
Conditional Death Penalty Policy in Law Number 1 of 2023 concerning the Criminal Code is Linked to the Principle of Legal Certainty

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Abstract

Conditional death penalty aims to provide an opportunity for convicts to rehabilitate themselves and change for the better. Conditional death penalty also aims to reduce the risk of execution of innocent people, show a humanist attitude and respect for human rights, and accommodate various conflicting views and interests regarding the death penalty in Indonesia. Conditional death penalty is regulated in Article 100 Paragraph of Law Number 1 of 2023 concerning the Criminal Code. The type of research to be carried out is normative legal research. From the perspective of its objectives, normative legal research can be divided into 7 (seven) types, namely in this case research is carried out on the principles of law, namely regarding the Implementation of Conditional Death Penalty in Law Number 1 of 2023 concerning the Criminal Code in the Perspective of Legal Certainty.

INTRODUCTION

The polemic of the death penalty in the legal system has long been a source of pros and cons that have not been resolved. Differences of opinion the death penalty often occurs between Retentionists *and* Abolitionists.¹ Retentionists are groups that support the implementation of the death penalty as the highest punishment for perpetrators of serious crimes, such as murder, terrorism, or drugs.² *Retentionists* argue that the death penalty has a deterrent effect on perpetrators and potential perpetrators, and provides a sense of justice for victims and their families. Retentionists *also* consider that the death penalty is part of state sovereignty and positive law in force in Indonesia.³ Meanwhile, *Abolitionists* are groups that

¹ A. W. Putra, and R. D. Sutanti, 2020, "Kebijakan Formulasi Pidana Mati Bersyarat dalam Perspektif Pembaharuan Hukum Pidana Indonesia," *Jurnal Pembangunan Hukum Indonesia*, vol. 2, no. 3, hlm. 319.

² Ade Mahmud, 2020, *Problema Pidana Mati Terhadap Pelaku Tindak Pidana Narkotika Dalam Sistem Hukum Indonesia*, *Jurnal Hukum & Pembangunan* Vol. 51 No. 2, Fakultas Hukum Universitas Indonesia, hlm.456.

³ <https://www.kompasiana.com/sitinurhaliza2214/62a6ef0df5f3293ea572a3d2/kebijakan-regulasi-ruu-kuhp-terhadap-kontroversi-hukuman-mati/> accessed January 20, 2024, 23.35 WIB.

reject the implementation of the death penalty and propose the abolition or moratorium on the death penalty. Abolitionists *argue* that the death penalty violates human rights, especially the right to life, which is guaranteed by various international agreements. Abolitionists *also highlight that the death penalty is ineffective in preventing crime, because there are still many other factors that influence the crime rate. Abolitionists also criticize*⁴that the death penalty is often imposed in a discriminatory, unfair, and non-transparent manner.⁵

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.⁶

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.⁷ 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.⁸

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,

⁴ <https://www.hukumonline.com/berita/a/pengaturan-pidana-mati-dalam-rkuhp-sebagai-jalan-tengah-lt628dd514b238a/> accessed January 20, 2024, 23.35 WIB.

⁵ Aloysius Wisnubroto, *Kebijakan Hukum Pidana dalam Penanggulangan Penyalahgunaan Komputer*, Yogyakarta, Universitas Atmajaya, 1999, hlm : 10.

⁶ Ade Mahmud, *Loc.cit*, hlm 458

⁷ Andre Adhigama Budiman, Ifitahsari, 2021, Maidina Rahmawati, *Situation Report on Death Penalty Policies in Indonesia of 2021 "Double Uncertainty: Calling for the Assurance of Commutations in the Death Penalty Cases*, Institute for Criminal Justice Reform, Jakarta, hlm 30

⁸ <https://www.hukumonline.com/berita/a/kuhp-baru-dianggap-tahap-menuju-penghapusan-hukuman-mati-lt6437a77f82cac/> accessed on October 31, 2023, 14.41 WIB

and accommodate various conflicting views and interests regarding the death penalty in Indonesia.⁹

Law Number 1 of 2023 concerning the Criminal Code (KUHP) has several changes, including those concerning the death 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.¹⁰

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. ¹¹The 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

⁹*Ibid.*

¹⁰ Arief Barda Nawawi, 2008, Kebijakan Hukum Pidana Perkembangan penyusunan Konsep KUHP Baru, Kencana Prenadamedia Group, Semarang, hlm. 40

¹¹ Chazawi Adami, 2002, Pelajaran Hukum Pidana I, Raja Grafindo Persada, Jakarta, hlm. 40

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.¹²

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 sentence. During the probationary period, the convict will not be executed, but must undergo a strict coaching and supervision process.¹³ Then the problem here is in Article 100 Paragraph 4 of Law Number 1 of 2023 concerning the Criminal Code which reads:

"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."

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,

¹²Chazawi Adami, *Pelajaran Hukum Pidana II*, Jakarta, Rajawali Pers, 2002, hlm. 12.

¹³ <https://www.hukumonline.com/berita/a/menilik-mekanisme-pidana-mati-dalam-kuhp-baru-lt63915b3ba44b7/> accessed on September 19, 2023, 21.04 WIB.

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. Based on the background and problems, the author is interested in discussing research with the title " **Conditional Death Penalty Policy in Law Number 1 of 2023 concerning the Criminal Code**". **Criminal Law is Associated with Principle of Legal Certainty . ”**

DISCUSSION

Urgency Of Conditional Death Penalty In Law Number 1 Of 2023 Concerning The Criminal Code

The death penalty in Indonesia is still a hot and controversial topic, both domestically and internationally. Many parties oppose the death penalty on the grounds of human rights, humanity, guilt, and injustice. However, many parties also support the death penalty on the grounds of Pancasila, religion, sovereignty, retaliation, and deterrent effects. With all these considerations, the death penalty law began to be discussed and considered to find alternative solutions. One of the proposed alternative solutions is the concept of conditional death penalty, known as the 'Indonesian way'.¹⁴

¹⁴ Ferawati, “Urgensi Revhtsvinding dan Rechtverfijning Sebelum Hakim Menjatuhkan Pidana dalam Rangka Mewujudkan Keadilan Terhadap Perempuan Pengedar Narkotika”, Jurnal Ilmu Hukum, Fakultas Hukum Universitas Riau, Vol. 6, No. 1 Agustus 2015-Januari 2016, hlm. 123.

With the concept of the 'Indonesian way' or conditional death penalty, this gives death row inmates the opportunity to change their behavior and receive pardon from the President after undergoing a 10-year probationary period.¹⁵ This concept is considered a middle ground between groups that are pro and con against the death penalty, as well as an effort to reduce the application of the death penalty which is considered to violate human rights, especially the right to life. The concept of conditional death penalty was proposed in the Criminal Code (KUHP) as an effort to revise and modernize criminal law in Indonesia.¹⁶

1. Philosophical Reasons for the Conditional Death Penalty Regulation in Indonesia

However, the conditional death penalty introduces a more humane element into law enforcement. This philosophy is based on the belief that humans have the capacity to change and improve themselves. By giving offenders the opportunity to improve their behavior during probation, the law not only punishes but also provides an opportunity for rehabilitation. This is in line with the principle of restorative justice, which emphasizes the restoration of social and moral relationships rather than mere retribution.

2. Legal Reasons Conditional Death Penalty Regulations in Indonesia

Legally, the death penalty in Indonesia is strictly regulated in Article 10 of the Criminal Code (KUHP), where the death penalty is classified as the main punishment and is known as the most severe punishment that can be imposed by the court. The status of the death penalty as the most severe punishment is based on the retributive principle, which aims to provide an appropriate response to crimes that are considered very serious and threaten social order, such as premeditated murder, terrorism, or treason.

3. Sociological Reasons for Conditional Death Penalty Regulation in Indonesia

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.

¹⁷According 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

¹⁵Freddy Markus, "Analisis Yuridis Pengaturan Jangka Waktu Pelimpahan Berkas Perkara dari Penyidik kepada Penuntut Umum dikaitkan dengan Penetapan Status Tersangka berdasarkan Kitab Undang-Undang Hukum Acara Pidana", Skripsi, Fakultas Hukum Universitas Riau, Pekanbaru: 2017, hlm. 11.

¹⁶ <https://www.hukumonline.com/berita/a/jalan-tengah-hukuman-pidana-mati-ala-profesor-muladi-lt5f8cdd3c7c243/> accessed on January 22, 2024, 14.40 WIB.

¹⁷ *Ibid.*

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 2022.¹⁸

The idea of conditional death penalty is mentioned in the Republic of Indonesia Law Number 1 of 2023 concerning the Criminal Code which was ratified on December 6, 2022 as a law that replaces the Criminal Code made by the Dutch East Indies which has been used for approximately 104 (one hundred and four) years. However, the Criminal Code Law can be used later after 3 (three) years of its ratification as a law or more precisely in 2026.¹⁹ In General Comparison of the Regulation of the Death Penalty Formulation in the Criminal Code with Law Number 01 of 2023 concerning the Criminal Code (National Criminal Code):

1. The death penalty can be changed to life imprisonment if the convict behaves well for 10 years.

When compared to the Old Criminal Code, the provisions or procedures that change the death penalty to life imprisonment are not found in the Old Criminal Code because the Old Criminal Code only provides an opportunity for convicts to apply for pardon or reduced sentence through Presidential Pardon, this is where one of the comparisons lies regarding the formulation of the death penalty in the Criminal Code with the National Criminal Code.

2. The death penalty is no longer included in the category of principal punishment and has become an alternative punishment (of a special nature).

Unlike the Old Criminal Code which stipulates the death penalty as one of the main types of criminal penalties, the National Criminal Code issued by the Directorate General of Legislation of the Ministry of Law and Human Rights, no longer lists the death penalty as a main penalty. However, in its formulation concept, the National Criminal Code still maintains the death penalty as one of the criminal sanctions.

3. Regulations on postponing the death penalty for pregnant women, breastfeeding mothers, and mentally ill people are included in the National Criminal Code.

The purpose and objective of why the provisions for the implementation of the death penalty for pregnant women or breastfeeding mothers must be postponed is because

¹⁸Amnesty International, *Death Penalties and Executions in 2023*, Amnesty International Report, p. 16

¹⁹ <https://nasional.tempo.co/read/1043555/muladi-hukuman-mati-bersyarat-jalan-tengah-polemic-pidana-mati/> accessed on January 22, 2024, 14.43 WIB.

the implementation of the death penalty must prioritize Human Rights, which Human Rights exist for Children or Babies who must continue to live because there are innocent souls who must be separated from punishment.

Basically, the significant differences lie in the differences in the regulation of the death penalty, the implementation of the death penalty, and also the number of articles contained in each Criminal Code, so it can be explained that these comparisons include:

Table III.2 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 Relations with the State Foreigners Cause War.	Article 192: Treason against the Unitary State 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): Aviation Crimes and Facilities Flight.	Article 610 paragraph (2): Narcotics Crimes.
11	Article 479 o paragraph (2): Aviation Crimes and Aviation Facilities.	

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

Law Number 1 of 2023 concerning the Criminal Code (KUHP) also raises several issues that need to be studied further, one of which concerns the conditional death penalty. The

conditional death penalty is a criminal concept that provides an opportunity for death row convicts to receive clemency from the President after undergoing a probationary period of 10 years, with certain conditions. This concept is regulated in Article 67 of Law Number 1 of 2023 concerning the Criminal Code (KUHP), which states that the conditional death penalty is a special punishment and is always threatened alternatively with life imprisonment or a maximum imprisonment of 20 years.

Issues that arise related to the conditional death penalty law include the unclear criteria and mechanisms for granting conditional death sentences, the potential for abuse of authority and discrimination in the pardon process, and the social and psychological impacts on death row inmates and victims. In addition, another issue is the inconsistency between the conditional death penalty law and international law, which stipulates that the death penalty may only be imposed for the most serious crimes, which according to international law only include crimes involving intentional murder. In fact, Law Number 1 of 2023 concerning the Criminal Code (KUHP) still imposes the death penalty for other crimes, such as narcotics, terrorism, and corruption, which are considered not to meet these criteria. Therefore, the conditional death penalty law needs to be evaluated and refined so that it can be accepted as a more humane and just alternative solution for death row inmates in Indonesia.

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.²⁰For 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.²¹

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.²²In 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.

Based on the explanation above regarding the urgency of the conditional death penalty in Law Number 1 of 2023 concerning the Criminal Code, if analyzed based on the theory of criminal law policy, the conditional death penalty is a legal concept that proposes that prisoners sentenced to death can be given the opportunity to change their behavior and receive pardon from the state. This conditional death penalty is needed as a middle ground between two groups with different views on the death penalty, namely the group that wants to abolish the death penalty because it is considered a violation of human rights, and the group that wants to

²⁰ Handoyo Sapto D.P., *Pelaksanaan Pidana Bersyarat Dalam Sistem Pemidanaan Di Indonesia*, Pakuan Law Review, Volume IV, Nomor 1, Januari-Juni 2018, Fakultas Hukum Universitas Pakuan, hlm. 24.

²¹ <https://nasional.tempo.co/read/1753851/kilas-balik-eksekusi-mati-freddy-budiman-7-tahun-lalu/> accessed January 22, 2024, 16.40 WIB.

²² <https://nasional.kompas.com/read/2023/07/14/13000661/a-year-case-of-ferdy-sambo-when-the-general-ended-in-jail/> accessed on January 22, 2024, at 16.48 WIB.

continue to apply the death penalty because it is considered a fair and effective punishment to prevent crime. Then the theory of criminal law policy is a science that studies how criminal law is formed, implemented, and evaluated to achieve certain goals, such as justice, legal certainty, crime prevention, community protection, and rehabilitation of perpetrators. The theory of criminal law policy can be used as a tool to analyze the urgency of the conditional death penalty from various perspectives, such as:

1. Utilitarianism Perspective

In the context of criminal law, this perspective emphasizes the function of criminal law as a tool to prevent crime and protect society. Therefore, criminal law policy must be measured based on its effectiveness in achieving these goals.

2. Deontological perspective

In the context of criminal law, this perspective emphasizes the values of criminal law as recognition and protection of human rights. Therefore, criminal law policy must be measured based on its conformity with moral principles and human rights.

3. Restorative perspective

In the context of criminal law, this perspective emphasizes the criminal law process as a means to achieve reconciliation and peace. Therefore, criminal law policy must be measured by its ability to facilitate this process.

The Author's Analysis with Criminal Law Policy Theory also provides direction and recommendations for designing, revising, or eliminating the Death Penalty Implementation Policy in accordance with the desired crime prevention goals and strategies. This theory can help determine the criteria, requirements, procedures, and mechanisms needed to carry out the death penalty fairly, effectively, and humanely.

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 are suffering or misery imposed on someone who is guilty of committing an act prohibited by criminal law. ²³Criminal sanctions have two main objectives, namely to prevent crime and to provide appropriate punishment to the perpetrator of the crime.

²³Jaka Mulyata, Keadilan, Kepastian dan Akibat Hukum Putusan Mahkamah Konstitusi Republik Indonesia Nomor 100/PUU-X/2012 Tentang Judicial Review Pasal 96 Undang-Undang Nomor 13 Tahun 2003 Tentang Ketenagakerjaan, Jurnal Ilmu Hukum, Fakultas Hukum Universitas Sebelas Maret, Surakarta, 2015, hlm.24.

²⁴The 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. ²⁵Indirect prevention aims to prevent society from committing crimes, by providing a warning effect, instilling fear, or raising legal awareness. The objectives of providing appropriate punishment to the perpetrator of the crime can be divided into two, namely punishment based on error (*retribution*) and punishment based on need (*utilitarianism*). Reward based on error aims to provide punishment that is commensurate with the error committed by the perpetrator, by restoring the legal, moral, or social balance that is disturbed by the perpetrator's actions. Reward based on need aims to provide punishment that is in accordance with the needs of society, by protecting society from harm, reducing suffering, or increasing welfare.²⁶

In Law Number 1 of 2023 concerning the Criminal Code, the death penalty is no longer the main punishment, but rather a special punishment, which is always threatened alternatively with life imprisonment or a maximum imprisonment of 20 years. ²⁷In addition, in Law Number 1 of 2023 concerning the Criminal Code, convicts sentenced to conditional death will be given a probationary period of 10 years to do good in prison. If during the probationary period there is a change in the convict's attitude and commendable actions, then the death penalty can be changed to life imprisonment or a maximum imprisonment of 20 years by Presidential Decree, after receiving consideration from the Supreme Court. However, this change also raises several problems, such as the unclear mechanism and criteria for the probationary period, the potential for corruption and manipulation, and challenges in the implementation and supervision of the conditional death penalty. Therefore, this change needs to be supported by implementing regulations, independent supervision, and extensive socialization, in order to provide certainty and justice for all parties involved.

²⁴Jamal Abdullah, "Kepastian Hukum Terhadap Pelaku Tindak Pidana Delik Biasa yang Diselesaikan dengan Mediasi (Studi kasus Kecelakaan Lalu Lintas yang Menyebabkan Kematian)", Jurnal Online Mahasiswa, Fakultas Hukum Universitas Riau Vol. III, No. 1 Februari 2016, hlm. 5.

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

²⁶ <https://www.hukumonline.com/klinik/a/mengenal-sanksi-hukum-pidana--perdata--dan-administratif-lt4be012381c490/> accessed on January 25, 2024, 11.03 WIB

²⁷M. Sholehuddin, Sistem Sanksi dalam Hukum Pidana (Ide Dasar Double Track System & Implementasinya), PT RajaGrafindo, Jakarta, 2003, hlm. 34.

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) shall be 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 sentence. During the probationary period, the convict will not be executed, but must undergo a strict coaching and supervision process.²⁸

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

²⁸ <https://www.hukumonline.com/berita/a/menilik-mekanisme-pidana-mati-dalam-kuhp-baru-lt63915b3ba44b7/> accessed January 25, 2024, 21.04 WIB.

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.²⁹

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.³⁰ 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.³¹ The 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 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

²⁹Marchell Nabil Muhamad, 2023, Transformasi Pidana Mati Dalam Kitab Undang - Undang Hukum Pidana Baru, Skripsi, Fakultas Hukum Universitas Pasundan, hlm. 1.

³⁰Muhammad Naufal Ruchiat, 2023, Masa Tunggu Dalam Pelaksanaan Pidana Mati Di Indonesia Dihubungkan Dengan Asas Kepastian Hukum, Skripsi, Fakultas Hukum Universitas Pasundan, hlm.1

³¹Mulyadi Lilik, 2008, Bunga Rapai Hukum Pidana Perspektif Teoritis dan Praktik, PT. Alumni, Bandung, hlm 30.

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;

The 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 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. There will be diplomatic intervention from foreign countries 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;³²

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 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,

³² T. Saharudin, "Pelaksanaan Peraturan Kepala Kepolisian Negara Republik Indonesia Nomor 14 Tahun 2011 Tentang Kode Etik Profesi Kepolisian Negara Republik Indonesia di Polda Riau", Skripsi, Program Sarjana Universitas Lancang Kuning, Pekanbaru, 2013, hlm. 14.

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.³³

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.

³⁴However, 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.³⁵

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 General's Office. ³⁶Conditional death penalty can also be considered as an effort to provide an opportunity for convicts to

³³ <https://kumparan.com/ilham-azhari-lubis/diplomatic-protection-pekerja-migran-indonesia-dan-ancaman-jerat-hukuman-mati-1x5gzNYvn7K/> accessed on January 25, 2024, 12.49 WIB.

³⁴Mulyadi Mahmud, 2008, Criminal Policy: Pendekatan Integral Penal Policy dan Non PenaPolicy Dalam Penanggulangan Kejahatan Kekerasan, Pustaka Bangsa Press, Medan, hlm. 15.

³⁵ <https://www.gramedia.com/literasi/teori-kepastian-hukum/> accessed January 25, 2024, 11.47 WIB

³⁶ <https://www.kai.or.id/berita/20228/mengenai-3-elemen-hukum-substansi-struktur-dan-kultur.html/> accessed January 25, 2024, 11.48 WIB

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.

³⁷However, 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.

CONCLUSION

Conditional death penalty is a criminal concept that provides an opportunity for death row convicts to receive pardon from the President after undergoing a 10-year probationary period, with certain conditions. This concept is regulated in Article 67 of Law Number 1 of 2023 concerning the Criminal Code (KUHP), which states that conditional death penalty is a special punishment and is always threatened alternatively with life imprisonment or a maximum imprisonment of 20 years. The granting of Conditional Death Penalty in Law Number 1 of 2023 concerning the Criminal Code is linked to the principle of legal certainty in which Article 100 paragraph (1) of the National Criminal Code states that the execution of the death penalty is determined by a postponement of the death penalty for 10 (ten) years which takes into account two conditions, namely, a sense of regret and a willingness to repent to improve themselves and the role of the defendant sentenced to death in the crime. For the author himself, the author would like to express his gratitude to the supervisor and examiner who have provided input in this research and to all parties involved in this research.

³⁷ <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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