



## Conditional death penalty policy in the new criminal code: An analysis of the 10-year probation period from the perspective of international human rights

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### Abstract

Law Number 1 of 2023 on the Criminal Code (New Criminal Code) introduces the concept of conditional death penalty as a form of criminal justice reform in Indonesia. One of its key mechanisms is a 10 (ten) year probation period regulated under Article 100 of the New Criminal Code, in which death row inmates are given the opportunity to demonstrate remorse and behavioral change before a decision on execution or sentence commutation is made. This study aims to analyze whether the 10-year probation mechanism complies with international Human Rights standards, particularly the International Covenant on Civil and Political Rights (ICCPR) and other human rights instruments. Using normative legal research methods, this study examines various laws and regulations, court decisions, and relevant legal doctrines. The results show that although the conditional death penalty mechanism represents a progressive step in Indonesia's criminal law reform, several unresolved legal problems remain, including the absence of clear criteria for assessing convict eligibility, the potential occurrence of the death row phenomenon contrary to Article 7 of the ICCPR, and legal uncertainty due to the lack of a definitive time limit in the clemency application process. This study recommends the need for comprehensive implementing regulations to ensure legal certainty while protecting the human rights of death row convicts during the probation period.

**Keywords:** Conditional death penalty, 10-year probation period, human rights, new criminal code, death row phenomenon

### Introduction

The reform of Indonesia's criminal law, which was enacted through Law Number 1 of 2023 concerning the Indonesian Criminal Code (New Criminal Code), marked a significant milestone in the history of national legislation. [1] One of the most notable breakthroughs in the New Criminal Code is the reclassification of the death penalty from a principal punishment into a special and alternative form of punishment, accompanied by a conditional death penalty mechanism as regulated under Article 100. [2]

The concept of conditional death penalty grants a 10 (ten)-year probation period for death row inmates to demonstrate remorse and improved behavior. If the inmate exhibits improved behavior during this probation period, the death penalty may be converted to life imprisonment through a Presidential Decree upon the recommendation of the Supreme Court. Philosophically, this policy reflects the state's effort to balance the interests of protecting society with respect for the right to life as the most fundamental human right.

However, this 10-year probation mechanism raises various critical questions from a human rights perspective. The International Covenant on Civil and Political Rights (ICCPR), which Indonesia has ratified through Law Number 12 of 2005, explicitly regulates that the right to life is a right that cannot be derogated from under any circumstances (non-derogable rights). [3] Article 28I, paragraph (1) of the 1945 Constitution of the Republic of Indonesia also affirms the same principle. [4]

On the other hand, without adequate implementing regulations, the provisions of Article 100 of the New Criminal Code face serious issues regarding legal certainty. The absence of measurable criteria for assessing a convict's "remorse" and "commendable behavior," as well as the lack of a clear time limit in the appeal process, has the potential to create inconsistencies in implementation that are

detrimental to the convict. [5] In several of its decisions, the Constitutional Court has also emphasized that the death penalty must be applied with great caution and consideration of human rights principles. [6]

Based on those explanations, this study aims to conduct an in-depth analysis of the mechanism for the 10-year probation period for conditional death penalty under Article 100 of the New Criminal Code from a human rights perspective, identify the legal issues that arise, and formulate recommendations for improving existing regulations to ensure maximum protection of human rights for death row inmates. [7]

### Research Method

This research employs the method of normative legal research, which involves examining library materials or secondary data consisting of primary, secondary, and tertiary legal sources. [8] The normative approach is applied because this study focuses on analyzing legal norms contained in legislation, international agreements, case law, and legal doctrine related to conditional death penalties and human rights.

This study utilizes three approaches: first, the statute approach, which examines all laws and regulations related to the death penalty and human rights, including the New Criminal Code, the 1945 Constitution, the Human Rights Law, and international human rights instruments. [9] Second, the case approach, which analyzes both national and international court decisions that are relevant to the research topic. Third, the comparative approach, which examines similar regulations in other countries for comparison.

The primary legal sources used in this research include: (1) Law Number 1 of 2023 on the New Criminal Code, specifically Article 100; (2) the 1945 Constitution, specifically Article 28I; (3) Law Number 39 of 1999 on Human Rights; (4) the ICCPR along with General

Comments from the UN Human Rights Committee; and (5) the 1984 UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.<sup>[10]</sup> The secondary legal materials include legal textbooks, legal academic journals, research reports, and academic articles related to the research topic. All legal materials are analyzed using a qualitative-prescriptive analysis method to produce conclusions that are both argumentative and recommendatory.

## Results and Discussion

### Regulations on Conditional Death Penalty in Article 100 of the New Criminal Code

The New Criminal Code, which was enacted in 2023, brings about a paradigm shift in Indonesia's sentencing system, particularly regarding the status and implementation of the death penalty.<sup>[11]</sup> In contrast to the old Criminal Code, which treated the death penalty as a principal punishment, the New Criminal Code classifies the death penalty as a special punishment that is always imposed as an alternative. This change reflects the recognition that the death penalty is an ultimate remedium that may only be imposed under the most extreme circumstances.

Article 100 of the New Criminal Code specifically regulates the mechanism for conditional death penalty as follows: a convicted person sentenced to death may be granted a probation period of 10 (ten) years if they meet certain requirements.<sup>[12]</sup> During this period, the execution is suspended, and the convicted person is given the opportunity to exhibit good behavior and conduct. If the convicted person behaves well during the 10-year probation period, the death penalty may be converted to life imprisonment by a Presidential Decree, with the approval of the Supreme Court.<sup>[13]</sup>

This mechanism represents a progressive breakthrough in Indonesia's criminal law system. For the first time, death row inmates are given a formal opportunity to avoid execution through self-rehabilitation.<sup>[14]</sup> This aligns with the theory of rehabilitative punishment, which views punishment not merely as retribution, but as a means to reform and reintegrate offenders into society. However, this regulation also leaves various legal issues that cannot yet be resolved under existing regulations.

### Analysis of the 10-Year Probation Period from an International Human Rights Perspective

From the perspective of international human rights, the mechanism of a 10-year probation period for a conditional death penalty must be evaluated based on the standards established in various international human rights instruments to which Indonesia is a state party.<sup>[15]</sup> This evaluation is crucial considering that the right to life is a guaranteed right and cannot be compromised in any form.

First, regarding the "death row phenomenon," international case law has recognized that the condition of awaiting execution for an extended period may be considered inhuman treatment and degrading to human dignity. The decision of the British Privy Council in *Pratt & Morgan v. Jamaica* (1993) stated that a delay in execution of 5 (five) years or more may be categorized as inhuman treatment.<sup>[16]</sup> In this context, the 10-year probation period under the New Criminal Code far exceeds that threshold, thereby potentially violating Article 7 of the ICCPR.

Second, the UN Human Rights Committee, in General Comment Number 36 of 2018 on Article 6 of the ICCPR, emphasizes that States Parties that still retain the death penalty must ensure that its implementation meets very strict standards, including a prohibition against any form of unnecessary suffering for the convicted person.<sup>[17]</sup> Prolonged uncertainty during a 10-year probation period, without clear criteria and definitive mechanisms, may cause constant psychological distress and constitutes a form of unnecessary suffering.

Third, the European Court of Human Rights, in the case of *Soering v. United Kingdom* (1989), established the doctrine that the extradition of a person to a country that would punish them in a manner violating Article 3 of the European Convention (prohibition of torture) may constitute a human rights violation, even if the execution has not yet taken place.<sup>[18]</sup> This doctrine reinforces the argument that the psychological conditions experienced by the convicted person during a long and uncertain period of probation can be categorized as a form of inhuman treatment under the standards of ICCPR Article 7.<sup>[19]</sup>

Fourth, the 1984 UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty require that the death penalty be imposed only for the most serious crimes, with guarantees of a fair trial, and with full consideration of the circumstances of the convicted person.<sup>[20]</sup> The absence of a clear definition of "most serious crimes" in the New Criminal Code creates room for subjectivity that could be abused and violate these international human rights standards.

### Issues of Legal Certainty in the Probation Mechanism

In addition to international human rights concerns, the 10-year probation mechanism for a conditional death penalty also faces serious issues from the perspective of legal certainty. Law Number 39 of 1999 on Human Rights explicitly guarantees every person's right to fair treatment and legal certainty in the judicial process.<sup>[21]</sup>

The first issue is the absence of measurable and objective criteria for assessing "commendable behavior and actions" during the probation period. Article 100 of the New Criminal Code merely mentions this requirement without providing clear and legally verifiable indicators.<sup>[22]</sup> This creates an overly broad discretion for the authorities in assessing the eligibility of convicts for sentence conversion and may result in inconsistent treatment across cases.

The second issue is the absence of a definitive time limit in the clemency process for the commutation of death penalties to life imprisonment.<sup>[23]</sup> The Constitutional Court, in Decision Number 107/PUU-XIII/2015, has held that a clemency petition may be filed at any time; however, this creates even greater uncertainty for convicts who have already demonstrated good behavior during the 10-year probation period.

The third issue is the lack of implementing regulations (Government Regulation or Presidential Regulation) that technically govern the procedures for monitoring and evaluating convicts during the 10-year probation period.<sup>[24]</sup> Without clear technical guidelines, correctional institutions, where convicts serve their sentence during the probation period, lack standardized criteria for evaluating and reporting on the convicts' progress to the Supreme Court and the President.

Gustav Radbruch, in his theory of legal certainty, emphasizes that good law must simultaneously fulfill three fundamental values, namely justice (Gerechtigkeit), utility (Zweckmäßigkeit), and legal certainty (Rechtssicherheit).<sup>[25]</sup> The lack of comprehensive implementing regulations on conditional death penalties undermines the value of legal certainty, and in turn, compromises the value of justice for the convicted.

### Comparative Analysis with Other Countries

To provide a more comprehensive perspective, it is necessary to compare Indonesia with other countries that have implemented similar mechanisms. China has a system of suspended death sentences, which grants a two-year probation period following the sentencing.<sup>[26]</sup> If the convict does not commit any new intentional offenses during those 2 years, the sentence is automatically converted to life imprisonment or 25 years in prison. This mechanism is significantly shorter than that regulated in the New Indonesian Criminal Code, thereby providing greater legal certainty for the convict.

Vietnam also has a mechanism for postponing the execution of certain death row inmates, but with more detailed conditions and criteria in its regulations.<sup>[27]</sup> Meanwhile, countries that have abolished the death penalty, like Philippines (which abolished the death penalty in 2006), demonstrate that abolishing the death penalty does not necessarily lead to an increase in crime rates, thus weakening the argument regarding the deterrent effect of the death penalty.

This comparison shows that the probation period mechanism adopted by Indonesia is relatively longer than that of similar countries, without being accompanied by more detailed criteria and procedures.<sup>[28]</sup> This situation creates a greater human rights risk because the convicted person must endure uncertainty for a longer period of time. Indonesia should therefore adopt best practices from these countries in formulating more comprehensive implementing regulations that prioritize the protection of human rights.

### Recommendations for Strengthening Regulations

Based on the analysis above, there are several recommendations that should be considered in strengthening regulations on conditional death penalties in Indonesia. First, the government needs to immediately issue implementing regulations in the form of a Government Regulation or Presidential Regulation that technically governs the mechanisms for monitoring, evaluating, and reporting on the progress of the convicted person during the 10-year probation period.<sup>[29]</sup> These implementing regulations must include measurable and objective indicators regarding “commendable behavior and actions” that serve as the criteria for sentence conversion.

Second, a definitive time limit must be established for the clemency application process following the conclusion of the 10-year probation period. The establishment of this time limit is crucial to provide legal certainty for the convicts and prevent prolonged uncertainty.<sup>[30]</sup> In accordance with ICCPR standards, the process of granting clemency or converting the sentence must be conducted within a reasonable timeframe and must not cause additional suffering to the convicts.

Third, Indonesia needs to consider ratifying the Second Optional Protocol to the ICCPR, which aims to

progressively abolish the death penalty. The mechanism for conditional death penalties in the New Criminal Code may be considered a transitional step toward a more comprehensive abolition of the death penalty in the future.<sup>[31]</sup>

Fourth, it is necessary to establish an independent institution or mechanism to supervise the conditions of death row inmates during their probation period, ensure that their basic rights are met, and provide evidence-based recommendations to the Supreme Court and the President in the decision-making process regarding sentence commutation.<sup>[32]</sup> This is crucial to prevent non-legal influences in a process that should be grounded in objective legal and human rights considerations.

### Conclusion

Based on the analysis conducted, several conclusions can be drawn. First, the 10-year probation period mechanism for conditional death penalties as regulated in Article 100 of the New Criminal Code is a progressive step in legal reform; however, it has the potential to cause serious human rights violations if not implemented with comprehensive regulations that prioritize the protection of human rights.<sup>[33]</sup>

From an international human rights perspective, particularly ICCPR Articles 6 and 7, a prolonged probation period without clear criteria and procedural certainty may potentially lead to the “death row phenomenon,” which is categorized as a form of inhuman treatment. International jurisprudence in the cases of *Pratt & Morgan v. Jamaica* and *Soering v. United Kingdom* supports the argument that prolonged existential uncertainty may violate the prohibition against inhuman treatment under the ICCPR.

There are several issues regarding legal certainty that must be addressed immediately, including: the lack of measurable criteria for assessing a convict’s eligibility, the absence of a definitive time limit in the pardon process, and the lack of implementing regulations governing the technical aspects of supervision and assessment during the probation period.

Therefore, the government needs to immediately issue comprehensive implementing regulations, establish definitive time limits for the clemency application process, form an independent supervision mechanism for death row inmates during their probation period, and consider further steps toward the abolition of the death penalty in line with developments in international human rights standards.

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