

Death Penalty and Rights of Inmates on The Death Row under Indonesia Criminal Justice System

Zenny Rezania Dewantary

zennyrezania@president.ac.id

Lecturer at law study programme, President University

Abstract

Indonesia has executed approximately 84 inmates in the death row since 1998. Indonesia actively performed death execution until 2016. After 2016, although no execution has been done, there was a death penalty dropped in 2018. In relation to that, death penalty is stipulated in Indonesia Criminal Code (KUHP and other penal codes outside KUHP) and this makes Indonesia as a retentionist country. Death penalty delivers a death row. Death row is a prolonged death execution, which usually measured in years. This situation caused a double-punishment, where the convicted must serve in an isolation room in prison, while waiting to be executed. This waiting period seems unavoidable due to some factors. Using normative-empirical research method, this research aims to bring the fact that in Indonesia, there are several factors that have been causing a death row. In this research, this situation is tested using state responsibility principle and some international conventions Indonesia has ratified. The absence of provision related to maximum death execution time after verdict is binding without further objections, together with the hierarchical system of court trial in Indonesia is the cause factor for the prolonged death execution. To encounter this situation The Government of Indonesia is proposed to (1) for short term goal, regulate strictly about the implementation of death execution; (2) for long term goal, to abolish capital punishment from the justice system.

Keywords: death penalty, death row, legal uncertainty, human rights, Indonesian Criminal Justice System.

Abstrak

Sejak tahun 1988 Indonesia telah melakukan eksekusi mati 84 kali. Eksekusi mati aktif dilakukan sampai dengan 2016. Sesudah 2016, walau belum dilakukan eksekusi sekalipun, putusan hukuman mati tetap dijatuhkan. Sanksi pidana mati sampai saat ini masih tercantum dalam sistem hukum Indonesia dan ini berarti Indonesia masih menjadi Negara retensionis. Pidana mati menghasilkan antrian eksekusi. Antrian eksekusi mati adalah masa tunggu sebelum eksekusi dilakukan dan biasanya terjadi dalam hitungan tahun. Hal ini menciptakan hukuman ganda, di mana terpidana juga harus menjalani pidana penjara sambil mereka menunggu dieksekusi mati. Menggunakan metode normatif-empiris, penelitian ini bertujuan untuk mengemukakan bahwa di Indonesia ada beberapa factor yang menyebabkan antrian eksekusi mati. Dengan menggunakan acuan tanggung jawab Negara dan konvensi internasional yang diratifikasi Indonesia, ketiadaan aturan mengenai batas maksimal masa tunggu atas eksekusi mati, bersama dengan sistem peradilan yang hirarkis berkontribusi sebagai factor penyebab antrian eksekusi mati. Untuk penanggulangan, Pemerintah Indonesia diharapkan untuk (1) Untuk jangka pendek, buat aturan yang lebih tegas dan berorientasi keadilan bagi terpidana mati; (2) Untuk jangka panjang, menghapuskan pidana mati seutuhnya.

Kata Kunci: pidana mati, antrian eksekusi mati, ketidakpastian hukum, hak asasi manusia, sistem hukum pidana indonesia

1. Introduction

Discussions on the Indonesian Criminal Justice System (ICJS) are always intertwined with the history of Indonesia

and the colonialization of The Dutch. The Dutch Legal System took role in the development of Indonesian Legal System. Indonesia was colonialized by Dutch for

around 3,5 centuries (at that period, Indonesia was named The Netherlands-Indie). The Dutch applied their legal system through out Netherlands-Indie through Concordantie Beginsel.⁴⁷

In August 17th, 1945, Indonesia declared independency and claimed itself as a unity. As a newly-declared independent country, Indonesia had many challenges in term of organizing a state. Legal system was also an issue, considering that for centuries Indonesia was so used in The Dutch legal system. Had no original legal system, Indonesia then re-implemented The Dutch legal system by translating the provisions into Bahasa Indonesia (Indonesian language). This procedure was also including the criminal justice system.

In Indonesian criminal justice system, death penalty is written on the Indonesian Criminal Code (*Kitab Undang-Undang Hukum Pidana/KUHP*)⁴⁸ and also in several laws outside the penal code which was established later.

⁴⁷ Concordantie Beginsel or Concordantie Principle stated that European Law (Dutch Law) to be implemented for all Europeans in Netherlands-Indie. This beginsel started to be implemented since the beginning of The Dutch colonialization. It was written in article 131 Indische Staatsregeling (IS).

⁴⁸ The Criminal Code was based on The Dutch's *Wetboek Van Strafrechts voor Netherlands-Indie* (WvS-NI) applied throughout *Netherlands-Indie* (Later known as Indonesia) in January 1st, 1918 during The Dutch Colonialism in *Netherlands-Indie*. Later after independent, Indonesia adopted it into national law regarding criminal matters. The code remains legit until present time with minor amendments. It has provisions about death penalty, e.g., article 10 mentions death execution by hanging

Death penalty serves as the heaviest punishment among other main sanction.⁴⁹ Further, the Code regulates several articles (*Pasal*) of crimes which provide death penalty as sanction. For example, in Book Two, article 340 mentions that a first degree murder is punishable with death execution or imprisonment for maximum 20 (twenty) years. Other example is article 104 about homicide that is addressed to a President or Vice President, article 111 (2) about engaging with other countries to start a war with Indonesia, article 365 about armed robbery that resulted to a death of victim, etc.

Outside The Criminal Code, there are several laws which impose death penalty, such as:

1. *Emergency law* ⁵⁰12/1951 of Armor, Ammo, and Explosive Devices.
2. Law 35/2009 of Narcotics.
3. Law 31/1999 of Corruption Eradication

as a type of punishment and article 340 of first degree murder punishable with maximum penalty by death execution. The Netherlands itself, on the other hand, has abolished death penalty for all crimes since 1982 (see

<https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140>)

⁴⁹ Main sanction here is to be distinguished with alternative sanction.

⁵⁰ *Undang-Undang* similar with Law regulates nation-wide. *Darurat* means emergency. This law was established in a situation when Indonesia was in an urgent need to have such law, so the law was created without a normal procedure of legislation-making process.

4. Law 15/2003 of *Penetapan Peraturan Pemerintah Pengganti Undang-Undang Republik Indonesia Nomor 1 Tahun 2002 tentang Pemberantasan Tindak Pidana Terorisme Menjadi Undang-Undang*⁵¹

These regulations are also followed with the procedural regulations which are regulating the further technical requirements for death execution, such as *Penetapan Presiden RI Nomor 2 Tahun 1964 tentang Tata Cara Pelaksanaan Pidana Mati yang Dijatuhkan oleh Pengadilan di Lingkungan Peradilan Umum dan Militer* (Presidential Decree Number 2 Year 1964 regarding Procedure of Death Sentence in a General Court and Military Court Competency. There is also regulation established by the Indonesian National Police as a code of conduct for all police officers within Indonesian sovereignty, namely *Peraturan Kepala Kepolisian Negara Republik Indonesia Nomor 12 Tahun 2010 tentang Tata Cara Pelaksanaan Pidana Mati* (Chief of Indonesian National Police Regulation Number 12 Year 2010 regarding Procedure

of Death Sentence). The first mentioned regulation also functions as an partial amendment of Indonesian Penal Code, related to the method of death penalty. The Indonesian Penal Code was adopted directly from The Dutch and it regulates death penalty method is by hanging. In *penpres RI 2/1964*, the method is changed into a dead shot.

In regulations scheme, other than some positive criminal laws that are still actively implemented, Indonesia also has the Draft of Penal Code (*Rancangan Kitab Undang-Undang Hukum Pidana*) that has been renewed for 14 times since the first time it was issued, in 1964. This latest version of draft is still putting death penalty as one of the alternative punishment provided, along with the main punishments. In the academic writing of The Draft, it is written,

Pidana mati secara alternatif dijatuhkan sebagai upaya terakhir untuk mengayomi masyarakat. (Death Sentence is alternatively dropped as a last resort to protect society).⁵²

Meanwhile, from the same manuscript, it is known that The Draft has

⁵¹ This law is an act in which contain a declaration to put Governmental-Regulation-as-a-Replacement-of-an-Act Number 1 Year 2002 regarding Terrorism Eradication into a self-standing act. All provisions about terrorism can be found on the later mentioned. As in law number 15/2003 only contains declaration.

⁵²Academic writing accessed from <http://dpr.go.id/dokakd/dokumen/K3-26-2ea83388ece0ae0d13b3977bebb049c1.pdf> page 189. Academic writing is a manuscript containing the preliminary research and discussion result before drafting legislation.

16 articles in total that use death penalty as sanction provided.⁵³

These regulations are the positive laws which provide legitimacy of the implementation of death penalty. Since 1998 estimatedly Indonesia has performed 84 death execution. Indonesia actively performed death execution until 2016. After 2016, although no execution has been done, there was a death penalty dropped in 2018 and is still waiting for some procedure until recently.

Taking example from the execution list in a period of 2013-2016, it can be seen the year the verdict dropped and the year when the execution is done:

Year	Name of Convicted	Crime	Court	Date of Verdict	Date of Execution
2013	Muhamad Abdul Hafeez/M/Pakistan	Narcotics (26 Juni 2001)	Pengadilan Negeri Tangerang (Tangerang District Court)	28 November 2001	17 November 2013
	Suryadi Swa Buana alias Kumis alias Dodi bin Sukarno/M/Indonesia	Murder (1991)	Pengadilan Negeri Palembang (Pale	1992	17 May 2013

			mbang District Court)		
	Jurit bin Abdullah/M/Indonesia	Premeditated Murder (1997)	Pengadilan Negeri Sekayu, Musi Banyuasin, Sumatera Selatan (Sekayu District Court)	April 1998	17 May 2013
	Ibrahim bin Ujang/M/Indonesian	Premeditated Murder (1997)	Pengadilan Negeri Sekayu, Musi Banyuasin, Sumatera Selatan (Sekayu District Court)	April 1998	17 May 2013
	Adami Wilson bin Adam alias	Narcotics (2003)	Pengadilan Negeri	2004	15 March

⁵³ See Tabel 7 on page 145 of the academic writing.

	Abu /M/Nigeria		i Tange rang (Tang erang Disric t Court)		2013
20 15	Rani Andriani alias Melisa Aprilia/F/Indonesian	Narcotics (12 Januari 2000)	Pengadilan Negeri Tangerang (Tangerang District Court)	22 August 2000	18 January 2015
	Namaona Dennis/M/Malawi	Narcotics (15 April 2001)	Pengadilan Tinggi Jawa Barat (West Java High Court)	15 October 2001	18 January 2015
	Marco Archer Cardoso Moreira/Brazil	Narcotics (Agustus 2003)	Pengadilan Negeri Tangerang (Tangerang District Court)	8 June 2004	18 January 2015
	Daniel Enemu alias Diarras	Narcotics (4 Januari)	Pengadilan Negeri	22 September	18 January

	sauba Mamadou/M/Nigeria	2004)	i Tange rang (Tang erang Distri ct Court)	2004	2015
20 15	Ang Kim Soei alias Kim Ho alias Ance Taher alias Tommy Wijaya /M/Dutch	Narcotics/boss of an ecstasy warehouse (4 April 2002)	Pengadilan Negeri Tangerang (Tangerang District Court)	13 January 2003	18 January 2015
	Tran Thi Bich Hanh/M/Vietnam	Narcotics smuggling (11 Juni 2011)	Pengadilan Negeri Boyolali, Jawa Tengah (Boyolali District Court)	22 November 2012	18 January 2015
	Myuran Sukumaran/M/Australia	Narcotics	Pengadilan Negeri Denpasar (Denpasar District Court)	14 February 2006	29 April 2015
	Andrew	Narcotics	Pengadilan	14	29

Chan/M/ Australia	cs	dilan Negeri Denp asar (Denp asar Distri ct Court)	Febr uary 2006	April 2015
Martin Anderson alias Bel/ Ghana	Narcoti cs	Penga dilan Negeri Jakart a Selata n (Sout h Jakart a Distri ct Court)	2 June 2004	29 April 2015
Masagus Zainal Abidin bin Masagus Mahmud Badaruddin/ M/Indonesia	Narcoti cs	Penga dilan Tingg i Palem bang (Pale mban g Hugh Court)	3 Dece mber 2001	29 April 2015
Raheem Agbaje Salami/M/R ep. Cordova	Narkoti cs	Mahk amah Agung (Supr eme Court)	16 Nove mber 1999	29 April 2015
Rodrigo Gularte/ M	Smuggl ed 6 kg	Penga dilan	7 Febr	29 April

/Brazil	cocain e	Negeri Tange rang (Tang erang Distri ct Court)	uary 2005	2015
Sylvester Obiekwe Nwolise/M/ Nigeria	Narcoti cs	Penga dilan Negeri Tange rang (Tang erang Dstric t Court)	1 Septe mber 2004	29 April 2015
Okwudili Ayotanze/M / Nigeria	Narcoti cs	Penga dilan Negeri Tange rang (Tang erang Disric t Court)	13 Augu st 2001	29 April 2015
20 16	Freddy Budiman/M/ Indonesian	Narcoti cs	Penga dilan Negeri Jakart a Barat (West Jakart a Distri ct Court)	29 July 2016
	Michael	Narcoti	15 July 2013	29 July 2016
		Penga	23	29

Titus Igweh/M/Nigeria	cs	dilan Negeri Tangerang (Tangerang District Court)	October 2003	July 2016
Seck Osmane/M/Seneegal	Narcotics	Pengadilan Negeri Jakarta Selatan (South Jakarta District Court)	21 July 2004	29 July 2016
Humphrey Ejike alias Doktor alias Koko/M/Nigeria	Narcotics	Pengadilan Negeri Jakarta Pusat (Central Jakarta District Court)	7 April 2004	29 July 2016

Table 1. List of Execution in 2013-2016 period in Indonesia. (data from imparisial.org team)

If data is including the list of execution since 1962 until 2018, from 84 total executions, 48 were filed so the information of death row period is known. The remaining 46 happened before Indonesian Reform (before 1998)⁵⁴ and the information is either classified or unrecorded.

The death row period is as follows:

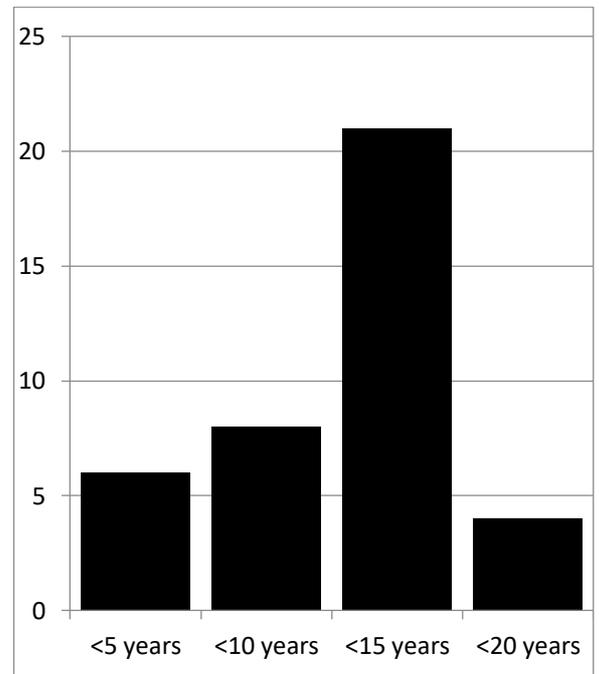


Chart 1. The death period following death sentence before finally executed (1983-2015)

⁵⁴ Indonesian 1998 reformation is when President Suharto was impeached on May 1998. It marked the beginning of a new period in Indonesian history. After being ruled by Suharto's authoritarian New Order regime for over three decades, Indonesia embarked for a new phase called Reformation (Reformasi in Indonesian). It was envisaged to be the starting period of a democracy with open and liberal politics in which extensive autonomy would

be transferred to the regions, away from the center (decentralization). The basis of this transition was formulated in a law which passed parliament in 1999 and called for the transfer of administrative powers from the central government to the regional districts. See <https://www.indonesia-investments.com/culture/politics/reformation/item181?> (accessed on August 21st 2018) for more.

The tabel shows that the implementation of the death penalty was never done in an immediate time. Small number of the convicted was finally executed after less than 5 (five) years period, but the highest number of duration is 10-14 years. There is similarity with United States, in US the average year of death row is 10 (ten) years⁵⁵. That is the period that the convicted went through behind bars, before they were executed.

Taking example of Myuran Sukumaran, he was executed in 2015, 9 (nine) years after being convicted in 2006. He went through some procedure set by Indonesian Justice System to fight against the verdict.⁵⁶ His appeal was dismissed by the high court in 2006, then in 2011, he filed for cassatie to The Supreme Court and only got the affirmation of the death penalty by The Supreme Court. He, then, plead for clemency to President Joko Widodo and the plea got rejected in 2014. Sukumaran was held imprisoned during the process. He was put in a maximum security wing before finally executed in early 2015.⁵⁷

That situation shows the condition where a death convicts cannot avoid to also be imprisoned during the court trial process.

This is the situation where death penalty also delivers double-punishment. Many offenders are kept on a death row for a long time. The ripple effect of this system is multiple ways. It is sickening for the inmates both physically and mentally and this is not in line with the restorative justice that Indonesia is applying. It is burdening the Indonesian prison system where prisons are in overcapacity and corroding budget too to keep death convicts for years. And in principles, it is going against the State Responsibility principles towards Universal Declaration of Human Rights (UDHR) and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention"). The specific analysis on this subject is delivered on next sub-chapter.

The Indonesian Criminal Justice System provides legal basis of criminal court procedure in general and of death penalty in particular, where those provisions are trying to make the death penalty less as an ordeal, but at the same time, the prolonged procedure also delivers double punishment in a form of death row.

That situation has brought up the fight between the pros and the cons of death

⁵⁵ See <https://deathpenaltyinfo.org/time-death-row> accessed on August 4th 2018.

⁵⁶ Indonesia implements a hierarchial court system where it has three level: District Court, High Court, and Supreme Court. Outside this hierarchy, there are several attempt that can be proposed, those are:

judicial review (*peninjauan kembali*), cassatie for law, and presidential clemency.

⁵⁷See <https://www.cnnindonesia.com/nasional/20150428185400-12-49829/kronologi-kasus-narkotik-yang-menjerat-duo-bali-nine> accessed on August 4th 2018.

penalty. Indonesia is obviously still in a corridor of enforcing death penalty both in its positive criminal justice system and in the draft of the new penal code, while according to Amnesty International, 106 countries have abolished death penalty completely. This situation is then narrowed to a formulation of problem:

Death Execution related to Death Row and The Rights of Death Row Convicts in Indonesian Criminal Justice System

The analysis towards death execution in relation with death row and the rights of the convicted can be departed from some international instruments. This is to be contested with the national atmosphere of death penalty policies, regulations, and implementations.

The death penalty breaches two essential human rights: the right to life and the right to live free from torture. Both rights are protected under the Universal Declaration of Human Rights, adopted by the UN in 1948. The following [international laws explicitly ban use of the death penalty](#), except during times of war:⁵⁸

- The Second Optional Protocol to the International Covenant on Civil and Political Rights

- Protocol No. 6 to the European Convention on Human Rights
- The Protocol to the American Convention on Human Rights to Abolish the Death Penalty.

The European Convention on Human Rights (Protocol No. 13) bans the use of capital punishment at all times, even during war.

1.1. International Covenant on Civil and Political Rights (ICCPR)

Indonesia ratified some international instruments related to human rights, including International Covenant on Civil and Political Rights (ICCPR) on 28 October 2005 and it was followed up with the establishment of Law Number 12 Year 2005 regarding the Ratification of International Covenant On Civil And Political Rights⁵⁹ (*Undang-Undang Republik Indonesia Nomor 12 Tahun 2005 Tentang Pengesahan Kovenan Internasional Tentang Hak-Hak Sipil Dan Politik*). This Covenant was also attributed with two optional protocols. The first protocol is to *enable the Human Rights Committee set up in part IV of the Covenant (hereinafter referred to as the Committee) to receive and consider, as provided in the*

⁵⁸ <https://www.amnesty.org/en/what-we-do/death-penalty/> accessed on 9 May 2018, 4 pm

⁵⁹ Documents can be downloaded here <https://treaties.un.org/doc/publication/unts/volume>

[%20999/volume-999-i-14668-english.pdf](https://www.unhcr.org/refugees/pdf/20999/volume-999-i-14668-english.pdf) accessed on October 8th, 2018.

*present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.*⁶⁰ Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

The ratification of ICCPR by Indonesia does not automatically be ratification for the two protocols. Indonesia did not ratify the two protocols by which it is under no obligation to implement the provisions therein.

Meanwhile, states ratified the second protocol in pursuant of abolishing death penalty. Abolitionist states indicate their recognition of this through signing and ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights⁶¹ This protocol not only pledges a total elimination of the death penalty domestically, but also includes a commitment to work towards its global abolition.⁶² Ultimately the requirement

under international law, and the movement of states more generally, is towards a progressive abolition of the death penalty.⁶³ Indonesia towards its national law implementation is still pursuant in retaining it as a form of criminal punishment. Although, the type of a crime that is punishable by law with death penalty is limited. For example, in Book Two, article 340 mentions that a first degree murder is punishable with death execution or imprisonment for maximum 20 (twenty) years. Other example is article 104 about homicide that is addressed to a President or Vice President, article 111 (2) about engaging with other countries to start a war with Indonesia, article 365 about armed robbery that resulted to a death of victim, etc.

Outside The Criminal Code, there are several laws which impose death penalty, such as:

1. *Undang-Undang Darurat 12/1951* of Armor, Ammo, and Explosive Devices.
2. Law 35/2009 of Narcotics.

⁶⁰

See <https://www.ohchr.org/en/professionalinterest/pages/opccpr1.aspx> accesses on October 8th, 2018.

⁶¹ Conall Mallory, Abolitionists at Home and Abroad: A Right to Consular Assistance and the Death Penalty, (Melbourne Journal of International Law. Vol 17). (online). Accessed on https://law.unimelb.edu.au/_data/assets/pdf_file/0/004/2039566/03_Mallory_171.pdf October 8th, 2018.

⁶² Ibid.

⁶³ Christof Heyns, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, GA Res 67/168, UN GAOR, 69th sess, Agenda Item 69(b), UN Doc A/69/265 (6 August 2014) as quoted in Conall Mallory, Abolitionists at Home and Abroad: A Right to Consular Assistance and the Death Penalty, (Melbourne Journal of International Law. Vol 17). (online). Accessed on https://law.unimelb.edu.au/_data/assets/pdf_file/0/004/2039566/03_Mallory_171.pdf October 8th, 2018.

3. Law 31/1999 of Corruption Eradication
4. Law 15/2003 of *Penetapan Peraturan Pemerintah Pengganti Undang-Undang Republik Indonesia Nomor 1 Tahun 2002 tentang Pemberantasan Tindak Pidana Terorisme Menjadi Undang-Undang*⁶⁴

This leads to the double standard of death penalty that Indonesia has. Paeri al-Feri, 44, the brother of the death penalty convict, Satinah Binti Jumadi Ahmad, 41 – an Indonesian domestic worker sentenced to death by beheading for robbing and murdering her employer’s wife, stated that “On the one hand, Indonesia is begging for its citizens to escape the death penalty, meanwhile Indonesia’s firing squad executes inmates, it’s not fair,” said al-Feri.⁶⁵

Article 6(2) of the *ICCPR* states:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present

Covenant and to the *Convention on the Prevention and Punishment of the Crime of Genocide*. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

Later on it was determined on what is categorized as most serious crimes. The definition of ‘most serious crimes’ has now been reduced to only cover intentional killing through murder.⁶⁶ Importantly for the context of the current discussion, the use of the death penalty for drug offences is not permissible under international law.⁶⁷ But then, referring to the Table of list of execution in 2013-2016 periods in Indonesia, the most number of executions is for narcotics offenses. This raised a question on the category of narcotics offenses in Indonesia and if it is not permissible under international law, yet Indonesia still executed many narcotics offenders.

Indonesia’s concept of most serious crime is correlating to the concept of extraordinary crime. No legal definition of the concept of extraordinary crime in legislations or Constitutional Court verdicts. The definitions are provided by

⁶⁴ See p. 1-2

⁶⁵Kate Lamb, “Bali Nine: Indonesia has death penalty double standard, says brother of spared maid” *The Guardian*, (16 February 2015) (online) <https://www.theguardian.com/world/2015/feb/16/bali-nine-indonesia-has-death-penalty-double->

[standard-says-brother-of-spared-maid](#) accessed on October 8th, 2018.

⁶⁶ Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*.

⁶⁷ *Ibid*.

scholars based on types of the extraordinary crime. Using gross violation of human right as references, Muladi has defined the concept of extraordinary crime as the crime that in criminology and victimology perfectives potentially to harm the interests of various dimensions, from the security order, systematic or organized, threatening political stability, future development, and others (Siswadi, 2015).⁶⁸ Then, as reported by Hamid (2015), in accordance with corruption Romli Atmasasmita in 22nd Seminar Attorney Association in North Sumatra University 6 June 2015 has defined the concept of extraordinary crime from legal impact perfective as the massive and systemic crime. From both definitions, the concept of the extraordinary crime shall fulfill two elements, crime and impact. The crime shall be held with systematically and the impact shall be massive.⁶⁹ Inconsistently, categorization for other types of the extraordinary crime does not use the threshold of the most serious of the crime as guidelines. Not all those crimes conducted with systematically and the impact shall be massive. However, the concept of extraordinary crime is introduced for terrorism, corruption, drug

abuse offenses, and child sexual abuse offenses because of several reasons.⁷⁰

1.2. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) also regulates about banning a severe condition of procedure and punishment. This convention rejects any torturous, cruel, inhuman and degrading treatment and punishment that likely to happen towards suspects of crime, suspects in custody, also inmates in prisons who are put in death row.

Indonesia ratified CAT with declaration towards article 20 (1)(2)(3) of CAT which statements are as follows,

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations

⁶⁸ Vidya Prahassacitta, "The Concept of Extra Ordinary Crime in Indonesia Legal System: Is the Concept Effective Criminal Policy?" *Humaniora*, (Volume 7 No. 4 2016), p. 515.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

with regard to the information concerned;

2. taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that - 10 - this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently;
3. if an inquiry is made in accordance with paragraph 2 of this article the Committee shall seek the cooperation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.

Also, a reservation for Article 30:

The Government of the Republic of Indonesia does not consider itself bound by the provision of article 30, paragraph 1, and takes the position that disputes relating to the interpretation and application of the Convention which cannot be settled through the channel provided for in paragraph 1 of the said article, may be referred to the International Court of Justice only with the consent of all parties to the disputes.

Bottom line in discussing CAT for death row is that Part 1 Article 1 of CAT gives the definition of torture, that is:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, it does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Death row arises from a death sentence established by a judicial body (court). With assumption that the court trial is held due process of law, then the death sentence is a lawful sanction. In general, Indonesian legal system still allows death penalty and this has given a legal basis for the implementation of death sentence to be a lawful sanction. Hence, despite of the ratification of CAT by Indonesia, death row is not included as torture that committed in a criminal law enforcement procedure. As

the consequence of the definition of torture, it is erasing the possibility to include death row as a torture based on CAT. This excludes Article 11 of CAT which statement is as follows:

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction with a view to preventing any cases of torture.

Also as the consequence of that, death row that has occurred because of death sentence and had been torturing death convicts for years is not the responsibility of the state.

As other consideration, the action of ratifying any international instruments such as ICCPR and CAT does not automatically implementable in the national sense. The state shall impose any provisions stated in the instruments but hard to win against state's sovereignty.

1.3. Indonesian Criminal Justice System Creates Death Row instead of Protecting Rights.

⁷¹ Author unknown, Judicial System, p. 61 accessed on <https://www.aseanlawassociation.org/papers/JudicialSystem.pdf> October 10th, 2018.

The Indonesian judicial system is regulated in the Constitution and an assortment of other implementing regulations. The Supreme Court is the highest judicial institution in Indonesia and constitutes the apex of the judicial power, as expressly stated in Article 24(2) of the Constitution.⁷¹ Indonesian criminal justice system, as part of the judicial system, is arranged to be hierarchical following the design of judicial system itself. The Supreme Court is the highest level of court in the administration of justice in Indonesia. In a technical judicial sense all courts in Indonesia fall under the leadership of the Supreme Court, but administratively and financially the courts fell under the organization of the Department of Justice. By virtue of its position as Indonesia's highest court, the Supreme Court has supervision and control over all lower courts.⁷²

Attempts on court decision are including appeal, cassatie, judicial Review and cassatie for law. There is also an attempt called presidential clemency (*grasi*). Appeal or known as *banding* in bahasa is a legal proceeding by which a case is brought before a higher court for review of the decision of a lower court.⁷³ In

⁷² Ibid, p. 54

⁷³ <https://www.merriam-webster.com/dictionary/appeals%20court> accessed on March, 31st 2018 at 18.10

Indonesian Justice System, court is divided into 3 stage; first stage is in District Court (Pengadilan Negeri)⁷⁴, High Court (Pengadilan Tinggi)⁷⁵ and Supreme Court (Mahkamah Agung)⁷⁶. Appeal is an attempt that is addressed to High Court. And this attempt can be followed (or not) by attempt of cassation to be reviewed in The Supreme Court. These stages is known as an ordinary remedy (*upaya hukum biasa*)⁷⁷. Other than ordinary remedy, there is an extra-ordinary remedy to examine a case that is already legally binding (in *kracht*), consists of two option those are Judicial Review (Peninjauan Kembali/PK) and Cassation for Law. All these series of stages in a Court System might take months to years to be finally settled. During the whole period the prosecuted mainly stays in a custody.

The stages of court, including attempts provided to review court decisions was designed to ensure the validity of decision. This is to protect the rights of parties involved in the dispute and to pursue the truth and justice. But, if the design is use to settle dispute with death penalty as

punishment, this will lead to a violation of rights of the convicted. The convicted stays in a prison after receiving death sentence and will stay there until the execution is scheduled. Problem is, this schedule comes after months and years. The table from previous sub-chapter shows that the waiting period before the convicted is executed took 5-10 years. Theoretically, after death sentence is legally binding, the execution should be prepared, unless the convicted tries for judicial review and/or presidential clemency. In the implementation, after being put in custody during the court process, the convicted has to remain captivated until after the verdict is dropped. The implementation of captivation and death execution for one death convict is a double punishment.

Here are reasons that have become a cause factor of the state intentionally postponing death execution:

1. Judicial review and presidential clemency mechanism.

⁷⁴ District court is located in cities (although not in all cities, usually located in big cities such as Bekasi and Karawang. This is a first stage of trial to examine facts regarding disputes (criminal, civil dispute, administrative dispute, and also military court).

⁷⁵ High Court is the second stage of court, after District Court. High Courts are located in province region, that is the actual building is located in the capital city of the province, such as, Bandung (West Java) and Jakarta (DKI Jakarta).

⁷⁶ Supreme Court is a single highest court on the top of the pyramid and is located in the capital city of Indonesia, Jakarta.

⁷⁷ Ordinary Remedy is a series of attempt to review court decision that is not legally binding (because the convicted has not yet satisfied with the verdict, and wants to demand a review). The attempt to review a court decision that is already legally binding is called extra-ordinary remedy. Extra-ordinary remedy consists of two option, Judicial Review (Peninjauan Kembali/PK) and Cassation for Law (Kasasi demi Kepentingan Hukum)

The postpone of death execution is claimed to be giving an opportunity for the death convict to request for judicial review (peninjauan kembali) and/or presidential clemency (grasi). This is to pursue the possibility to attain forgiveness or at least a change of punishment. Ario Priojati, S.H., M.Si. the Head of Criminal Justice Section in Nusa Kambangan Penitentiary stated that the execution shall conducted as soon as possible after all the procedures of remedy are no longer requested. But it depends on two conditions:

- Whereas in the criminal justice system, the court judge is a public prosecutor. If there has been no decision on the execution of the public prosecutor, in this case, the Attorney General, then the execution cannot be implemented.
- Whereas with respect to the

decision of permanent legal force, the convicted shall be entitled to file a clemency to the President in the form of a request for change, mitigation, abolition, or elimination of criminal action against him, as provided by Law Nu. 22 year 2002 of Clemency.

Therefore, the decision on death penalty cannot be executed until there is a decision from the president regarding the request for the pardon from the convicted.

2. Problem in Budget.

Ario Priojati also mentioned that cost is the factor that has caused the postponing of execution. There has been no rule that explicitly regulate the cost required to execute death execution. On the other hand, keeping

inmates in a penitentiary requires cost too.

The postponing of death execution leads to several consequences, there are:

1. Death row and death row phenomenon.

Related to the subject, the prolong delay of death execution can cause death row phenomenon. Academic discussions of the term generally identify at least two components: the length of time spent on death row and the severity of conditions that prisoners are typically exposed to.⁷⁸ Specifically, that, the inmates were put in a confinement for months and years without any certainty of the execution time. Currently, various courts and tribunals use different approaches to establishing the death row phenomenon as a violation of a right not to be tortured. The ECtHR⁷⁹ upheld the death row phenomenon as a breach of Article 3⁸⁰ where an

individual passed a very long period of time spent on death row in extreme conditions under “mounting anguish of awaiting execution”. Importantly, the breach was based on the potential for harm to an individual in the future.⁸¹

2. Overcrowded prisons.

Indonesia has a longtime issue where the high criminality leads to overcrowded prisons. Keeping death inmates in prison is adding the number of inmates in an-already-overcrowded prisons. Yasonna Laoly, the Minister of Justice and Human Rights of Indonesia stated that in some region, the over capacity of prisons already reach 600%.⁸²

Indonesian criminal justice system is siding to regulate still about death penalty and its application towards special crimes, including murder, narcotics, and crime against humanities. President Joko Widodo stated that he will not grant a clemency for narcotics death convicts, thus, during his

⁷⁸ Human Rights Advocates, Death Row Phenomenon Violates Human Rights, <http://www.humanrightsadvocates.org/wp-content/uploads/2010/05/Death-Row-Phenomenon-2012.pdf> accessed on October 12th, 2018.

⁷⁹ European Court of Human Rights.

⁸⁰ European Convention of Human Rights (ECHR) Article 3.

⁸¹ Olga Hempel, “Death Row Phenomenon. A Fate Worse Than Death.” Torture on death row from a

psychological and legal perspective, University of Vienna, p 37.

⁸² Ragil Ajiyanto, “Over Kapasitas Penghuni LP dan Rutan di Indonesia Capai 600 Persen”, <https://news.detik.com/berita-jawa-tengah/d-3762377/over-kapasitas-penghuni-lp-dan-rutan-di-indonesia-capai-600-persen> accessed on October 12th, 2018.

period, clemency is only for murder and crime against humanities.

The design of punishment in such way is in a shadow of illegal enforcement of criminal law procedure. Zulfiqar Ali, a Pakistani who worked in textile industry in Indonesia, was dropped a death sentence in 2005. Although he was not executed until recently he died due to cancer, the investigation and court trial towards him was not due process of law. Many technical investigation requirements were not carried out by the police, unfair trial, Zulfiqar Ali was also tortured during the process and he was not given his rights to call Pakistan embassy.⁸³

This situation is picturing on how death sentence is an irreversible action. Once there is a mistake in the enforcement, then there is no way to reverse the execution. Indonesia is showing a regress by still keeping death sentence in its draft of penal code, thus:

- Death sentence is carrying out retributive justice, while other system in criminal justice of Indonesia already pursuing restorative justice, such as, Juvenile Justice System.

- The quality of criminal law enforcement of Indonesia is still often questioned. As an archipelago country with large areas, the monitoring and supervision system is a problem.
- Indonesia should be more progressing among other South East Asia countries in death penalty abolition issue. The death penalty was abolished in Cambodia in 1989, in East Timor a decade later and in the Philippines in 2006. What's more, in countries where capital punishment was still wielded, moratoriums were in place. No executions took place in Indonesia between 2008 and 2013, and none in Singapore between 2010 and 2013.⁸⁴ But, the Indonesia implemented death execution after 2013. Meanwhile, just recently, Malaysia stated that its government is abolishing death penalty.⁸⁵

Indonesia is retaining death penalty and still actively executing until 2016. The draft of penal code is also still putting death penalty as alternative punishment. Death row

⁸³ See www.imparsial.org

⁸⁴ David Hutt, "Capital Punishment Far From Dead in South East Asia", <http://www.atimes.com/capital-punishment-far-from-dead-in-southeast-asia/> accessed on October 12th, 2018.

⁸⁵ "Malaysia to abolish death penalty, granting reprieve for 1,200 on death row" <https://www.cbsnews.com/news/malaysia-to-abolish-death-penalty-rare-move-against-capital-punishment-asia/> accessed on October 12th, 2018.

is a fact that happening where mainly death convicts spent 5-10 years in death row. This is violating human rights. But Indonesia held no responsibility under international human rights law; since Indonesia did not ratify the optional protocol of ICCPR. The CAT is also not sharply effective to say that death row in Indonesia shall be prohibited since the definition of torture that this convention gives have a limitation. Also, Indonesia has its own sovereignty to abolish or not to abolish death penalty from its constitution.

Considering the many weaknesses in criminal law enforcement Indonesia is having, death penalty is a dangerous option of punishment due to its nature of irreversibility. It is also not in line with the concept of justice that Indonesia is pursuing, that is restorative justice. Death penalty has a retributive approach.

The only effective way to avoid death row is by abolishing death penalty completely. As a sovereign state, Indonesia has its own decision regarding death penalty despite international convention it ratified. It can be considered for international community to propose South East

Asia to have a convention of death penalty. Hopefully, a regional convention may give stronger influence for South East Asia countries to, together, abolish death penalty completely.

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