



DEATH ROW PHENOMENON IN INDONESIA

INSTITUTE FOR CRIMINAL JUSTICE REFORM



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(Summary Translation)

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to commemorate the day the General Assembly of the UN adopted and proclaimed the Universal Declaration of Human Rights (Human Rights Day) on 10 December every year.

Introduction

The Institute for Criminal Justice Reform (ICJR) 2019 report on death penalty revealed that the number of death penalty being used as a punishment in the criminal justice system in Indonesia remained high, between October 2018 - October 2019 alone there were 80 people faced death penalty in Indonesia, 65 of whom were sentenced to death on the court of first instance.¹ These 80 people had joined the other people sitting on death row whose numbers have jumped sharply since the war against narcotics was initiated by the President of the Republic of Indonesia, Joko Widodo.

As of April 2020, 60 death row prisoners were already in a waiting period for execution for more than 10 years. They can be considered as the people who have been serving a double sentence, imprisonment filled with fear and anxiety and the death penalty itself. They can wait in death row with no clear time and live in fear for years.

The draft bill of Penal Code (RKUHP) was an effort by the government to reform the criminal justice policy in Indonesia, but it still does not guarantee the protection for detention conditions of death row prisoners. The government is trying to introduce the "Indonesian Way" of punishment related to death penalty. As of the last discussion in September 2019, it was still uncertain. The provision regarding the death penalty as a special form of punishment and must always be used alternatively was revised in the full version of the September 2019 RKUHP. The guaranteed commutation as the right of any person sentenced to death is now depending heavily on the judge's authority in delivering decisions.² According to the latest version of the RKUHP discussed, the 10-year suspended sentence must be stated in the court ruling, instead of automatically received. Despite the government's version of the draft in November 2019, this provision is still the same, the suspension period of 10 years will be depending on the court's decision.³

The absence of clear guarantees during the waiting period is seen as a form of violation of human rights, particularly concerning the fulfilment of basic rights. UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (2010 – 2016), Juan Mendez, at the 2012 UN General Assembly stated that death penalty can be a form of torture.⁴ Apart from the possibility of a death row

¹ Napitupulu et. al., *Laporan Situasi Kebijakan Hukuman Mati di Indonesia 2019: "Mempermainkan Takdir"* (ICJR, 2019)

² Draft Bill of Penal Code (RKUHP) full version September 2019, S 100(2)

³ Draft Bill of Penal Code (RKUHP) version November 2019, S 100(2)

⁴ UNGA, 'Interim report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' 67th session (2012) (A/67/279)

prisoner getting a commutation, the mental and physical health condition in the death row itself has often been assessed as having a bad impact and can amount to torture.

To push the belief of "death penalty is torture" and adopted as an international norm so that it should be abolished, Mendez called for a more comprehensive study on the relationship between death penalty and torture.⁵ As of today, the death penalty has not been declared contrary to protection from torture and other cruel, inhuman and degrading treatment or punishment, however, the practices and findings found during the prolonged waiting period proved different.⁶ If execution is a form of torture, the death penalty must be abolished immediately.

To Define Death Row Phenomenon in Indonesia

Waiting to be executed in an uncertain time can cause tension over their death, but the situations in prisons can be accumulated and resulted in intense mental or stress, which can even lead to death.

Apart from the detention conditions of the death row prisoners, an integral factor that plays a major role, such as the average length of detention for death row prisoners. Some of these decisions referred by Mendez (*Attorney General v. Susan Kigula* (2009), *Pratt and Morgan v. Jamaica*, *Henfield v. Bahamas* (1997)) said that the prolonged delay itself is one cause of death row phenomenon and other harsh conditions on the death row constitute violations of the prohibition of torture or cruel, inhuman or degrading treatment. The UN Human Rights Committee, however, said the length of the waiting period was not sufficient to justify that a death row phenomenon exists, in some cases even in 10 years of waiting sometimes there was no indication of a violation of Article 7 of the International Covenant on Civil and Political Rights (ICCPR).⁷

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (2004-2010), Philip Alston, argued that although a country does not carry out executions, the fear of the possibility of the execution can threaten the accused of years constitutes a form of cruel, inhuman or degrading treatment or punishment.⁸

There are 60 out of 274 death row prisoners who have been waiting on prolonged delays of more than 10 years, 4 of them for more than 20 years, and 1 of whom has died. This opens the possibility that the death row prisoners experienced conditions that could be defined as the death row phenomenon.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ UNGA, *op. cit.*, 12

⁸ See: Dewan Ekonomi dan Sosial PBB, 'Civil And Political Rights, Including The Question Of Disappearances And Summary Executions' 62nd Session (7 Januari 2006) (E/CN.4/2006/53/Add.4) para. 35

If the lengthy waiting period does not meet the definition of death row phenomenon, we should see some of the reports by Komnas HAM, Komnas Perempuan and KontraS regarding the situation of death row prisoners (will be explained further in the next section). KontraS found that based on an interview in 8 prisons in Indonesia, extreme detention conditions can end in trauma and deterioration of the physical condition of the death row prisoners, including isolation cells for prisoners commit acts of violence against other prisoners or themselves (suicide), restrictions to a family visit, insufficient of nutritional food, excessive use of handcuffs and leg-cuffs, physical violence or disproportionate disciplinary measures, inadequate health care both physically and mentally, filtered access to books and literature, and prolonged delays in uncertainty.⁹ Based on findings by Komnas HAM, this condition has even resulted in death.¹⁰

Physical abuse against death row also took place, some of which include a piece of shocking news that received public attention.¹¹ This incident is sparked during the process of relocating prisoners and forced the prison staffs to take action. Indications of ill-treatment occur not only in 1 or 2 prisons where people sentenced to death are detained but vary depending on the effectiveness of prison administration to the understanding of prison staffs regarding mental health and the fulfilment of basic human rights of death-row prisoners.

Batu Prison, for example, from several accounts from the KontraS Report, 6 alleged violations took place in Batu High-Risk Prison.¹² For a person sentenced to death whose verdict is final, exhausted all legal remedies, has undergone a lengthy waiting period for more than 10 years, and being placed in an institution that is allegedly having a harsh condition¹³ such as Batu Prison, it can be proven that he has experienced what we called the death row phenomenon. Moreover, from the point of view of the delays, based on several decisions by the Privy Council, death row prisoners who have been in delays for more than 10 years can be used as independent considerations of the death row phenomenon.

It needs to be reaffirmed that the factor of prolonged delay is very significant in determining death row phenomenon, plus if the condition is exacerbated by poor treatments and harsh detention conditions for the death row. The combination of these two defines the death row phenomenon.

⁹ UNGA, *op. cit.*, 10

¹⁰ Komnas HAM, *Kertas Kerja, op. cit.*

¹¹ Muhamad Ridlo, 'Kronologi Kekerasan Terhadap Narapidana Narkoba di Nusakambangan' *Liputan6* (Cilacap, 03 May 2019) <<https://www.liputan6.com/regional/read/3956605/kronologi-kekerasan-terhadap-narapidana-narkoba-di-nusakambangan>> accessed 02 March 2020

¹² Carole Berrih, *Tidak Manusiawi: Kondisi Lembaga Pemasyarakatan Bagi Terpidana Mati di Indonesia* (KontraS & ECPM, 2019)

¹³ See: Carole Berrih, *loc. cit.*

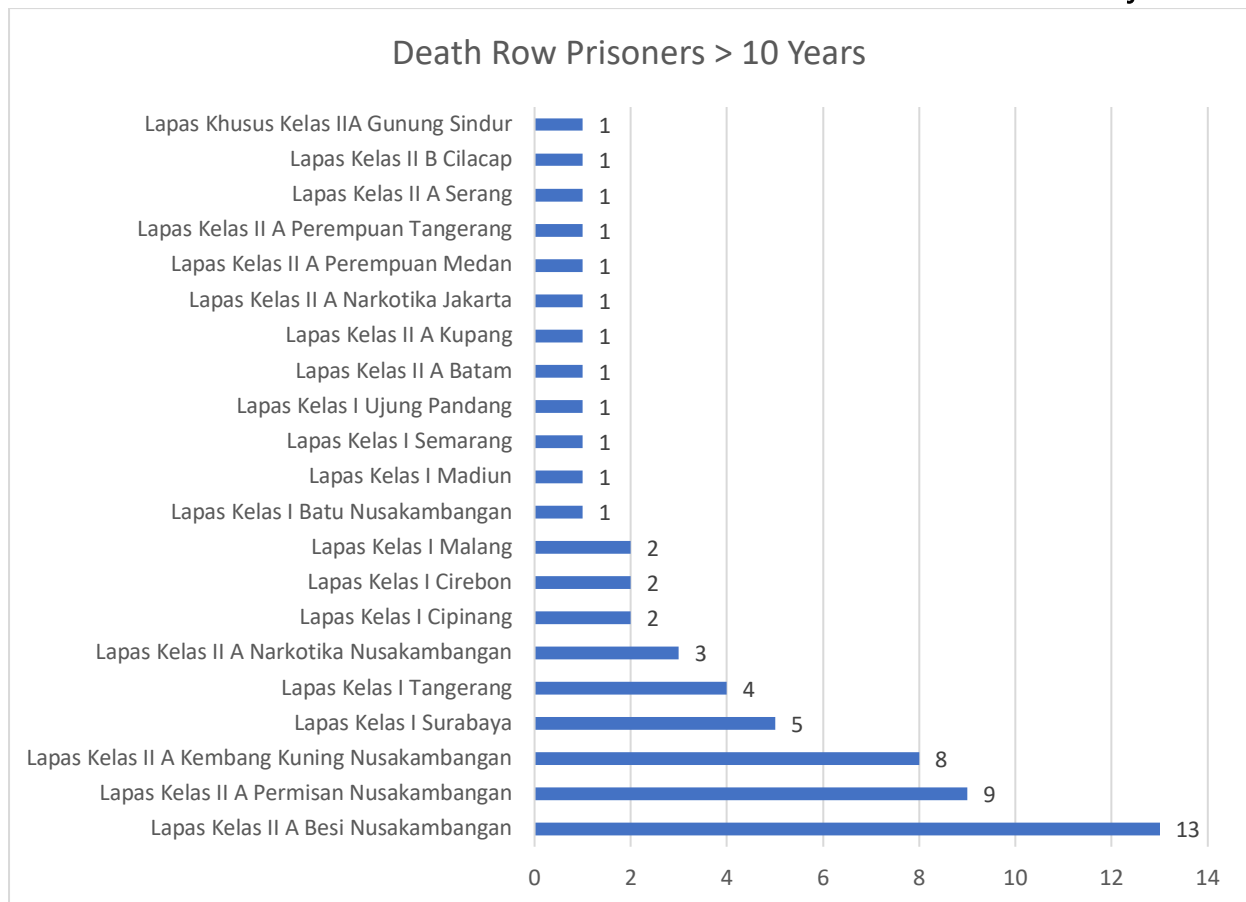
The most important note is that in a way to avoid the death row phenomenon, it does not mean that an immediate execution is a better option. It should be understood that those awaiting execution for so long in the death row have experienced multiple sentences. On the one hand, the death row prisoners have also undergone correctional training inside the place of detention/prison/correctional institution (Lembaga Pemasyarakatan). So the solution is not by carrying out an immediate execution, but rather opening up options for commutation of the death penalty.

Detention Conditions of Death Row Prisoners in Indonesia

As of April 2020, there were 274 people sentenced to death awaiting execution, the housing of people sentenced to death in the Lembaga Pemasyarakatan (hereafter prison) in Indonesia is unclear. Death row prisoners in Indonesia's legal framework are not the subject of a correctional program but still, they are being detained with other prisoners. Currently, there is no guarantee of commutation for death row prisoners even if they have undergone a correctional trainings in the prisons. In fact, in practice, all of this time the death row prisoners are placed in the correctional facilities all across Indonesia. Correctional trainings is part of correction program given to the prisoners to improve a prisoner physically and spiritually, devotion to God, intellectual, attitude and behavior, and competence.¹⁴

¹⁴ Government Regulation No. 31 of 1999, S 1(1)

Distribution Of Prisons With Death Row Prisoners Over 10 Years of Delays



Source: Processed based on data from the Directorate-General for Correction Facilities as of 09 October 2019 and ICJR Database on Death Penalty in Indonesia

In the current situation in Indonesia, people sentenced to death could have been already experiencing death row phenomenon. As of April 2020, there were at least 60 death row prisoners who have been in a prolonged stay of more than 10 years. Most of these people were placed in Class II A Besi Nusakambangan Prison (13 people), followed by Class II A Nusakambangan Prison (9 people) and Class II A Kembang Kuning Nusakambangan Prison (8 people).

Data per April 2020, the number of prisoners in Class II A Besi Nusakambangan Prison was 386 people (including 13 people on death row), while the total capacity is only for 365 people, the density had reached 106%. The number of prison staffs continuously reducing, from 10 people as of April 2020 to 5 people¹⁵ as of September 2020, the

¹⁵ Ditjenpas, 'Sistem Database Pemasyarakatan' <http://smlap.ditjenpas.go.id/public/sdm/detail/monthly/upt/db60a9c0-6bd1-1bd1-ee54-313134333039>

number of health workers throughout 2020 was vacant. The security unit in April 2020 was only 15 people to supervise 386 people and was also carried out by turns.

The conditions of Permisan Nusakambangan Prison (with 9 people on death row) are even more concerning, as of April 2020 the number of prisoners was 434 people for a prison that can accommodate only as much as 221 people, so the density of this prison had reached 196%. Out of the 434 prisoners, the number of correctional staffs was only 8 people. So that in conducting correctional training, 1 officer is at least responsible for 54-55 people. Meanwhile, there were only 30 security officers for the 434 residents, who work alternately. What is more concerning is, there was only 1 health worker which can be in the form of a doctor or other paramedic, the competency of the institution therefore in handling mental health can be ascertained minimal. Space is also not enough because of the excess occupants, the risk of infectious diseases increases,¹⁶ while the number of health workers is minimal.

The same thing was also experienced by death row prisoners in Class II A Kembang Kuning Prison (with 8 people on death row) the number of prisoners had reached 348 people, while the capacity is only 275 people, the density level had reached 127%. The number of prison staffs providing correctional training was only 6 and no medical staffs at hand. The number of security officers has been decreasing since April to September 2020, from 32 people to 25 people.

Class I Surabaya Prison with 5 people on death row, as of April 2020 had reached the total number of residents of 2.500 people with a density of 241%. The number of prison staffs to carry out correctional trainings was only 29 people for 2.500 prisoners, and the number of health workers was only 3 people. As an important note, the Class I Prison in Surabaya during the Covid-19 pandemic was one of the transmission clusters, with the number of infections as of 1 September 2020 reaching 48 prisoners and 4 staffs,¹⁷ including one death row prisoners who have been infected with Covid-19.¹⁸

It can be ascertained that the detention condition with minimal health care services is to be weighed by whether it has or not having the number of health workers available. Concerning health care, the standard¹⁹ regarding human resources says in every prison must be provided: the least number required 1 doctor, 1 dentist, 2 nurses, 1 tocologist

¹⁶ See: Sven Todts, 'Infectious Diseases in Prison' in Enggist et. al., *Prison and Health* (WHO, 2014) 73

¹⁷ Kompas TV Jember, 48 Narapidana dan 4 Petugas Lapas di Porong Terpapar Covid-19, <<https://www.kompas.tv/article/105429/48-narapidana-dan-4-petugas-lapas-di-porong-terpapar-covid-19>> accessed 7 October 2020

¹⁸ Achmad Faizal, *Cerita Terpidana Mati Sembuh dari Covid-19: Saya Juga Takut, tetapi Harus Optimistis*, <<https://surabaya.kompas.com/read/2020/10/06/06030011/cerita-terpidana-mati-semuh-dari-covid-19--saya-juga-takut-tetapi-harus?page=all>>, accessed 7 October 2020

¹⁹ Decree of the Director General for Correction Facilities, Ministry of Law and Human Rights of the Republic of Indonesia No. Pas-32.Pk.01.07.01 Tahun 2016 on "Standar Pelayanan Dasar Perawatan Kesehatan Di Lapas, Rutan, Bapas, LPKA dan LPAS"

(for female prisoners), 1 pharmacist assistant, 1 laboratory analyst, 1 nutritionist, 1 psychologist, 1 sanitarian, and administrative staffs of at least 2 people. Not achieved this minimum number, the death row prisoners are likely subjected to harsh condition.

In the National Commission on Human Rights (Komnas HAM) report,²⁰ some conditions are very inhumane to death row prisoners, such as extreme overcrowding in several prisons where prisoners subjected to poor detention conditions, poor air circulation and sanitation, improper correctional trainings, inadequate medical and psychological health services, limited access to visits, solitary confinement, and mental and psychological conditions of living in fear and uncertainty. Besides, the effects of the death row phenomenon could develop severe mental and physical trauma. This impact also leads to stress, anxiety disorders, mental disorders, and even death.²¹

Furthermore, findings and reports from a non-governmental organization, the Commission for Missing Persons and Victims of Violence (KontraS), provide several indicators of alleged violations of the rights of death row prisoners.²² However, it should be noted that the places of detention for death row prisoners are scattered and varied and some of them are being placed mixed up with other prisoners who are not on death row.

KontraS's findings during the interviews with several death row prisoners had led to several facts, including:

1. Some of the death row prisoners are being placed in low brightness cells in several prisons.²³
2. Excessive use of handcuffs and leg-cuffs with minimal time to carry out outside activities.²⁴ In interviews with death row prisoners in Batu Prison and Super Maximum Narcotics Prison, it was found that there were no sports facilities, the only permitted activities are religious activities and prisoners were only permitted to walk 1 hour per day in front of their cell.
3. Conditions of overcrowded prisons affect the stress levels²⁵ and there is a report of punishing death row prisoner with mental health problems in solitary confinement/isolation cell.²⁶ Death row prisoners can be put in isolation if he is found to have committed violence against other prisoners or to himself, which means an attempt to commit suicide.

²⁰ Komnas HAM, *et.al.*, *Kertas Kebijakan: Fenomena Deret Tunggu dan Rekomendasi Komutasi Hukuman Mati*, Jakarta, Komnas HAM, 2020.

²¹ *Ibid.*

²² Carole Berrih, *loc. cit.*

²³ *Ibid.*, 92

²⁴ *Ibid.*, 93

²⁵ *Ibid.*, 95

²⁶ *Ibid.*, 95, 98

4. Discrimination and bullying.²⁷ One of the death row prisoners reportedly experienced bullying and discrimination based on ethnic background.
5. Disproportionate corrective action and violence.²⁸ In a media report, the Head of the Public Relations of the Directorate General for Correction Facilities (Ditjen) said that a reported physical abuse was part of shock therapy taken against some of the transferred prisoners, and it was taken due to the prisoners were "not responding quickly" to the orders of the prison staffs.
6. Lack of nutritional food provided.²⁹ Due to the limited amount of food, some prisons (except Batu Prison) allow death row prisoners to receive food from outside the prison. However, this is not possible for prisoners of foreign citizens or whose families are far from the prison. One source has even experienced a 20 kg weight loss and food poisoning in prison.
7. The absence of periodic medical examinations.³⁰ Makassar Prison does not have routine health checks, forcing some of the death row prisoners to seek medical examinations at the outside clinics. The access of death row prisoners to drugs is very dependent on the facility's budget and security level of the prison to allow goods from outside. There are even reports that prison staff refused to give special prescription drugs for a prisoner with high blood pressure condition. In a different case, prison staff impose restrictions on access to drugs that should be received by death row prisoners daily.
8. Limited time for family visits or visiting hours.³¹ Depending on the prison policy occupied by death row prisoners, Batu Prison e.g. only allows a visit once a month and for 30 minutes under the supervision of the security staff.
9. Meanwhile, access to books or literature is also controlled. Although death row prisoners are free to have reading books, the contents of these readings are filtered to avoid anything seen as radical or provocative material.³²

As a result of the unclear status of death row prisoners in Indonesia prison system, it led to the mixing of death row prisoners with other prisoners, placing them scattered in various prisons in Indonesia. Batu Prison for example, of the nine findings above, six of them occurred in High-Risk Batu Prison.

Those sentenced to death who are placed in medium-security prisons do not experience treatment as bad as those detained in maximum-security prisons, even though they are both sentenced to death.

²⁷ *Ibid.*, 95

²⁸ Ugo, 'Penyiksaan Tahanan, Kalapas Narkotika Nusakambangan Dicopot' *CNN Indonesia* (Jakarta, 03 May 2019) <<https://www.cnnindonesia.com/nasional/20190503092109-12-391561/penyiksaan-tahanan-kalapas-narkotika-nusakambangan-dicopot>> accessed 13 March 2020

²⁹ Carole Berrih, *op. cit.*, 95

³⁰ *Ibid.*, 96

³¹ *Ibid.*, 98

³² *Ibid.*, 93

In prisons with super-maximum security, due to overcrowding, some of the death row prisoners have to share a cramped space with other prisoners. Overcrowding of prisons and the absence of periodic medical examinations also accumulated the ill-treatment experienced by death row prisoners. Early in 2019, nine death row prisoners asked to be executed immediately because they were quarantined in a small room with no light that they became hopeless and depressed.³³

Correctional trainings carried out in Indonesia prisons is far from effective, and only directed to religious activities and not a psychological approach.³⁴ Komnas Perempuan's report also found the relationship between the mental health problems of death row prisoners with the situation of overcrowded prison. Many female death row prisoners experienced mental health problems from the start of their arrest, during the trial, to the time when the death penalty is delivered.³⁵ Some have shown warning signs and symptoms of suicidal behaviour. The tension caused by the cramped situation during detention also plays a role in the daily situation of death row prisoners.

The contribution of overcrowded prison also plays a role in the placement of death row prisoners in an isolated world with minimal space that leaves with no other choice but to survive.³⁶ The prison situation forces death row prisoners to survive excessively under extreme condition and only to be executed later in a manner inconsistent with the prohibition of torture and cruel, inhuman or degrading treatment.

The findings above illustrate that it is not only cruel, inhuman, degrading treatments that are experienced by death row prisoners but also act that can fulfil the definition of torture under the Convention against Torture (CAT).

The only protection mechanism to shield the death row prisoners from human rights violations is the right to submit a complaint.³⁷ In the commentary of the law, it is explained that "if the prisoner in question found that there is a violation of his/her human rights and other rights that arise in connection with the correctional trainings, which is carried out by the prison staffs or fellow prisoners, the person concerned can submit a complaint to the warden/head of the prison." This article and the protection of the human rights of those sentenced to death depends very much on the understanding of

³³ Nefri Inge, '9 Terpidana Kasus Narkoba Minta Segera Dieksekusi Mati' *Liputan6* (Palembang, 16 February 2019) <<https://www.liputan6.com/regional/read/3896287/9-terpidana-kasus-narkoba-minta-segera-dieksekusi-mati>> accessed 12 March 2020

³⁴ Amir Hasan Ramli dan Wiwik Utami, 'Urgensi Penyusunan Model Bimbingan Kesehatan Mental (Mental Hygiene) Selama Menunggu Eksekusi Mati' (2012) *De Jure: Jurnal Hukum dan Syar'iah* Vol. 4, No. 1 <<http://ejournal.uin-malang.ac.id/index.php/syariah/article/view/2157>> accessed 12 March 2020

³⁵ Imam Nahef *et.al.*, *Kematian Berulang; Perjuangan Perempuan Pekerja Migran Terpidana Mati Dan Keluarganya Merebut Hak Hidup* (Komnas Perempuan, 2016) 35

³⁶ *Ibid.*, 36

³⁷ Law No. 12 of 1995 on Corrections, S 14(1)(E)

the head of prison on human rights. Without an independent monitoring body, human rights violations may continue to occur and go unreported. The discovery that to those who have attempted suicide can be punished with solitary confinement shows that the prisons have failed to understand such a basic point.

Ministry of Law and Human Rights Regulation (Permenkumham) No. 35 of 2018 concerning the Revitalization of Correctional Institution provides psychological counselling for prisoners, even for prisoners in Super Maximum-Security Prison.³⁸ However, mental disorders rehabilitation can only be provided for prisoners in Maximum-Security Prison.³⁹ A prisoner's access to rehabilitation for mental disorders rehabilitation also depends heavily on luck in which prison the person was held or transferred to.

This Permenkumham regulates the implementation of correctional duties and functions in terms of the placement of prisoners based on the level of risk. At present, places of detention for people sentenced to death vary depending on where they are detained,⁴⁰ thus limiting the capability to assess the death row's situation as a whole.

Prior to this Permenkumham, people sentenced to death in drug-related offences were detained in Class I and Class II prisons which scattered in several places⁴¹ including Nusakambangan island as the location for the Class I Batu High-Risk Prison. The Karanganyar Super Maximum-Security Prison was then subsequently built on this island and was introduced in 2019 by the Minister of Law and Human Rights. This prison is intended to house prisoners of drug-related and terrorism cases.⁴² The transfer of prisoners that have been carried out since last year by the Ditjenpas is included in the Prison Revitalization Program Plan to solve the problem of overcrowded prisons.⁴³

³⁸ Permenkumham No. 35 of 2018 on Revitalisasi Penyelenggaraan Pemasyarakatan, S 11(2)(d)

³⁹ *Ibid.*, S 15(2)(f)

⁴⁰ Carole Berrih, *op. cit.*, 92

⁴¹ Komnas HAM, *Comments' Of The Indonesian National Human Rights Commission On Indonesia's Compliance With The International Covenant On Civil And Political Rights* (14 June 2013) para. 16

⁴² Muhamad Ridlo, 'Mengintip Ketatnya Lapas 'High Risk' Karanganyar Nusakambangan' *Liputan6* (Cilacap, 23 August 2019) <<https://www.liputan6.com/regional/read/4044812/mengintip-ketatnya-lapas-high-risk-karanganyar-nusakambangan>> accessed 12 March 2020

⁴³ *Ibid.*

The Need for a Commutation for Death Row Prisoners in Indonesia For Just and Civilized Humanity

As it is known, Indonesia criminal justice system wording capital punishment as one of the punishments that separated from other basic punishment such as imprisonment. However, unfortunately, there are no clear regulations regarding the housing of death row prisoners facing execution.

The only rule that hints about this is Article 5 of Law No. 2/Pnps/1964 concerning Means of Implementation of the Death Penalty Imposed by the General and Military Courts. In the article, it is explained that a death row prisoners who are awaiting execution are detained in prison or another place specially appointed by the High Prosecutor [sic] / the Prosecutor. At that time it was still called as a prison, as the place for serving of sentence before it was renamed as Correctional Institution or Lembaga Pemasyarakatan.

In more recent regulation, the National Police Chief Regulation No. 12/2010 concerning Procedures of Death Penalty, although it does not specifically mention the provision for the housing of death row prisoners, Article 11 paragraph (2) implies that the optional location for death row prisoners before execution is only in prisons or correctional institutions.

There is a distinctly different concept between the implementation of the basic punishment aiming for corrections which is a place 'to correct' from the place to 'execute'. The concept of correctional is intended to replace the concept of prison left behind by the Dutch colonial government,⁴⁴ it is considered that this is no longer following the society's stance and norms of post-independence Indonesia.⁴⁵ Correctional Institution itself is a place for the implementation of the correctional trainings aims to improve the development of persons jailed for crime to realize their mistakes, improve themselves, and not repeat the criminal acts so that they can be accepted into the community again.⁴⁶

Prior to Law on Corrections (Law No. 12 of 1995), the prison system in Indonesia used Dutch era regulations which focused more on punishment than social integration, preventive, educative, and corrective.⁴⁷ In the discussion of the draft bill of the 1995 Correctional Law, the Government and the House of Representative (DPR) agreed that

⁴⁴ Regulated in *Ordonantie op de Voorwaardelijke Invrijheidstelling* (Stb 1917-749 27 December 1917 j.o tb 1926-488), *Gestischen Reglement* (Stb 1917-708 10 December 1917), *Dwangopvoeding Regeling* (Stb 1917-741 12 December 1917), and *Uitveringordonnantie op de Voorwaardelijke veroordeeling* (Stb 1926-487 1 26 December 1926)

⁴⁵ Eva Achyani Zulfa, 'Pergeseran Paradigma Pemidanaan di Indonesia' (2006) *Jurnal Hukum dan Pembangunan* Vol. 36, No. 3 <<http://jhp.ui.ac.id/index.php/home/article/view/1256/1179>> accessed 07 April 2020

⁴⁶ Law No. 12 of 1995, S 1(2)

⁴⁷ See: Putusan Pengadilan Negeri Kabanjahe No. 17/Pid/Sus/2019/PN Kbj.

punishment is an effort to return prisoners to become useful and responsible citizens of society, who obey the law, uphold moral and social values to achieve a safe and peaceful life following the values contained in the State Ideology/Pancasila. 1st and 2nd *Sila*,⁴⁸ the purpose of 'correctionalization' is social reintegration to return people from prison to society.

There are two types of system working to return the convicted persons to the community, namely the process of correctional trainings in prisons/correctional facilities and coaching in the correctional centre (Balai Pemasyarakatan).⁴⁹ The housing system with a correction scheme follows rules that explain the mechanism of correctional trainings, but this does not explain or include the mechanism regarding death row prisoners. The Implementing Regulations for the Corrections Law (PP) No. 31 of 1999 describes 3 stages of training, consisting of initial, advanced, and final stage which are adjusted to the length of imprisonment, this clearly cannot apply to death row prisoners.

However, in reality, death row prisoners are not separated from other prisoners. The correctional staffs are left with no choice to include these prisoners in the correctional trainings.⁵⁰ This confused the prison staffs in carrying out trainings⁵¹ due to unclear regulation, mechanism, and objectives.

Up to now, there is no system that explains the possibility of a death row being commuted based on the successful results of the correctional trainings. For now, those sentenced to death undergo two forms of punishment without certainty, imprisonment with no assurance of returning and the execution itself.

If we focus on correctional trainings from the point of view of to correct a prisoner, then a guarantee to a commutation should be given. The politic of criminal justice in Indonesia has sprouted a commitment to commute the death penalty. As provided in the draft bill of Penal Code, firstly, there will be death penalty with 10-year reprieve mechanism to assess whether the death row prisoner shows a positive attitude and actions so that the sentence can be modified.⁵² Secondly, the commutation will be given if the application for clemency is rejected and the execution is delayed for 10

⁴⁸Secretary General DPR RI, *Proses Pembahasan Undang-undang tentang Pemasyarakatan*, (Jakarta:DPR RI), 2013, 54

⁴⁹ Law No. 12 of 1995, S 6(1)

⁵⁰ Oktavia et. al., 'Pelaksanaan Pembinaan Narapidana yang dijatuhi pidana mati (Studi Kasus Lembaga Pemasyarakatan Kelas 1 A Raja Basa Bandar Lampung)' (2019) Jurnal Fakultas Hukum Universitas Lampung

⁵¹ Budiyo, 'Fungsi Lembaga Pemasyarakatan sebagai Tempat untuk Melaksanakan Pembinaan dan Pelayanan Terpadu Mati sebelum Dieksekusi' (2009) Jurnal Dinamika Hukum, Fakultas Hukum Universitas Jenderal Soedirman Purwokerto <<http://dinamikhukum.fh.unsoed.ac.id/index.php/JDH/article/view/233>> accessed 10 February 2020

⁵² RKUHP full version September 2019, S 100(4) dan RKUHP version November 2019, S 100(4)

years since the clemency was rejected, not because the prisoner escaped.⁵³ This reform should be encouraged.

A commutation mechanism for another judicial sentence apart from the death penalty in Indonesia is in the form of sentence remissions. Presidential Decree (Keppres) No. 174 of 1999 guarantees the change of sentences for convicted persons from life imprisonment to 15 years of imprisonment. Remission for death row prisoners can be an opportunity for Indonesia to prevent and stop the death row phenomenon.

The condition for death row prisoners to get remission can also be adjusted according to the existing remission provisions. For example, employing a Humanitarian Remission mechanism. Based on humanity and the right to live, those sentenced to death should also be able to get remission.

Furthermore, following the objective in RKUHP, many things can be harmonized with the current situation. For those sentenced to death who have been sitting in prolonged delay for 10 years, have good or praiseworthy behaviour, and have followed the correctional trainings properly, they should be given a commutation by the government.

Amid Indonesian judicial system where correction for death row prisoners has been carried out for many years and there is a commitment to present a commutation for death penalty later in the RKUHP, even before the draft is passed, the government needs to review and consider to apply commutation based on humanity. This should be the response to the correctional trainings that have been carried out for death row prisoners of more than 10 years.

Apart from the normative side, ideologically, Indonesia has a Pancasila ideology which emphasizes the importance of ensuring that the treatment of death row prisoners is fair and civilized humanity.⁵⁴ In the concept of justice, the double punishment that has been experienced by death row prisoners, imprisonment for uncertain time and execution, can be categorized as unfair treatment.⁵⁵ The state of the death row phenomenon, which is also defined as inhuman and degrading treatment, is not in line with the second principle of Pancasila.

⁵³ RKUHP full version September 2019 and RKUHP version November 2019, S 101

⁵⁴ Komnas HAM, *et.al.*, *Kertas Kebijakan: Fenomena Deret Tunggu dan Rekomendasi Komutasi Hukuman Mati*, Jakarta, Komnas HAM, 2020

⁵⁵ *Ibid.*

The second Sila is upholding humanity as the highest values. When linked to the Constitution, the government must protect human rights.⁵⁶ Indonesia had several times engaged to moderate the use of the death penalty. By bringing together abolitionist and retentionist in the “Indonesian Way” of death penalty, the government presented a commitment in the politic of criminal justice and the values of Pancasila, ensuring a commutation is an important path to take.

⁵⁶ *Ibid.*

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ICJR PROFILE

Institute for Criminal Justice Reform, abbreviated as ICJR, is an independent research institution that focuses on criminal law reform, criminal justice system reform, and general legal reform in Indonesia. One of the crucial problems facing Indonesia during the current transition period is reforming the law and its criminal justice system toward more democratic direction. In the past, criminal law and criminal justice were more used as a means of supporting authoritarian power, beside used as social engineering purposes. Now is the time for the orientation and instrumentation of criminal law from a tool of authoritarian move towards a pillar for the operation of a democratic political system that respects human rights. These are the challenges faced in the context of restructuring criminal law and criminal justice in the current transitional period. To answer those challenges, a planned and systematic effort is needed to answer these new challenges. A grand design for reform of the criminal justice system and law in general must be initiated. The criminal justice system as it is known have a very strategic place in the framework of building the Rule of Law and respect for human rights. Because democracy can only function properly if there is institutionalization of the concept of the Rule of Law. Reform of the criminal justice system which is oriented towards protecting human rights is a "*conditio sine quo non*" with the process of institutionalizing democratization in the current transitional period. Steps in transforming the law and criminal justice system to make it more effective are currently underway. But this effort needs to have wider support. The Institute for Criminal Justice Reform (ICJR) is trying to take the initiative to support these steps. Providing support in the context of building respect for the Rule of Law and simultaneously building a culture of human rights in the criminal justice system. This is the reason for the ICJR's presence.

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