

## *Premium Remedium Principal in Criminal Death Penalty of Drug Dealers*

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### Abstract

The rise of drug abuse is inseparable from the existence of illicit drug trafficking carried out by drug dealers. In fact, the most severe punishment, in the form of death penalty, needs to be given to reduce the prevalence of drug abuse in Indonesia. However, the death penalty for drug dealers in Indonesia is still very minimal, so it is necessary to apply the *premium remedium* principle that is used by judges in giving the death penalty since drug trafficking is considered detrimental to the interests of the state. Through the Normative-Empirical Legal Research method and the legislation approach, a study was obtained on the importance of applying the death penalty for drug dealers in Indonesia. Even this action does not violate human rights because the safety of the nation's youth is more important, but. However, in its application, this death penalty still raises the pros and cons in society

**Keywords:** Premium remedium; drug dealers; death penalty; human rights.

### Abstrak

*Maraknya penyalahgunaan narkoba tidak terlepas dari adanya peredaran gelap narkoba yang di lakukan oleh Bandar. Sejatinya hukuman terberat berupa hukuman mati layak diberikan bagi mereka untuk menekan angka prevalensi penyalahgunaan narkoba di Indonesia. Namun putusan hukuman mati Bandar narkoba di Indonesia masih sangat minim, sehingga perlu adanya penerapan asas Premium remedium yang digunakan hakim dalam memberikan putusan hukuman mati karena perbuatan bandar narkoba dinilai merugikan kepentingan negara. Melalui metode Penelitian Hukum Normatif-Empiris dan pendekatan perundang-undangan maka diperoleh kajian mengenai pentingnya penerapan hukuman mati bagi Bandar narkoba di Indonesia. Tindakan inipun tidak melanggar Hak Asasi Manusia karena keselamatan generasi muda bangsa lebih utama, namun dalam penerapannya hukuman mati ini masih menimbulkan pro dan kontra di masyarakat.*

**Kata Kunci :** Premium remedium; bandar narkoba; hukuman mati; hak asasi manusia.


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## Introduction

The problem of drug abuse is not a new problem in Indonesia. From a historical perspective, the use of opium-type drugs had long been known in Indonesia, long before the outbreak of the Second World War, during the Dutch colonial era. In general, the opium users were Chinese. The Dutch government gave permission to certain places to consume opium and provide supplies legally based on the Act. The Chinese at that time used opium traditionally, by smoking it through a long pipe. This happened until the arrival of the Japanese Government in Indonesia. The Japanese occupation government abolished the law and banned the use of opium.

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After Indonesia's independence until now, drug abuse still occurs, even with the mode, usage patterns, and circulation patterns that continue to develop. This problem is a very serious concern for the Government and the public who are aware of the dangers of drug abuse. The high rate of drug abuse in Indonesia, as shown by the results of a survey by both Data Research Center and BNN information in collaboration with the LIPI Community and Cultural Research Center in 2019, shows that the prevalence of drug abuse in Indonesia reaches 1.8% or equivalent to 3,419,188 people in the 15-64 years age group who commit drug abuse. The data illustrates that the problem of drug abuse in Indonesia is very alarming.

Drug abuse is also a serious problem because it has reached all levels of society from parents, adolescents, to children. Urban and rural areas, public places, and educational institutions have been the target of drug dealers and peddlers to sell their products. It can be said that it is very difficult to find an area in Indonesia that is not exposed to the danger of drugs. The threat of drug abuse continues to haunt people's lives, bringing parents' concern about the safety and security of their children's future (Saputra, 2017).

In terms of drug abuse, criminal offenders consist of addicts (abusers), victims of abuse, peddlers, collectors, drug dealers, and producers. Of the six roles, those that need more serious handling are drug producers and dealers. This is because drug abuse starts from the role of drug producers and dealers with their efforts to produce and distribute the addictive substance to the public. To deal with drug producers and drug dealers, a more severe criminal act is needed.

Indonesia has specifically regulated criminal sanctions in cases of drug abuse and illicit trafficking. This can be seen from the issuance of Law Number 35 Year 2009 concerning Narcotics which specifically regulates the handling of narcotics crime (not based on Criminal Code/*lex specialist derogat lex generalis*). The Act states the amount of punishment that can be imposed on drug offenders based on their role. The most severe punishment is a death penalty.

Criminal policies required for criminal sanctions in Law No. 35 of 2009 concerning Narcotics, in particular, is the application of the death penalty. The death penalty is still carried out, but is regulated in a separate article and with certain conditions. This is based on the comparison of criminal acts on several articles that contain the threat of death penalty, with articles that do not contain the threat of death penalty. It seems clear, criminal acts in the article that could be threatened with death penalty are indeed more severe and more complex, so that they should receive the threat of punishment (Aritonang, 2014).

Judging from the role of drug dealers in producing and distributing, the heaviest punishment in the form of death penalty is very appropriate for them. As a result of their actions, this nation can lose its next generation. However, it seems this has not been done in Indonesia. Many drug dealers only get prison sentences, not even a maximum prison sentence that can be imposed on a drug dealer. This can be seen through data obtained

from the following Directorate General of Corrections of the Ministry of Law and Human Rights (Indonesia Drugs Report 2019, 2019).

**Table 1. Number of Prisoners and Detention of Drug Cases in All of Indonesia by Province by Dealers/ Peddlers and Users in 2018**

No.	Regional Office	Drug Cases				User Outside Classification	Pure Users	Total
		Producer	Dealers	Peddlers	Collectors			
1.	Aceh	102	250	3,138	174	112	1,097	4,873
2.	Bali	34	494	544	11	2	294	1,379
3.	Banten	45	544	4,612	471	379	604	6,655
4.	Bengkulu	13	102	464	7	5	102	693
5.	Special Region of Yogyakarta	7	50	146	1	6	142	352
6.	Jakarta Capital Special Region	37	954	4,334	96	16	1,247	6,684
7.	Gorontalo	-	22	94	20	-	15	151
8.	Jambi	3	292	1,327	97	8	144	1,871
9.	West Java	167	1,570	5,199	139	14	1,851	8,940
10.	Central Java	34	874	2,120	39	19	543	3,629
11.	East Java	29	278	6,631	166	193	2,959	10,256
12.	West Kalimantan	7	258	1,078	31	3	249	1,626
13.	South Kalimantan	20	795	2,913	66	32	359	4,185
14.	Central Kalimantan	3	292	1,113	16	-	223	1,647
15.	East Kalimantan	50	2,947	4,075	223	85	618	7,998
16.	Bangka-Belitung	1	68	660	244	2	105	1,080
17.	Kepri	10	49	1,439	78	15	237	1,828
18.	Lampung	26	456	1,447	263	9	1,782	3,983
19.	Maluku	9	17	134	4	5	44	213
20.	Malut	2	6	167	3	10	48	236
21.	West Nusa Tenggara	-	92	603	80	2	189	966
22.	East Nusa Tenggara	-	2	33	1	-	33	69
23.	Papua	1	9	617	5	2	166	800
24.	West Papua	-	1	174	-	-	106	281
25.	Riau	24	967	4,677	204	20	352	6,244
26.	West Sulawesi	4	65	235	3	2	64	373
27.	South Sulawesi	16	1,196	2,647	229	9	505	4,602
28.	Central Sulawesi	2	231	466	19	12	291	1,021

29.	North Sulawesi	9	290	286	26	3	81	695
30.	North Sulawesi	1	3	96	4	22	62	188
31.	West Sumatera	6	229	1,359	37	417	488	2,536
32.	South Sumatera	140	2,161	3,460	66	88	1,124	7,039
33.	North Sumatera	494	3,015	12,381	967	1,107	2,590	20,554
<b>Total</b>		<b>1,296</b>	<b>18,579</b>	<b>68,669</b>	<b>3,790</b>	<b>2,599</b>	<b>18,714</b>	<b>113,647</b>

Source: Directorate General of Corrections of the Indonesian Ministry of Law and Human Rights, March 2019

From the data, it can be seen that the number of residents of correctional institution (Warga Binaan Pemasyarakatan/WBP) from narcotics cases, the number of prisoners who act as dealers/peddlers and producers is quite large, consisting of 18,579 Bandar and 1,296 producers. However, when compared to the number of drug dealers/peddlers who got death penalty, this is very small. This can be compared with the data from the Directorate General of Corrections of the Ministry of Law and Human Rights as follows:

**Table 2. Number of prisoners convicted of narcotics specific crimes throughout Indonesia in 2018**

No.	Regional Office	Technical Implementation Unit (UPT)	Number of prisoners	Citizenship	Total
1.	Bali	Denpasar Correctional Institution for Women	1	UK	1
2.	Banten	Class I Tangerang Correctional Institution	27	China	5
				Hongkong	2
				Indonesia	7
				UK	1
				Malaysia	3
				Nigeria	1
				Singapore	1
				Taiwan	7
		Class II A Tangerang Correctional Institution for Women	1	Indonesia	1
3.	Special Region of Yogyakarta	Yogyakarta Correctional Institution for Women	1	Phillipines	1
4.	Jakarta Capital Special Region	Class I Cipinang Correctional Institution	7	Hongkong	1
				Indonesia	5
				Malaysia	1
				Class I Jakarta National Narcotics Agency of Republic of Indonesia ( BNN RI) Detention Center	1
5.	West Java	Class I Cirebon Correctional Institution	7	Indonesia	3
				Iran	2
				Malaysia	1
				Taiwan	1

	Class III Gunung Sindur Correctional Institution	4	Indonesia	4
6. Central Java	Class I Batu Nusakambangan Correctional Institution	6	Indonesia	2
			Nigeria	3
			Zimbabwe	1
	Class I Semarang Correctional Institution	1	Indonesia	1
	Class II A Besi Nusakambangan Correctional Institution	3	India	1
			Indonesia	2
	Class II A Kembang Kuning Nusakambangan Correctional Institution	1	Indonesia	1
	Class II A Nusakambangan Narcotics Correctional Institution	6	China	2
			Indonesia	2
			Nigeria	1
Class II A Permisan Nusakambangan Correctional Institution	6	China	2	
		Indonesia	4	
Class II A Purwokerto Correctional Institution	2	China	2	
Class II B Cilacap Correctional Institution	1	Indonesia	1	
7. East Java	Class I Surabaya Correctional Institution	2	Indonesia	2
8. West Kalimantan	Class II A Pontianak Correctional Institution	2	Indonesia	1
			Malaysia	1
9. Riau Islands	Class II A Batam Correctional Institution	3	Malaysia	2
			Singapore	1
10. Lampung	Class I Bandar Lampung Correctional Institution	2	Indonesia	2
11. Riau	Class II Pekanbaru Correctional Institution	1	Indonesia	1
12. South Sulawesi Selatan	Class II A Sungguminasa Narcotics Correctional Institution	1	Indonesia	1
13. South Sumatera	Class I Palembang Correctional Institution	2	Indonesia	1
			Malaysia	1
14. North Sumatera	Class I Medan Correctional Institution	5	Indonesia	4
			Malaysia	1
	<b>Total</b>	<b>93</b>		<b>93</b>

Source: Directorate General of Corrections of the Indonesian Ministry of Law and Human Rights, March 2019

The difference in the number of convict producers and drug dealers/ peddlers with the number of those convicted of death is very small. Only about 0.4% of drug case defendants who act as producers and dealers/peddlers were sentenced to death. The small number of death sentences cannot be separated from a number of judges' considerations in determining the verdict for the defendant. One of the considerations is human rights, which until now is still a controversy in determining the death penalty in Indonesia.

The death penalty is best determined by a judge's consideration based on the severity of the criminal act committed by the defendant. The consideration of the death penalty as the first choice or final choice in determining the verdict for the defendant really depends on the point of view of a judge. A criminal decision can be used as the primary choice (*premium remedium*) if the criminal act is detrimental to the interests of the state and the people, both based on the law and from aspects of community life. The death penalty in extraordinary crimes such as narcotics, is a severe punishment that is applied as the form of state protection for its citizens, especially for the rights of victims. For this reason, law enforcement must be specific, effective, and maximum.

## Research Problems

Based on the background of the problems that have been described and seeing the facts that occur in Indonesia, the author is interested in studying How is the principle of *premium remedium* in criminal law is appropriate to be used in the death penalty for drug trafficking? in order to reduce the number of drug abuse in Indonesia. The author is also interested in studying, how the application of the death penalty applied in Indonesia and its obstacles?.

## Research Method

In conducting this study, the author used the Normative-Empirical Legal Research method, a legal research that combines normative legal approach (library research) with the addition of various empirical elements. The approach used is a live case study, an approach to a legal event that is still ongoing or has not yet ended. In making the analysis, the author used the “descriptive analytical” method. The author described the application of the principle of *premium remedium* on the capital punishment of narcotics in Indonesia by using secondary data in the form of data obtained from ministries/institutions and primary data obtained from research related to drug abuse where the author was involved to strengthen the analysis. In conducting studies, researcher also used a statutory approach. The statutes used are those related to the abuse and illicit trafficking of Narcotics and Human Rights.

## Discussion

### ***Premium remedium Principles in the Death Penalty for Drug Dealers***

The narcotics abuse case is one of the criminal acts which must be prioritized in the examination. This is stated in Article 57 of Law Number 8 of 2004 concerning Amendments to Law Number 2 of 1986 concerning General Judiciary which stated, “The Chairperson of the Court determines cases that must be handled in order, except for criminal acts which must be prioritized as follows:

- a. corruption;
- b. terrorism;

- c. narcotics / psychotropic substances;
- d. money laundering; or
- e. other criminal cases determined by the law and the case where the defendant is in the State Detention Center.”

The case of narcotics must be prioritized because of the potential to kill a generation. This case is also a transnational crime because many narcotics enter Indonesia by smuggling. Seeing this fact, there needs to be the best solution for all parties and for the sustainability of the country. Criminal law in Indonesia is familiar with the principle of *ultimum remedium* and *primum/premium remedium*. *Ultimum remedium* is the last tool in conducting law enforcement. *Ultimum remedium* is one of the principles in Indonesian criminal law which says that criminal law should be used as a last effort in law enforcement. Whereas the meaning of *primum/premium remedium* is the opposite. This criminal law is enforced as the first choice.

In the development of law in Indonesia, the application of *ultimum remedium* principle found many obstacles, especially for acts that were considered very detrimental to the lives of many people, both viewed from the applicable laws and sociological aspects that grew in the community. For acts that can harm the community and the state, the principle of *premium remedium* is needed (criminal becomes the main choice). The existence of the *premium remedium* principle is no longer the last choice, but rather the main choice needed to cause a sense of deterrence for the perpetrators of criminal acts.

Referring to the two principles of criminal law, there are two treatments that must be considered in narcotics crime, because there are both narcotics abuse and narcotics illicit trafficking. In criminal acts of narcotics abuse, the *ultimum remedium* principle is more appropriate. The form of imprisonment is the last alternative after the rehabilitation efforts for narcotics abusers, especially those who are at the stage of addiction. This is as regulated in Law Number 35 Year 2009 Article 54 concerning Narcotics, that “Narcotics addicts and victims of Narcotics abuse must undergo medical rehabilitation and social rehabilitation”. Whereas in the crime of narcotics illicit trafficking, the *primum/premium remedium* principle is more appropriate to be applied in order to cause a deterrent effect, especially in criminal punishment for drug dealers who have repeatedly been in and out of prison. Many of them have been arrested and imprisoned. Some of those who had finished their sentences returned to work as drug dealers. They did not seem to learn from the punishment given by the state. With a variety of sentences given in accordance with the level of crime they committed, the number of drug trafficking in Indonesia does not seem to reduce. (Ahmad, 2017).

In the context of crime studies, criminal acts are referred to as the legal definition of crime. In the perspective of criminal law, the legal definition of crime is divided into what is called *mala in se* and *mala prohibita*. *Mala in se* are acts which from the beginning have been perceived as injustice because they contradict the norms in society by law as a criminal act. Therefore, *mala in se* is called a crime. The *premium remedium* principle can be applied, not necessarily through the *ultimum remedium* principle or Administrative

Law (Rumbadi, 2016). In resolving criminal acts related to the prosperity of the people of Indonesia (the sustainability of a country), it is necessary to apply criminal sanctions that have an element of *premium remedium*. In addition to creating a deterrent effect on the perpetrators of the crime, it can also provide recovery of the losses suffered by the community (Sekhroni, 2017).

Drug dealers are people who control drug trafficking clandestinely and as the party that finances drug crime. Drug dealers have a very big role in the production and distribution of drugs. Therefore, the punishment given must also be in accordance with the level of crime he has committed. The death penalty is the most appropriate form of punishment, because this drug dealer action results in a large number of deaths, especially among the younger generation. The results of a survey conducted by the National Narcotics Agency Research and Information Data Center (BNN Puslitdatin) in collaboration with the LIPI Community and Cultural Research Center in 2019 showed that the prevalence of drug abuse in Indonesia reached 1.8% or equivalent to 3,419,188 people in the 15-64 year age group abusing drugs in 2019. From these data, it appears that the number of drug abuse has been very worrying, and will certainly have negative effects that are very dangerous for the survival of a nation.

The death penalty for a criminal act, which is considered extremely detrimental to the interests of the nation and the state and society, is the primary choice (*premium remedium*). For crimes that have been relatively severe and have a relatively large impact and cause public unrest, the provision of appropriate punishment for the action is no longer an *ultimum remedium* but a *premium remedium* (Lisdiyono, 2018).

The imposition of the death penalty is also considered very necessary or the primary choice (*primum/premium remedium*) since drug dealers often do not deterred from committing crimes. They even committed the crime repeatedly despite being sentenced to prison. Drug dealers often still run their illicit business which is controlled from within a correctional institution. Related facts can be seen from the news reported in the BNN Press Release on July 31, 2018 which stated that the "National Narcotics Agency (BNN) cooperates with the Financial Transaction Reports and Analysis Center (PPATK) to reveal the case of the Narcotics Money Laundering (TPPU) Act involving the correctional institution network, with a total asset value of Rp. 24,000,000,000 (TWENTY-FOUR BILLION)". BNN Press Release on September 28, 2019 informed that "BNN detained prisoners involved in drug smuggling by securing two prisoners from 1<sup>st</sup> class Prison, Tangerang, with the initials MIF alias K and SI alias B. Both were proven involved in smuggling 98.7 kg marijuana, which was successfully revealed by the BNN Team some time ago. K and B managed to control the process of sending marijuana from within the correctional institution "

Other facts were also found in the author's interview with drug dealers at the Class IIA Narcotics Correctional Institution, Jogjakarta, in a Drug Abuse Survey in 2018. The drug dealer said, "I am very active selling in this prison.... the buyer is from the outside... we just use communication tools... The tools were sent from outside... the goods were



obtained from the outside too.... We communicate with the boss... we have a trusted person to hand over the goods to my people.... Those who prepare the goods are also my people.... I just control the communication from here.... The goods circulation is outside, not inside the prison... To avoid fraud, we look for people who can be trusted and can be relied on.... Profits from selling drugs were used to support the family.”

Even drug production is carried out in a correctional institution. This information was obtained from an interview with a former drug dealer in the 2019 narcotics abuse survey. He said, “Because I was also involved in the production... took part in production.... The precursor supply was inside... sometimes I gave instruction to outsiders and they could enter.... We have wardens who can be invited to cooperation....” From the interview, we can conclude that drug dealers can still freely control their narcotics business from prison and the action also involves prison officers.

Drug trafficking in correctional institutions and detention centers are inseparable from the involvement of wardens or officers who facilitate the drugs circulation. If this is the case, imprisonment in correctional institution and detention center will not provide a deterrent effect on drug convicts. Instead, it will provide a safer space for people to consume drugs or conduct drug transactions. The drug business in the correctional institution and detention center is very easy and smooth, of course there is a great power behind this illicit goods network. Simply stated, it is impossible for the prisoners' activities to take place smoothly and safely in a long period of time, if there is no power to back them up. It is also impossible for the correctional institution officers to be willing to play with drugs and risk their credibility, if there is no such reward for these actions (Apriansyah, 2016).

From these facts, it can be seen that the imposition of criminal sanctions does not have a deterrent effect for drug dealers since they can still control the business from within the correctional institution. Even when they are free, they still have a drug distribution network. The imposition of death penalty for drug dealers who is proven to still control the drug business from within prison and after being released from prison, is expected to have a deterrent effect for other drug dealers who have not been caught in a legal case.

The death penalty stated in the Act is a form of state protection for the rights of citizens, especially for those who become victims of narcotics abuse. As the matter of fact, in narcotics business cycle, there is demand and supply where the addicts themselves need and look for drugs in dealers/peddlers. However, the existence of the dealers/peddlers has a very big role in providing drugs. If there is no drug trafficking, there is certainly no drug abuse. The death penalty is also very necessary for extraordinarily serious crimes against humanity, such as narcotics crimes that often result in death for addicts. Because of this extraordinary nature, the imposition of death penalty for drug dealers/peddlers is the main choice (*premium remedium*) to cause a deterrent effect.

## **Death Penalty for Drug Dealers**

The death penalty has existed since ancient times, throughout human civilization. It is justified as the most effective punishment for a mistake that cannot be corrected. The death penalty is also intended to cause fear to the people, so that they do not commit similar crimes. From the economic standpoint, the death penalty requires the least cost compared to other types of punishment. In several countries, including Indonesia, the existence of the death penalty is still an interesting thing to study. Some countries in the world have abolished this type of punishment because it is considered violating human rights. For countries that still impose the death penalty, the decision to determine it becomes the authority of the judge. The death penalty given to the defendant depends very much on the independence of the judge, with freedom restricted by law and based on the conscience.

In Indonesia, the imposition of the death penalty is still maintained. In addition to being regulated in the Criminal Code, offenses threatened with the death penalty are also contained in the Law, one of which is the Narcotics Act. In Indonesia positive law, the criminal provisions for drug dealers have clearly been regulated in Law Number 35 of 2009 concerning Narcotics, which is a form of *lex specialis* in the law enforcement of narcotics cases. The threat of death penalty in Law No. 35 of 2009 concerning Narcotics is very relevant, because narcotics crime is an extra ordinary crime. The death penalty in the Narcotics Act is a protection to the nation and the state from illegal drug trafficking. Prison is not effective to deter perpetrators, even they can run their business in prison. Therefore, the only way to break the chain of narcotics illicit trafficking is to impose the death penalty on narcotics offenders (Abimanyu, 2013).

The provisions on death penalty are mentioned in several articles in Law Number 35 Year 2009 concerning Narcotics: Article 113 paragraph (2), Article 114 paragraph (2), Article 116 paragraph (2), Article 118 paragraph (2), Article 119 paragraph (2), and Article 121 paragraph (2). These articles explain the imposition of the death penalty for dealers/peddlers who produce, import, export, distribute, offer to sell, sell, buy, receive, become intermediaries in buying and selling, exchanging, delivering, and using narcotics to other people. The types of narcotics are those of Group I and Group II weighing more than 1 (one) kilogram for narcotics of plant species and exceeding 5 (five) grams for non-plant narcotics.

Referring to the provisions in the regulation, the number of narcotics which is used as a measure of punishment is relatively small compared to the amount of narcotics under the control of drug dealers. Therefore, it is very possible for drug dealers to be subject to death penalty for their crimes. However, the determination of the level of criminal punishment depends mainly on the judge's decision. This is because the articles mentioned several types of sentences: death penalty, life imprisonment, imprisonment of 5-20 years, and fines.

Provisions that state certain types of punishment of a convicted person can cause a punishment disparity. The disparity itself in *letterlijk* is often interpreted in terms of criminal differences. However, this is not a problem in criminal law, because there must

be a disparity when a judge decides a case. It is an absolute consequence or consequence because first, the freedom of the judge, and secondly, the specific case he is handling. This means that in the same case, people who commit offenses may be different, the reasons for offenses are also different, and with different conditions, too (Nugroho, 2012).

The death penalty is not an easy thing for a judge to decide. Many considerations must be done before making a decision. The death penalty is the heaviest criminal form because it removes the right to life of a person that is truly God's right. If there is a mistake in the death penalty, even more so after the execution, the decision can not be corrected. For this reason, many countries have begun to abolish the death penalty. They believe that the death penalty is a fundamental violation of the right to life and the right to be free from excessive punishment (Barry, 2017). This abolition movement sees the death penalty differently. This movement condemns the brutality and violence of the death penalty and states that it is not consistent with the aspirations of justice that have been mandated in a country's constitution (Cassell, 2008). Although the death penalty has been abolished in some countries, it is still maintained in Indonesia.

The death penalty is greatly influenced by the authority of a judge. A judge has the authority to impose criminal decisions on perpetrators of criminal offenses based on judicial and sociological considerations. This consideration must be made so that criminal decisions given are in accordance with the responsibilities and rights of the accused, and benefit the community. Therefore, the conviction must pay attention to the purpose of punishment (straf soort), the level of punishment (straf mart), and how to impose a crime (straf mode). There are many theories about criminal objectives known as criminal theories. This theory is about the justification of imposing suffering in the form of a crime against someone. One theory of punishment is integrative theory. This theory said, "nature teaches that whoever commits a crime will suffer pain" (the absolute aspect). However, the weight of the suffering imposed depends on social benefits (relative aspects) (Maramis, 2012).

Referring to the theory, the judge can decide the punishment as the primary choice (remedium premium) depending on the weight of the criminal act committed by the defendant and the impact of his actions for the community. The crime committed by the drug dealer is not an individual crime but an organized crime that endanger the survival of a nation. Considering the weight of the crime committed by a drug dealer, it is no exaggeration if the heaviest punishment in the form of death penalty becomes the primary choice for judges in passing verdicts.

Whether a death penalty for a drug dealer is a *premium remedium* or *ultimum remedium*, it depends on the judge's personality. The judicial process in Indonesia is still very dependent on individual judges, not on the legal system. In such a situation, a judge's decision are very dependent on the his wisdom and intelligence. If the judge is wise and intelligent, the quality of the decision reflects the wisdom and intelligence. If the judge is honest, then the verdict reflects the honesty. In other words, the judicial process in our

country depends on individual judges and other parties involved in the process (Ubbe, 2008).

In deciding a case, a judge must first analyze the criminal acts committed by the defendant and his criminal responsibility. After that, he can determine the amount of criminal punishment that will be given to a defendant. When the judge analyzes the criminal act, what must be considered is whether the defendant committed the criminal act or not. The main element of concern is the interest of the community, whether the defendant really committed a crime in which the punishment has been regulated in the Law, in terms of this, whether the act that is harmful or not. If the defendant's actions fulfill the elements in a criminal law article, then the defendant is declared proven to have committed the criminal act charged with him.

The next step is to analyze criminal responsibility. In this stage, if a defendant is proven to have committed a criminal offense that violates a certain article, the judge analyzes whether the defendant can be held responsible for the criminal act he committed. Then, he will determine the amount of criminal punishment for the defendant. In this stage, if the judge believes that the perpetrator has committed an unlawful act, found guilty of his actions, and is able to take responsibility for his actions, then the judge will impose a punishment by looking at the articles of the Act violated by the perpetrator. In hearing the case of a drug dealer, by paying attention to the evidence and the physical and psychological condition of the drug dealer, the amount of criminal punishment can be maximized.

Court decisions are also very dependent on the knowledge and belief of a judge. In legal culture, the judge's knowledge and belief system serves as a guide for action (pattern for behavior) in handling cases in court. Judges' knowledge and belief systems greatly determine the way of thinking, methods of interpreting the law, and orientation of judges in carrying out the law. This shows that there are several types of personalities of judges. From the ideology, judges can be divided into those who are positivistic and nonpositivistic. Positivistic judges tend to use the law as a reference and the only source that is considered valid in handling cases, focus on the dimensions of procedural justice with a point of emphasis on legal certainty, apply deductive logic in getting the truth. Whereas judges who are non-positivistic tend to view the law not as a reference and the only source that is considered valid in handling cases. Judges' discretion to make legal discoveries get an adequate place, emphasize the dimensions of substantive justice, and apply inductive logic in getting the truth of the law.

In addition to ideological differences, there are also textual and contextual types of judges. Textual judges tend to interpret acts against the law narrowly, only limited to violations of written statutory regulations. Whereas contextual judges tend to interpret acts against the law widely, not only limited to violations of written statutory regulations, but also violations of unwritten laws in the form of propriety values that exist in society and good general principles of government.

The next types of judges are materialist, pragmatic, and idealistic. Judges who have a materialist type tend to be greatly influenced by the orientation of material values in handling cases. Judges with a pragmatic type tend to be greatly influenced by an orientation towards favorable situations in handling cases. Whereas the idealist judge type tends to be strongly influenced by the orientation to the ideal values of law in handling cases (Syamsudin, 2012). In deciding case justice, these three typologies of judges have their own weaknesses and strengths. Ideally, a judge has a nonpositivistic, contextual, and idealistic type for realizing restorative justice which focuses more on the conditions for creating justice and balance for the crime perpetrators and their victims.

Besides relying on an individual judge, in deciding a case, a judge can use theory or approach in considering criminal decisions in a case (Manan, 2006), as follows:

1. Balance theory is a theory of a balance between the conditions determined by the Act and the interests of the parties involved or related to the case. The balance is related to the interests of the community, the interests of the accused, and the interests of the victim, or the interests of the plaintiff and the defendant.
2. Art and intuition approach is a theory of a discretion in rendering decisions. A Judge will adjust to the conditions and reasonable punishment for each criminal offense or in civil cases.
3. Scientific approach theory is a theory which explains that the criminal conviction process must be carried out systematically and carefully, especially in relation to previous decisions in order to ensure the consistency of Judges' decisions.
4. Experience approach theory states that the experience of a Judge is something that can help in dealing with cases that he faces on a daily basis. With his experience, a judge can find out the impact of a decision in a criminal case, relating to the perpetrators, victims and the community, or the impact caused in the civil case decision relating to the parties involved in the case, as well as the community.
5. The ratio decidendi theory is a theory based on a fundamental philosophical foundation, which considers all aspects related to the subject matter in dispute. Legislation that are relevant to the subject matter of the dispute are used as a legal basis for making decisions. Judges' considerations must be based on clear motivation to uphold the law and provide justice for litigants.
6. Wisdom theory is a theory relating to the decisions of judges in juvenile court cases. The foundation of this wisdom theory emphasizes that the love to the motherland and the Indonesian nation and the sense of kinship must always be maintained. Furthermore, aspects of this theory emphasize that government, society, family and parents, share the responsibility to guide, foster, educate, and protect children so that they can later become useful humans for their families, communities and for their nation.

Based on the theories/approaches, a judge considers his decision based on several aspects, including the balance relating to the interests of the community, the interests of the accused, the interests of the victim, the fairness against the crime committed by the

defendant, not in conflict with scientific principles, as well as experience and wisdom a judge. Based on these aspects, the approach used by judges in deciding death penalty can consider the balance between criminal acts committed by drug dealers and the interests of the community and nation. In addition, this is still considered reasonable with the weight of the crime committed and does not violate the legal system in Indonesia. In giving a verdict, a judge is also guided by the attitude of the defendant in court, such as when the defendant does not admit evidence, is convoluted in giving information, does not show remorse for his actions, and also the impact on society and the country caused by the actions of the defendant (Sari, 2015).

In addition to the role of judges in determining decisions, public prosecutors also play an important role in determining the verdicts of suspects. The position of the prosecutor in criminal justice is decisive because it is a bridge that connects the investigation stage with the examination stage at the court hearing. Based on legal doctrine, Public Prosecutors have a prosecution monopoly. This means that a person can only undergo a court hearing if there is a criminal suit from the Public Prosecutor, which is the prosecutor's institution, because only the Public Prosecutor has the authority to bring the suspect of a criminal offense to the court (Pilok, 2013).

The duties and authority of the prosecutor as stated in Article 30 of Law Number 16 Year 2004 concerning Public Prosecution of Republic of Indonesia states that the prosecutor's office has the duty and authority to (1) carry out prosecutions, (2) carry out judges' verdicts and court decisions that have obtained permanent legal force, (3) conducts oversight of the implementation of conditional criminal decisions, oversight criminal decisions, and conditional offenses, (4) investigates certain criminal acts based on the law, (5) completes certain case files, so that they can carry out additional examinations before being handed over to the court which in its implementation is coordinated with the investigator. The Public Prosecutor as the controller of the case process (*Dominus Litis*) has a central position in law enforcement, because only the Prosecutor's institution can determine whether a case can be submitted to the Court or not, based on legal evidence according to the Criminal Procedure Code. Aside from being a person with *Dominus Litis*, the Public Prosecutor is also the only implementing agency for a criminal decision/*executive embrenaar*.

Seeing its function as the control of the case process (*Dominus Litis*), the role of a prosecutor is very much needed in determining the articles that will serve as a charge for a defendant. Claims submitted by a prosecutor can influence judges when deciding a case. The higher the demands filed by a prosecutor, the more severe the sentence imposed by the judge.

The role of prosecutors in influencing judges is also needed in presenting evidence in court proceedings. In deciding a case, a judge needs sufficient evidence and confidence. This means that the Public Prosecutor needs to present two evidences to gain the judge's conviction (Perbawa 2014).

Given the important role of a prosecutor in carrying out lawsuits, he can use the principle of *primum/Premium remedium* in demanding the death penalty of a defendant. This principle can be applied when a criminal act has been considered very detrimental to the interests of the nation, the state, and the community. This primary choice is used to cause a deterrent effect for the perpetrators.

Related to the death penalty, based on data from the Directorate General of Corrections of the Ministry of Law and Human Rights, the number of death row inmates of Indonesian citizens and foreigners in 2018 narcotics and psychotropic cases was 93 people. Meanwhile, the number of drug producers and dealers/peddlers based on data from the Directorate General of Law and Human Rights Correction in 2018 was 19,875 people. If we look closely, the ratio of the number of drug dealer/peddler inmates and the number of death row inmates was very small, only about 0.4 % of drug case defendants were sentenced to death. It also illustrates that of all drug dealers/peddlers cases handled by law enforcers, only a small proportion were sentenced to death. Therefore, there needs to be attention from all elements of criminal justice in Indonesia to address this matter.

Death penalty is a form of demand and supply reduction efforts undertaken by the Government. The death sentence and the execution are expected to have an effect on reducing the number of narcotics abuse. In 2016, the execution part three of four drug lords: Freddy Budiman (Indonesia), Michael Titus Igweh (Nigeria), Humprey Ejike (Nigeria), and the Acena Seck Osmane (South Africa) grief were carried out by the Government. The Government's decision to execute the four drug kingpins seems to have resulted in a decrease in the prevalence of drug abusers in Indonesia. From the results of research conducted by the National Narcotics Agency (the author was involved in the research) obtained the following data:

**Tabel 3. The Prevalence of Narcotics Abuse in Indonesia**

2008	2011	2014	2017	2019
1.99 % or equivalent to 3,362,529 people	2.23 % or equivalent to 4,274,259 people	2.18 % or equivalent to 4,022,702 people	1.77 % or equivalent to 3,376,115 people	1.8% or equivalent to 3,419,188 people

Source: National Narcotics Agency

From the data above, there is a significant decrease in the number of drug abusers, after the execution in 2016. This prevalence rate is a reference for the writer to look at the number of drug abuse compared to using the number of drug cases. This is because the number of drug cases is directly proportional to the performance of law enforcement officers. The more optimal the performance of the authorities, the higher the number of drug cases in Indonesia, so it cannot be used as a reference to see trends in drug use in Indonesia. The prevalence rate used as a reference in looking at the severity of drug abuse in Indonesia, was obtained from a survey exploring the opinions of the community as the target of research.

The ups and downs of the prevalence of drug abuse in Indonesia as explained in the table above, is not only caused by the execution of drug kingpin death. This is also influenced by many factors, including the success of the Program for the Prevention and Eradication of Illicit Abuse and Circulation of Narcotics and Narcotics Precursors (P4GN) conducted by the Government, the higher level of public awareness of health, and the higher awareness of the legal community. Although the cause of this prevalence decline is not yet known, because no research has been conducted on this matter, the execution can also be indicated as one of the driving factors. Therefore, the implementation of the death penalty needs to be reconsidered to reduce the number of drug abuse in Indonesia.

### **Constraints on the Application of the Death Penalty in Indonesia**

The death penalty in the Criminal Code is included in the main criminal code, but its application still raises the pros and cons, especially when related to human rights. The concept of Human Rights can be seen from a religious point of view, namely the relationship between humans and their Creator. There is no human being whose position is higher than others. There is only one of the absolute, the Creator, who governs the entire civilization of mankind in the world. Humans are created with the rights attached to him, such as the right to life. No one can revoke the right of life given by God to someone, even though the person has done the most heinous deeds towards others. Respecting the basic rights possessed by humans means respecting the Creator.

At the international level, death penalty is prohibited based on humanitarian reasons. The United Nations (UN) encourages the elimination of this type of punishment based on the Universal Declaration of Human Rights which contains guarantees of the right to life and protection against torture. However, in Indonesia, the death penalty is still included in the positive law. It was only that the execution is uncertain, even though the death sentence has been declared permanent (*in kracht van gewisjd*). Before actually being executed, there is a “waiting period” given for the convicted person to take extraordinary legal remedies.

The term “waiting period” is unknown in the laws and regulations about the execution of the death penalty. The waiting period for execution appears as a consequence of the rights granted by law to death row inmates. It is the right to file extraordinary remedies, to review and request clemency. There are no specific and definite rules regarding the execution of prisoners sentenced to death. In fact, the waiting period for the execution of a convicted person is very important in order to realize legal certainty in the process of resolving criminal cases (Sitanggang, 2019).

The execution of death penalty in Indonesia still consider legal action from the convicted person. Efforts are given to death row inmates, both in the examination process and after the death penalty imposition by the Judge. Before the decision has permanent legal force (*incracht*), the defendant is given the opportunity and facilities to take legal action, both ordinary legal remedies and extraordinary legal remedies. After the defendant was sentenced to death, there is only one legal remedy to take: asking for clemency from



the president in accordance with the procedure in the 1945 Constitution. Acceptance and rejection of clemency in the death penalty is the final effort of all proceedings and legal remedies related to the death sentence of the drug dealers and users (Mustari, 2017).

Death penalty is always regarded as an arbitrary and unpleasant method. Judicial review and clemency that imply constitutional principles regarding the imposition of the death penalty, can reduce such arbitrariness. The judicial review also reflects the willingness of people to provide equal rights to death row inmates. The judicial review and clemency also confirms that there is no court's arbitrariness. However, although these rules can minimize arbitrariness in the death penalty, this is not the most effective way. There must be a clear reason that the big villain can still live freely because of the appeal and judicial review, but he must be executed later (Goodpaster, 1983). The death penalty must pay attention to the rights of the convicted and the victim. Therefore, a multi-dimensional approach is the most appropriate approach to see the impact of individual and social punishment (social defense).

The aim of the death penalty based on both preventive-intimidative and repressive-depressive theories is to try to restore the sense of justice of the society. Crime perpetrators must be afflicted in the form of criminal punishment which is also a lesson to make him deterrent. The death penalty also prevents vigilantism by the public against crime perpetrators. Finally, the death penalty serves as a lesson for every member of the community not to commit a crime and get punishment for his actions. Meanwhile, according to persuasive-preventive theory, death penalty is an effort to educate crime perpetrators to be aware of their mistakes, have good intentions to repent, and also to educate people not to commit crimes that will harm themselves and others (Hamenda, 2013).

The imposition of the death penalty for criminal offenses must look at the criteria of crimes committed, which (1) exceed humanitarian limits, (2) harm and threaten many humans, (3) damage the nation's generation, (4) damage the nation's civilization, (5) damage the order on earth, and (6) harms and destroys the economy of the country. Seeing the criteria, for crimes committed by drug dealers, especially those who often go in and out of prison (recidivists) and continue to run their drug business in prison, death penalty is something that can be justified.

Human Rights are inherent in every human being, including crime perpetrators, as stated in the Second Amendment to the 1945 Constitution of the Republic of Indonesia Article 28A which states, "Every person has the right to live and has the right to defend his life." This is also stated in the Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights, specifically Basic Human Rights in Article 4 which states that humans have the right to life, a human right that cannot be reduced under any circumstances and by anyone. The side of abusers/drug addicts, especially in victims of drug abuse (forced to use drugs), also needs to be considered. Even though most of the criminal acts committed by drug abusers/addicts of their own volition, but the existence of drug dealers as providers and dealers play a role in drug abuse, especially on the impact

caused by the users. Based on victimology that narcotics addicts are self victimizing victims (victims as perpetrators) it still places the narcotics abuser as a victim even from criminal acts/crimes he committed himself (Dewi, 2012).

The use of narcotics gives impact in the form of space and time disorientation (hallucinations), paranoia, psychiatric illness, and accompanying physical illness experienced by a drug addict, making his survival disrupted as well as can damage the future for young addicts. This is contrary to what is stated in the 1945 Constitution Article 28B paragraph (2) which stated, "Every child has the right to survival, growth and development and is entitled to protection from violence and discrimination". Human rights violations committed by drug dealers for their interests, are considerations in deciding the level of punishment for drug dealers.

This consideration refers to the principle of justice that is acceptable to the perpetrators of crime and victims. Aristoteles divides the notion of justice into three basic namely equality, distributive, and corrective. Equity-based justice is based on the principle that law is binding on all people, so that justice to be achieved by law is understood in the context of equality which includes numerical similarity and proportional equality. Numerical equality is based on the equality of each person before the law, while proportional equality is giving everyone what they are entitled to. Distributive justice is synonymous with proportional justice which originates in the granting of rights in accordance with the size of the service, so that in this case justice is not based on equality, but according to their respective portions (proportional). Whereas corrective justice is basically justice which rests on rectification of a mistake, for example if there is a mistake of someone who causes harm to others, then the person who caused the emergence of the loss must provide compensation (compensation) to the party receiving the loss to recover the situation as a result of mistakes made.

Based on this form of justice, if human rights are only focused on the perpetrators of criminal acts, the human rights of victims will be ignored. A judge must be able to be fair in accordance with the portion of the defendant's mistakes. The mistakes made by drug dealers are huge, and can even harm a generation as a victim. The most appropriate fair concept here is to face the heaviest punishment for the defendant in the form of a death penalty, considering the current condition of drug abuse in Indonesia is getting worse.

The increasingly high rates of drug abuse in Indonesia can be seen from survey data on drug abuse and illicit trafficking in student groups and students conducted in 2016, where the results of the survey stated that the prevalence of drug abuse among student groups / students last year was 1.9 %. In other words, it can be said that 2 out of 100 students consume drugs. This data shows how alarming drug abuse is in Indonesia. If there is no attempt to deter perpetrators of illegal drug trafficking, more victims will fall.

A *premium remedium* principle is needed to be imposed on the death penalty for drug dealers, especially those who continue to run their narcotics business in prison. From the aspect of Human Rights, the implementation of the death sentence on drug dealers does not contradict the results of the international convention, because killing one person

is better than destroying the crowd due to his actions. It is also stated in international treaties and conventions on civil and political rights, which state that capital punishment is not prohibited. The acts of drug traffickers or narcotics dealers have destroyed the greater humanity, so it is appropriate if a death penalty is imposed to eradicate the crimes and save more humans (Anwar, 2016).

## Conclusion

The death penalty for a criminal act that has been considered very detrimental to the interests of the nation, state, and society is the primary choice (*primum/premium remedium*). This is intended to have a deterrent effect on criminal offenders. The death penalty is also felt to be very necessary or to become the first choice (*primum/premium remedium*) because a drug dealer is often not deterred from committing his crime, even repeatedly committing his crime even though he has been sentenced to prison, and they are still free to carry out his illicit business behind bars.

In positive law in Indonesia, the criminal provisions for drug dealers have clearly been regulated in Act Number 35 of 2009 concerning Narcotics which is a form of *lex specialis* in law enforcement narcotics cases. The death penalty provisions can be imposed on dealers/peddlers who produce, import, export, distribute, offer to sell, sell, buy, receive, become intermediaries in buying and selling, exchanging, delivering, and using narcotics to others. However, the amount of punishment greatly depends on the judge's decision. This article has mentioned several types of punishment can be imposed, they are death penalty, life imprisonment, imprisonment of 5-20 years, and criminal fines. In addition to the role of judges in determining decisions, prosecutors as public prosecutors also play an important role in determining verdicts for suspects.

The death penalty and its execution are one of the factors driving the decline in drug abuse in Indonesia. This can be seen through the number of drug abuse prevalence obtained from the BNN survey results in 2008, 2011, 2014, 2017, and 2019. From the survey data, it can be seen that there is a significant decrease in the prevalence of drug abuse after the execution of four people drug kingpins by the Government of Indonesia in 2016. Although the exact cause of the decline in prevalence rates from 2014 to 2017 is not yet known due to the absence of research on this matter, but the execution can be indicated as one of the contributing factors.

The death penalty in the Criminal Code is included in the main criminal code, but its application still raises the pros and cons, especially when related to human rights. Violation of Human Rights by drug dealers against the interests of drug abusers/addicts and victims of drug abuse must be considered by a judge in deciding the amount of punishment, especially for those who continue to run a drug business in prison. From the aspect of Human Rights, the implementation of the death penalty on drug dealers does not contradict the results of the international convention, because killing one person is better than destroying many more people due to his actions.

## Suggestions

The death penalty imposition for drug dealers is highly dependent on the consideration of the prosecutor in making demands and judges in deciding cases. The application of the *Premium remedium* principle in this case could be further realized by the existence of a Special Narcotics Court in which Judges and Prosecutors involved are specifically narcotics law enforcers who have the same vision and mission as the National Narcotics Agency in eradicating drug trafficking.

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