrity and credibility of the President and the Supreme Court, which can be influenced by political, economic, social, or cultural factors in making decisions.

Therefore, the phrase “can” in Article 100 paragraph 4 of the new Criminal Code needs to be replaced with a more definite and firm phrase, such as “must” or “obligatory”, to be in accordance with the principle of legal certainty. This more definite and firm phrase will provide definite rights for convicts, definite consequences for commendable attitudes and actions, and definite obligations for the President and the Supreme Court. This more definite and firm phrase will also provide protection and justice for convicts, clear and objective criteria for the President and the Supreme Court, and trust and satisfaction for the public. Thus, the possible negative effects are hidden prison sentences and irrelevant roles in criminal acts that can be subject to the death penalty. Related to this conditional death penalty, what is worrying in the future is the abuse of authority by related officials in reducing or changing this death penalty, which can be an opportunity such as:

1. There is potential for corruption from the convict to the Head of Prison, to the Supreme Court as a recommendation

provider to the President and the Attorney General's Office as the implementer of the conditional death penalty;

This conditional death penalty is intended to provide an opportunity for convicts to regret their actions and improve themselves, as well as to reduce the controversy that arises regarding the implementation of the death penalty in Indonesia. Convicts who are sentenced to conditional death will be given a 10-year probationary period to do good in prison. If during the probationary period there is a change in attitude and commendable actions from the convict, then the death penalty can be changed to life imprisonment or a maximum of 20 years imprisonment by Presidential Decree, after receiving consideration from the Supreme Court.

2. It will be a diplomatic intervention from a foreign country to Indonesia, whose citizens are threatened with the death penalty to have their sentences reduced to life imprisonment and certainly other countries want their citizens to be free from the threat of this punishment;<sup>30</sup>

The conditional death penalty imposed by Indonesia on foreign nationals (WNA) involved in serious crimes, such as drug trafficking and terrorism, often provokes strong reactions from their home

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<sup>30</sup> <https://pssat.ugm.ac.id/id/belajar-sebuah-cepatan-mati-di-negara-negara-asia-tenggara/> accessed on January 25, 2024, 12.48 WIB .

countries. These countries usually ask Indonesia to review or reduce the death penalty for their WNA, on the grounds of human rights, humanity, or bilateral relations. Indonesia, as a sovereign country, has the right to determine laws and punishments that are in accordance with its national values and interests, and to respect the applicable judicial process. However, with the diplomatic intervention of foreign countries to Indonesia, Indonesia must consider the political and diplomatic impacts of implementing the death penalty against WNA, especially if these countries have important relations with Indonesia, whether in the economic, social, cultural, or security fields.<sup>31</sup>

3. The conditional death penalty system is a fairly long and complicated process.

The procedures for implementing the death penalty in Indonesia currently still focus on Law Number 2/PNPS/1964 concerning the Implementation of the Death Penalty, in which the regulation does not explain how the mechanism for the conditional death penalty is regulated.

Based on this explanation, it can be analyzed using the theory of legal certainty, where the provision of conditional death penalty in Law Number 1 of 2023 concerning

the Criminal Code can be analyzed using several aspects as follows:

1. The substantive aspect of the law concerns the content and material of the conditional death penalty.

From this aspect, conditional death penalty can be said as a form of compromise between the parties who are pro and contra to the death penalty. Conditional death penalty can also be considered as an effort to accommodate the values of law, humanity, and national interests in determining the appropriate punishment for certain crimes.<sup>32</sup> However, conditional death penalty also has several weaknesses, such as the lack of clarity regarding the mechanism and criteria for the probation period, the potential for corruption and manipulation, and challenges in the implementation and supervision of conditional death penalty.<sup>33</sup>

2. Aspects of legal structure, namely regarding the institutions and processes involved in granting conditional death sentences.

From this aspect, conditional death penalty can be said as a form of cooperation between various legal institutions, such as the panel of judges, correctional institutions, the Supreme Court, the President, and the Attorney

<sup>31</sup>

<https://kumparan.com/ilham-azhari-lubis/diplomatic-protection-pekerja-migran-indonesia-dan-ancaman-jerat-jiwaan-mati-1x5gzNYvn7K/> accessed on January 25, 2024, 12.49 WIB.

<sup>32</sup>Jan Michiel Otto, Real Legal Certainty in Developing Countries, in Jan Michiel Otto ( et.all ), 2012,

Socio-legal studies: Series of Elements Composing the Building of a Legal State, Publisher Pustaka Larasan, First Edition, Denpasar, Bali, p. . 122.

<sup>33</sup> <https://www.gramedia.com/literasi/teori-kepastian-hukum/> accessed January 25, 2024, 11.47 WIB

General's Office.<sup>34</sup> Conditional death penalty can also be considered as an effort to provide an opportunity for convicts to improve themselves, as well as provide comprehensive and proportional considerations in determining changes to sentences. However, conditional death penalty also has several challenges, such as coordination and communication between legal institutions, transparency and accountability in the legal process, and adequate resources and facilities to implement conditional death penalty.

3. The legal culture aspect, namely regarding the attitudes and behavior of society towards the conditional death penalty.

From this aspect, conditional death penalty can be said as a form of response to the dynamics and aspirations of society related to the death penalty. Conditional death penalty can also be considered as an effort to create awareness and compliance with the law, as well as to prioritize restorative and rehabilitative values in criminal law.<sup>35</sup> However, conditional death penalty also has several obstacles, such as the lack of socialization and education about conditional death penalty, differences in views and interests between society, convicts, and victims, as well as the potential for conflict and

dissatisfaction with conditional death penalty.

#### IV. CONCLUSION

The conditional death penalty, as regulated in Article 100 of Law Number 1 of 2023 concerning the Criminal Code, represents a progressive penal policy that allows death row convicts a 10-year probationary period during which they may demonstrate reformatory behavior. If these conditions are met—such as a demonstrated sense of remorse and a minor role in the crime—the sentence *may* be commuted to life or fixed-term imprisonment through Presidential Decree. This policy reflects a shift toward a more humanistic and rehabilitative criminal justice approach.

However, from the perspective of the principle of legal certainty, the current formulation—particularly the use of the discretionary term “*may*” in Article 100(4)—raises serious legal ambiguities. The absence of mandatory language and clear procedural safeguards weakens the enforceability of rights for the convict and opens the door to unequal treatment. Therefore, while the conditional death penalty offers a compromise between abolitionist and retentionist positions, its successful implementation requires further refinement to fully align with the principle of legal certainty.

<sup>34</sup> <https://www.kai.or.id/berita/20228/mengenal-3-elemen-hukum-substansi-struktur-dan-kultur.html/> accessed on January 25, 2024, 11.48 WIB

<sup>35</sup> <https://timesjurnal.id/2021/04/03/proses-penegakan-hukum-sistem-struktur-substansi-dan-kultur-hukum-pidana-di-indonesia/> accessed on January 25, 2024, 11.49 WIB



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