

# DOUBLE PUNISHMENT IN THE WAITING TIME FOR DEATH PENALTY: A STUDY OF HUMAN RIGHTS PROTECTION IN INDONESIA

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## Abstract

In Indonesia, until 2022 there were 428 people who have been sentenced with death penalty by anaesthetics and were still waiting for their execution to be carried out. Among those people, 101 have been sitting in the death row for more than 10 years. This means that those who are sentenced to death by the court (*inkracht van gewijsde*) were imprisoned for life until their execution. They had to carry out two kinds of punishments, *videlicet* death penalty and imprisonment. There is a lengthy waiting time, which results in the neglect of death row convicts' rights. This is a normative juridical research with data collected through literature study, court decision analysis, and concept test in focus group discussion attended by Supreme Prosecutor, Supreme Court, National Narcotics Agency, State Police of Republic of Indonesia and National Commission of Human Rights. The result of this research shows that such waiting period creates distrust between judicial institutions. It also creates uncertainty and becomes a loophole for death row inmates to apply for unlimited legal remedies which causes delay of the execution of the death penalty. On the other hand, the role of the Public Prosecutor as the executioner of death penalty is not yet optimal. Because of the two reasons above (legal remedies and political will), they worry about potentially being considered as violating human rights.

## 1. INTRODUCTION

One of the functions of the law is to guide human behavior. As guidance, law has role in controlling behaviors and attitudes. Besides, law is also supported by negative sanctions in the form of punishment in order to demand obedience. Therefore, law is a means of social control. In this case, law is also a means of coercion that protects citizens from threats and actions endangering the citizens themselves and their properties. So, whoever violates the law will get a penalty (criminal). The law regulating which actions to be sanctioned to criminals and where the criminal rules are incarnated is called criminal law. That is why criminal law is also called as Special Sanction Law. The imposition of a crime as a punishment to violators is only the ultimate remedy (Ultimate Remedium) which is only

carried out if other measures, such as prevention, cannot be performed. One of the most severe forms of punishment is the death penalty.<sup>1</sup>

The death penalty is the heaviest sanction among all types of criminals and is also the oldest, toughest, and often considered to be the cruelest and most controversial type of criminal in all criminal systems, both in countries that adhere to Common Law and in countries that adhere to Civil Law. There are two main opinions regarding the death penalty; the first is a group that likes to maintain the death penalty according to the applicable provision, and the second is a group that wants to abolish the death penalty in its entirety. The current trend is the abolition of the death penalty as has been done by the United States and European Union countries. Indonesia is a country that still maintains the death penalty as its positive legal system. This can be found in the Criminal Code. Indonesia executed the last death penalty in 2016 on 4 death row inmates. Previously in 2015, there were 14 death row inmates sentenced to death.<sup>2</sup>

Amnesty International Indonesia itself noted that courts in Indonesia had handed down 84 death rulings from 2017 to the end of 2018. Of those numbers, 47 were handed down in 2017 and the rest throughout 2018. The most verdicts passed in 2016 with 60 cases. Meanwhile, in 2015, the number dropped to 46 persuasions. Also, for 2014, there were 6 rulings handed down, 16 rulings in 2013, and 12 death rulings in 2012. Until 2022 there have been at least 428 death row convicts staying to be executed. A quarter of the division or as many as 101 people have been sitting in the waiting list for more than 10 years.<sup>3</sup> Presently, there are as numerous as 98 death cons who are still staying for clarity on the prosecution of their death. One of the most important phenomena of the death penalty is the condition of double punishment. In this condition, the convicts are in an uncertain position, videlicet serving two rulings at the same time. Basically, the government does not have a definite formula for who will be executed. Based on the data below, the waiting period for death row inmates varies. There were 87 death row inmates having a waiting period of 5 years, and this number was the most time span, then there were 31 and 30 death row inmates having waiting periods of 6 years to 10 years and 11 years to 15 years. Ten (10) death row inmates have waited for 16 to 20 years in prison. Interestingly, there were also 2 death row inmates that have waited for a long time, in which one of them waited for 21 to 25 years, and the other waited for 36 to 40 years.<sup>4</sup>

According to BNN research,<sup>5</sup> marijuana is strictly regulated by the UN Drug Control Treaties.<sup>6</sup> Narcotics abusers were mainly young people who were in their productive age, namely 50% of young people who were already working, and 27.29% who were still students. Unfortunately, the remaining 22% were young people who did not go to school and were jobless. So, the statement delivered by the President of the Republic of Indonesia

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<sup>1</sup> "Indonesia: A briefing on the death penalty," Amnesty International, last modified September 30, 2004, 34–40. <https://www.amnesty.org/en/documents/asa21/040/2004/en/>.

<sup>2</sup> Clive R. Hollin, *Psychology and Crime: An Introduction to Criminological Psychology* (London & New York: Routledge, 2013), 330.

<sup>3</sup> Ulil Albab Alshidqi, "Sepanjang 2022 Terdapat 132 Kasus Hukuman Mati, Sebagian Besar Berkaitan Kasus Narkotika," *Serat.id*, April 13, 2023, <https://serat.id/2023/04/13/sepanjang-2022-terdapat-132-kasus-hukuman-mati-sebagian-besar-berkaitan-kasus-narkotika/>.

<sup>4</sup> Kelik Wardiono, Natangsa Surbakti and Widi F.R., *Eksekusi Pidana Mati Tindak Pidana Narkotika* (Surakarta: Muhammadiyah University Press, 2020), 92.

<sup>5</sup> Humas BNN, "Satu Padu Musnahkan Ladang Ganja," *Badan Narkotika Nasional*, 4 May 2015, <https://bnn.go.id/satu-padu-musnahkan-ladang-ganja/>.

<sup>6</sup> Adami Chazawi, *Pelajaran Hukum Pidana Bagian I* (Jakarta: Raja Grafindo Persada, 2002), 71.

that Indonesia is in a Narcotics Emergency.<sup>7</sup> Meanwhile, according to 2018 data, narcotics abusers among students in 2018 (from 13 provincial capitals in Indonesia) reached 2.29 million people. One of the groups of people who are prone to be exposed to drug abuse is those who are in the age range of 15-35 years or the millennial generation. The projected number of drug abusers in 2015 was 5.8 million people (2.8%) while in 2019 was 7.4 million people (4.9%),<sup>8</sup> so until now, the level of narcotics abuse and illicit trafficking in Indonesia has increased from year to year.<sup>9</sup>

Judging from the profitable losses due to lawless anesthetics trafficking, it caused a loss of Rp39.5 trillion in 2009 and an increase in 2015 of Rp63 trillion, which comported social losses of Rp.6.9 trillion and particular losses of Rp56.1 trillion. Deaths due to medicine abuse alone reach people per time. Indeed children and women are also listed as perpetrators of medicine abuse. Rotation of anesthetics has entered the exigency department, so it needs a redundant ordinary crime, one of which is requested in Composition 74 paragraph (1) of Law Number 35 of 2009 concerning Narcotics (Narcotics Law), which states that cases of abuse and lawless trafficking of anesthetics and anesthetics precursors, including cases that take priority over other cases to be submitted to the court for immediate agreement.

The high level of narcotics abuse causes the death penalty for the perpetrators of these abusers to be stipulated in the law. Based on this background, the question that we ask in this paper is, what is the cause of the perpetration of double punishment for anesthetics death row cons? The purpose of this research is to find out why the execution of death row inmates for narcotics crimes is delayed, and what efforts can be made to overcome the causes of delays in the execution of death row inmates for narcotics crimes.

## 2. METHOD

The research methodology used a normative juridical research type with secondary data and a concept test using a focus group discussion technique<sup>10</sup> with state institutions that have competence in carrying out executions in Indonesia.

## 3. RESULTS AND DISCUSSION

### 3.1 The existence of the Death Penalty

There is opposition to the actuality of the death penalty, especially in Indonesia. The Indonesian government still maintains the death penalty for anesthetics crimes because of the impact of rotation on the youngish generation and the methodical nature of their distribution. Speaking of capital discipline, it cannot be separated from the history of its regulation and operation, which was preliminarily regulated by the Government of the Kingdom of the Netherlands for the Dutch East Indies region through *Wetboek van Strafrecht Voor Nederlands Indie* which was declared to be effective on January 1, 1918.<sup>11</sup>

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<sup>7</sup> Dery Ulum, "Perlindungan Anak dalam Kebijakan Narkotika: Tindak Pidana Narkotika yang Dilakukan Anak," *Jurnal Peradilan Indonesia Teropong* 5, no. 2 (2017): 102.

<sup>8</sup> Lydia Harlina Martono and Satya Joewana, *Menangkal Narkotika Dan Kekerasan: Belajar Hidup Bertanggung Jawab* (Jakarta: Balai Pustaka, 2006), 2.

<sup>9</sup> Uyat Suyatna, "Evaluasi Kebijakan Narkotika Pada 34 Provinsi Di Indonesia," *Sosiohumaniora* 20, no. 2 (2018): 169, <https://doi.org/10.24198/sosiohumaniora.v20i2.16054>.

<sup>10</sup> Agus Budianto, "Legal Research Methodology Reposition in Research on Social Science," *International Journal of Criminology and Sociology* 9, (2020): 1340, <https://doi.org/10.6000/1929-4409.2020.09.154>.

<sup>11</sup> Topo Santoso, *Principles of Indonesia Criminal Law* (New York: HART Publishing, 2022), 27.

The death penalty itself in the Kingdom of the Netherlands was abolished in 1870, indeed since 1525, but the death penalty was still maintained in *Wetboek van Strafrecht Voor Nederlands Indie* for colorful reasons that were disguised as social and ethical, in addition to looking at the nature, character, and the belief of indigenous people as substantiations in felonious cases, which is the deceitfulness of the indigenous people. While not much different from Simons, Kruseman argues that indigenous people fluently believe, indeed accept falsehoods as verity, so Kruseman argues that numerous people natives are bad, so according to these people, it was not wrong if the death penalty was included in *WvS-Nederlands Indie* at that time.<sup>12</sup>

After Indonesia declared itself independent, through Composition II of the Transitional Rules of the 1945 Constitution, *WvS-Nederlands Indie* which was formed in 1915 through Stb. 1915 No. 732 which was executed on January 1, 1918, was declared valid in the home of the Republic of Indonesia by Law No. 1 of 1946 concerning the Criminal Law Regulations and was declared valid again by Law No. 73 of 1958 concerning declaring the enactment of the Act No. 1 of 1946.

Composition 10 of the Criminal Code places the death penalty as one of the main crimes, in addition to fresh penalties. The actuality of the death penalty still pros and cons. A view agrees with the death penalty for anesthetics crimes because their crime can cause substantial damage as mentioned above. The death penalty can also function as a deterrent effect,<sup>13</sup> which means it give a shocking effect on people who will or want to do anesthetics dealing. The alternate view is societies that disagree with the implementation of the death penalty on the basis of human rights consideration. In their opinion, the objective of punishment is retaliation for drug abusers causing substantial damage. However, this implementation is proven neither to achieve the objective nor provide a deterrent effect because currently drug crime still can be found and the number of which is getting higher with more advanced operating modes.<sup>14</sup>

No matter how, the death penalty can injure someone, and it takes the right to life from the convicts. According to the International Covenant on Civil and Political Rights (hereinafter abbreviated as "ICCPR") in article 6 paragraph (1), stated that every human being has a right to live. This right must be protected by law, and this law also considers it wrong to take the life of someone recklessly. Besides, as explained in Article 3 of Universal Declaration of Human Right, the implementation of the death penalty violates article 6 paragraph (1) because the death penalty can injure and take someone's life, and this is contrary to Article 6 paragraph (1) of ICCPR and Article 3 of Universal Declaration of Human Right. Even though there are still many countries that do not abolish the death penalty including Indonesia, China, and Iraq, the fulfillment and regulation on the implementation of the death penalty both in the arrest process and the examination process in the court are still unclear. Therefore, this is contrary to the concept of the rule of law where the regulation is clear, both equality before the law and also the existence of an independent and impartial judiciary which have implications for independent judicial power.<sup>15</sup>

The key to the argument of whether the abolition of the death penalty should now be regarded as a goal that all countries are committed to human rights should pursue lies in

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<sup>12</sup> Masruchin Ruba'i, *Buku Ajar Hukum Pidana* (Malang: Media Nusa Creative, 2015), 140.

<sup>13</sup> Jan Palmer, "Economic Analyses of the Deterrent Effect of Punishment: A Review," *Journal of Research in Crime and Delinquency* 14, no. 1 (1977): 11–13, <https://doi.org/10.1177/002242787701400102>.

<sup>14</sup> Kevin M. Carlsmith, Timothy D. Wilson, and Daniel T. Gilbert, "The Paradoxical Consequences of Revenge," *Journal of Personality and Social Psychology* 95, no. 6 (2008): 1320, <https://psycnet.apa.org/doi/10.1037/a0012165>.

<sup>15</sup> Gottfried Dietze, *Two Concept of Rule of Law* (Germany: Liberty Fund, 2006), 14–29.

the interpretation of Articles 6 and 7 of the ICCPR, which all but a few states that retain capital punishment, such as Indonesia, have signed or ratified. Article 6 (2) of the ICCPR restricts the imposition of the death penalty to the 'most serious crime'. The first of the safeguards emphasizes that the death penalty may only be imposed for 'intentional crimes with lethal or other extremely grave consequences'. Article 6 (4) of the ICCPR states that 'anyone sentenced to death shall have right to seek pardon or commutation of the sentence'. Amnesty, pardon, or commutation of the sentences of death may be granted in all cases.<sup>16</sup>

According to the recent case law of the UN Refugee Agency (hereinafter abbreviated as "UNHCR"), the definition of the most serious crimes should be interpreted as narrowly as possible. The Committee has said that the death penalty should not be enforced for crimes that do not result in the loss of human life, such as drug-related or economic crimes, which is contrary to the ICCPR. The position that drug-related offenses do not fall into the category of the most serious crimes is shared by the UNHCR and the UN Office on Drugs and Crime. Furthermore, in 2009, the UNHCR noted that the application of the death penalty for those convicted solely of drug-related offenses raised serious human rights concerns as they did not meet the threshold of most serious crimes.<sup>17</sup>

Capital punishment (death penalty) is prescribed in Indonesia for murder, terrorism, and betrayal of the military in case of war and drug trafficking. Amnesty International has expressed concern over the fact that the death penalty is provided for in Indonesian law for a very large number of criminal offenses, and that the recently adopted law is combating criminal acts of terrorism 2018 which contain provisions for the death penalty and fall short of international standards for fair trials. This trend toward greater use of the death penalty has also been confirmed by a recent ruling by the Indonesian Constitutional Court to uphold the death penalty for drug offenses, Act of Narcotics 2009.<sup>18</sup>

With a population of about 270 million, Indonesia is the largest domestic market for narcotics in Southeast Asia. As it comprises more than 17,000 widely scattered islands, with a staggering 54,000 kilometers of coastline, tight border controls are almost impossible in the Indonesian archipelago. This makes it vulnerable to the illicit narcotics trade and makes Indonesia a strategic transit hub for the International drug trade. The government of Indonesia portrays narcotics trafficking and drug abuse as a major threat to the lives and cultural values of the Indonesian people, and even the nation's security. So, it is very reasonable for narcotics crime to be given the death penalty. And the death penalty does not conflict with Article 3 of the UDHR. According to Barda Nawawi<sup>19</sup>, it does not conflict with the principle of "right to life" as regulated in Article 28A jo. Article 28I of the 1945 Constitution and Article 9 Paragraph (1) jo. Article 4 of Law No. 39/1999 on Human Rights and the "right to be free from loss of life" in Article 33.

### 3.2 The Political Will on the Prevailing Criminal Justice System

The result to the death penalty problem in Indonesia can first be started by reformulating or redesigning the death penalty policy in Indonesia. Also bearing in mind that, currently, crimes that are punishable by the death penalty similar to

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<sup>16</sup> Jaime Orea, *Human Rights in State of Emergency in International Law* (University Michigan: Clarendon Press, 2008), 94–96.

<sup>17</sup> William Schabas, *The Death Penalty and Drug Offences* (China: The Irish Center for Human Rights & The International Centre on Human Rights and Drug Policy, 2010), 2–8.

<sup>18</sup> Murthy, *The Role of National Human Rights Institution in Abolishing Capital Punishment: A Critical Evaluation* (Oxford: OUP, 2013), 78.

<sup>19</sup> Barda Nawawi Arief, *Kebijakan Hukum Pidana* (Jakarta: Prenada Media Group, 2011), 68.

terrorism, corruption, anesthetics crimes, and sexual crimes against children are "massive" and wide as if they did not fete differences in age and place in terms of crimes. Certain felonious acts are not only in big metropolises but have spread to all situations of society. Grounded on the Narcotics Law, the death penalty is regulated in Articles 113 (2), 114 (2), 116 (2), 118 (2), 119 (2), 121 (2), and 133.<sup>20</sup>

Still, in the perpetuation of the felonious justice system, there are sins regarding the prosecution of the death penalty, similar to the actuality of an unclear waiting period for the perpetration of the death penalty and the death penalty being regulated as the main crime that occupies the top of the scale of types of crimes. The death penalty is considered a form of discipline that is not evaluative to perpetrators of felonious acts or does not have a restorative justice perspective<sup>21</sup>. In the absence of a clear waiting time for the prosecution of the death penalty, it is cerebral suffering for the cons because, in practice, the prosecution of the death penalty can take a long time and without certainty.

The implementation of the death penalty is influenced by the dynamics of the criminal justice system prevailing in Indonesia. The existence of the distrust of the Constitutional Court towards the criminal justice system (prosecutors, law enforcers, etc.) becomes evidence that the legal system in this country is no longer normal. Legal decisions are no longer seen as pure legal remedies because they have been influenced by politics. In relation to the criminal justice system prevailing in Indonesia, the Criminal Procedure is a procedure that must be completed in carrying out executions. There are several stages of legal rights owned by a convict ranging from Appeal, Cassation, Review of Court Decision, to Commutation. As a country that has a legal system, all relevant stakeholders must be able to respect it.

In addition to the legal rights of death row inmates, there are also several regulations that hinder the execution of the death penalty, for example, the existence of Law No. 5 of 2010 on Commutation/Clemency, followed by the issuance of the Constitutional Court's decision Number 107/PUU-XIII/2015. Execution of court decisions with permanent legal force in criminal cases is the duty and authority of the Prosecutor at the Prosecutor's Office of the Republic of Indonesia as mandated by the Criminal Procedure Code and Law No. 16 of 2004 on the Prosecutor's Office. The implementation of the duty and authority to execute decisions often gets the public's attention, especially with regard to the execution of the death penalty. Controversy regarding the death penalty seems to escalate to its execution and is not solely in the realm of legislative and judicial policies.<sup>22</sup>

In the criminal justice system of Indonesia, the implementation of court decisions that have permanent legal force (*inkracht van gewijsde*) is the full authority of the Prosecutor at the Prosecutor's Office of the Republic of Indonesia. Prosecutors at the KPK are not the executors because Law No. 30 of 2002 on KPK does not authorize the institution, including its officials/employees, to carry out the execution of the decisions. The authority to execute decisions that have permanent legal force is attributively affirmed in the Criminal Procedure to be a monopoly of the Prosecutor in the Prosecutor's Office. It is because there is no other official, including other apparatuses of the criminal justice system given the same authority.

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<sup>20</sup> Carolyn Hoyle and Diana Batchelor, *Investigating Attitudes to the Death Penalty in Indonesia (Part II Public Opinion: No Barrier to Abolition)* (London: WIT3EY & LBH Masyarakat, 2021), 25–27.

<sup>21</sup> Anna Bindler and Randi Hjalmarsson, "The Persistence of the Criminal Justice Gender Gap: Evidence from 200 Years of Judicial Decisions," *Journal of Law and Economics* 63, no. 2 (2020): 301, <https://doi.org/10.1086/707482>.

<sup>22</sup> Chairul Huda, "Eksekusi Pidana Mati Pasca Putusan Mahkamah Konstitusi Nomor 107/PUU-XIII/2015," Fakultas Hukum Universitas Muhammadiyah Jakarta, accessed 21 November 2021, <https://fh.umj.ac.id/eksekusi-pidana-mati-pasca-putusan-mahkamah-konstitusi-nomor-107puu-xiii2015/>.

This is reflected in several provisions governing the prosecutor's authority in carrying out court decisions, including Article 1 paragraph 6 and Article 270 of the Criminal Code, and which is further embodied in Law No. 16 of 2004 on the Prosecutor's Office. Based on Article 30 paragraph (1) letter b of Law No. 16 of 2004 on the Prosecutor's Office, the Prosecutor "implements judges' decisions and court decisions that have permanent legal force" and it becomes the duty and authority of the prosecutor in the criminal field.<sup>23</sup>

To sum up, the implementation of court decisions that have legal force remains the authority of the Prosecutor and the Prosecutor's Office, which are basically "subordinated" to the judicial power. However, this does not mean that there is absolutely no discretionary space regarding this matter, considering that the Prosecutor in carrying out his duty and authority must heed religious norms, decency, and morality, and must explore and uphold human values that live in society as emphasized in Article 8 paragraph (4) of Law No. 16 of 2004 on the Prosecutor's Office. This is also applicable in carrying out the duty and authority to control the implementation of the death penalty.

According to the Deputy Attorney General on General Criminal Affairs (Jampidum),<sup>24</sup> technically, the prosecutor cannot carry out executions even though the convict has exceeded the time limit for taking legal action. However, legally, as long as the convict has used all his legal rights, then the execution can be carried out immediately. Regarding the function of the prosecutor, in the criminal justice system, it is the public prosecutor who carries out court decisions. If there is no execution decision from the public prosecutor, in this case, the Attorney General's Office, then the execution cannot be carried out.

As the executor to implement the sentence against the court verdict which has permanent legal force, the prosecutor as the public prosecutor and the executor of the decision carries out his duties under the provisions of the legislation. This includes the execution of decisions against death row inmates in narcotics cases. Regarding the uncertain timing of executions, especially for death row inmates in narcotics cases, the prosecutor as the executor, in addition to carrying out according to the provisions of the law, must also carefully consider that the death penalty is very sensitive to human rights. If the execution has been implemented for the convicts, and then problems arise, further information or accountability cannot be obtained from the convicts.

In addition, the prosecutor, as the executor of the death penalty decision, is also a government apparatus in the field of law enforcement. Therefore, all actions taken, including executing the death penalty for convicts in narcotics cases must consider and pay attention to government policies. Moreover, those who are sentenced to death for narcotics cases consist of various nationalities/citizenships.

### 3.3 Implementation of Double Punishment Against Death Convicts with Narcotics

Narcotics have been known to humans since the Neolithic period. The word "narcotics" principally comes from the Greek "Nar-koun" which means to paralyze or numb<sup>25</sup>. Roughly 2000 BC, in Samaria, was planting Opoion flower substance or latterly more known as opium (opium= papavor somniferitum). This flower thrives in upland

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<sup>23</sup> Inten Kuspitarsi, Purwoto, and Umi Rozah, "Peran Kejaksaan Sebagai Eksekutor Pidana Mati di Indonesia," *Diponegoro Law Journal* 6, no. 2 (August 2017): 5–7. <https://ejournal3.undip.ac.id/index.php/dlr/article/view/17437>.

<sup>24</sup> Fadil Zumhana (Deputy Attorney General for General Crimes), interview in Focus Group Discussion, Serpong, Banten, 16 October 2021.

<sup>25</sup> Sujono and Bony Daniel, *Komentar dan Pembahasan Undang-Undang Nomor 35 Tahun 2009 tentang Narkotika* (Jakarta: Sinar Grafika, 2011), 2.

areas above an altitude of 500 measures above the ocean position.<sup>26</sup> The description of Narcotics itself in the Narcotics Law is a substance or medicine deduced from shops or non-plants, both synthetic and semi-synthetic, which can beget a drop or change in knowledge, loss of taste, reduce to exclude pain, as well as can beget dependence.

Regarding acts that are banned as acts of anesthetics abuse, it is regulated in the Narcotics Law in Chapter XV Papers 111 to 148 which is a lex specialist, which regulates 4 (four) kinds of unlawful acts regarding anesthetics crimes, which by law can be hovered with felonious warrants, i.e. enjoying, producing, offering, or carrying. The prosecution of the death row cons must be carried out after the court's decision, which has been handed down, has endless legal force, and the cons have been given the occasion to submit all legal remedies, similar as prayers, cassation, retrospection and requesting leniency to the chairman. The prosecution can be carried out with a previous blessing from the President.

In the operation of the death penalty, the problem is the lack of clarity or the absence of rules regarding the timing of prosecutions for the death row cons themselves, in this case, the death row cons are anesthetics merchandisers. The current problem in Indonesia is regarding the death penalty, videlicet the prolonged time in the prosecution process itself. This happens because there is no provision that regulates the time limit for the prosecution of the death penalty after a court decision has endless legal force. This condition collides with the right of the cons/their family to file extraordinary legal remedies in the form of a PK (Judicial Review) to the Supreme Court and a request for leniency to the Chairman.

Under Article 268 of the Criminal Procedure Code, it is originally stated that a reconsideration request may be made once. This provision was, however, recently successfully challenged in the Constitutional Court. It was found in March 2014 that there could be no limit to the number of applications for reconsideration as that could cause injustice to defendants who only found evidence to support them after the first application was refused. The Constitutional Court held that preventing more than one reconsideration application was a violation of fundamental constitutional principles of substantive justice, rule of law, and guarantees of citizens' rights.

For illustration, there are several cases of anesthetics dealers who are executed with the death penalty. In 2005, grounded on the Supreme Court's decision, Marco Archer Cardoso Moreira was doomed to death for his prosecution in 2015, Namaona Denis was doomed to death in 2002 and his prosecution was in 2015, Rani Andriani was doomed to death in 2001 and her prosecution was carried out in 2015, Zainal Abidin was doomed to death in 2001 and his prosecution was carried out in 2015, while Raheem Agbaje Salami was doomed to death in 1999 and the prosecution was carried out in 2015.<sup>27</sup>

This shows that there is no clarity or legal certainty regarding the time span of the prosecution of the death penalty, causing death cons to laterally admit a double judgment, videlicet prosecution itself and imprisonment in terms of staying for death prosecution. This is because there are no rules that regulate the time limit for the

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<sup>26</sup> Paudira Dwijo Hapsari, Awallia Septiyana Putrim and Henzie Kerstan, "Legal Policy for Drug Users in Indonesia and the Netherlands," *Journal of Creativity Student* 7, no. 1 (2022), 2-3. <https://doi.org/10.15294/jcs.v7i1.36206>.

<sup>27</sup> Humas, "Minggu Dinihari, 6 Terpidana Narkoba Telah Dieksekusi Mati," *Sekretariat Kabinet Republik Indonesia*, January 18, 2015, <https://setkab.go.id/minggu-dinihari-6-terpidana-narkoba-telah-dieksekusi-mati/>.



prosecution of death row cons in Indonesia, so this can produce a legal query for death row convicts, in this case, the death row cons, anesthetics merchandisers, and the public.

According to Fadil Zumhana, technically, the Prosecutor cannot carry out prosecution indeed though the cons have exceeded the time limit for taking legal actions. Still, fairly, as long as the cons have used all their legal rights, also the prosecution can be carried out incontinently. Regarding the function of the Prosecutor, in the felonious justice system, it is the Public Prosecutor who carries out court decisions. However, in this case, in the Attorney General's Office, the prosecution cannot be carried out if there is no prosecution decision from the Public Prosecutor.<sup>28</sup>

In addition, through the decision of the Indigenous Courts, Number 23/PUU-V/2007 concerning Judicial Review of Law Number 22 of 1997 in confluence with Law Number 35 of 2009 concerning Narcotics against the 1945 Constitution rejected the pleaders' solicitation to abolish the death penalty not only in anesthetics cases but from the Indonesian felonious system. This is in agreement with the Narcotics Law which stipulates that the death penalty can be assessed on people who commit certain types of anesthetics crimes. The duty of life imprisonment or the death penalty is applied to anesthetics offenses of class I and class II with certain conditions as regulated in the law.

According to Hans Kelsen,<sup>29</sup> legal certainty refers to the application of a clear, permanent, and consistent. According to Surya Jaya, people need legal certainty to which in a given situation, there are clear, consistent, and accessible legal rules issued or acknowledged by the state; these rules are applied by government institutions; citizens (generally) conform to such rules; the rules are consistently applied by independent and impartial judges in the case; and these decisions are put into practice. In summary, the existence of real legal certainty can be determined by legal rules, legal institutions, and the wider social context in which they operate. Therefore, the judge decided differently from jurisprudence, which is related to the Indonesian civil law legal system where judges are obliged to dig out the values of justice in society.<sup>30</sup>

Supreme Court Justice Surya Jaya also added that in relation to the duty of a double judgment on anesthetics death row cons, it is necessary to pay attention to the ensuing matters. First, the holdback of the perpetration of the death penalty or tentative death penalty, i.e., however, the death penalty can be changed to life imprisonment or 20 (twenty) times imprisonment; Second, life imprisonment can be changed to 15 (fifteen) times in captivity if the cons have served a minimal judgment of 10 (ten) times with good geste if during a probationary period of 10 (ten) times, the cons have shown a station estimable.

Another contributing factor to the creation of a double punishment for anesthetics death row cons is the allocation of Indigenous Court Decision No. 34/PUU-XI/2013 which states that a request for retrospection can be made further than formerly. The District Court's decision was also used as a legal loophole to delay the prosecution of the death penalty. For an illustration, the author conveys the case of anesthetics death row cons Michael Titus Igweh (MTI) as follows: the MTI case was preliminarily

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<sup>28</sup> Fadil Zumhana (Deputy Attorney General for General Crimes), interview in Focus Group Discussion, Serpong, Banten, 16 October 2021.

<sup>29</sup> Stefano Bertae, "Toward A New Paradigm of Legal Certainly," *Legisprudence* 2, no. 2 (2008): 27–29. <https://doi.org/10.1080/17521467.2008.11424672>.

<sup>30</sup> Surya Jaya (Supreme Court Justice of the Supreme Court of the Republic of Indonesia), interview in Focus Group Discussion, Serpong, Banten, 16 October 2021.

decided by Tangerang District Court with Decision Number 425/Pid.B/2003/PN.TNG, which ruled that the defendant MTI was fairly and convincingly proven shamefaced committing a crime without rights and against the law immolation for trading, distributing, delivering, entering, central in the trade and purchase of anesthetics class I in the form of heroin which is carried out concertedly, continuously, and in a systematized manner. The defendant MTI was also doomed to the death penalty and forfeiture of Rp. with an attachment of three months in captivity.

In addition, in the Appeal Decision of the Bandung High Court Number 315/Pid/2003/PT.Bdg., the decision upheld the Tangerang District Court's Decision Number 425/Pid.B/2003/PN.Tng. At the cassation position, the Supreme Court has decided with Decision Number 641K/Pid/2004 which rejected the appeal from MTI. The cassation decision was submitted for review by MTI and was decided by Decision Number 251 PK/Pid.Sus/2011 with a decision rejecting the request for review from MTI. MTI re-submitted the operation for judicial review for the alternate time, but the judge still rejected the operation for judicial review for the alternate time contained in Decision Number 144PK/Pid.Sus/2016.

Legal considerations of Decision Number 144PK/Pid.Sus/2016 stated that, preliminarily, the aspirant for review/condemned MTI had filed for a review, and it had been decided by the Supreme Court with Decision Number 251PK/Pid.Sus/2011 dated October 10, 2012, with the sound decision, among others, to reject the aspirant's operation. The judge considered that, judicially, the submission of a request for judicial review in a felonious case might only be one time. The operation for retrospection by the aspirant for review is the alternate time, so the operation for review by the aspirant for review is not predicated according to the law.

In the MTI case, it can be seen that the first instance decision was handed down in 2003 and entered an alternate PK (judicial review) decision in 2016, where 12 (twelve) times, MTI had served a double judgment, videlicet imprisonment, and the death penalty. The Indigenous Court's decision was latterly annulled by the Circular Letter of the Supreme Court (Surat Edaran Mahkamah Agung, hereinafter abbreviated as "SEMA") No. 7 of 2014, which was only possible if it full filled the reasons quested in SEMA Number 10 of 2009, videlicet if there is an object of a case, there are two or further judicial review opinions that contradict one to another. Turning down to review for the alternate time, the judge was grounded on SEMA Number 7 of 2014 which limits the review to only one time.

From the explanation over, it can be said that the policy of the felonious law system still maintains the operation of the death penalty for perpetrators of narcotics crimes, indeed though the surpluses caused by its perpetration laterally produce a double judgment. Supreme Court Justice Surya Jaya also handed results to find a middle way to the miracle of double discipline, which is legal certainty. The researchers applied Hans Kelsen's legal proposition which states that in the legal process, there should be no political interference from certain authorities.<sup>31</sup> Accordingly, the enforcement of lawful assurance rests on main components, namely certainty in exposure for society (the principle of certainty orientation) that people understand, what behavior is expected by others from them, and what response they can expect from other people for their behavior.

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<sup>31</sup> Muhammad Harun, "Philosophical Study of Hans Kelsen's Thoughts on Law and Satjipto Rahardjo's Ideas on Progressive Law," *Walisongo Law Review (Walrev)* 1, no. 2 (2019): 211. <https://doi.org/10.21580/Walrev/2019.1.2.4815>.

Currently, the politics of punishment in Indonesia for narcotics crime remains consistent. President Jokowi has executed more people in his first year than his predecessors, almost matching the total of executions carried out during Yudhoyono's ten years, namely with eighteen people already executed less than two years into his administration. Jokowi's execution rate had reached six per year. The increasing trend is reflected not only in the rate of executions but also the number of death sentences imposed by the courts. In September 2016, for example, reprieve's database recorded 178 people on death row, of whom 105 were drug offenders. By December 2018, the number had increased to 298, with 186 drug offenders. Meanwhile, the information provided by the prisons of the Department of the Ministry of Law and Human Rights stated that in April 2015, there were 121 people on death row, with fifty-three of them for drug offenses, and by October 2017, there were 165 death row prisoners, with seventy-three of them were drug offenders.<sup>32</sup>

Grounded on the result of this exploration, it can be concluded that the law requested in the form of a Law does not always succeed in creating law as a tool of social engineering. The law should be neither most-up and vice versa, and the law should be progressive, but it must also be suitable to wangle the society.<sup>33</sup>

#### 4. CONCLUSION

Based on the research data analyse, it can be concluded that unlimited legal remedies have caused a double punishment for anethetics death row cons in Indonesia. Furthermore, substantive law that specifically regulates the time limit for executions is not available yet. These situations have created a sense of "distrust" between the judiciaries. Decisions of Constitutional Court No. 34/PUU-XI/2013 and SEMA No. 7 of 2014, which are contradictory, are also a form of uncertainty in the criminal system in this country. Besides, it is also a legal loophole for convicts to apply for unlimited legal remedies, resulting in an indefinite delay of in executing the death penalty. As a consequence, the convicts serve two sentences, which are imprisonment and the death penalty. The role of the Public Prosecutor as the executioner of the death penalty is not yet optimal. It is caused by legal remedies. This makes the executioners hesitate because there are no standard rules, and they tend to wait for instructions from 'above', and they also worry about being considered violating human rights. Whereas the death penalty based on the laws and regulations in Indonesia is justified, including the main punishment, and the state apparatus prosecutors in the field of law enforcement should carry out their main duties (executors) properly, not take a decision on their own.

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<sup>32</sup> Tim Lindesey and Helen Pausacker, *Crime and Punishment in Indonesia* (UK: Routledge, 2021), 282.

<sup>33</sup> Pasal 100 *Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana*.

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