

# LEGAL AND HUMAN RIGHTS IMPLICATIONS OF THE UNEXECUTED DEATH PENALTY IN INDONESIA BASED ON THE PRINCIPLE OF HUMANITY

*Rafa Reihan Pradipa* 

Universitas Negeri Semarang, Semarang, Indonesia  
[rafareihano4@students.unnes.ac.id](mailto:rafareihano4@students.unnes.ac.id)

*Anis Widyawati* 

Universitas Negeri Semarang, Semarang, Indonesia  
[anis@mail.unnes.ac.id](mailto:anis@mail.unnes.ac.id)

## Abstract

The death penalty is still maintained within the Indonesian criminal justice system as the most severe form of punishment for extraordinary crimes such as terrorism, narcotics offenses, premeditated murder, and corruption. However, the implementation of the death penalty in Indonesia raises serious legal issues, particularly regarding the prolonged waiting period for execution, which lacks legal certainty. Death row inmates are often required to endure years of uncertainty before execution, even after a final and binding court decision has been rendered. This condition gives rise to legal implications and violations of human rights, especially the right to life, the right to legal certainty, and the right to humane treatment. The prolonged delay in carrying out death sentences potentially causes severe psychological suffering, commonly referred to as the death row phenomenon and death row syndrome, which contradict the principle of



humanity as a fundamental value in the formation and enforcement of law in Indonesia. This research employs a normative legal research method using statutory, conceptual, and case approaches to analyze the legal basis of the death penalty and its legal and human rights implications for death row inmates whose executions are indefinitely delayed. The findings indicate that the absence of clear regulations regarding the execution waiting period results in legal uncertainty and violations of the principle of humanity. Although the 2023 Criminal Code introduces conditional death penalty with a ten-year probation period as a moderating approach, such regulation has not fully resolved issues related to psychological suffering and legal certainty for death row inmates. Therefore, comprehensive regulatory reform is necessary to ensure legal certainty, human rights protection, and respect for humanitarian values in the implementation of the death penalty in Indonesia.

### **KEYWORDS**

Death Penalty; Human Rights; Principle of Humanity; Death Row Phenomenon

## **Introduction**

Human rights are fundamental rights inherent to every person from birth to death, as part of divine destiny or will. These rights cannot be taken away or abolished, and must be respected, recognised, and protected by the state, government regulations, and every person, in order to uphold human dignity and rights.<sup>1</sup> Human rights are rights possessed by every individual as part of their existence. Human rights are fundamental rights that are essential for humans to be able to live and obtain protection.<sup>2</sup> Human rights require the state to protect the absolute rights of its citizens, especially the right to life. To respect, uphold, and protect humans so that their rights are fulfilled, a state creates regulations to protect its people and align with the values or morals prevailing in society.

The definition of regulations is provisions or norms established by institutions with authority, aimed at implementing or technically regulating more general legal principles. Rules have a role in regulating procedures and behaviour in certain situations and are mandatory. In regulations, there are

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<sup>1</sup> Eko Hidayat, *PERLINDUNGAN HAK ASASI MANUSIA DALAM NEGARA HUKUM INDONESIA* (n.d.).

<sup>2</sup> Audina Putri et al., "Hak Asasi Manusia Dalam Perspektif Islam," *Al-Wasathiyah: Journal of Islamic Studies* 2, no. 2 (2022), <https://doi.org/10.56672/j831kr09>.

provisions that determine permissible and prohibited actions, as well as sanctions for violators, in order to create order and certainty.<sup>3</sup> Legal principles can be implemented through predetermined rules and other regulations, which create general and uniform norms in the legal system. Therefore, the general public desires the establishment of a structured system to stop and prevent negative behaviour, as well as to create a safer and more planned environment for every individual.<sup>4</sup> With the existence of regulations, the state can punish people who commit crimes.

In Indonesia, criminal behaviour is considered a violation of the law. A criminal act refers to an act that is considered a violation of the law and is potentially punishable by imprisonment. Criminal sanctions are punishments imposed by the state on a person who has committed an act prohibited by existing law, which is considered a crime. In the context of the laws applicable in Indonesia, criminal sanctions are divided into three types, namely primary penalties, additional penalties, and special penalties. Primary penalties include imprisonment, confinement, supervision, fines, and community service. Additional sanctions include the revocation of certain rights, confiscation of certain goods and/or bills, announcement of the judge's decision, payment of compensation, revocation of certain permits, and fulfilment of local customary obligations. The latest regulations further classify special penalties as , whereby Article 67 of the Criminal Code Law Number 1 of 2023 states that these special penalties are death penalties that must be imposed as an alternative. Referring to this explanation, Indonesia still carries out the death penalty as an alternative sanction for perpetrators of certain crimes. Currently, the implementation of the death penalty is a controversial issue because it is considered incompatible with human rights, especially the right to life. Various countries around the world have begun to abolish the death penalty because

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<sup>3</sup> Akhmad Zaki Yamani, "The Technical Preparation Of Legislation In The Legal System Of Indonesia," *JURNAL HUKUM SEHASSEN* 10, no. 1 (2024), <https://doi.org/10.37676/jhs.v10i1.5712>.

<sup>4</sup> Anis Widyawati et al., "The Regulation of Integrity Zone and the Corruption-Free Zone in Indonesia and Rusia," *Bestuur* 11, no. 2 (2023), <https://doi.org/10.20961/bestuur.v11i2.76306>.

it is considered contrary to the principles of human rights. Developed countries have abandoned retributive justice in the form of the death penalty because, in addition to being considered contrary to human rights, the death penalty increases the possibility of judicial errors that cannot be corrected after the death penalty has been carried out.<sup>5</sup>

Indonesia still imposes the death penalty on perpetrators of serious crimes with a probation period of 10 years. Despite calls to abolish the death penalty, Indonesia still maintains it as a special punishment that can be imposed as an alternative.<sup>6</sup> The application of the death penalty in Indonesia still causes problems other than the violation of the right to life, but executions in Indonesia cannot be carried out quickly. Prisoners who have been sentenced to death must wait their turn to be executed, but the execution of the death penalty takes years, resulting in uncertainty as to when prisoners will be executed. The Coordinating Minister for Law, Human Rights, Immigration and Corrections, Yusril Ihza Mahendra, stated that there are still 300 prisoners on death row who have not yet been executed. The waiting period for prisoners who are not executed can cause psychological distress to prisoners, which further exacerbates human rights violations.

Various studies have been conducted to examine the death penalty at a time when other countries have begun to abolish capital punishment in order to respect human rights. The implementation of the death penalty is not directly enforced, which is a problem in Indonesia because the process of executing the death penalty is not carried out. This article will examine the death penalty and the issue of death row inmates who are not executed, which affects their psychological state. Various studies focus on the existence of the death penalty but do not examine whether the death penalty is carried out immediately or must wait for an indefinite period of time.

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<sup>5</sup> Gunawan Widjaja, "Analisis Komparatif: Penerapan Hukuman Mati Dalam Kasus Pembunuhan Di Berbagai Negara," *Bulletin of Community Engagement* 4, no. 3 (2024).

<sup>6</sup> Juan Valedra Sitorus and Hery Firmansyah, "Eksistensi Penerapan Penjatuhan Hukuman Mati Di Indonesia Terhadap Kejahatan Narkotika Di Indonesia," *UNES Law Review* 6, no. 2 (2023).

Based on this description of the death penalty, the author raises the issue of the death penalty not being carried out, which causes psychological distress. Therefore, the questions to be discussed in this study are: how does the jurisdiction of the death penalty apply to Indonesian prisoners? And how do the law and human rights apply to the death penalty that is not carried out in Indonesia based on the principle of humanity?

## **Methods**

This study is a normative legal analysis that adopts a normative juridical approach. This study focuses on the analysis of legal norms contained in legislation, legal principles, and legal doctrines relevant to the issue under study.

The data used in this study includes primary and secondary legal sources. The primary legal sources consist of legislation and court decisions directly related to the object of the study, while the secondary legal sources include law textbooks, articles from scientific journals, and various other scientific studies that serve to deepen the analysis.

Information was collected through library research by analysing various relevant legal sources. The information obtained was then analysed using a qualitative approach through descriptive-analytical methods. This approach is carried out by analysing and explaining legal issues in a structured manner in accordance with existing laws and regulations. Thus, it is hoped that objective conclusions supported by strong legal arguments can be obtained.

## **Result and Discussion**

### **Legal Basis for Capital Punishment in Indonesia**

Indonesia has applied the death penalty since the colonial era. At that time, the death penalty was implemented by indigenous communities and was included in the customary laws of each region. For example, in ancient times, the Minangkabau people applied the law of retaliation, whereby a

person who committed murder had to be killed. Even worse, on the island of Bonerate, thieves were punished by being tied up and starved to death.

After Indonesia gained independence in 1945, the death penalty began to be carried out based on the legal regulations in force in the country. According to Article 104 of the Criminal Code (KUHP), a person who commits treason against the president or vice president is punishable by death. In addition, Article 111 paragraph 2 contains provisions regarding incitement of foreign countries to wage war, and Article 340 regulates premeditated murder. The death penalty is not only regulated in the Criminal Code (KUHP), but also in various regulations outside the KUHP, as stated in several laws in force in Indonesia. Perpetrators of corruption are subject to the death penalty in accordance with Law No. 20 of 2001, which is a revision of Law No. 31 of 1999 concerning the Eradication of Corruption. Furthermore, perpetrators of narcotics trafficking are subject to the death penalty under Law No. 5 of 1997 concerning Psychotropic Substances. According to Law No. 15 of 2003 concerning the Eradication of Criminal Acts of Terrorism, perpetrators of terrorist crimes can be subject to the death penalty.<sup>7</sup>

The implementation of the death penalty in Indonesia originated from provisions contained in the *Wetboek van Strafrecht*, which was later accepted and incorporated into the Criminal Code (KUHP). This book was approved by the Dutch East Indies government on 1 January 1918. The fundamental basis for the application of the KUHP is explained in Article I of the Transitional Provisions of the 1945 Constitution, which states that all laws that have been enacted shall remain valid until there are new regulations that replace them, which are enacted based on the 1945 Constitution. This statement is also supported by Law No. 1 of 1946 concerning the application of the *Wetboek van Strafrecht*.

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<sup>7</sup> Yohanes S. Lon, "Penerapan Hukuman Mati Di Indonesia Dan Implikasi Pedagogisnya," *KERTHA WICAKSANA: Sarana Komunikasi* 14, no. 1 (2020).

The application of the death penalty has a theoretical purpose that is both preventive and intimidating in nature, accompanied by a repressive and depressive nature, which means that the death penalty is imposed in the hope of restoring a sense of justice to society. Criminals must be punished in the form of criminal penalties or punishments that can serve as a lesson to criminals in an effort to provide a deterrent effect. To reduce vigilante justice by the community, the death penalty is applied as proof of justice in this country and serves to teach everyone in Indonesia not to commit crimes.

In principle, individuals who carry out acts prohibited by law, especially crimes, must be subject to criminal sanctions. Criminal sanctions are a form of criminal responsibility for a person who commits a crime.<sup>8</sup>

The WVS Criminal Code stipulates that criminal offences are divided into two categories as stated in Article 10 of the Criminal Code, namely primary penalties and additional penalties. Primary penalties consist of the death penalty, imprisonment, confinement, and fines. Additional penalties include the revocation of certain rights, the confiscation of certain objects, and the announcement of the judge's decision.

Article 10 of the Criminal Code WVS, as stated in Law Number 1 of 1946, classifies the death penalty as a primary penalty, which means that this sanction is the most severe punishment that can be imposed on a convicted person. Because the death penalty is the most severe and harshest punishment, it must be positioned as a last resort or ultimatum remedium to protect society and provide legal certainty.

Based on the National Criminal Code as stipulated in Law Number 1 of 2023, the death penalty is a special punishment and must be alternative. Law Number 1 of 2023 concerning the Criminal Code introduces a new paradigm by placing the death penalty as a conditional special punishment. In the National Criminal Code, the death penalty can only be imposed on

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<sup>8</sup> Nurbaiti Syarif and Winda Yunita, "ANALISIS YURIDIS PIDANA MATI TERHADAP PELAKU TINDAK PIDANA NARKOTIKA DI TINJAU DARI PERSPEKTIF HAK ASASI MANUSIA," *Keadilan* 20, no. 1 (2022), <https://doi.org/10.37090/keadilan.v20i1.599>.

perpetrators of serious crimes or most serious crimes, which include narcotics crimes, which are considered particularly serious crimes because their level of threat is comparable to genocide crimes and crimes against humanity.<sup>9</sup> The National Criminal Code stipulates a ten-year probation period that is automatically granted to death row inmates to assess the possibility of converting their sentence to life imprisonment or twenty years' imprisonment. This provision allows for a change in the type of punishment if the convict demonstrates good behaviour and the potential for rehabilitation during the waiting period. This approach reflects a shift from the concept of absolute execution towards a more humane and restorative model of punishment, and is supported by various international human rights institutions as an alternative that is more in line with the protection of the right to life.<sup>10</sup>

Crimes that are punishable by death in Indonesia include narcotics crimes, particularly drug trafficking involving a certain amount, premeditated murder, terrorism, and corruption. In general, the death penalty is imposed on perpetrators of extraordinary crimes that threaten the lives of many people, national security, and public order.

Premeditated murder is punishable by death because it is a very serious crime and the perpetrator acts deliberately and with preparation or a plan to commit murder. This crime is considered a serious violation because it deprives others of their right to life. The death penalty may be imposed for this crime with the aim of providing a strong deterrent effect and justice for the victim's family. The death penalty for perpetrators of

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<sup>9</sup> Yudhistira cipta Ismara and Lagasakti Parwati Margaretha, "KONSTITUSIONALITAS PIDANA MATI BERSYARAT DARI PERSPEKTIF TUJUAN PEMIDANAAN," *Jurnal Ilmu Hukum: ALETHEA* 7, no. 2 (2024), <https://doi.org/10.24246/alethea.vol7.no2.p133-148>.

<sup>10</sup> H Abdul Halim, "Masa Tunggu Pelaksanaan Hukuman Mati Dalam Perspektif Undang-Undang Nomor 2/Pnps/Tahun 1964," *Wasaka Hukum: Jendela Informasi & Gagasan Hukum* 11, no. 2 (2023).

premeditated murder is an effort to prevent similar crimes from occurring again in the future.<sup>11</sup>

Drug trafficking is also punishable by death because in Indonesia, narcotics are classified as serious crimes. Based on Law No. 35 of 2009 on Narcotics, distributors of illegal drugs can be sentenced to the maximum penalty of death if they distribute narcotics in the form of plants weighing more than 1 (one) kilogram or more than 5 (five) trees or in non-plant form weighing 5 (five) kilograms. The impact of narcotics can endanger public health and the economy, which is why narcotics are classified as a serious crime. The implementation of the death penalty for narcotics dealers is intended as a stern warning, with the hope that it will have a deterrent effect not only on the perpetrators but also on other individuals who may intend to commit similar crimes in the future. The death penalty is a preventive measure to stop future dealers.<sup>12</sup>

In addition to premeditated murder and drug trafficking, another crime that is punishable by death is terrorism. Terrorism is a crime committed by certain groups in an organised manner to carry out violence by spreading terror or making the public fearful of the actions that will be carried out by the perpetrators of the crime.<sup>13</sup> Terrorist acts cause chaos in society, so firm action is needed to eradicate this crime. Terrorist acts can endanger the security of the state and its citizens, so they are considered a very serious issue. Therefore, in accordance with Law Number 15 of 2003 concerning the prevention of criminal acts of terrorism, which was later revised by Law Number 5 of 2018, it is stated that perpetrators of terrorist crimes can be sentenced to death.

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<sup>11</sup> Devi Anggreni Sy et al., "FAKTOR PENYEBAB DAN PERTIMBANGAN HAKIM DALAM MEMUTUS PERKARA PEMBUNUHAN BERENCANA," *Jurnal Hadratul Madaniyah* 10, no. 1 (2023), <https://doi.org/10.33084/jhm.v10i1.5402>.

<sup>12</sup> Sri Hartini et al., "HUKUMAN MATI BAGI PENGEDAR NARKOBA DI INDONESIA," *YUSTISI* 11, no. 3 (2024), <https://doi.org/10.32832/yustisi.v11i3.17908>.

<sup>13</sup> Andi Kurniawan, "Rehabilitasi Dan Reintegrasi Sosial Narapidana Terorisme," *Gema Keadilan* 10, no. 1 (2023), <https://doi.org/10.14710/gk.2023.20072>.

The death penalty is maintained normatively to maintain public order and protect society from serious crimes such as drug trafficking, terrorism, corruption, and premeditated murder that threaten the existence of the state and collective welfare. This extreme punishment is in line with the values of Pancasila as a just state based on the rule of law (Article 5 paragraph (1) of the 1945 Constitution), in which the death penalty serves as proportional retribution or *qisas* that satisfies the public's sense of justice, as accommodated in the national Criminal Code (KUHP) and the Draft Criminal Code (RKUHP). The retention of the death penalty also reflects the state's interest in upholding social order, national morality, and the rule of law amid international human rights pressures, including the ICCPR convention ratified by Indonesia.<sup>14</sup>

The practice or implementation of the death penalty is stipulated in Law Number 2/PNPS/1946 concerning Procedures for the Death Penalty. This law was created because previously there were no procedures explaining how the execution of the death penalty was carried out. Law No. 2/PNPS/1946 explains that the death penalty is carried out by shooting the convicted person to death. The death penalty is carried out by an execution team officially appointed by the state to carry out the sentence using firearms against those who have been sentenced to death. Based on Presidential Decree No. 2 of 1964 and National Police Chief Decree No. 12 of 2010, the execution team is responsible for carrying out the execution by firing firearms at the condemned person. In Indonesia, the death penalty must be carried out using firearms and not other methods such as lethal injection, which is used in some other countries that still apply the death penalty.

Theoretically, the death penalty is strongly rooted in the theory of retributive justice, which is the imposition of a punishment commensurate with the severity of the offender's crime ("an eye for an eye, a life for a life")

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<sup>14</sup> Triantono and Muhammad Marizal, "Konsep Moderasi Pidana Mati RKUHP Dalam Perspektif HAM Dan Kepentingan Negara," *Volkgeist: Jurnal Ilmu Hukum Dan Konstitusi* 5, no. 1 (2022), <https://doi.org/10.24090/VOLKSGEIST.V5I1.6399>.

in order to restore moral balance and satisfy the demands of substantive justice for the victim and society. This theory is dominant in the Indonesian criminal law tradition, which is derived from colonial Dutch law and customary values, where the death penalty is considered an expression of distributive justice that is proportional to the most serious violations of social norms. In addition to retribution, this punishment fulfils the function of general deterrence through a psychological deterrent effect on potential perpetrators, as well as special deterrence/incapacitation by permanently eliminating the perpetrator's ability to repeat the crime, especially in cases of transnational and destructive narcotics.<sup>15</sup>

This repressive approach remains a key pillar of Indonesia's criminal justice system, which prioritises retributive punishment, despite a gradual transition towards a restorative justice paradigm through the RKUHP, which introduces moderation of the death penalty. Abolitionist criticism often ignores the local context in Indonesia, where the retention of the death penalty is supported by the majority of the population as a form of collective protection and an affirmation of national legal sovereignty against foreign intervention. Thus, the death penalty is not only a law enforcement tool, but also a manifestation of the harmonisation of the Pancasila norms, classical penal theory, and the empirical need to combat extreme criminality.<sup>16</sup>

## **Legal and Human Rights Implications of the Death Penalty That Has Not Been Executed in Indonesia Based on Humanitarian Principles**

The death penalty is a frequently discussed and controversial issue, as many parties consider its application to be contrary to the principles of human rights. Execution by death is considered a violation of the human

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<sup>15</sup> Brilian Capera, "Keadilan Restoratif Sebagai Paradigma Pemidanaan Di Indonesia," *Jurnal Lex Renaissance* 6, no. 2 (2021), <https://doi.org/10.20885/jlr.vol6.iss2.art1>.

<sup>16</sup> Maria Anna Muryani and Noor Rosyida, "The Concept of Death Penalty in a Pancasila State (Perspective of Official Religion in Indonesia)," *Walisongo Law Review (Walrev)* 2, no. 2 (2020), <https://doi.org/10.21580/walrev.2020.2.2.6588>.

right to life that every individual possesses.<sup>17</sup> The definition of human rights is explained in the applicable law in Indonesia, namely in Article 1 Paragraph (1) of Law Number 39 of 1999 concerning Human Rights. This article states that human rights are a set of rights that belong to every person. They are the essence and existence of humans as created beings. The One God is a gift that must be appreciated and upheld, and everyone has the right to protection from the state, the law, the government, and every person to maintain human dignity and honour.<sup>18</sup>

The death penalty implemented by the Indonesian government has sparked a variety of opinions. Based on the principle of human rights, the right to life is a right that cannot be diminished under any circumstances. This clause is contained in Article 28A, which affirms the right of every individual to live and to maintain their life and livelihood. Article 28I stipulates that the right to life is a fundamental right that cannot be diminished under any circumstances.<sup>19</sup>

With the implementation of this regulation, the death penalty is not in line with human rights. Although it is contradictory, Indonesia still applies the death penalty as the most severe punishment in its jurisdiction. This punishment is only given to perpetrators of certain crimes such as terrorism, narcotics, premeditated murder, and others as stipulated in the Law of the Republic of Indonesia.

A frequently discussed issue related to the death penalty is the revocation of the right to life inherent to every person. According to Article 1 paragraph (1) of Law Number 39 of 1999 concerning Human Rights, it is stated that the state, the legal system, and the government have an obligation to protect the rights of every individual, especially the right to life.

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<sup>17</sup> Friska Rosita Roring, "Penerapan Hukuman Mati Di Indonesia Dalam Sudut Pandang Pelanggaran Hak Asasi Manusia," *Lex Privatum* 11, no. 4 (2023).

<sup>18</sup> Aveidel Arven et al., "Hukuman Mati Herry Wirawan Dalam Perspektif HAM," *Das Sollen: Jurnal Kajian Kontemporer Hukum Dan Masyarakat* 1, no. 1 (2022).

<sup>19</sup> Rizky Ramadhan Adi Wijaya and Mitro Subroto, "Analisis Hukuman Mati Di Indonesia Di Tinjau Dari Prespektif Hak Asasi Manusia," *Rio Law Jurnal* 2, no. 2 (2021).

The application of the death penalty results in the loss of the right to life for certain criminals, which is contrary to the Human Rights Law in Indonesia.

The execution of the death penalty is not always carried out immediately after the judge bangs the gavel or after the judge issues a final and binding decision. The implementation of this punishment requires time to carry out the sentence. Basically, every prisoner who is sentenced to death waits for their turn to be executed, which sometimes takes years.

Technically, people who are sentenced to death by the court will be transferred to a correctional institution (LAPAS). However, in reality, there are no regulations governing the placement of prisoners who will be sentenced to death. In accordance with National Police Chief Regulation No. 12 of 2010 concerning Procedures for the Implementation of the Death Penalty, correctional institutions collaborate with the police to isolate prisoners who have been sentenced to death. In addition, Article 5 of Law No. 2/PNPS/1964 states that prisons only function as locations for prisoners sentenced to death, where they await the execution of their sentences. According to the provisions of this article, the term "prison" refers to correctional institutions (LAPAS). Prosecutors in charge of the prosecution process are given the authority and responsibility to determine the prison or other special location where death row inmates await the execution of their sentences.

The length of time that death row inmates must wait is still not legally defined or regulated. This grace period includes the exercise of the right to file extraordinary legal remedies, such as requests for review or clemency, as well as Constitutional Court Decision No. 34/PUU-XI/2013 on Review, which allows death row inmates to extend their waiting time and delay the execution of their death sentence.<sup>20</sup>

For example, the case of Merri Utami, who was sentenced to death in 2002, was not executed until 2016. In 2016, Merri Utami received an order

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<sup>20</sup> Rudi Efendy Siregar, "Kepastian Hukum Masa Tunggu Eksekusi Pidana Mati," *Locus Journal of Academic Literature Review*, ahead of print, 2022, <https://doi.org/10.56128/ljoalr.v1i7.90>.

to prepare herself before being executed, but while preparing herself, Merri Utami also submitted a clemency petition to President Joko Widodo. When the execution was prepared for Merri Utami, President Joko Widodo suspended her execution. Even though it had been suspended, Merri Utami was still under the shadow of the death penalty until there was a decision from President Joko Widodo. The clemency requested by Merri Utami in 2016 was granted by President Joko Widodo in 2023.

This case demonstrates that there is no legal certainty regarding when death row inmates will be executed, which can result in them having to wait for years for their turn to be executed.

The prolonged postponement of capital punishment creates legal uncertainty for convicts, where an indefinite waiting period often lasting decades gives rise to the death row phenomenon, which violates the constitutional right to legal certainty as guaranteed by Article 28D paragraph (1) of the 1945 Constitution. The lack of clarity regarding the deadline for execution in Law No. 2/PNPS/1964 and the Criminal Code causes disharmony between substantive law (criminal penalties) and procedural law (enforcement), thereby undermining public confidence in the criminal justice system and potentially leading to the abuse of political clemency.<sup>21</sup>

This uncertain waiting period is not in line with the theory of legal certainty, in which certainty is the basis of social order. Justice, utility, and legal certainty are three fundamental principles in the legal system. Although justice is often seen as the most essential element, its existence cannot be separated from utility and legal certainty. In order to realise the welfare and prosperity of society, an ideal law must be able to integrate these three principles in a balanced manner. Legal certainty, as stated by Radbruch, refers to a condition in which the law functions as a binding guideline that must be obeyed. In line with the purpose of law to create

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<sup>21</sup> Maghdalina Maghdalina, Yati Nurhayati, and Nahdhah Nahdhah, "Studi Komparatif Penundaan Eksekusi Hukuman Mati Dalam Tindak Pidana Narkotika Di Indonesia Dan Tiongkok," *Jurnal Penegakan Hukum Indonesia* 6, no. 2 (2025), <https://doi.org/10.51749/jphi.v6i2.145>.

social order, legal certainty plays an important role in providing direction and stability in social life.<sup>22</sup>

Death row inmates who are not executed may experience fear about when they will be executed, causing psychological distress. Inmates will feel anxious and afraid while waiting for their turn to be executed, which is often referred to as the Death Row Phenomenon.<sup>23</sup>

The Death Row Phenomenon is a phenomenon in which prisoners sentenced to death suffer due to the length of time they must wait for their execution. Poor prison conditions and the physical and mental suffering experienced by prisoners continue to increase while they wait for their turn to be executed. There are two specific phrases related to the death penalty waiting period, namely the death row phenomenon and death row syndrome. According to Hudson, the death row phenomenon is the prolonged delay of the death row inmate with cruel circumstances during the waiting period. Meanwhile, according to Smith, death row syndrome is a psychological danger created through a series of psychological effects on prisoners stemming from the period of waiting. The situation experienced by death row inmates during their waiting period, both mentally and physically in prison, does not reflect the principles of humanity that are upheld and respected.

According to Lemnahas, the principle of humanity emphasises that all provisions in the law must demonstrate an effort to protect and respect human rights. In addition, the must also respect the dignity of every person, both as citizens and residents of Indonesia, in a fair and balanced manner. The absence of regulations that provide certainty regarding how long the waiting period for death row inmates should be results in non-compliance with the principle of humanity because, under this principle, the law must

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<sup>22</sup> Amalia Syauket et al., *KEPASTIAN HUKUM MASA TUNGGU EKSEKUSI PIDANA MATI BAGI BANDAR NARKOBA* (n.d.), [www.penerbitlitnus.co.id](http://www.penerbitlitnus.co.id).

<sup>23</sup> Firdaus Firdaus, Okky Chahyo Nugroho, and Oksimana Darmawan, "Alternatif Penanganan Deret Tunggu Terpidana Mati Di Lembaga Pemasarakatan Dalam Konstruksi Hak Asasi Manusia," *Jurnal HAM* 12, no. 3 (2021), <https://doi.org/10.30641/ham.2021.12.503-520>.

prioritise humanitarian values as the main foundation with the aim of not harming human dignity and basic rights. The waiting period causes mental and physical distress to death row inmates.

This implication also violates the principle of legal certainty (*rechtszekerheid*), where the judge's final verdict declaring the death penalty is not followed by timely execution, creating vague norms and injustice for victims who are waiting for restorative justice. The position of the Attorney General's Office as the sole executor (based on Law No. 16/2004 on the Attorney General's Office and Attorney General Regulation No. Per 6/2017) is vulnerable to legal action, because delays due to implicit moratoriums or external pressure place prosecutors in a *dominus litis* dilemma, where the authority to execute conflicts with the principle of humanity and the potential for legal malpractice charges.<sup>24</sup>

Furthermore, delays impose a heavy administrative burden on the state, including the cost of maintaining overcrowded prisons for death row inmates (around £1,200-1,500 per person per year), the management of repeated appeals/reviews, and international litigation that burdens the state budget and the resources of prosecutors and judges. This phenomenon is contrary to humanitarian principles (as stated in Article 27 paragraph (1) of the 1945 Constitution and the second principle of Pancasila), as it causes prolonged suffering for prisoners and reduces the deterrent effect of the death penalty as a general deterrent to serious crimes, such as drug trafficking. Overall, these legal implications call for reform of the Criminal Code with clear execution deadlines (e.g., a 2-5 year suspended sentence as in China) to balance legal certainty, state efficiency, and humanitarian principles.<sup>25</sup>

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<sup>24</sup> Samuel Soewita, Ngatiran Ngatiran, and Nurhayati Nurhayati, "Pelaksanaan Eksekusi Pidana Mati Narkoba Di Tinjau Dari Undang-Undang No 8 Tahun 1981," *Jurnal Surya Kencana Dua : Dinamika Masalah Hukum Dan Keadilan* 10, no. 1 (2023), <https://doi.org/10.32493/skd.v10i1.y2023.32251>.

<sup>25</sup> Wulan Puji Anjarsari, "Pengaturan Tenggat Waktu Pelaksanaan Pidana Mati Dalam Hukum Pidana Indonesia," *Jurnal Indonesia Sosial Teknologi* 2, no. 3 (2021), <https://doi.org/10.36418/jist.v2i3.114>.

According to the National Criminal Code (KUHP), convicts sentenced to death will be given a probation period of 10 years. If during that period the convict demonstrates positive behaviour, their death sentence can be commuted to life imprisonment. The latest regulation regarding prisoners sentenced to death with a 10-year probation period shows recognition of the principles of humanity and human rights. Based on the principle of humanity, this probation period can respect the human right to life if prisoners sentenced to death are treated appropriately in prison. This probation period can reduce the death row syndrome if the death row inmate behaves well, thereby eliminating the pressure of waiting to be executed. However, on the other hand, this probation period can create new problems related to how death row inmates who behave well are assessed.

It is not explained in detail what constitutes good behaviour, which is left to the discretion of the judge, leading to subjectivity in assessing good behaviour. Due to the uncertainty surrounding the judge's assessment of good behaviour, death row syndrome can still be felt by death row inmates during their 10-year probation period. After the 10-year probation period, prisoners can still apply for clemency, resulting in which further delays the execution of the death penalty, meaning that prisoners are not executed.

As a long-term solution, it is necessary to update regulations related to the procedures for carrying out the death penalty, specifically by setting a maximum waiting period for execution. Revisions to the laws and regulations governing the implementation of the death penalty need to be made by considering a waiting period of between one and seven years, as is the case in several other countries. In addition, the draft law on the procedures for carrying out the death penalty needs to accommodate the postponement of executions in special circumstances, such as pregnancy or mental disorders, accompanied by a temporary moratorium policy until the National Criminal Code comes into effect. This approach is expected to

guarantee legal certainty without neglecting the protection of human rights and humanitarian values.

## **Conclusion**

The legal basis for the death penalty in Indonesia dates back to the colonial era through the *Wetboek van Strafrecht*, which was later ratified as the Criminal Code (KUHP) and continues to be enforced after independence. In the Criminal Code and various special laws, the death penalty is considered the most severe punishment imposed on perpetrators of extraordinary crimes, such as premeditated murder, narcotics offences, terrorism, and corruption, which are considered to endanger the lives of the wider community, public order, and national security. The application of the death penalty has a dual purpose, namely as a means of retribution and as a preventive measure to deter crime and provide a sense of justice for victims and society. However, with the development of modern legal values, the death penalty is no longer understood solely in a retributive framework, but must also take into account respect for human rights and humanitarian values. This is reflected in the 2023 Criminal Code, which places the death penalty as a conditional punishment with a probation period of ten years, opening up the possibility of changing the punishment to life imprisonment if the convict demonstrates good behaviour.

On the other hand, the practice of postponing the execution of the death penalty has serious implications for legal certainty and the protection of human rights. The absence of clear regulations regarding the time limit for execution means that those sentenced to death must endure a long and uncertain waiting period, even up to years, as reflected in the case of Merri Utami. This condition gives rise to psychological suffering known as the death row phenomenon and death row syndrome, which is contrary to the principles of humanity and the protection of human dignity. Although the provision for a probationary period in the 2023 Criminal Code can be seen as a progressive step towards reducing human rights violations, the lack of clarity regarding the standards for assessing good behaviour and the

mechanisms for its implementation still leaves legal issues unresolved. Therefore, if the death penalty is to be maintained, its implementation must be accompanied by regulations that guarantee legal certainty, protect human rights, and respect humanitarian values so that the criminal justice system operates fairly and civilly.

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