Jurnal Dinamika Hukum

Vol. 19 Issue 1, January 2019
E-ISSN 2407-6562 P-ISSN 1410-0797
National Accredited Journal, Decree No. 21/E/KPT/2018
DOI: 10.20884/1.jdh.2019.19.1.1266

Disparity of the Waiting Period of the Capital Punishment Execution for Narcotics and Murder Cases in the Perspective of Human Rights[1]

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Abstract
Disparity of the waiting period of the capital punishment execution for narcotics and murder cases occurs as the legal consequence of the policy of the Indonesian Public Prosecution Service for prioritizing the execution of death row inmates in narcotics cases. The problem is how the analysis is in the perspective of Human Rights for such disparity of the waiting period for the execution of the death row inmates as a result of the Prosecutor's policy to prioritize the execution of the death row inmates in narcotics cases. This study uses a juridical normative method with the legislation and case approaches. The study's result concludes that disparity of the waiting period for the execution of death row inmates in narcotics and murder cases represents no protection and respect for human rights. There should be an implementing regulation that governs the waiting period of the execution of death row inmates to avoid the disparity, so that execution of death row inmates will be carried out to represent the human rights protection.

Keywords: Disparity, Waiting Period of Execution, Death Row Inmate, Human Rights

Abstrak
Disparitas masa tunggu eksekusi terpidana mati perkara narkotika dan perkara pembunuhan, terjadi sebagai konsekuensi hukum adanya kebijakan dari Kejaksaan Republik Indonesia untuk memprioritaskan atau mendahulukan eksekusi bagi terpidana mati perkara narkotika. Permasalahannya adalah bagaimana analisis disparitas masa tunggu eksekusi terpidana mati perkara narkotika dan perkara pembunuhan sebagai akibat adanya kebijakan Kejaksaan untuk memprioritaskan eksekusi terpidana mati narkotika dalam perspektif Hak Asasi Manusia. Metode penelitian yang digunakan adalah yuridis normatif dengan pendekatan perundang-undangan dan pendekatan kasus. Hasil penelitian menyimpulkan, bahwa disparitas masa tunggu eksekusi terpidana mati perkara narkotika dan perkara pembunuhan ini tidak mencerminkan adanya perlindungan dan penghormatan terhadap Hak Asasi Manusia. Hendaknya ada peraturan pelaksana yang mengatur mengenai masa tunggu eksekusi bagi terpidana mati agar tidak terjadi lagi disparitas, sehingga eksekusi terpidana mati tetap dilaksanakan sesuai dengan cerminan perlindungan Hak Asasi Manusia.

Kata kunci: *Disparitas, Masa Tunggu Eksekusi, Terpidana Mati, Hak Asasi Manusia..*

Introduction

Capital punishment is one of the oldest and most controversial types of criminal sentences, both in the Anglo-Saxon countries with the common law system, as well as in Continental European countries with its civil law legal system. The historical search for

[1] This paper is part of first author's Ph.D. dissertation entitle "Kepastian Hukum Masa Tunggu Eksekusi Pidana Mati Dalam Mewujudkan Rasa Keadilan Menuju Pembaruan Hukum Pidana" in Doctoral Program of Faculty of Law, Universitas Padjadjaran, Bandung-Indonesia.

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capital punishment has proven that today, almost every country has a problem with the application of capital punishment **(Rukman, 2016).**

The capital punishment is carried out by law enforcement agencies having the authority to eliminate the lives of the perpetrators who have been found guilty based on court decisions. The capital punishment should not be carried out arbitrarily, yet it should be based on laws and regulations since the capital punishment concerns a person's life and is certainly related and cannot be separated from the issue of Human Rights.

Since the issue of human rights has become increasingly prevalent, the implementation of capital punishment raises a debate within the international community. The awareness for the importance of human rights has increased since the establishment of the United Nations which later made international legal instruments regarding human rights. The international community also gave birth to the opinion that at least, there should be an agreement on the existence of minimal human rights which should not be violated under any circumstances, including during martial law. These minimum human rights principles are known as non-derogable rights or the human rights that should not be violated **(Lubis, 2005).**

The debate on capital punishment also takes place in Indonesia which has re-emerged since the right to live is no longer considered only a human right protected by law, but also a constitutional right to be compulsory fulfilled **(Zulfa, 2007).** The capital punishment came into a discussion in 2003, when President Megawati refused the clemency of four death row inmates in a narcotics case and lastly, by the decision of the Constitutional Court in October 2007 regarding the judicial review of the threat of capital punishment in Law No.22/1997 on Narcotics. The debate raised between two groups arguing on whether capital punishment is needed or not, according to its role as a preventive and repressive means **(Mohammad, 2011).**

There are two currents of thought which have led to a debate regarding the application of capital punishment in Indonesia, namely the pro-capital punishment groups and the anti-capital punishment groups. The pro-capital punishment groups argue that capital punishment is a sanction worth the crime committed by the perpetrators; therefore, capital punishment is still relevant to implement. The anti-capital punishment groups base their arguments on the constitution that it is contrary to human rights as stipulated in the 1945 Constitution **(Wahyudi, 2012).**

Apart from the debate over the capital punishment in positive law in Indonesia, the Decision of the Constitutional Court Number 2-3/PUU-V/2007 dated 30 October 2007 has confirmed that the capital punishment is not contrary to Article 28A and Article 28I of the 1945 Constitution. The Constitutional Court argues that the spirit for the formulation of human rights in the 1945 Constitution is based on the principle that human rights are not without limits. Human Rights are not free but can be limited if they are stipulated by law. The original intent of the establishment of the 1945 Constitution states that human rights can be limited and also justified by the placement

of Article 28J as the closing article of all provisions governing Human Rights in Chapter XA of the 1945 Constitution. Referring to systematic interpretation (sistematische interpretatie), human rights are regulated in Article 28A to Article 28I of the 1945 Constitution are subject to the restriction stipulated in Article 28J of the 1945 Constitution. The regulatory system for human rights in the 1945 Constitution is in line with the regulatory system in the Universal Declaration of Human Rights which also places articles concerning the restrictions on Human Rights as the closing article. In addition, the Constitutional Court also suggested that any decision for capital punishment sentence having permanent legal force (in kracht van gewijsde) is carried out as it should be.

The capital punishment subjected to constitutional testing and declared not contrary to the 1945 Constitution of the Republic of Indonesia should be used as a commitment of the law enforcement institutions for a consistent implementation, not only for sentencing the capital punishment carefully and mindfully, but also considering the aspects of legal certainty and justice regarding the capital punishment execution.

Capital punishment execution is a part of series of criminal law enforcement processes. It is carried out as an effort to enforce and as the legal norms that contain the threat of capital punishment within the community, nation, and state through court decisions that have obtained legal force, or in other words, there is no more legal effort to change the decision.

Law No.8/1981 concerning the Criminal Procedure Code as a guideline for criminal procedural law in Indonesia has provided the duty and authority of the Public Prosecution Service of the Republic of Indonesia as the executor to ensure that a person is sentenced with the capital punishment based on a court decision with permanent legal force through a prompt execution in accordance with the provisions of the legislation. The capital punishment execution that is immediately carried out by the Public Prosecution Service, in principle, is a commitment to be able to completely handle criminal cases in accordance with the principle of justice that is quick, simple, and low-cost.

Public Prosecution Service in carrying out its duties and authorities is required to work professionally, proportionally, and with integrity for being on the right track or subject to the laws and regulations. Prosecutors should consistently enforce criminal law by promoting justice, legal certainty, and expediency.

The duties and authority of Public Prosecution Service in carrying out capital punishment decisions should also pay attention to the rights of death row inmates to submit extraordinary legal measures ranging from judicial review to the application for clemency. The prompt execution by Public Prosecution Service after the rights fulfillment actually reflects legal certainty and justice in a law enforcement process.

The capital punishment execution carried out by the Public Prosecution Service, in fact, cannot be effectively implemented. Death row inmates in narcotics and murder cases must face the issue of the waiting period disparity for the execution. This disparity

is due to the absence of any implementing regulation regarding the waiting period for death row inmates so that the Public Prosecution Service issues a policy to prioritize the execution of death row inmates in narcotics cases.

The waiting period disparity for the execution causes the death row inmates in the narcotics case undergoes a relatively shorter waiting period, while the ones in the murder case have to wait for a very long time.

The waiting period disparity aforementioned will intersect with Human Rights, so that the study may direct us to the existence of an implementing regulation on the waiting period for execution of death row inmates in order to create legal and fair law enforcement.

Research Problems

Based on the explanation above, the problems in this study are: how is the analysis of the waiting period disparity in a human rights perspective for the execution of death row inmates in narcotics and murder cases as a result of the Public Prosecution Service policy to prioritize the execution of death row in a narcotics case?

Research Methods

This study uses a juridical-normative method with the legislation and case approaches. The legislative approach is carried out by analyzing legislation relating to research problems, while for the case approach, outlining some facts related to the waiting period disparity for the execution of death row inmates in narcotics and murder cases. This study has a descriptive-analytical specification, which is research that aims to provide a detailed, systematic and comprehensive description for the problems of the waiting period disparity for execution of death row inmates in narcotics and murder cases based on laws and practices implemented so far. The data collection method used is the library study method. Data is analyzed by qualitative juridical, through: First, secondary data and primary data will be inventoried and identified. Second, the data will be arranged systematically and thoroughly for qualitative analysis.

Discussion

Capital Punishment in Positive Law in Indonesia

Capital Punishment is an all-time reality in the history of law in the world. The capital punishment has been officially applied for a long time since the existence of the Hamurabi Act in Babylon in the 18th century BC, when there were 25 (twenty five) crimes threatened with capital punishment. The types of crimes have been increasingly limited from time to time due to the massive movement of capital punishment widely known as the abolitionist movement. The movement for the capital punishment abolition was inspired by the essay "On Crimes and Punishment", written by Cesare

Beccaria, which said the state has no right to take people's lives **(Purba & Sulistyawati, 2015).**

The abolitionist movement certainly sees capital punishment differently. In the book "Debating the Death Penalty", Hugo Bedau condemned brutality and violence from capital punishment. Bryan Stevenson said capital punishment was rooted in despair and anger, and Stephen Bright stated that capital punishment was inconsistent with the aspirations of justice that had been mandated in the constitution of a country **(Cassell, 2008).** This movement argues that many international human rights instruments have changed the use of capital punishment which initially became a matter of state sovereignty because besides that it is a fundamental violation of the right to life, but also the right to be free from excessive and repressive punishment **(Barry, 2017).**

Criminal sanctions are one of the important elements in formulating the norms of criminal law, in addition to the elements that govern illegal or prohibited actions. The crime itself is sorrow or suffering given to people with the conditions determined by the laws and regulations.

Criminal sanction is basically a part of efforts to eradicate crime. This method has been long used and becomes the oldest one. The role of criminal sanction in handling crime cannot be separated from the national goals mandated in the fourth paragraph of the Preamble of the 1945 Constitution, that is, one of them, to protect the entire Indonesian nation. Crime prevention efforts in order to protect Indonesia entirely require a policy on the criminal sanctions for every crime, including by setting the most severe criminal sanctions, namely capital punishment.

Capital punishment is one of the most severe criminal sanctions. The justification basis for capital punishment is inseparable from the theory of punishment itself. The state through an authorized institution certainly has a certain purpose in giving capital punishment to a criminal offense. The purpose of this punishment has various types or variations that are adjusted to the development of criminal law. However, the purpose of punishment based on criminal law development consists of at least three groups, namely:

First, the Absolute Theory (Revenge). This theory considers punishment as a revenge to the perpetrators for their actions, so the punishment must show the proportionality between the degree of seriousness of the act and the sentence imposed. The implication is that the punishment imposed on perpetrators of crime still has to consider the seriousness of the actions committed by the perpetrator so that the weight of the crimes should not exceed the perpetrator's mistake even though the purpose is for general prevention **(Kholiq & Wibowo, 2016).**

Absolute theory justifies punishment since one has committed a crime. Criminal retribution must absolutely be carried out against any criminal offender. The consequences for sentencing the convicts are not questioned since the punishment according to this theory is based on the actions or mistakes of the criminal perpetrators. Absolute theory teaches that the basis of punishment is the crime itself. Punishment

must be considered as "revenge or reward" (vergelding) against people who commit a crime. Crime causes suffering for the victim, therefore the suffering must be given to people who have committed a crime. The criteria for the core thinking of Absolute Theory are as follows: emphasizing aspects of action; looking into the past to justify the law since the convict deserves to be punished for his/her proven mistakes; in order to cause deterrent and fear effects; and raises the special and general deterrence **(Hikmawati, 2016).**

Second, Relative Theory (Purpose). This theory emerged as a reaction to Absolute Theory. According to this theory, criminal sanction is imposed for certain objectives, which includes maintaining public order, protecting personal interests, safeguarding the law and social order within society **(Purba & Sulistyawati, 2015).** The purpose of the criminal sanction according to this theory is to prevent order in the community from being disturbed, in other words, the crime imposed on the perpetrator is not for revenge, but to maintain public order.

Relative Theory or also called the Goal Theory sees that the criminal sanction is intended for general prevention. According to Vos, this theory is a method used to prevent other people from committing crimes, where the criminal sanction is given in public as in an ancient method. This Relative Theory was inspired by Anselm von Feuerbach with his psychologische zwang theory, explaining that with the punishment imposed, one would understand that the related action is prohibited to do. Even so, it might be possible for someone to commit a crime since one is evil by nature so that punishment does not affect his soul. Therefore, public prosecution is a must. Besides aiming to maintain public order, according to van Hamel in Relative Theory, it is also intended for special prevention, that to frighten and improve **(Zaidan, 2014).**

The relative theory has several characteristics, namely: general prevention which emphasizes that the purpose of the criminal is to maintain public order from the disturbance of the perpetrators of crime. By sentencing the perpetrators, other community members are expected not to commit criminal acts. Special prevention which emphasizes that the purpose of the criminal sanction is intended for prisoners not to repeat their actions. In this case, punishment serves to educate and improve prisoners to become good and useful members of society **(Usman, 2011).**

Third, Combined Theory. This theory was first stated by Pellegrino Rossi, that retaliation remains as the principle of criminal imposition, but the criminal sanction has various influences, including the improvement in society and general prevention **(Suharti, 2011).**

According to the Combined Theory that in addition to the criminal retribution, punishment is also intended to protect the public, and create order. This theory uses the two previous theories, namely Absolute Theory and Relative Theory as the basis for punishment, considering that both theories have weaknesses. The weakness of Absolute Theory is that it causes injustice since in the prosecution it is necessary to consider the available evidence and it is not mandatory for the state to take the intended revenge. The

weakness of Relative Theory is that it can cause injustice since the perpetrators of minor crimes can be punished severely, the community satisfaction is ignored if the purpose is to improve society, and the crime prevention by giving fear will be difficult to implement **(Usman, 2011).**

Based on the three objectives of the theories of punishment above, the rational basis for punishment should not only be oriented towards retaliation to perpetrators of crimes in order to provide a deterrent effect and also provide fear for others not to commit crimes, but punishment must also be oriented to the interests of individuals (perpetrators of crimes) and the interests of the community.

Capital punishment in the perspective of punishment purpose theory, cannot be separated from the deterrent or frightening aspects that aim to protect the community. The deterrent and frightening aspects of the capital punishment are based on the consideration that with such punishment it is expected to give deterrent effects to others who have committed crimes, and or give fear to others who will commit crimes with the threat of capital punishment, so that the deterrent and frightening aspects can protect the community **(Arba'i, 2015).**

The existence of capital punishment can prevent the occurrence of crime since the frightening effect or the effect of fear for others not to commit crimes that are threatened with capital punishment. With the death penalty in positive law in Indonesia, it can provide protection and security for everyone as the rights guaranteed in the 1945 Constitution. Conversely, by the absence of capital punishment, it is possible that crime will increase since the criminal perpetrator is not afraid of being sentenced to severe punishment, therefore, it does not give a sense of security for everyone in the life of society, nation and state.

Problems with the application of capital punishment will not be exhausted to be debated. In a global perspective, there will always be pro-capital punishment and abolitionist regarding the existence of capital punishment and its execution as long as the issue of Human Rights becomes the basis of thought to debate capital punishment in its positive law **(Budiyono, 2009).**

Although the application of capital punishment in practice in Indonesia often creates controversy between the pros and cons, the fact is that informal jurisdiction capital punishment remains maintained. This can be proven by several articles that are inside and outside the Criminal Code which still include capital punishment **(Handayani, 2014).**

The juridical basis for the existence of capital punishment in positive law in Indonesia, which is based on the provisions of Article 10 of the Criminal Code which includes capital punishment as one type of principal punishment, in addition to imprisonment, confinement, fines, and felony. The current Criminal Code is a Dutch heritage that was first applied in Indonesia in 1918 with the name "Wetboek van Strafrecht voor Nederlandsch Indie". After Indonesia's independence on August 17, based on the provisions of Article II of the Rules of Justice of the 1945 Constitution, "Wetboek

van Strafrecht voor Nederlandsch Indie" was changed to Wetboek van Strafrecht or can be referred to as the Criminal Code.

The Criminal Code continues to list capital punishment in its principal criminal sentence, while the Netherlands itself has abolished capital punishment. This was not followed by Indonesia because special conditions in Indonesia demanded that the biggest criminals be opposed to capital punishment (Eleanora, 2012). The Dutch state has abolished capital punishment for ordinary crimes since 1870 and abolished capital punishment for all crimes in 1982.

The application of the capital punishment in Indonesia does not only apply to several types of criminal acts in the Criminal Code (such as murder crime in Article 340 Criminal Code), but some criminal acts that are regulated outside the Criminal Code are also threats of capital punishment. The threat of capital punishment is regulated outside the Criminal Code, for example in the Law on the Eradication of Corruption Crime, Terrorism Narcotics, Psychotropic, and others.

Capital punishment has been greatly rejected due to the procedure of the death execution considered cruel and inhuman. As the examples, some of the execution have been done in cruel such as being crucified, sink in the sea, burned alive, thrown with stones to death (stoning), even the most famous capital punishment execution was carried out on the Greek philosopher Socrates in 399 BC by using drinks containing poison **(Latumaerissa, 2014).**

The procedure for executing capital punishment refers to the provisions of Article 11 of the Criminal Code which states that: "The capital punishment is carried out by executioners on hangers by trapping the rope tied to the gallows on the convict's neck then dropping the board where the convict stands" The provisions of Article 11 of the Criminal Code actually come from Article 11 Wetboek van Strafrecht voor Nederlandsch Indie which lasted until March 9, 1942 when the Dutch East Indies Government surrendered to Japan. During the Japanese occupation, the procedure for the execution of capital punishment was based on the Osamu Gunrei Regulation No.1 of 1942, which was carried out by shooting the inmates to death.

The provisions of Article 11 of the Criminal Code as the basis for the procedure for the implementation of the capital punishment execution by the death row inmates convicted by the executioner were apparently not carried out against the perpetrators of the Cikini incident in 1958 with the death row inmates named Tasrif, Saadon, and friends. Their executions were carried out by being shot to death.

The procedure of the capital punishment execution which was initially carried out in the form of hanging by the executioner, then replaced by shooting to death since the enactment of Law No.2/PNPS/1964 stated that: "Without prejudice to the provisions of criminal procedure the execution of court decisions, the execution of capital punishment imposed by courts in the general court or military court is carried out by being shot to death ".

Through Law No.2/PNPS/1964, capital punishment is no longer carried out with hanging sentences but by being shot to death. The consideration of choosing the method of being shot to death is among others more humane and effective (Christianto, 2009). The provisions of Article 11 of the Criminal Code are considered to be no longer in line with the development and spirit of the Indonesian revolution, so the execution of capital punishment is carried out with the shooting to death (Soge, 2012). The procedure for the execution of capital punishment by means of hanging is considered more efficient than hanging since it does not cause long suffering for death row inmates. The procedure for hanging execution requires a relatively longer time from the beginning of the process until the convict is declared dead, while the procedure for execution by being shot requires a relatively shorter time.

Law No.2/PNPS/1964 gives authority to the Public Prosecution Service as the person in charge of the execution of capital punishment. The authority of Public Prosecution Service to carry out executions of capital punishment is also in line with the provisions stipulated in Article 270 Criminal Code and Article 30 paragraph (1) letter b of Law No. 16/2004 concerning the Public Prosecution Service of the Republic of Indonesia, namely the authority to implement court decisions that have permanent legal force.

Court decisions that have permanent legal force based on Article 2 paragraph (1) of Law No. 5/2010 concerning Amendment to Law No.22/2002 concerning Clemency (Clemency Law), namely: (i) The first level court ruling which is not appealed within the time determined by the Criminal Procedure Code; (ii) Court ruling that is not filed for cassation within the time specified by the Criminal Procedure Code; or (iii) Decision on cassation, Provisions of Article 2 paragraph (1) of the Clemency Law associated with the provisions stipulated in the Criminal Procedure Code, then a court decision has permanent legal force, namely: first court decision not appealed seven days after the decision made or after the verdict is notified to the defendant who is not present as stipulated in Article 233 paragraph (2) jo. Article 234 paragraph (1) Criminal Procedure Code; the decision of the appellate court which was not filed cassation within fourteen days after the court decision requested for cassation was notified to the defendant as stipulated in Article 245 paragraph (1) jo. Article 246 paragraph (1) KUHAP; or cassation decision. In other words, a court decision has a permanent legal force if the convicted person and the public prosecutor have received the verdict as stated in the letter of statement of acceptance and if the legal remedy is not used for a specified period of time.

The capital punishment execution is a reflection of the responsibility of the state through its law enforcement officers, namely the Public Prosecution Service to ensure that a person who has been sentenced to death on the basis of a court decision that has obtained permanent legal force underwent its execution in accordance with statutory provisions. The executions were immediately carried out by the Public Prosecution Service in principle as a commitment to be able to complete the handling of criminal cases.

Public Prosecution Service has a central position in relation to the enforcement of criminal law in Indonesia. The central position of Public Prosecution Service in the enforcement of criminal law in Indonesia is as one of the legal subsystems that are in an orderly and integrated unit, influencing and complementing each other with subsystems to achieve the objectives of the legal system. Public Prosecution Service according to institutional aspects, must be integrated with other law enforcement agencies, such as Police, Judges, Advocates, and Correctional Institutions that are subsystems in the enforcement of criminal law in Indonesia. The central position of Public Prosecution Service in the enforcement of criminal law in Indonesia emphasizes the existence of this institution, both in the theoretical level and in the practical normative aspects which are guided by legislation. Public Prosecution Service in carrying out its duties and authority in the position as a body associated with judicial power in the enforcement of criminal law must uphold the supremacy of law as an absolute prerequisite for the implementation of life in a society, nation and state **(Effendy, 2005).**

Public Prosecution Service in carrying out executions is assisted by the Police with their duty to maintain security and order during the execution of capital punishment, as well as to provide necessary personnel and tools, including to provide a Shooting Team under the orders of Public Prosecution Service as stipulated in Article 3 paragraph (3) jo. Article 10 of Law No.2 / PNPS / 1964.

Execution of capital punishment must also pay attention to the provisions stipulated in the Clemency Law. The link between the capital punishment execution and the Clemency Law is due to the rights granted by law to death row inmates to apply for clemency before the execution of capital punishment.

Clemency, as stipulated in Article 1 number 1 of the Clemency Law, is an amnesty in the form of the amendment, mitigation, reduction or abolition of criminal conduct to convicts given by the President. This petition for clemency in Article 2 paragraph (2) of the Clemency Law is the right for every convict who has obtained a court decision that has permanent legal force, whether for a death sentence, life imprisonment, or a minimum of 2 (two) years in prison.

For the death row inmate who applies for clemency, his execution cannot be undertaken before he receives the Presidential Decree on the refusal towards the clemency application. The execution will be held if all the rights of the death row inmate to apply for the clemency have been fully fulfilled, and his clemency application has been rejected.

Law No.2/PNPS/1964 which is used as the legal basis in implementing capital punishment does not explicitly regulate the waiting period for executions. The regulation regarding the waiting period for the execution of capital punishment according to Law No.2/PNPS/1964 is left to the authority of Public Prosecution Service to determine the time and place of execution of capital punishment. On the basis of this authority, Public Prosecution Service makes rules that are internal related to the implementation of capital punishment, namely through Circular of the Attorney General

for General Crimes (Surat Edaran Jampidum) Number: B-235/E/3/1994 concerning Execution of Court Ruling, on the basis of consideration, namely: "Based on the results of observations, it turns out that there are still judicial and administrative weaknesses and technical problems in handling the execution of Court Ruling that has permanent legal force, due to lack of control of the provisions and instructions that have been given."

In connection with these considerations, this Circular Letter of Jampidun Number: B-235/E/ 3/1994 is used as a technical guide for the Public Prosecution Service to execute Ruling Court that has permanent legal force, including death penalty decisions. The Circular Letter of Jampidun Number: B-235/E/3/1994 indeed regulates the period of execution for death row inmates after the refusal of clemency, namely: "Applied after 30 (thirty) days from the following day the decision cannot be changed again and the Presidential Decree regarding the refusal of clemency has been received by the Head of the District Public Prosecution Service." This provision only regulates the period of execution of the new death sentence after 30 (thirty) days after receipt of the Presidential Decree on denial of clemency, but the exact time period for executing death row inmates after passing 30 (thirty) days is not regulated further. The provisions above show that there is no implementing regulation that specifically regulates the waiting period for execution of death row inmates so that the Public Prosecution Service through its policy will decide the execution time for death row inmates.

Related to the execution of capital punishment in Indonesia, the legal certainty of the execution of death row inmates is still a separate issue, both for the interests of the death row inmates and aspects of supervision that must be carried out, so that executions have not been carried out effectively and fulfill justice (Muzakkir, Rani , & Ali 2014). This condition actually results in a disparity in the waiting period of execution between death row inmates, particularly the priority of the types of crimes that must be immediately executed. It is not uncommon in practice that there are several death row inmates associated with murder cases, having to undergo a relatively long waiting period compared to death row inmates in narcotics cases.

Disparity of the Waiting Period of the Capital Punishment Execution for the Death Row Inmates in Narcotics and Murder Cases in the Human Rights Perspective

Capital punishment is a punishment that has a special characteristic and different from other types of principal. It is impossible to change or repair the capital punishment that has been carried out if it turns out that there is an error or even a mistake element "novum" found in the case. The execution of the capital punishment has been carried out, the person who has lost his life cannot be immediately implemented even though the court ruling has permanent legal force since the Public Prosecution Service must pay attention to the interests of the death row inmates or in this case there is a waiting period for execution.

The term "waiting period" is not known in the laws and regulations governing the execution of capital punishment. The waiting period for the executions appears as a consequence of the rights granted by law to death row inmates, namely the right to file extraordinary legal remedies to review and appeal for clemency. There is no specific and definite regulation regarding the execution of death row inmates. In fact, the waiting period for the execution of death row inmates is very important in order to realize legal certainty in the process of resolving criminal cases.

Public Prosecution Service of the Republic of Indonesia, during the administration of President Joko Widodo, has demonstrated its commitment to immediately carry out the death execution of the row inmates as evidenced by the 3 (three) times executions, namely the execution "Volume I" on January 18, 2015, the execution "Volume II" date April 29, 2015, and the execution "Volume II" on July 29, 2016. The execution of death row inmates committed by the Public Prosecution Service was only directed against the death row inmates in narcotics cases, including the execution "Volume III" which executed 4 (four) death row in narcotics cases in Nusakambangan, Cilacap.

Due to the absence of implementing regulations that specifically and definitively stipulate the waiting period for execution of death row inmates, a series of the executions Volume I, II, and III are based on the policies of the Public Prosecution Service. This Public Prosecution Service policy is implemented through an Execution Order issued by the Attorney General to the Team that will carry out the execution of death row inmates for narcotics crimes since it is a priority to be executed immediately. The research was carried out on administrative matters, legal rights of death row inmates (extraordinary legal remedies for review and petition for clemency), and other data relating to executions. The results of the Team's research found that several death row inmates in narcotics cases had fulfilled the requirements to be executed. Indicators fulfill the requirements to be executed, namely several of the death row inmates have exercised their rights to file extraordinary legal remedies with the decision to reject the request for reconsideration, and have exercised their rights to apply for clemency with a Presidential Decree rejecting clemency applications.

The execution of death row inmates Volume I, II, and III which are prioritized for death row inmates in narcotics cases based on the Execution Order issued by the Attorney General, raises the issue of disparity in the waiting period for executions carried out by death row inmates in narcotics and murder cases. Based on data from the Directorate of Other General Crimes at the Deputy Attorney General for General Crimes until December 2016 the total number of the convict in narcotics and murder cases is 171 persons, consisted of 71 (seventy one) death row inmates in narcotics cases and precisely the most death row inmates in murder cases as many as 100 (one hundred) people.

Several death row inmates in murder cases such as Sakak Waluyo and Fatijanolo have experienced relatively long waiting periods of execution, even though their legal rights (review of return and clemency) have been rejected but until now they have not been executed by Public Prosecution Service. Unlike the case with death row inmates in

narcotics cases, namely Andrew Chan and Myuran Sukumaran who have been denied legal rights are priorities for the Public Prosecution Service to immediately execute them.

The waiting period for death row inmates, Sakak, is more than 20 (twenty) years since the verdict was legally enforceable in 1995. Death row inmates Waluyo underwent a waiting period of execution for more than 10 (ten) years after the law was fixed in 2002. The death row inmate Fatijanolo is undergoing a waiting period of execution for more than 7 (seven) years since the decision was legally binding in 2008. Extraordinary legal efforts in the form of the judicial review of death row inmates Sakak, Waluyo, and Fatijanolo have undergone a long waiting period and until now it has not been executed. Unlike the case with the death row inmates in narcotics cases, namely Andre Chan and Myuran Sukumaran who were undergoing a waiting period of execution which was less than 9 (nine) years, then after the refusal of clemency by the President it only took less than 1 (one) year for the Public Prosecution Service to execute them.

Furthermore, if the Public Prosecution Service remains committed to prioritizing the execution of death row inmates in narcotics cases, it is possible that the death row inmates Sakak, Waluyo, and Fatijanolo will still undergo a longer waiting period without clarity or certainty of execution time. This happens since the Public Prosecution Service will definitely put a priority on completing the execution of death row inmates in narcotics cases where there are still 71 (seventy one) people who have not been executed.

The execution of capital punishment has been carried out without the availability of the consistent and right implementing regulations regarding the waiting period for execution. Public Prosecution Service cannot implement a death sentence that has legal force consistently with the absence of an implementing regulation on the waiting period for capital punishment execution so that Public Prosecution Service uses its discretion to determine the execution time by prioritizing death row inmates in narcotics cases. The absence of implementing regulations specifically regulating the waiting for the execution of death row inmates resulted in the Public Prosecution Service issuing a policy (Execution Order from the Attorney General) to prioritize the execution of death row inmates in narcotics cases, resulting in a disparity between the waiting period death row inmates in narcotics and murder cases. This priority is even more "obscure" the meaning of legal certainty, since the death row inmates associated with murder cases will be increasingly "shackled" awaiting certainty about their execution time.

It was said that there was a disparity since the death row inmates in the narcotics case are undergoing a waiting period for execution which was relatively shorter than the death row inmates in the murder case which had to undergo a very long waiting period of execution. The waiting period of execution is very long without any legal certainty of its implementation, it will have a negative impact, namely:

First, death row inmates in murder cases such as Sakak, Waluyo, and Fatijanolo will be faced with the problem of double punishment that must be followed. The long waiting period of execution resulted in the death row inmates in the murder case had to undergo 2 (two) types of principal, namely: First, imprisonment for an indefinite period

of time by being placed in a Penal Institution until the execution of capital punishment is carried out. Second, capital punishment. Death row inmates in murder cases who have been denied legal rights, then the death sentence will not be changed again and death row inmates for murder cases are only a matter of time for their execution.

The condition of multiple sentences as a result of the long and protracted waiting period resulted in death row inmates in the murder case not obtaining fair legal certainty from the implementation of court decisions that had permanent legal force. Legal uncertainty is reflected in 2 (two) types of basic crimes that seem to be carried out by death row inmates, even though court decisions that have obtained legal force remain expressly impose capital punishment on the defendant, not imposing 2 (two) principal crimes namely imprisonment and capital punishment.

Second, the psychological stress experienced by death row inmates in murder cases. This is due to the mental stress and prolonged fear that the death row inmates have to experience since they think about death without clarity of execution time every day.

The execution of capital punishment for so long, sometimes they wait until ten or even twenty years, has caused spiritual, psychological and mental torture for people sentenced to death (Sulistyo, 2014). Death row inmates in murder cases such as Sakak, Waluyo, and Fatijanolo are in a condition of psychological distress or pressure, including experiencing stress, mental stress, despair, and prolonged fear. Therefore, they spend more time in the room at the Penitentiary by daydreaming and continuing to think about the death they will face.

In principle, no one is ready to face his death. Feelings of anxiety, stress, and anxiety will surely be felt by death row inmates in murder cases, particularly when there is news about the execution of capital punishment. Psychological conditions experienced by death row inmates in the case of this murder have actually begun when the person concerned was sentenced to death by the court. The psychological condition of death row inmates for murder cases will be increasingly depressed when there is no opportunity for him to be released from the death sentence.

The long waiting period for execution will only result in stress levels, mental stress, breakups, and fears that have been experienced by death row inmates in cases of murder leading to depressed conditions. Death row inmates who fall under conditions of depression, can not only harm themselves but also potentially endanger other residents in the Penitentiary.

Third, the repetition of criminal offenses committed by death row inmates in murder cases. Because death row inmates for murder cases are in a state of depression, then their mental condition is unstable which can lead to very easily ignited emotions. Therefore, the death row inmates for murder cases who are not immediately executed or who have a very long waiting period will endanger fellow residents of other community institutions. Death row inmates in murder cases have the potential to repeat their criminal acts by killing other residents if their emotions are ignited.

This disparity in the waiting period makes the execution of death row inmates no longer aimed at the sake of criminal law enforcement, but also other factors that influence its implementation, such as the types of criminal acts that are prioritized to be executed (narcotics case is a priority), including factors a limited budget also plays an important role in executing death row inmates. This condition has resulted in the execution of death row inmates not being carried out consistently by the Public Prosecution Service.

The disparity in the waiting period for the execution of death row inmates in narcotics and murder cases certainly does not reflect the protection and respect for human rights as mandated by the 1945 Constitution. After the second amendment to the 1945 Constitution, there are some natural and universal rights inherent in human identity. It is the human right which the constitution guarantees respect and protection.

Human rights are a set of rights that are inherent in the nature of human existence as creatures of the Eternal God and are gifts that must be respected, upheld and protected by the rule of law, government and everyone for the sake of respect and protection of dignity (Rahmadan, 2010). Human Rights are closely related to the rule of law, even the Universal Declaration of Human Rights suggests that human rights must be protected by the rule of law (**Peerenboom, 2005).**

Human rights are natural and natural which in fact every human being since birth has free and basic rights and obligations. Therefore, the respect for and protection of human rights make a very important pillar in every country.

The indicators show that the disparity in the waiting period for the execution of death row inmates for narcotics and murder cases, contrary to the human rights guaranteed by the constitution are:

First, it contradicts Article 28D paragraph (1) of the 1945 Constitution. The disparity in the waiting period for the execution of death row inmates results in unequal treatment between death row inmates in narcotics cases and death row inmates in murder cases. This is certainly not in line with Human Rights which has been mandated in Article 28D paragraph (1) of the 1945 Constitution, which expressly mandates that: "Everyone has the right to recognition, guarantee, protection, and fair legal certainty and equal treatment before the law".

When examined in depth about the substance of the provisions of Article 28D paragraph (1) of the 1945 Constitution, it is clear that basically, the constitution mandates the right to all people to get a sense of justice for recognition, guarantee, protection, and legal certainty, and equally important in the same treatment before the law, including death row inmates. The actions of the state through law enforcement institutions that hang the fate of death row inmates to obtain fair legal certainty from the waiting period of their execution, can be categorized as a form of violation of Human Rights.

In connection with the disparity in the waiting period for execution for death row inmates, of course, there are an unequal treatment between death row inmates in narcotics cases and death row inmates in murder cases. Death row inmates murder case must undergo a long waiting period of execution without certainty of execution, while death row inmates in narcotics cases are prioritized for immediate execution. The condition of the disobedience of the execution waiting period for death row inmates can be categorized as a violation of Human Rights as mandated in Article 28D paragraph (1) of the 1945 Constitution, especially the right to obtain equal treatment before the law.

Secondly, it contradicts Article 281 Paragraph (2) of the 1945 Constitution. The disparity in the waiting period for execution of death row inmates in narcotics and murder cases will also be faced with the issue of discriminative treatment. In fact, Article 281 paragraph (2) of the 1945 Constitution expressly mandates that: "Everyone has the right to be free from discriminative treatment on any basis and has the right to receive protection against discriminatory treatment".

Understanding of discrimination, in this case, is related to the difference in the waiting period of execution between the death row inmates in narcotics cases and in a murder case, especially with the Public Prosecution Service policy through the Attorney General's Order to prioritize the execution of death row inmates in narcotics cases. The death row inmates Sakak, Waluyo, and Fatijanolo were treated discriminatively in terms of the waiting period for their execution compared to the death row inmates Andrew Chan and Myuran Sukumaran. Death row inmate Abdrew Chan and Myuran Sukumaran were immediately executed, while death row inmates Sakak, Waluyo, and Fatijanolo were given the opportunity to live a longer life without prioritizing their execution. The difference in the waiting period for execution of death row inmates in narcotics and murder cases is certainly contrary to human rights to be free from discriminatory treatment as mandated in Article 281 paragraph (2) of the 1945 Constitution.

This waiting period disparity of the capital punishment execution for the death row inmates in narcotics and murder cases is contrary to Human Rights that has been guaranteed by the constitution, therefore, there should be a concept of the implementing regulation that expressly and surely regulates the waiting period of the capital punishment execution for the death row inmates. The definite implementing regulation concerning the waiting period of the capital punishment execution for the death row inmate can be the manual for the Public Prosecution Service as the executor to promptly execute the death row inmates in narcotic crime without any discrimination over the types of criminal punishment carried out. There is no more policy of Public Prosecution Service that prioritizes the execution of the death row inmates in narcotic crime. This aims to eliminate the gap and disparity of the waiting period disparity of the capital punishment execution for the death row inmates in narcotics and murder cases.

The legal consequence by the existence of the implementing regulation is that all the death row inmates both in narcotic and murder cases will be equally treated during the waiting period for the execution. Thus, the execution for the death row inmates will

comply with the principles of respect for and protection of human rights as mandated in the 1945 Constitution.

The implementing regulation regarding the waiting period for the death execution will make capital punishment as the common matter as like the other criminal punishment executions without the massive publications. The capital punishment execution can be implemented every year by the Public Prosecution Service when the requirements are fulfilled in accordance with the waiting period has been definitely determined in the implementing regulation, so that waiting period disparity of the capital punishment execution for the death row inmates not only prioritize the legal certainty and justice but also the expediency.

By carrying out the capital punishment without the discrimination over the narcotics and murder cases, the legal certainty with the fairness value in the criminal law enforcement and legal protection for the death row inmates, victims, and their families and the community will be made. This is in line with the concept "state of law" adopted by Indonesia that gives high respect and protection towards Human Rights.

The concept state of law (rechtsstaat) does not place the power of the ruler based on the power itself only, but such power is limited by law. The power restriction based on law aims to highly value the fundamental rights of the people in order to free them from the arbitrary actions of the ruler. This concept is extremely related to the issues of Human Rights, so we can say that the State of Law serves as the medium, and Human Rights is the content (Rukmini, 2007). The State of Law adopted by Indonesia is the one based on the Pancasila (Five Principles) emphasizing on the role of law as the highest ruler in governing the state of law. The legal function in a state that adopts the principle of the state of law, places the law as a fundamental instrument within the society and state.

Based on the description above, juridical measures through the regulatory renewal are necessary to expressly and definitely regulate the waiting period of the capital punishment execution for the death row inmates. This regulatory renewal that regulates the waiting period of the capital punishment execution for the death row inmates will certainly support the law enforcement apparatus, mainly the Public Prosecution Service in promptly carrying out the execution of the death row inmates that having complied with the requirements for the refusal of the application of extraordinary legal effort in form of the judicial review and for clemency.

The regulatory renewal by the formation of the implementing regulation that expressly and definitely regulates the waiting period of the capital punishment execution for the death row inmates, should be accompanied by the commitment of the law enforcement institutions related to the waiting period of the capital punishment execution for the death row inmates in accordance with its duty and authority. This is also necessary in order to create an effective implementing regulation on the waiting period of the capital punishment execution for the death row inmates.

The implementing regulation on the waiting period of the capital punishment execution for the death row inmates is one of the ideas on the regulatory renewal of criminal law. The renewal serves as a systematical and comprehensive attempt in preparing a legal order adjusted to the development of society. Accordingly, there is no stiff and shackled law towards society, but it can lead the society's development to the desired direction.

The criminal law renewal is currently very necessary as an effort to reform in the field of law which aims to restore the authority of the law which has been getting worse and worse and unable to provide fair legal certainty due to too many conflicts of interest. The direction of the development of criminal law is based on the concept of a legal state that upholds respect and protection of human rights.

Conclusion

The existence of capital punishment in the perspective of the criminal punishment theory is based on frightening or deterrent aspects that aim to protect the public. The existence of capital punishment is expected to create a deterrent effect to other people who have and or will commit crimes that are threatened with capital punishment so that the frightening or deterrent aspects of capital punishment can protect the public.

Laws and regulations relating to the execution of capital punishment do not explicitly and definitively regulate the waiting period for executions including the implementing regulations. The absence of this implementing regulation resulted in the Public Prosecution Service issuing a policy in the form of an Execution Order from the Attorney General to prioritize the execution of death row inmates in narcotics and murder cases.

This disparity of the waiting periods for narcotics and murder cases is contrary to Human Rights guaranteed by Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution. As a country that adheres to the concept of the state of law, the process of law enforcement in the execution by the Public Prosecution Service should be based on the principle of respect and protection of the fundamental rights of death row inmates.

Suggestion

The implementing regulation that clearly and decisively regulates the waiting period for execution of death row inmates is necessary so that there is no more policy from the Public Prosecution Service to prioritize the execution of death row inmates in narcotics cases. The legal consequence is that there is no more disparity in the waiting period for execution of death row inmates in narcotics and murder cases. The stricter and more definite implementing regulations regarding the waiting period for execution for death row inmates will show the commitment of the state. The commitment is shown by the law enforcement apparatus who carry out their duties and authorities

professionally and proportionally in completing the cases which reflect legal certainty, justice, protection, and respect for Human Rights.

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