

## Regulating The Waiting Period For The Execution Of Capital Punishment: A Legal Certainty And Prisoners' Rights Protection Perspective After The Enactment Of Law Number 1 Of 2023 On The Criminal Code

Ceria Rahma Yani Br Sitepu<sup>1)</sup>, I Nyoman Nurjaya<sup>2)</sup>, Faizin Sulistio<sup>3)</sup>  
<sup>1,2,3)</sup> Brawijaya University

\*Corresponding Author

Email: [ceriarahmayani07@gmail.com](mailto:ceriarahmayani07@gmail.com), [invoman@ub.ac.id](mailto:invoman@ub.ac.id), [faizin@ub.ac.id](mailto:faizin@ub.ac.id)

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### Abstract

Indonesia's newly enacted Criminal Code, Law Number 1 of 2023, reclassifies capital punishment from a primary penalty into a special and conditional sanction accompanied by a ten-year probationary period. This reform was intended to reconcile the death penalty with contemporary principles of humanity and rehabilitation. However, neither the new Code nor its predecessor regulation establishes a definite time limit within which an execution must be carried out following the exhaustion of legal remedies or the expiry of the probationary period. Empirical evidence shows that numerous death-row convicts in Indonesia have endured waiting periods far exceeding the maximum term of fixed-term imprisonment, in some cases spanning more than two decades, exposing them to what may be characterized as a double punishment and prolonged psychological uncertainty. Employing normative legal research through statutory and conceptual approaches, this article examines the regulatory vacuum surrounding the waiting period for execution under Indonesian law and evaluates its implications for the principle of legal certainty and the protection of convicts' fundamental rights. Drawing on Gustav Radbruch's theory of legal certainty and Lon Fuller's principles of the inner morality of law, the study argues that the absence of a clearly promulgated and consistently applied time frame undermines both the normative coherence of the criminal justice system and the constitutional guarantee of legal certainty. The article concludes by underscoring the urgency of further statutory regulation to close this normative gap and to safeguard the rights of death-row convicts pending execution.

**Keywords:** Capital Punishment, Death Row, Legal Certainty, Waiting Period for Execution

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## INTRODUCTION

Article 1(3) of the 1945 Constitution of the Republic of Indonesia affirms that Indonesia is a state based on law, or *rechtsstaat* (The 1945 Constitution of the Republic of Indonesia, 1945). This principle requires that every act of government be grounded in valid legal norms so as to realize justice, legal certainty, and public order. Criminal law, as part of this constitutional design, functions as public law whose principal purpose is to protect society against acts that threaten or harm it. A person is subjected to a criminal sanction once it has been proven that they have committed a criminal offense; punishment itself constitutes a form of suffering deliberately imposed by the state upon an offender who has fulfilled the elements of a criminal act (Hamzah, 2009). Criminal law is generally understood as *ultimum remedium* a measure of last resort to be invoked only where other branches of law have proven insufficient to protect the interests at stake.

Among the various forms of punishment recognized in Indonesian criminal law, capital punishment remains the most contentious, dividing scholars and practitioners between retributive and deterrence-based justifications on one hand, and human-rights-based abolitionist arguments on the other. (Nur Heriyanto, 2016) Law Number 1 of 2023 on the Criminal Code (the "National Criminal Code") did not resolve this debate, but it did fundamentally alter the doctrinal position of capital punishment: the death penalty is no longer a primary punishment as under the colonial-era Code, but a special and alternative punishment, threatened only for specific offenses such as narcotics crimes, terrorism, corruption, and gross violations of human rights, and imposed solely as a measure of last resort, reflecting a broader international trend toward restricting rather than

expanding the scope of capital punishment.(Law of the Republic of Indonesia Number 1 of 2023 on the Criminal Code, 2023)

A central innovation of this reform is Article 100, which introduces a ten-year probationary period for every death sentence, beginning one day after the court's decision acquires permanent legal force. During this period the judge must have regard to the offender's remorse, prospects for rehabilitation, and role in the offense. Commendable conduct may lead to commutation to life imprisonment through a Presidential Decision issued after Supreme Court consideration; absent such conduct, the Attorney General retains authority to order that execution proceed. This mechanism reflects a deliberate shift toward a more conditional and rehabilitative model of capital punishment.

Notwithstanding this innovation, the National Criminal Code leaves a significant normative gap unaddressed: it stipulates no definite time frame within which the execution itself must be carried out once the probationary period has lapsed, clemency has been refused, or legal remedies have been exhausted. Article 102 merely delegates further regulation of execution procedure to a future, separate statute. (Law of the Republic of Indonesia Number 1 of 2023 on the Criminal Code, 2023) This omission is not novel: the predecessor regulation, Law Number 2/PNPS/1964, likewise fixes no maximum waiting period, regulating only the administrative procedure for notifying a convict of the scheduled time of execution. (Law Number 2/PNPS/1964 on the Procedure for the Execution of Capital Punishment Imposed by Courts of General and Military Jurisdiction. 1964)Both the old and the new frameworks thus leave the duration of the pre-execution waiting period entirely open-ended.

The practical consequences are well documented. A number of death-row convicts in Indonesia have been held awaiting execution for periods far exceeding the statutory maximum for fixed-term imprisonment, which does not ordinarily exceed twenty years. Bahar bin Matsar, sentenced in the early 1970s for premeditated murder, armed robbery, and rape, awaited execution for approximately 38 years, while Sakak bin Jumak, sentenced in 1995, died in Cipinang Penitentiary in 2020 after 25 years on death row, reportedly from malnutrition and limited access to healthcare during the Covid-19 pandemic. (*Bahar bin Matsar, convicted in 1970 for premeditated murder, armed robbery, and rape in Tembilahan, Riau, had awaited execution for approximately 38 years, while Sakak bin Jumak, convicted in 1995, died in Cipinang Penitentiary in August 2020 after 25 years on death row, reportedly due to malnutrition and limited access to healthcare during the Covid-19 pandemic, n.d.*)Such convicts effectively serve two cumulative punishments: an indeterminate term of imprisonment already surpassing the ceiling applicable to fixed-term sentences, compounded by unresolved anticipation of eventual execution a phenomenon comparative literature terms the "death row phenomenon," capable of amounting to inhuman treatment (Soering v. United Kingdom, App. No. 14038/88, Judgment of 7 July 1989., 1989).These custody spans stand in stark contrast to the twenty-year ceiling that Indonesian law otherwise applies to fixed-term imprisonment, underscoring that the absence of a defined waiting period is not a merely theoretical gap but one with severe, documented human consequences.

This problem invites examination through legal-certainty theory. Gustav Radbruch identified three values law must simultaneously serve justice, expediency, and legal certainty the last requiring that law operate as a clear, binding, and consistently enforced set of rules, allowing citizens to predict the legal consequences of their situation. A complementary lens is Lon Fuller's inner morality of law, whose eight principles of legality include the requirement of congruence between rules as officially announced and their actual administration in practice (Fuller, 1969). A framework that announces a formal, judicially supervised procedure for capital punishment yet leaves the timing of its ultimate execution wholly unregulated and, in practice, subject to years or decades of delay exhibits precisely this incongruence.

Although the waiting period for execution has previously drawn scholarly attention, existing studies have examined this issue from narrower angles that, taken together, still leave the present problem unaddressed. Adiansyah Surya Yudhistira addressed legal certainty and the clarity of the waiting period within the general renewal of Indonesian criminal law prior to the National Criminal Code (Yudhistira, 2023), while Rusdianto Matulatuwa focused on procedural problems surrounding judicial review and clemency applications ((Matulatuwa, 2021). Roni Efendi examined the constitutionality of the waiting period from the standpoint of the sentencing system, concluding that its absence from statute constitutes a disharmony between substantive and procedural law, but confined the analysis to the pre-2023 legal order without extending it to any conditional or probationary mechanism (Efendi, 2019). Reflian Efrata Siregar likewise identified the same normative vacuum through a statutory and case-based approach, yet stopped short of proposing a concrete reformulation of the governing provisions (Siregar, n.d.). More recently, Shyifa Safira Refani examined the issue through the single narcotics case of Mary Jane Fiesta Veloso, illustrating how socio-political considerations can compound an already indeterminate waiting period, but without generalising the analysis beyond that one case (Refani, 2024). None of these studies has examined the regulatory vacuum in light of the probationary mechanism newly introduced by Article 100 of the National Criminal Code, nor situated the problem within the constitutional guarantee of Article 28D of the 1945 Constitution (The 1945 Constitution of the Republic of Indonesia, 1945). This article seeks to fill that gap.

This article accordingly addresses two questions. First, how does the prevailing statutory framework regulate the waiting period preceding execution, both before and after Law Number 1 of 2023? Second, how should future regulation be formulated to guarantee legal certainty in the execution process while protecting the fundamental rights of death-row convicts during that waiting period?

## RESEARCH METHODS

This study employs a normative juridical (doctrinal) legal research method. Peter Mahmud Marzuki defines normative legal research as a process undertaken to find the rules, principles, or legal doctrines needed to answer the legal issue under examination, treating law as a coherent system of norms rather than as an empirical social fact (Marzuki, 2017). Soerjono Soekanto similarly characterizes normative legal research as research directed at positive legal norms, encompassing the study of legal systematics, the synchronization of vertical and horizontal norms, legal history, and comparative law (Soekanto, 2001). Johnny Ibrahim adds that this method is appropriate wherever the object of inquiry is a gap, conflict, or inconsistency within positive law itself precisely the character of the problem examined here, namely a normative vacuum in the regulation of the pre-execution waiting period (Ibrahim, 2006). Guided by these conceptions, the research is conducted through a statutory and a conceptual approach, supplemented by a comparative approach.

The statutory approach examines legislation governing capital punishment and its execution in Indonesia, particularly Law Number 1 of 2023 on the Criminal Code, Law Number 2/PNPS/1964, Government Regulation Number 8 of 2008, Law Number 20 of 2025 on the Criminal Procedure Code, and the 1945 Constitution. The conceptual approach draws on Gustav Radbruch's theory of the three values of law and Lon Fuller's principles of the inner morality of law to evaluate the normative coherence of the existing framework. The comparative approach situates the Indonesian regulatory vacuum against comparable jurisprudence, in particular *Soering v. United Kingdom* before the European Court of Human Rights and *Pratt and Morgan v. The Attorney General for Jamaica* before the Judicial Committee of the Privy Council. The legal materials used consist of primary materials legislation and case law and secondary

materials, comprising books, journal articles, theses, and other authoritative legal literature, analyzed qualitatively through legal interpretation and systematic legal reasoning. Together, these approaches allow the analysis to move from a description of what the positive law currently provides presented as the Results below to a normative assessment, presented in the Discussion, of what it ought to provide if legal certainty and the protection of convicts' fundamental rights are to be genuinely secured

## RESULTS AND DISCUSSION

### Results

This section presents the descriptive findings of the statutory-approach mapping described above: how Indonesian positive law has regulated or left unregulated the interval between the point a death sentence becomes legally enforceable and the moment it is carried out, across the two regimes that have successively governed capital punishment in Indonesia. The analytical implications of these findings, assessed against legal-certainty theory and comparative jurisprudence, are taken up separately in the Discussion section that follows.

#### **The Existing Regulation of the Waiting Period for Capital Punishment Before and After Law Number 1 of 2023**

This sub-section examines that landscape across the two regimes that have successively governed capital punishment in Indonesia: the colonial-era *Wetboek van Strafrecht voor Nederlandsch-Indie* (WvS) together with Law Number 2/PNPS/1964, and the regime introduced by the National Criminal Code, which took full legal effect on 2 January 2026 after a three-year transitional period.

Under the colonial-era Code, capital punishment was classified as a primary punishment, placed at the most severe end of the hierarchy together with imprisonment, confinement, and fines. (Nawawi Arief, 2010) The Code said little about execution procedure Article 11 merely stipulated hanging, later replaced by firing squad under the 1964 implementing statute and contained no provision fixing a maximum pre-execution period. The temporal dimension of execution was, in other words, left entirely to administrative practice rather than to any binding rule.

Law Number 2/PNPS/1964, promulgated in 1964 and still formally in force pending superseding legislation, partially filled this gap but was never designed to regulate the length of the waiting period; its scope is confined to the administrative mechanics of execution itself. (Law Number 2/PNPS/1964 on the Procedure for the Execution of Capital Punishment Imposed by Courts of General and Military Jurisdiction., 1964) Article 1 designates the public prosecutor as responsible for the execution, while Article 7 requires that the convict be notified of the scheduled date no later than three days beforehand, so as to prepare a final statement or request a religious counsellor. Government Regulation Number 8 of 2008, which supplements the 1964 Law with technical procedures for the Attorney General's Office, likewise confines itself to coordination, security, and firing-squad composition, again without prescribing any outer time limit. (Government Regulation Number 8 of 2008 on the Amendment to Government Regulation Number 28 of 1964 on the Procedure for the Execution of the Death Penalty for Members of the Armed Forces., 2008) These procedural instruments were designed to standardize the administrative choreography of a scheduled execution once it has been decided upon, not to discipline the antecedent period during which that decision itself remains pending.

The consequence of this silence was that, prior to 2023, a convict whose judicial remedies had been exhausted appeal, cassation, case review, and clemency could lawfully be left in detention indefinitely before the Attorney General's Office scheduled execution. This is precisely the structural defect that produced the documented cases of Bahar bin Matsar and Sakak bin

Jumak, whose custody spans of 38 and 25 years vastly exceeded the twenty-year ceiling Indonesian law otherwise applies to fixed-term imprisonment. In the absence of any binding rule fixing either a minimum or a maximum interval, the pre-2023 framework left the fate of every death-row convict to unregulated administrative discretion.

Law Number 1 of 2023 substantially reconfigured the doctrinal status of capital punishment but, as noted above, merely relocated the temporal gap to a later stage. Article 98 reclassifies the death penalty as a special punishment, always alternative and threatened only for the most serious offenses, imposed only as a last resort a reclassification intended to signal that the death penalty is no longer the ordinary consequence of the gravest offenses but an exceptional measure reserved for cases in which no lesser sanction can adequately serve the interests of justice. Article 100 attaches a mandatory ten-year probationary period, commencing one day after the decision acquires permanent legal force, during which the convict's demeanour, remorse, and prospects of rehabilitation are observed and reported by the correctional institution. Commendable conduct may lead to commutation by Presidential Decision after Supreme Court consideration; absent such prospect, Article 101 empowers the Attorney General to proceed with execution once probation lapses. On its face this represents a genuine humanization of the death penalty.

Yet the reform stops short of the very problem that motivated it. Article 102 provides only that further provisions on execution procedure "shall be regulated by law", (Law of the Republic of Indonesia Number 1 of 2023 on the Criminal Code, 2023) a clause that remains unimplemented, so that Law Number 2/PNPS/1964 continues to apply by default under Article 615's transitional provisions. More fundamentally, the Code fixes no outer time limit for any of the intervals composing the full waiting period from finality of judgment to commencement of probation, from expiry of probation to a commutation or execution order, and from that order to execution itself each remaining subject to unregulated administrative and prosecutorial discretion, exactly as under the pre-2023 regime. A convict who fails to secure commutation re-enters the same condition of indefinite uncertainty that characterized the earlier regime, since Article 101 sets no deadline for Attorney General action and the Article 102 implementing statute has yet to materialize (Achjani Zulfa, 2019).

Read together, the pre- and post-2023 frameworks reveal a striking continuity in what they omit rather than in what they provide: each successive layer of regulation addresses classification, method, notification, probation, and commutation while consistently declining to fix any maximum duration for the waiting period itself (Yudhistira, 2023). A convict today can determine the length of the probationary period from the statute but cannot determine, from any enacted rule, how long detention may lawfully continue once that period ends without commutation or execution. This asymmetry precise regulation of substantive entitlement coupled with silence on procedural timing is the principal finding that the Discussion section now takes up.

## **Discussion**

Building on the descriptive findings presented above, this section analyses their implications for legal certainty and the protection of prisoners' rights, drawing on Radbruch's and Fuller's theoretical frameworks, comparative jurisprudence, and Amartya Sen's distinction between *niti* and *nyaya*, before advancing a concrete reformulation of Articles 100 to 102.

### **The Regulatory Vacuum on the Waiting Period: Implications for Legal Certainty and the Protection of Prisoners' Rights**

Articles 98 through 101 represent a deliberate attempt to civilize the death penalty through a ten-year probationary period during which remorse and rehabilitation may convert a death sentence into life imprisonment. Yet the reform stops precisely where its practical consequences for the convict become most acute: once probation lapses without commutation, clemency is refused, or legal remedies are exhausted, the Code prescribes no outer limit within

which the Attorney General must act. This sub-section situates that finding against the benchmarks of Radbruch and Fuller, contrasts it with the more disciplined temporal architecture Indonesian law applies to ordinary pre-trial detention, and considers its constitutional and human-rights consequences asking whether a reform confined to the front end of the process, sentencing and probation, can be said to have achieved its humane purpose if the back end of the process, enforcement, remains as unregulated as it was before the reform began.

A close reading of Articles 98 to 102 reveals a carefully sequenced procedure up to, but not beyond, the point of final decision: Article 98 confines capital punishment to a last-resort alternative sanction; Article 99 governs the manner of execution and defers execution for pregnant or nursing women and persons with severe mental illness; Article 100 installs the probationary mechanism and its criteria. What none of these provisions supplies is a temporal boundary on the final administrative step the Attorney General's order that execution proceed once probation has run its course. Article 102 instead defers the entire question, indefinitely, to a future statute. The defect is not that any individual delay is necessarily improper the Attorney General may have entirely legitimate administrative reasons for deferring a given execution but that the law supplies no external, ascertainable standard against which the propriety of any given delay, however long, can be measured.

The vacuum is compounded by Article 142(3), which exempts execution of capital punishment from any period of prescription, while every other principal penalty becomes unenforceable once a defined prescription period elapses. The result is a structurally asymmetrical relationship: the state's authority to execute never lapses by operation of law, while the convict enjoys no corresponding entitlement to have the matter resolved within any ascertainable period. What is striking is that a recodification otherwise attentive enough to prescribe a ten-year probationary period down to the day it begins to run left this particular gap entirely untouched.

Radbruch's account treats legal certainty as one of three values that law must simultaneously pursue, alongside justice and expediency, and understands it to require that a norm be laid down in positive, written form, be definite in content, and be enforced in a manner its subject can reasonably anticipate. Measured against that standard, the waiting period fails on the second and third limbs even where it satisfies the first: the Code addresses capital punishment in positive terms but fixes no definite content for the interval between lapse of probation and execution, offering the convict no basis on which to anticipate when or under what process the sentence will be carried out. Fuller's requirement of congruence between announced rule and actual administration supplies a complementary diagnostic: a statute announcing a formal procedure culminating in a specific executive act, yet leaving its timing wholly unconstrained and, in documented practice, subject to decades of delay, exhibits exactly the incongruence Fuller regarded as corrosive of a legal system's claim to be a functioning system of rules. (Fuller, 1969) The defect is not that any individual delay is necessarily improper, but that the law supplies no external, ascertainable standard against which the propriety of any given delay can be measured a property of the statutory scheme itself, not of any official's conduct under it.

This vacuum is difficult to attribute to mere oversight once the National Criminal Code is read alongside the companion 2025 Criminal Procedure Code, which regulates pre-trial detention with considerable temporal precision, fixing successive maximum periods at each stage of the process investigation, prosecution, trial, appeal, and cassation typically in increments of thirty or sixty days, with exceeding those limits triggering release by operation of law irrespective of case status (Law of the Republic of Indonesia Number 20 of 2025 on the Criminal Procedure Code, 2025). The legislature was plainly capable of translating legal certainty into concrete, self-executing temporal ceilings for a merely suspected or accused person. No equivalent discipline was extended to the far more consequential interval following a final, binding sentence of death: a person whose guilt has been conclusively established and who faces the state's most severe

sanction is, paradoxically, afforded less temporal protection than a person merely under investigation an internal inconsistency a future implementing statute under Article 102 would need to resolve.

This absence of a temporal ceiling produces measurable human suffering, illustrated by the cases of Bahar bin Matsar and Sakak bin Jumak described above, whose thirty-eight and twenty-five years respectively on death row exceeded, by a wide margin, the twenty-year ceiling Indonesian law otherwise applies to fixed-term imprisonment, and recognized in comparative jurisprudence: in *Soering v. United Kingdom*, the European Court of Human Rights held that the anguish of prolonged, uncertain anticipation of execution may itself amount to treatment incompatible with the prohibition on inhuman or degrading treatment, independently of the underlying sentence's lawfulness a form of psychological suffering frequently discussed in comparative literature under the label of the "death row phenomenon" (*Soering v. United Kingdom*, App. No. 14038/88, Judgment of 7 July 1989., 1989). These consequences bear directly on Article 28D(1) of the 1945 Constitution, which guarantees every person fair legal certainty before the law (The 1945 Constitution of the Republic of Indonesia, 1945). A convict left to wait, without any ascertainable limit, for a state decision determining whether they live or die cannot meaningfully be said to enjoy fair legal certainty in the constitutional sense, however impeccable the procedure that produced the original sentence.

Amartya Sen's distinction between *niti* and *nyaya* offers a clarifying lens: *niti* is the correctness of formally promulgated arrangements considered on their own terms, while *nyaya* denotes realized justice what world actually emerges from those arrangements, including the lives people are able to lead under them (Sen, 2009). Article 100's probationary mechanism is, as *niti*, a genuine advance: well drafted, procedurally coherent, and rehabilitative in rationale. Measured in *nyaya* terms, however, the regulatory vacuum allows this formally correct arrangement to generate decades of realized confinement under an unresolved sentence of death precisely the outcome the reform was designed to avoid. Closing the vacuum is therefore not a peripheral drafting matter but a precondition for Article 100 to achieve, in practice, the humane purpose it serves in principle; the statute Article 102 contemplates must fix a definite outer limit for executive action following lapse of probation, and attach to it a consequence comparable in force to the automatic-release rule already governing pre-trial detention. (Law of the Republic of Indonesia Number 1 of 2023 on the Criminal Code, 2023)

### **Reformulating the Regulation of the Waiting Period for Capital Punishment in Indonesia**

The preceding analysis shows that the National Criminal Code, notwithstanding its probationary mechanism, leaves the temporal dimension of execution essentially unregulated. Article 100 confines the ten-year probationary period to cases in which the sentencing court has expressly attached a probationary term a determination left to judicial discretion dependent on factors such as remorse or subordinate role in the offence. It is against this backdrop that the following reformulation is proposed, drawing on comparative practice and on the internal logic already embedded in the Code's own probationary mechanism.

Where no probationary term is attached, the convict's fate is instead governed by Article 101, which provides only that capital punishment may be converted to life imprisonment by presidential decree if, following rejection of clemency, execution has not been carried out within ten years for reasons unrelated to the convict's own flight from justice. Three structural weaknesses follow. First, the provision is permissive rather than mandatory: *dapat* ("may") vests the President with discretion even once the ten-year threshold is crossed, so the passage of time generates no enforceable entitlement for the convict, however long the delay has in fact continued. Second, the ten-year period is triggered only by rejection of a clemency application; a convict who does not petition for clemency remains outside the provision's protection indefinitely, notwithstanding that Article 142(3) of the same Code expressly exempts capital punishment from any statute of limitations. Third, Article 102 delegates the entire procedural

architecture to further legislation that, decades on, has been discharged only by the outdated 1964 instrument governing pre-execution notification silent on any maximum waiting period and never amended to correspond to the new Code.

This three-fold gap is not merely theoretical, as the cases of Bahar bin Matsar and Sakak bin Jumak attest. As Yudhistira (Yudhistira, 2023) and Matulatuwa (Matulatuwa, 2021) have separately observed in relation to the pre-Code regime and to judicial review and clemency mechanics, and as Efendi (Efendi, 2019) and Siregar (Siregar, n.d.) have further confirmed through their own statutory analyses, the absence of a determinate ceiling on the waiting period is a defect of legal certainty that predates, and has not been cured by, the 2023 codification. Such convicts endure what comparative scholarship terms the death row phenomenon: an indeterminate compounding of two punishments a term of imprisonment already exceeding the statutory ceiling applicable to fixed-term sentences, layered upon the unresolved anticipation of eventual execution.

Measured against Radbruch's tripartite conception of law's values, a regime leaving the timing of ultimate enforcement wholly indeterminate fails the certainty limb regardless of how carefully it satisfies justice or expediency at sentencing. Fuller's requirement of congruence between announced rule and administration supplies the more precise diagnostic: a scheme announcing a formal procedure culminating in execution or commutation, yet leaving that culmination's timing subject to years of unexplained silence, leaves the convict nominally subject to a rule-governed process but, in substance, to the unregulated discretion of an executive under no obligation to act at all (Fuller, 1969). This incongruence implicates Article 28D(1) of the Constitution directly: a convict under sentence of death remains entitled to know, within a determinate and enforceable horizon, what will ultimately become of the sentence.

Comparative practice offers a workable template. In *Pratt and Morgan v. The Attorney General for Jamaica*, the Judicial Committee of the Privy Council held that delay exceeding five years between sentence and execution gives rise to a strong presumption of inhuman or degrading punishment, with automatic commutation to life imprisonment as the appropriate remedy, and recommended realistic institutional benchmarks domestic appeals within roughly two years, recourse to international human-rights bodies within eighteen months to keep cumulative uncertainty within that outer limit (*Pratt and Morgan v. The Attorney General for Jamaica and Another*, 1993). Indonesia need not adopt the Jamaican five-year figure; Article 100's own ten-year probationary period already supplies a domestically legitimated benchmark that could, with adaptation, govern every death sentence, whether or not a probationary term was expressly pronounced at trial. What matters structurally is not the precise number of years but the existence of an outer, non-discretionary limit coupled with an automatic legal consequence once it is reached without lawful justification.

On this basis, it is submitted that Articles 100 to 102 should be reformulated as follows. First, the ten-year probationary period should be generalised as the maximum period within which the state must resolve the status of every death sentence by execution, by commutation following demonstrated rehabilitation, or by automatic conversion rather than remaining discretionary and attached only where the trial court chose to invoke it. Second, the trigger for this maximum period should run from the date the judgment acquires final and binding legal force, rather than from rejection of a clemency petition the convict may never submit. Third, the word *dapat* ("may") in Article 101 should be replaced with *wajib* ("shall"), so that once the maximum period elapses without lawful execution, conversion to life imprisonment occurs by operation of law, confirmed by presidential decree as a ministerial rather than discretionary act, subject only to a narrow exception where delay is attributable to the convict's own conduct, such as flight from custody or dilatory invocation of remedies in evident bad faith.

This proposal rests on three cumulative arguments. First, the constitutional guarantee of legal certainty implies that the state may not hold a person in indefinite legal suspension: a legal

system that can neither carry out nor formally abandon its own sentence has, in substance, ceased to govern that sentence by rule at all. Second, prolonged, unexplained delay is inherently at odds with legal certainty as identified by Article 28D(1) and by Radbruch's and Fuller's respective theories. Third, and most directly dispositive, the maxim *nemo ex suo delicto meliorem suam conditionem facere potest* no one may improve his position through his own wrong militates against allowing the state, where it is itself responsible for the failure to execute a sentence within a legally sanctioned period, to rely on that same failure to preserve indefinitely its prerogative to execute at a time of its own choosing.

This proposal does not dilute the exceptional, last-resort character the Code assigns to capital punishment, nor disturb the substantive conditions under which a death sentence may be imposed; it operates entirely downstream of conviction and sentencing, in the enforcement phase the Code leaves comparatively unregulated. It is consistent with the Elucidation to Article 53(2), which instructs judges to prioritize substantive justice wherever it conflicts with formal legal certainty. Finally, generalising the Article 100 time limit to govern Article 101 would correct an internal inconsistency: it is difficult to justify why a convict whose sentence carries an express probationary term enjoys a determinate ten-year horizon while a convict whose sentence carries no such term may be left to an open-ended, clemency-contingent waiting period. A single, mandatory maximum period applicable to every death sentence would eliminate this disparity and align Indonesian law with the constancy and congruence that legal-certainty doctrine and Fuller's internal morality of law demand.

## CONCLUSION

The regulation of the waiting period for the execution of capital punishment under the National Criminal Code remains structurally incomplete. Article 100 confines temporal discipline to death sentences accompanied by an express probationary term, while Article 101 leaves every other sentence subject to an indeterminate, clemency-contingent, and discretionary waiting period that Article 102 fails to operationalise through implementing legislation. Measured against Radbruch's value of legal certainty, Fuller's requirement of congruence between announced rule and administrative practice, and the constitutional guarantee in Article 28D(1) of the 1945 Constitution, this gap allows the state to hold convicts in prolonged, unregulated suspension without ever being legally compelled to resolve their status. Comparative practice, exemplified by the Privy Council's ruling in *Pratt and Morgan*, demonstrates that a determinate outer limit coupled with automatic commutation is both workable and principled.

The continuity between the pre- and post-2023 regimes in this respect is more significant than their difference: both regulate in detail who may be sentenced to death and how that sentence may be reviewed, commuted, or carried out, while remaining silent on when execution must occur or the sentence must lapse. It is accordingly proposed that Articles 100 to 102 be reformulated to establish a single, mandatory maximum waiting period calculated from finality of judgment rather than rejection of clemency upon whose expiry capital punishment converts by operation of law into life imprisonment, absent lawful justification attributable to the convict's own conduct. Such a reformulation would give binding legal effect to the principle that the state may not profit from its own default, and would restore to Indonesia's regulation of capital punishment the temporal discipline that legal certainty, constitutional guarantee, and basic respect for the convict's dignity alike require. Until such a reform is enacted, Indonesian law will continue to permit precisely the kind of prolonged, unresolved suspension between sentence and execution that the 2023 recodification, in principle, sought to humanize.

## REFERENCES

- Achjani Zulfa. (2019). “Pidana Mati dalam RUU KUHP: Antara Pembaharuan dan Jalan Tengah.” *Jurnal Hukum Dan Peradilan* , 8.
- Bahar Bin Matsar, Convicted in 1970 for Premeditated Murder, Armed Robbery, and Rape in Tembilahan, Riau, Had Awaited Execution for Approximately 38 Years, While Sakak Bin Jumak, Convicted in 1995, Died in Cipinang Penitentiary in August 2020 after 25 Years on Death Row, Reportedly Due to Malnutrition and Limited Access to Healthcare during the Covid-19 Pandemic.
- Efendi, R. (2019). Konstitusionalitas Masa Tunggu Eksekusi bagi Terpidana Mati dalam Sistem Pemidanaan. *Jurnal Konstitusi. Jurnal Konstitusi*, 16(2), 296–312.
- Fuller, L. L. (1969). *The Morality of Law*. Rev. ed. . Yale University Press.
- Government Regulation Number 8 of 2008 on the Amendment to Government Regulation Number 28 of 1964 on the Procedure for the Execution of the Death Penalty for Members of the Armed Forces., Pub. L. 8 (2008).
- Hamzah, A. (2009). *Terminologi Hukum Pidana*. Sinar Grafika.
- Ibrahim, J. (2006). *Teori & Metodologi Penelitian Hukum Normatif*. Malang: Bayumedia Publishing.
- Law Number 2/PNPS/1964 on the Procedure for the Execution of Capital Punishment Imposed by Courts of General and Military Jurisdiction., Pub. L. 2 (1964).
- Law of the Republic of Indonesia Number 1 of 2023 on the Criminal Code, Pub. L. 1, 2025 (2023).
- Law of the Republic of Indonesia Number 20 of 2025 on the Criminal Procedure Code, Pub. L. 20 (2025).
- Marzuki, P. M. (2017). *Penelitian Hukum Cet. 13*. Kencana Prenada Media Group.
- Matulatuwa, R. (2021). *Problematika Pelaksanaan Eksekusi Pidana Mati Berkaitan dengan Hak Terpidana Mati dalam Pengajuan Peninjauan Kembali dan Grasi dari Aspek Kepastian Hukum* [Undergraduate thesis]. Universitas Kristen Indonesia.
- Nawawi Arief, B. (2010). *Bunga Rampai Kebijakan Hukum Pidana*. Kencana.
- Nur Heriyanto, D. S. and H. G. (2016). Death Penalty Legislation in China and Indonesia under International Human Rights Law Perspective. *Ius Quia Iustum* , 4.
- Refani, S. S. (2024). Kepastian Hukum Masa Tunggu Eksekusi Terpidana Mati dalam Tindak Pidana Narkotika. *Syntax Literate Jurnal Ilmiah Indonesia*, 9(2).
- Sen, A. (2009). *The Idea of Justice*. Harvard University Press.
- Siregar, R. E. (n.d.). Kepastian Hukum Masa Tunggu Eksekusi Pidana Mati. *Locus Journal of Academic Literature Review. Academic Literature Review*, 1(7), 373–385.
- Soekanto, S. , & M. S. (2001). (2001). *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*. . RajaGrafindo Persada.
- Soering v. United Kingdom, App. No. 14038/88, Judgment of 7 July 1989. (1989).
- The 1945 Constitution of the Republic of Indonesia (1945).
- Yudhistira, A. S. (2023). *Kepastian Hukum dan Kejelasan Masa Tunggu Waktu Pelaksanaan Eksekusi Pidana Mati dalam Rangka Pembaharuan Hukum Pidana di Indonesia*. [Undergraduate thesis]. Universitas Lampung.