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Legal Certainty Regarding the Probationary Period for the Death Penalty under Law No. 1 of 2023 on The Criminal Code

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Abstract: This study is motivated by the revision of the death penalty provisions in Law No. 1 of 2023 on the Criminal Code, which introduces a ten-year probationary period as a condition for the possible commutation of the death penalty to life imprisonment. Although this provision reflects a more humanistic paradigm of punishment, it still raises issues of legal certainty, particularly regarding the indicators of “praiseworthy conduct and behavior” and the mechanisms for evaluating them. This study employs Gustav Radbruch theory of legal certainty as its primary framework, supported by the theory of legal protection and the concept of the purposes of punishment. The research method used is a normative-empirical legal study employing legislative, conceptual, and comparative approaches. Data collection was conducted through literature review, document analysis, and analysis of relevant legislation and legal materials. The results of the study indicate that the provision regarding the probationary period for the death penalty in Article 100 of Law No. 1 of 2023 represents a form of criminal law reform that prioritizes a balance between legal certainty, justice, and public interest. However, the lack of objective parameters regarding the assessment of a convicted person's behavior, evaluation procedures, and the authority of the relevant agencies has the potential to lead to multiple interpretations and inconsistencies in the application of the law. Therefore, further regulations are needed that clearly outline indicators, mechanisms, and implementation procedures to ensure legal certainty in the application of the probationary period for the death penalty.

Keywords: Legal Certainty, The Death Penalty, Probation, Article 100 of the National Criminal Code

INTRODUCTION

The death penalty is a form of punishment that has long been the subject of debate within the criminal justice system, both at national and international levels. This debate relates not only to human rights, but also to legal certainty, justice, public interest and the effectiveness of criminal law in achieving the objectives of punishment. As a state governed by the rule of law and founded on the principles of Pancasila, Indonesia seeks to balance the protection of human rights with the need to enforce the law against criminal offences deemed to be particularly serious. The enactment of Law No. 1 of 2023 on the Criminal Code (National Criminal Code) marks a significant milestone in the reform of Indonesia's criminal law, as it introduces a new paradigm regarding the regulation of the death penalty which was previously considered final by reclassifying it as a special form of punishment. This change reflects a new orientation within the national penal system that places greater emphasis on striking a balance between legal certainty, justice and the protection of human rights (Undang-Undang Republik Indonesia Nomor 1 Tahun 2023, 2023).

This paradigm shift is realised through the provision that the death penalty is imposed subject to a ten-year probationary period. During this probationary period, the convicted person is given the opportunity to demonstrate commendable conduct and behaviour, so that the death penalty may be commuted to life imprisonment. This provision represents an innovation previously unknown in the old Criminal Code. The introduction of the concept of a probationary period for the death penalty is intended as a means of implementing the principle of *ultimum remedium*, whilst also reflecting developments in modern criminal law thought, which places greater emphasis on rehabilitation and resocialisation without undermining the retributive function against perpetrators of very serious criminal offences (Arief, 2017).

Conceptually, this reform forms part of Indonesia's criminal law policy, which seeks to accommodate various developments in international law without disregarding the characteristics of the national legal system. In many countries, there is a growing trend towards the abolition of the death penalty, whilst some other countries still retain it subject to various restrictions. Indonesia has adopted a moderate approach by retaining the death penalty as a special punishment, but allowing scope for review of its implementation through a probationary period mechanism (Muladi & Arief, 2015, p. 112). This approach reflects a compromise between the interests of public protection, respect for the right to life, and the rehabilitative objectives for offenders. Nevertheless, the provisions on the probationary period for the death penalty in Law No. 1 of 2023 still leave various normative issues that have the potential to create legal uncertainty. One of the main issues lies in the absence of clear parameters regarding the indicators of 'commendable conduct and behaviour' as the basis for commuting the death penalty to life imprisonment. The ambiguity of this provision has the potential to give rise to multiple interpretations in its implementation, as there are no objective criteria that law enforcement officials or correctional institutions can use as a guide when assessing convicted offenders (Radbruch, 1950, p. 107).

Such circumstances open the door to unequal treatment of prisoners who are in the same legal position. Empirical evidence shows that the implementation of the death penalty in Indonesia has, to date, been subject to various dynamics, both in terms of the execution process itself and the protection of prisoners' rights. In recent years, there have still been a number of prisoners on death row who have been awaiting execution for an extremely long time, thereby creating uncertainty regarding their legal status. On the other hand, developments in criminal law policy indicate a trend towards prioritising the rehabilitation of prisoners through various correctional programmes. With the enactment of the National Criminal Code, this issue has become increasingly complex due to the existence of an evaluation mechanism during the ten-year probationary period, which requires clear,

measurable and legally accountable assessment standards. If the provisions regarding the probationary period for the death penalty are not accompanied by definite parameters, the objectives of criminal law reform may not be fully achieved. Legal certainty, as one of the primary objectives of the law, requires provisions that are clear, unambiguous and can be applied consistently by all law enforcement officials. Conversely, vague legal provisions will lead to inconsistencies in the application of the law, reduce the predictability of judgements, and have the potential to cause injustice to both the convicted person and the public.

Therefore, the provisions governing the probationary period for the death penalty must provide certainty regarding procedures, assessment criteria, and the authority of the institutions responsible for evaluating the convicted person (Kelsen, 1967, p. 198). This issue highlights a gap between the legislature's aim to establish a more humane penal system and the normative reality, which still leaves regulatory provisions unclear. On the one hand, the concept of a probationary period for the death penalty is intended to serve as an instrument for the protection of human rights by providing convicted persons with an opportunity for rehabilitation. However, on the other hand, the absence of provisions that regulate in detail the implementation mechanisms, evaluation indicators, assessment procedures, and parameters for the success of the probationary period means that this objective may prove difficult to achieve in practice. Consequently, there remains a gap between the intended normative concept and the actual implementation of the law (Fuller, 1969, p. 39).

Based on a review of various previous studies, the majority of research on the death penalty continues to focus on aspects of constitutionality, human rights, the politics of criminal law, and a comparative analysis of death penalty regulations across different countries. Research specifically examining legal certainty regarding the probationary period for the death penalty under the provisions of Law No. 1 of 2023 remains relatively limited, particularly studies focusing on the analysis of the clarity of legal norms and their implications in law enforcement practice. This situation indicates that there remains an academic gap that needs to be addressed through more in-depth research on legal certainty in the implementation of the probationary period for the death penalty (Friedman, 1975). Given these circumstances, this research is significant as it aims to analyse legal certainty regarding the regulation of the probationary period for the death penalty in Law No. 1 of 2023, identify the factors causing legal uncertainty, and formulate regulatory concepts that provide greater legal certainty. It is hoped that the findings of this research will contribute to the development of criminal law, particularly in the field of national criminal law reform, whilst also serving as a basis for consideration by legislators and law enforcement officials in refining policies on the implementation of the death penalty in Indonesia (Atmasasmita, 2018, p. 84).

Consequently, the research entitled "LEGAL CERTAINTY REGARDING THE PROBATIONARY PERIOD FOR THE DEATH PENALTY UNDER LAW NO. 1 OF 2023 ON THE CRIMINAL CODE" holds both academic and practical significance. Academically, this research is expected to enrich the study of the theory of legal certainty within the national penal system. In practical terms, this research is expected to produce a formulation that clarifies the norms regarding the probation period for the death penalty so that its implementation complies with the principles of legal certainty, justice and public interest. It is hoped that this research will ensure that the reform of Indonesian criminal law not only results in normative changes but also creates a legal system that is consistent, predictable and provides legal protection for all stakeholders (Ashiddiqie, 2019).

METHODS

A research method is a scientific approach used to obtain data for specific purposes and applications, ensuring that the data obtained is objective, valid and scientifically

accountable. A research method sets out systematic steps ranging from problem formulation, data collection and data analysis to drawing conclusions. According to Nazir, a research method is defined as the process or approach used by researchers to solve research problems through the planned collection and analysis of data. The research method used in this study is as follows. As for the type of research within this research methodology, it employs a normative-empirical legal research approach, which may also be referred to as applied legal research (applied law research) (Muhaimin, 2020, p. 29). This is a form of legal research that examines the factual implementation of provisions of positive law (legislation) and contracts in specific legal events occurring within society, with the aim of achieving predetermined objectives (Soekanto & Mamudji, 2001, pp. 12–15).

The research approaches employed in this study include the statutory approach, the conceptual approach and the comparative approach. The statutory approach was carried out by examining the relevant legislation, particularly the latest Criminal Code (KUHP), namely Law No. 1 of 2023 on the Criminal Code, specifically Articles 67 and 100. This approach aims to systematically understand the legal provisions and analyse their relationship with death penalty rulings in Indonesia. The conceptual approach involves analysing theories of criminal law, the objectives of the law, and the concept of the death penalty as an extreme sanction. This approach aims to provide an in-depth framework for understanding the principles, objectives and legal logic underlying the provisions on the death penalty (Rahardjo, 2015, pp. 67–72). The comparative approach involves comparing legal provisions regarding the death penalty and the mechanisms for probation or review of the implementation of the death penalty within the legal systems of other countries. The comparative approach aims to identify similarities and differences in these provisions, as well as to gain an understanding of how other countries establish limitations, evaluation mechanisms, and legal certainty regarding the application of the death penalty. The results of this comparison are then used as the basis for analysis to provide a perspective on improving the provisions governing the probationary period for the death penalty in Indonesian criminal law.

In this normative-empirical legal study, the types of data used are secondary data and primary data. Secondary data sources are obtained through a literature review, including books, journals, seminar proceedings, papers, legal dictionaries, legal encyclopaedias, legal literature dictionaries or other written legal materials. In addition to the literature review, there is also a review of documents, including legal documents such as legislation in a hierarchical or tiered structure, case law, agreements/contracts and other documents. As for primary data, the researcher argues that the data sources in normative-empirical legal research are secondary data (literature and legal documents), more commonly known as legal materials, which comprise primary, secondary and tertiary legal materials.

Primary legal sources are legal sources comprising legislation, official records, court rulings and official state documents. According to Peter Mahmud, primary legal sources are authoritative in nature that is, they possess authority and consist of legislation, official records or minutes relating to the drafting of legislation, and judicial rulings. Secondary legal sources are legal materials comprising legal textbooks, legal journals containing fundamental principles (legal principles), the views of legal experts (doctrine), the results of legal research, legal dictionaries and legal encyclopaedias. Interviews with legal experts to provide legal opinions on a legal event or phenomenon can be regarded as secondary legal sources; however, their academic credentials must be considered, and they should ideally have no involvement in the event in question so that the comments provided remain objective. Tertiary legal materials are those that provide guidance or explanations regarding primary or secondary legal materials, such as legal dictionaries, language dictionaries, encyclopaedias and legal encyclopaedias. In normative-empirical legal research, there are two types of data:

primary and secondary. Consequently, data collection techniques in normative-empirical legal research may be used either separately or in combination. These data collection techniques include the collection of secondary data (literature and written documents) through literature reviews and document analysis.

The analysis of legal material in this study was conducted qualitatively using a normative-analytical method. This method focuses on the analysis of legal norms contained in legislation, legal doctrine, legal principles, and legal theories relevant to the subject of the study. The analysis was carried out through legal interpretation of the provisions in Law No. 1 of 2023 on the Criminal Code, specifically Articles 67 and 100, which regulate the status of the death penalty as a special form of punishment and the granting of a probationary period for the death penalty.

RESULTS AND DISCUSSION

Provisions on the Probationary Period for the Death Penalty in Article 100 of Law No. 1 of 2023

The provisions regarding the probationary period for the death penalty in Law No. 1 of 2023 on the Criminal Code represent a fundamental reform of the national penal system. These provisions reflect a paradigm shift in the approach to the death penalty, moving away from an approach based solely on retribution towards one that strikes a balance between the interests of public protection, the interests of victims, respect for human rights, and the possibility of behavioural change in offenders. Through the concept of a probationary period, the death penalty is no longer positioned as a sentence that directly leads to execution, but rather as a sentence that includes a mechanism for evaluating the condition and progress of the convicted person over a specified period.

In the Indonesian context, Law No. 1 of 2023 adopts a moderate stance by retaining the death penalty whilst making changes to its status and the mechanisms for its application. The death penalty in the National Criminal Code is no longer classified as a principal penalty, as under previous provisions, but rather as a special penalty that is always imposed as an alternative. The policy of retaining the death penalty whilst providing a ten-year probationary period, as set out in Article 100 of the National Criminal Code, represents a compromise between the state's interest in safeguarding public security and the principle of respect for human dignity. The state retains the authority to impose the death penalty on perpetrators of certain criminal offences involving a very serious degree of culpability and impact, whilst at the same time providing the convicted person with an opportunity to demonstrate a change in attitude and behavior (Moeljatno, 2015, p. 23).

Philosophically, the probationary period for the death penalty reflects the influence of modern theories of punishment, which regard human beings as legal subjects who retain the potential for change. Granting a ten-year period of probation to death-row prisoners demonstrates that the law provides an opportunity for rehabilitation and evaluation of an individual's behavioral development. Viewed through Gustav Radbruch's theory of the purposes of law, the regulation of the death penalty probationary period represents an effort to achieve a balance between justice, utility, and legal certainty. From the perspective of justice, the probationary period provides convicted persons with an opportunity to reform themselves before the state carries out a final and irreversible punishment. From the perspective of utility, this mechanism enables criminal law not only to focus on imposing suffering on offenders but also to provide opportunities for rehabilitation and social reintegration. Meanwhile, from the perspective of legal certainty, the ten-year period establishes a clear timeframe for the evaluation process before a final decision is made regarding the execution of the death penalty or its commutation (Schabas, 2002, p. 3).

Nevertheless, the provisions on the probationary period for the death penalty in Article 100 of the National Criminal Code still raise issues when viewed from the perspective of legal certainty. Whilst this provision does provide a general framework for the probationary period, there remain several abstract concepts that require further interpretation, such as 'remorse', 'hope for rehabilitation', and, in particular, 'commendable conduct and behaviour'. The provision does not yet provide objective criteria regarding the indicators that can be used to determine whether a convicted person is eligible to have their death sentence commuted to life imprisonment. This lack of clarity has the potential to lead to inconsistencies in application from one case to another, as the application of the law is highly dependent on the interpretation of the competent authorities (Priyatno, 2013, p. 98).

Article 100 of the National Criminal Code contains several key elements that form the basis for the application of a probationary period for the death penalty, namely the judge's authority to impose the death penalty with a probationary period, the duration of the probationary period of ten years, consideration of the defendant's remorse, their prospects for rehabilitation, the defendant's role in the criminal offence, and commendable conduct and behaviour as grounds for commuting the death penalty to life imprisonment. Each of these elements has legal consequences and raises distinct issues when considered in relation to the principle of legal certainty.

The authority of judges to impose the death penalty with a ten-year probationary period demonstrates that judges play a central role in determining the application of the death penalty in specific cases. Judges do not merely act as mechanical enforcers of the law, but also assess the circumstances of the case, the degree of the defendant's guilt, and the personal circumstances of the offender before imposing the death penalty with a probationary period. However, this authority raises questions regarding the balance between judicial independence and legal certainty. Judicial discretion is necessary to ensure that judgements take into account the individual characteristics of each case; however, an excessively broad scope of discretion may lead to inconsistent application of the law across cases with similar characteristics. Therefore, clear legal parameters are required to ensure that the application of Article 100 does not result in disparities in sentencing.

The provision regarding the ten-year probationary period is one aspect that provides legal certainty, as it sets a time limit for the evaluation process of the convicted person. With this time limit in place, the probationary period does not continue indefinitely, but has a specific duration which forms the basis for determining subsequent legal consequences. The ten-year period may also be understood as a timeframe deemed sufficient to assess the consistency of a person's change in attitude and behaviour whilst undergoing rehabilitation. However, the certainty regarding this timeframe does not fully resolve the legal issues, as Article 100 does not set out in detail how the evaluation process is to be carried out over the course of those ten years. The absence of a clear evaluation mechanism may lead to uncertainty regarding the criteria for assessing the success or failure of the probation period.

The defendant's expression of remorse was also a factor taken into account in imposing the death penalty with a probationary period. Remorse indicates a moral awareness that the act committed was a mistake and can serve as an indicator of a person's potential for rehabilitation. However, remorse is a psychological state that is difficult to measure objectively. Judges need to distinguish between remorse that genuinely reflects awareness and behaviour that is merely a strategy to secure a more lenient sentence. Without clear indicators to gauge remorse, there is a risk of inconsistent assessment standards arising from one case to another. Therefore, specific parameters are required, such as the results of psychological assessments, behaviour during the trial proceedings, and the defendant's track record whilst undergoing rehabilitation.

In addition to remorse, Article 100 of the National Criminal Code takes into account the prospect of the defendant reforming. This element indicates that the Indonesian penal system still allows scope for the concepts of rehabilitation and social reintegration. However, the prospect of reform is also an abstract concept, as there are no explicit criteria setting out how a judge might assess the likelihood of a person's behaviour changing. Such change can be influenced by various factors, such as behaviour whilst undergoing rehabilitation, compliance with prison rules, social relationships, and awareness of the offences committed. Therefore, clearer assessment standards are required so that the concept of rehabilitation does not rely solely on subjective considerations, but can be assessed using objective indicators.

Article 100 of the National Criminal Code also takes into account the defendant's role in the criminal offence as one of the factors in imposing the death penalty with a probationary period. This provision reflects the principle of individualisation of punishment, which requires that sentences be imposed taking into account the degree of culpability and involvement of each perpetrator. In criminal offences committed jointly, each perpetrator may have a different level of involvement; therefore, the imposition of punishment must take into account the position of each perpetrator. The assessment of the defendant's role still requires clear parameters to avoid differences in interpretation. Factors such as the defendant's contribution, intent, position within the structure of the criminal offence, and the impact of their actions may serve as objective considerations in making such an assessment.

The most problematic element of Article 100 of the National Criminal Code is the provision concerning 'commendable conduct and actions'. This term forms the basis for determining whether a death sentence may be commuted to life imprisonment once the probationary period has ended. The main problem is the absence of a clear definition or indicators regarding the meaning of commendable conduct and behaviour. This is an 'open norm' that leaves room for interpretation by those applying the law. On the one hand, open norms provide flexibility so that the law can adapt to evolving societal values; on the other hand, they can lead to uncertainty if not accompanied by clear parameters. In the context of the death penalty, this issue becomes even more serious as it relates to the commutation of the death penalty to life imprisonment. Therefore, implementing regulations are required that provide objective indicators regarding commendable conduct and behaviour so that the application of the probationary period for the death penalty can provide legal certainty.

The implementation of a probationary period for the death penalty is essentially a legal process that takes place between the imposition of the death sentence and the possible carrying out of the execution or the commutation of the sentence to life imprisonment. Article 100 of the National Criminal Code provides that a judge may impose the death penalty with a probationary period of ten years, taking into account the defendant's remorse, prospects for rehabilitation, or the defendant's role in the criminal offence. If, during the probationary period, the convicted person demonstrates commendable behaviour and conduct, the death sentence may be commuted to life imprisonment by Presidential Decree following consideration by the Supreme Court. Thus, this implementation mechanism comprises the stage following the final and binding verdict, the stage of rehabilitation and supervision during the probationary period, and the stage of evaluation and determination of the legal consequences once the probationary period has ended.

Once a court judgement has become final and binding, a convicted person sentenced to death with a probationary period is not immediately executed, but instead serves a probationary period of ten years. This reflects a conceptual shift from previous provisions, as the death penalty under the National Criminal Code is conditional in nature and the carrying out of the execution depends on the convicted person's progress during the probationary period. During this process, the convicted person is still afforded the opportunity to undergo rehabilitation aimed at assessing their personal development, compliance with rules and

regulations, social responsibility, and changes in attitude whilst serving the probationary period. However, the National Criminal Code does not yet provide detailed provisions regarding the legal status of the convicted person during the probationary period, including their rights and obligations. This gap has the potential to give rise to problems in practice and to reduce legal certainty regarding the treatment of death row prisoners whilst they are serving their probationary period.

The next stage involves rehabilitation and supervision over a period of ten years. The probationary period is not merely a postponement of the sentence, but a period during which changes in the convicted person's attitude and behaviour are assessed. The successful implementation of Article 100 depends heavily on the quality of the rehabilitation and supervision carried out by the relevant institutions. Changes in behaviour can be observed through compliance with prison rules, relationships with fellow inmates, participation in rehabilitation activities, and attitudes towards victims and the wider community. However, Article 100 of the National Criminal Code does not explicitly specify which institution has the authority to carry out evaluations during the probationary period. This lack of clarity regarding the competent authority and evaluation standards risks leading to subjective assessments when determining whether a convicted person meets the criteria for having their death sentence commuted to life imprisonment. Consequently, implementing regulations are required to set out the assessment criteria, evaluation methods, the competent authority, and the procedures for submitting recommendations to the President.

Once the ten-year probationary period has ended, an evaluation is carried out to determine the legal consequences regarding the death sentence that has been imposed. Under Article 100 of the National Criminal Code, if, during the probationary period, the convicted person demonstrates commendable conduct and behaviour, the death sentence may be commuted to life imprisonment by Presidential Decree. This evaluation stage is of critical importance as it directly concerns the condemned person's survival. Consequently, the evaluation must be conducted on the basis of objective, transparent and legally accountable criteria. The main issue at this stage once again relates to the standard of 'commendable conduct and behaviour', which is broad in scope and open to differing interpretations by the various parties involved. To provide legal certainty, the evaluation mechanism needs to be supplemented with clear parameters, including the prisoner's behavioural record during the probationary period, the results of rehabilitation programmes within the correctional institution, the level of compliance with rules, the level of awareness regarding the criminal offence committed, and the results of psychological and social assessments. These parameters are necessary to ensure that the commutation of the death penalty to life imprisonment does not rely solely on moral judgement, but is based on verifiable legal indicators.

Normative Issues and Legal Certainty Regarding the Probationary Period for the Death Penalty

The provisions on the probationary period for the death penalty in Law No. 1 of 2023 on the Criminal Code have essentially set the direction for a more humane reform of criminal law. Setting the probationary period at ten years provides a clear timeframe for evaluating the convicted person. However, legal certainty is not merely a matter of having a time limit; it also encompasses clarity regarding procedures, powers and indicators in the application of a legal norm. In this context, Article 100 of the National Criminal Code still has several shortcomings as it does not yet regulate in detail the mechanism for implementing the probationary period for the death penalty. The lack of clarity regarding the party conducting the evaluation, the standards for assessing the convicted person's behaviour, and the mechanism for making recommendations may make it difficult to apply this provision

uniformly and could potentially lead to disparities in the conversion of the death penalty to life imprisonment.

One of the most significant normative issues lies in the provisions concerning the commutation of the death penalty to life imprisonment. Article 100(4) of the National Criminal Code stipulates that if, during the probationary period, the convicted person demonstrates “commendable conduct and behaviour”, the death penalty may be commuted to life imprisonment by Presidential Decree following consideration by the Supreme Court. This provision reflects a paradigm shift in sentencing, as the death penalty is no longer regarded as an absolute punishment, but rather allows scope for evaluating the development of the convicted person’s behaviour during the probationary period.

However, the use of the term ‘commendable conduct and behaviour’ raises issues from the perspective of legal certainty. This term constitutes an ‘open norm’ as it does not explicitly set out the criteria or indicators that may be used to determine whether a convicted person has met these requirements. The use of open norms does indeed provide flexibility for judges and relevant institutions to adapt the application of the law to the specific circumstances at hand. However, in the context of the death penalty, this flexibility needs to be limited so as not to give rise to differences in interpretation that could lead to disparities in the application of the law. Legal certainty requires clarity regarding rights, obligations and the legal consequences arising from a norm. If a provision grants broad discretion without clear parameters, the outcome of its application becomes difficult to predict and has the potential to create legal uncertainty.

To address this issue, more objective indicators are required to determine the meaning of ‘commendable conduct and behaviour’. Such indicators could include the prisoner’s behaviour whilst serving their sentence, compliance with prison regulations, participation in rehabilitation programmes, expression of remorse for the offence committed, and the results of psychological and social assessments of the prisoner. With the introduction of more measurable indicators, the process of commuting a death sentence to life imprisonment can be carried out in accordance with objective and accountable standards, thereby reducing the likelihood of differing interpretations in practice.

The next normative issue concerns the mechanism for commuting the death penalty by Presidential Decree. Article 100 of the National Criminal Code stipulates that the commutation of the death penalty to life imprisonment is carried out by Presidential Decree following consideration by the Supreme Court. This provision demonstrates the involvement of the judicial and executive branches in determining the change in the penal status of a person sentenced to death. The Supreme Court’s involvement can be understood as a form of judicial oversight to ensure that the commutation is not based solely on political or administrative considerations, but remains within the legal framework. Meanwhile, the President’s authority in this context is a power conferred by law and relates to the outcome of an assessment of whether the conditions for commutation of the death penalty have been met.

Nevertheless, Article 100 of the National Criminal Code does not provide any clarification regarding the nature of the Supreme Court’s opinion. There is no provision that explicitly states whether the Supreme Court’s opinion is binding on the President or merely serves as a factor to be taken into account when making a decision. This lack of clarity has the potential to raise issues regarding legal certainty in the process of commuting the death penalty to life imprisonment. Therefore, clearer regulations are required regarding the status and legal consequences of the Supreme Court’s opinion within this mechanism.

When analyzed based on Gustav Radbruch’s theory of the purposes of law, the commutation of the death penalty to life imprisonment represents an effort to achieve a balance between justice, utility, and legal certainty. From the perspective of justice, the mechanism for commuting the death penalty provides convicted persons with an opportunity

to demonstrate personal reform. Criminal law, therefore, does not merely assess an individual based on their past conduct but also takes into account the possibility of behavioral change following the imposition of punishment. From the perspective of utility, the commutation of the death penalty to life imprisonment provides an opportunity to achieve the objectives of rehabilitation and correctional treatment, while the state continues to protect society through the imposition of life imprisonment.

Meanwhile, from the perspective of legal certainty, the provisions of Article 100 of the National Criminal Code still have several shortcomings. Although there is certainty regarding the ten-year probationary period, there remains a lack of clarity regarding the criteria for assessing commendable conduct and behaviour, the mechanism for evaluating changes in the convicted person's behaviour, the body authorised to carry out the assessment, and the Supreme Court's role in reviewing the Presidential Decree. These circumstances indicate that Article 100 of the National Criminal Code has provided a legal basis for the commutation of the death penalty, but further regulatory refinement is required to ensure that its implementation does not give rise to differing interpretations.

Consequently, the main problem with the regulation of the probationary period for the death penalty does not lie in the absence of a legal basis, but rather in the incompleteness of the implementing regulations that provide guidance on how these provisions are applied in practice. For the law to provide certainty, it is not enough for it merely to set out formal provisions; it must also provide clarity regarding the mechanisms for their application. Consequently, implementing regulations are required that specifically govern the mechanism for evaluating the death penalty probation period, the indicators of behavioural change in the convicted person, the body authorised to carry out the assessment, and the procedures for making recommendations and taking decisions regarding the commutation of the death penalty to life imprisonment.

An Analysis of the Balance between Justice, Utility and Legal Certainty

Legal certainty is one of the fundamental values among the aims of law set out by Gustav Radbruch, alongside justice and utility. In Radbruch's view, the law does not merely function as a set of norms regulating social behaviour, but must also provide clear guidance on what is permitted, what is prohibited, and the legal consequences arising from a particular act. Legal certainty is necessary so that the law can create order, regularity and a sense of security for both society and the legal subjects subject to the rules. In the context of criminal law, legal certainty holds a particularly important position because criminal law is directly concerned with the restriction of an individual's fundamental rights through the imposition of criminal sanctions. Therefore, every criminal provision must be formulated clearly, unequivocally and in a manner that allows for the predictability of its application. This principle is consistent with the principle of legality, which requires that a person may only be punished on the basis of pre-existing and clearly formulated legal provisions.

The provision for a probationary period for the death penalty in Article 100 of Law No. 1 of 2023 represents a new development in Indonesia's penal system. This provision signals a paradigm shift regarding the death penalty, which was previously understood as a final punishment, to one that includes an evaluation mechanism through a ten-year probationary period. From a normative perspective, Article 100 of the National Criminal Code provides several forms of legal certainty. Firstly, there is certainty regarding the mechanism for granting a probationary period to those sentenced to death; that is, there is a legal basis for judges to impose the death penalty with a probationary period, so that the death penalty is not automatically carried out immediately after the judgement becomes final and binding. Secondly, there is certainty regarding the duration of the probationary period namely, ten years thereby establishing a clear limit on the evaluation period for the convicted

person. Thirdly, there is certainty regarding the possibility of converting the death penalty into life imprisonment if, during the probationary period, the convicted person demonstrates commendable conduct and behaviour through a Presidential Decree following consideration by the Supreme Court.

Although Article 100 of the National Criminal Code formally provides a legal basis for the existence of a probationary period, its duration and the possibility of a change in sentence, these provisions do not yet fully satisfy the requirement for substantive legal certainty. This problem arises because there are still a number of elements that do not provide clear boundaries and parameters for their application. One of the main issues is the indicator of success during the probationary period. Article 100 stipulates that the death penalty may be commuted to life imprisonment if the convicted person demonstrates 'commendable conduct and behaviour', but the law has not provided clear criteria for determining whether these criteria have been met. This phrase is abstract and is open to differing interpretations by those with authority in the evaluation process. This situation has the potential to lead to disparities in the application of the law to convicted persons in relatively similar circumstances.

In addition to the indicator of 'commendable conduct and behaviour', legal certainty is also affected by the lack of objective standards regarding the aspects to be assessed during the probationary period. Article 100 of the National Criminal Code does not explicitly stipulate whether the assessment must be based on the convicted person's level of remorse, compliance with prison regulations, the success of rehabilitation programmes, changes in social behaviour, personal development, or other indicators. The absence of such standards may lead to differing views amongst correctional institutions, prosecutors, judges, the Supreme Court and even the President when determining the eligibility for a commutation of the death penalty. Consequently, cases with similar characteristics have the potential to result in differing decisions due to varying interpretations of the convicted person's behavioural development.

Legal certainty is also linked to the evaluation mechanism during the probationary period. A ten-year probationary period should not be understood merely as a postponement of the execution of the sentence, but as a mechanism for evaluating changes in behaviour, personal development and the possibility of the convicted person's rehabilitation. Therefore, the evaluation must be carried out through a clear, structured and accountable mechanism. However, Article 100 of the National Criminal Code does not yet provide detailed provisions regarding the procedures for evaluation, the parties responsible for conducting the evaluation, the format of the evaluation report, or the standards for recommendations regarding the commutation of the sentence. This lack of clarity may result in the process of commuting the death penalty to life imprisonment being dependent on the subjective assessment of certain parties and, ultimately, undermining legal certainty.

During the probation period, the assessment of the convicted person's behaviour is a crucial aspect, as it forms the basis for determining the success of the probation. One indicator that can be used is the convicted person's level of compliance with the rules and regulations of the correctional institution. Compliance demonstrates the convicted person's ability to follow the rules, control their behaviour, and respect the applicable legal system. However, administrative compliance cannot be the sole measure of success, as an individual may demonstrate good behaviour in a formal sense without showing any substantive change in their legal awareness. Therefore, the assessment must be carried out comprehensively, taking into account the convicted person's behaviour, attitude and personal development.

Personal development is also a key aspect of the evaluation process, as the aim of the correctional system is not merely to restrict prisoners' freedom, but also to provide rehabilitation so that prisoners recognise their mistakes, reform themselves, and can be

reintegrated into society. In the context of death row inmates serving a probationary period, personal development serves as a key indicator for assessing whether positive changes have occurred during their rehabilitation. Furthermore, participation in rehabilitation programmes can be used as an indicator, as it demonstrates a willingness to reform. However, Article 100 of the National Criminal Code does not yet directly link the success of rehabilitation programmes to the assessment of the element of ‘commendable conduct and behaviour’; consequently, there remains room for interpretation regarding the extent to which the outcomes of rehabilitation can form the basis for a commutation of the death sentence.

Remorse for a criminal offence may also form part of the assessment of a convicted person’s change in attitude. However, remorse is subjective in nature as it relates to a person’s inner state. Therefore, remorse cannot be adequately assessed on the basis of verbal statements alone, but must be observed through consistent changes in behaviour whilst serving the sentence. The same applies to changes in attitude and behaviour, which are the primary objectives of granting a probationary period. The state affords convicted persons the opportunity to demonstrate that they have changed and no longer have a propensity to commit criminal offences. To ensure that such assessments do not result in disparities between one convicted person and another, changes in attitude and behaviour must be assessed on the basis of objective and verifiable indicators.

Another issue affecting legal certainty is the supervision mechanism during the probationary period. Article 100 of the National Criminal Code does not comprehensively regulate the process of supervising a convicted person’s behaviour over a ten-year period. Yet, such supervision is necessary to ensure that the probationary period genuinely serves an evaluative function and is not merely a waiting period prior to the execution of the death penalty. This lack of clarity raises questions regarding which institution holds the primary authority to carry out monitoring and compile progress reports on the convicted person: is it the prison service, the public prosecutor’s office as the enforcer of court rulings, or another institution designated by implementing regulations? From a legal administration perspective, every authority must have a legal basis, clear limits to its powers, and a clear accountability mechanism to prevent both the abuse of authority and legal vacuums.

Legal certainty is also linked to the balance of powers between judges, the government, the President and the Supreme Court. Under Article 100 of the National Criminal Code, judges have the authority to impose the death penalty with a probationary period. Furthermore, if during the probationary period the convicted person demonstrates commendable behaviour and conduct, the death penalty may be commuted to life imprisonment by Presidential Decree following consideration by the Supreme Court. However, this provision does not yet explain in detail the respective positions of these institutions’ powers. One key issue is the nature of the Supreme Court’s advice: whether it is binding on the President or merely serves as a factor to be taken into account in the decision-making process. Furthermore, there is as yet no mechanism that clearly regulates the coordination between correctional institutions, the government, the Supreme Court and the President in the process of evaluating and deciding on changes to sentences.

Based on Gustav Radbruch’s theory of legal certainty, this situation indicates that Article 100 of the National Criminal Code has provided formal legal certainty, but has not yet fully achieved substantive legal certainty. Formal certainty is evident from the existence of provisions governing the probationary period, the ten-year time limit, and the possibility of commuting the death penalty to life imprisonment. Meanwhile, substantive certainty has not yet been fully realised as there remain gaps regarding indicators of success, assessment standards, evaluation mechanisms, oversight mechanisms, and the division of powers between institutions. Good law must not only provide certainty in writing, but must also be capable of providing clarity, consistency and predictability in practice. Therefore, the

provisions governing the probationary period for the death penalty need to be supplemented by implementing regulations that provide guidelines on indicators of the convicted person's behaviour, evaluation mechanisms, assessment standards and the division of powers between the institutions involved.

From the perspective of striking a balance between justice, utility and legal certainty, the probationary period for the death penalty reflects an effort to reconcile these three values. Justice is reflected in the opportunity afforded to the convicted person to reform and demonstrate a change in behaviour before the death penalty is carried out. Utility is reflected in the provision of guidance, rehabilitation and the possibility of social reintegration, whilst continuing to protect the public. Meanwhile, legal certainty is realised through the setting of a ten-year probationary period and the mechanism for commutation of the sentence via a Presidential Decree following consideration by the Supreme Court. However, this balance is not yet optimal, as clarity regarding the indicators and procedures for implementation remains limited. Consequently, the flexibility afforded by the probationary period needs to be balanced by clear guidelines to ensure that humanitarian and rehabilitative objectives do not undermine the certainty and consistency of the application of the law.

Based on this overall analysis, it can be concluded that the provisions governing the probationary period for the death penalty in Article 100 of Law No. 1 of 2023 have provided a more humane legal basis and allow scope for the evaluation and behavioural change of the convicted person. However, from the perspective of legal certainty, these provisions still require refinement as they do not yet provide objective standards and measurable mechanisms for their implementation. Therefore, supporting legal instruments are required to regulate in greater detail the indicators of 'commendable conduct and behaviour', standards for behavioural assessment, oversight mechanisms, evaluation procedures, and the division of powers amongst institutions. These improvements are necessary to ensure that the implementation of the probationary period for the death penalty can proceed objectively, transparently, consistently and predictably, whilst maintaining a balance between justice, public interest and legal certainty.

Reform of the Provisions Governing the Probationary Period for the Death Penalty to Ensure Legal Certainty

Based on an analysis of Article 100 of Law No. 1 of 2023 on the Criminal Code, the provision regarding the probationary period for the death penalty reflects a shift towards a more humane sentencing paradigm compared to previous provisions. The granting of a ten-year probationary period affords the convicted person the opportunity to demonstrate a change in behaviour before the death penalty is carried out. However, these provisions still leave various normative issues that have the potential to cause legal uncertainty in their implementation. These issues relate primarily to the absence of objective indicators regarding 'commendable attitudes and conduct', the lack of clarity regarding the evaluation mechanism, and the lack of clarity regarding which institution has the authority to assess the convicted person's progress. Therefore, a legal reconstruction is required as an effort to refine the legal norms so that the objectives of the National Criminal Code, particularly in realising legal certainty, justice and public benefit, can be optimally achieved. This reconstruction is not intended to abolish or alter the existence of Article 100 of the Criminal Code, but rather to refine its provisions through more operational and measurable implementing regulations.

The first step required is the formulation of implementing regulations for Article 100 of the Criminal Code. The current provisions already set out the conditions for granting a probationary period, a ten-year timeframe, and the possibility of commuting the death penalty to life imprisonment, but do not yet provide detailed provisions regarding the

implementation mechanism. This situation means that law enforcement officials do not yet have uniform guidelines for evaluating convicted persons during their probationary period. Therefore, implementing regulations are required which may take the form of a Government Regulation or a Supreme Court Regulation to comprehensively govern the procedures for implementing the probationary period for the death penalty. The provisions must, at a minimum, cover the procedures for determining the probationary period, rehabilitation procedures, evaluation mechanisms, the preparation of progress reports on the convicted person, and the procedures for applying for the commutation of the death penalty to life imprisonment. With uniform guidelines in place, the application of Article 100 of the Criminal Code can be carried out more consistently and provide legal certainty for all parties involved.

The next step is to establish objective indicators for assessing the success of the probation period. The main issue with Article 100 of the Criminal Code lies in the use of the phrase ‘commendable conduct and behaviour’ without any clear legal criteria. This phrase constitutes an ‘open norm’ that allows for broad interpretation, thereby potentially leading to differing assessments and disparities in its application. To avoid subjectivity, indicators are required that are objective, measurable, transparent and legally accountable. These indicators should cover at least five aspects, namely behaviour whilst serving the sentence, including compliance with rules and regulations and the absence of disciplinary offences; the results of rehabilitation, as evidenced by participation in programmes for personal development, education, religious instruction and self-reliance; psychological condition, based on a professional assessment of personality changes and the level of risk of reoffending; genuine remorse, reflected in a cooperative attitude, acknowledgement of wrongdoing, and awareness of the consequences of one’s actions; and social contribution through positive activities, mentoring fellow inmates, or other relevant forms of contribution whilst serving the sentence.

In addition to objective indicators, it is also necessary to establish a mechanism for periodic evaluation during the probationary period. Article 100 of the Criminal Code does not specify in detail when the evaluation is to be carried out, who is to compile the report, what form the report should take, or the standards used to assess the convicted person’s progress. Therefore, evaluations may be carried out periodically for example, annually using a standardised assessment tool across Indonesia. The results of the evaluation must be set out in a written report detailing behavioural progress, the outcomes of rehabilitation, psychological condition, the level of compliance with prison rules, and recommendations regarding the suitability of a change in sentence. This mechanism for periodic evaluation not only provides legal certainty but also enhances accountability in the decision-making process regarding the commutation of the death penalty to life imprisonment.

The reform should also focus on clarifying the authority of the bodies responsible for conducting evaluations. Article 100 of the Criminal Code does not yet explicitly specify whether evaluations are to be carried out by correctional institutions, the ministry responsible for legal affairs, supervising judges and observers, the Supreme Court, or other bodies. To avoid overlapping authority and subjectivity in assessments, evaluations should be carried out by a multidisciplinary assessment team comprising representatives from correctional institutions, forensic psychologists, criminologists, social workers, the public prosecutor’s office, as well as supervising judges and observers. This team is tasked with assessing the prisoner’s progress based on predetermined indicators and formulating recommendations regarding the suitability of a change in sentence. Under this model, decisions regarding changes to sentences are not based solely on the assessment of a single institution, but are the result of a more objective and accountable collective evaluation.

Furthermore, guidelines need to be drawn up for judges when imposing the death penalty with a probationary period. Although Article 100 of the Criminal Code grants judges

the authority to impose the death penalty with a probationary period, this provision does not provide sufficiently clear parameters regarding the circumstances that may form the basis for granting such a probationary period. The guidelines for judges should set out the factors that must be taken into account, including the degree of the offender's culpability, the offender's role in the offence, the presence of remorse, the potential for rehabilitation, age, psychological condition, and the likelihood of the offender reintegrating into society as a responsible member. These guidelines are necessary to reduce disparities in sentencing between judges and to ensure that the application of Article 100 of the Criminal Code is based on consistent and justifiable considerations.

Comparisons with other countries also reinforce the need for such improvements. China, for example, already has a mechanism for a two-year suspension of the death penalty, with relatively clearer evaluation criteria regarding the behaviour of the convicted person, the conditions for commutation, and the body authorised to carry out the evaluation. Compared with China, Indonesia shares the common feature of providing convicted prisoners with the opportunity to have their death sentences commuted, but still has shortcomings in terms of evaluation indicators, assessment mechanisms and the competent authorities. Meanwhile, Japan places greater emphasis on procedural certainty in the implementation of the death penalty, whilst Vietnam relies more heavily on the President's pardon mechanism. This comparison shows that Indonesia's approach places greater emphasis on rehabilitation and the individualisation of sentencing, but still needs to strengthen the aspect of legal certainty through more structured evaluation arrangements.

Consequently, the reform of the provisions governing the probationary period for the death penalty is aimed at strengthening legal certainty without undermining the principles of justice and public interest that underpin the National Criminal Code. Legal certainty cannot be achieved solely through the existence of written provisions; it must also be underpinned by clear indicators, procedures, competent authorities and implementation mechanisms that can be applied consistently. The formulation of implementing regulations, the establishment of objective indicators, periodic evaluations, the clarification of institutional powers, and the drafting of guidelines for judges are necessary steps to ensure that Article 100 of the Criminal Code can be applied in a more objective, transparent and accountable manner. With these improvements, the death penalty probation period will not only serve as a symbol of reform in Indonesia's criminal law, but will also genuinely provide fair, certain and beneficial legal protection for the convicted person, the victim, the public and the state.

CONCLUSION

Based on the findings of the research and the discussion, it can be concluded that the provision for a probationary period for the death penalty in Article 100 of Law No. 1 of 2023 on the Criminal Code constitutes a reform of national criminal law that reflects a paradigm shift in the application of the death penalty. The death penalty is no longer positioned solely as a final punishment, but is subject to a ten-year probationary period to allow for the assessment of the convicted person's attitude and behaviour. This provision essentially reflects an effort to balance the values of justice, utility and legal certainty. From the perspective of justice, the convicted person is given the opportunity to reform and demonstrate a change in behaviour before the death penalty is carried out. From the perspective of utility, the probationary period provides scope for the process of guidance and rehabilitation, whilst from the perspective of legal certainty, there is a clear time limit and a mechanism for converting the death penalty to life imprisonment by means of a Presidential Decree following consideration by the Supreme Court.

However, the provisions on the probationary period for the death penalty in Article 100 of Law No. 1 of 2023 do not yet fully provide legal certainty in terms of both substance and

implementation. The main issue lies in the use of the phrase ‘commendable conduct and behaviour’, which is not accompanied by objective and measurable indicators, thereby leaving room for differing interpretations when determining the success of the probationary period. Furthermore, there are as yet no sufficiently detailed provisions regarding assessment standards, mechanisms for periodic evaluation, the authorities responsible for conducting evaluations, the format of progress reports on convicted persons, and the division of powers between correctional institutions, the Public Prosecutor’s Office, the Supreme Court, and the President. These conditions have the potential to lead to inconsistencies and disparities in the application of the law to convicted persons in relatively similar circumstances. Therefore, a restructuring of the regulations is required through the formulation of implementing regulations that provide objective indicators of changes in the behaviour of convicted persons, measurable and transparent evaluation mechanisms, a clear division of powers between institutions, and guidelines for judges in imposing the death penalty with a probationary period. With these improvements, it is hoped that the implementation of the probationary period for the death penalty will strike a balance between legal certainty, justice and the public interest within the national penal system.

Based on the findings of this research, the government and the People’s Representative Council need to refine the provisions governing the implementation of the death penalty probation period set out in Article 100 of Law No. 1 of 2023 by enacting more comprehensive implementing regulations. These regulations must provide clear definitions and indicators for the phrase ‘commendable conduct and behaviour’ to prevent differing interpretations in practice. Assessment indicators may include the convicted person’s level of compliance with prison rules, the outcomes of rehabilitation programmes, personal development, psychological condition, the presence of genuine remorse, and social contributions made during the probationary period. Furthermore, a mechanism for periodic evaluation over a ten-year period must be established, including procedures for report preparation, assessment standards, and recommendations regarding the suitability of commuting the death penalty to life imprisonment. Such provisions are essential to ensure that decisions concerning the convicted person are based on objective, transparent, and legally accountable criteria.

The Supreme Court also needs to draw up guidelines for judges on the application of Article 100 of Law No. 1 of 2023, particularly regarding the criteria for imposing the death penalty with a probationary period and assessing the progress of the convicted person during that probationary period. Meanwhile, correctional institutions, the public prosecutor’s office and relevant agencies need to have a clear division of responsibilities in providing guidance, supervision and evaluation of convicted persons. The evaluation mechanism should involve a multidisciplinary assessment so that decisions are not based solely on a single aspect or a single institution. With clearer regulations and guidelines, the implementation of the probationary period for the death penalty can proceed in a consistent, objective and accountable manner, thereby reducing disparities in the application of the law whilst providing better legal protection for the convicted person, victims, the public and the state.

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