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Law Enforcement and Human Right
Comparative Study Law Enforcement And Human Right
Between Indonesia & Thailand
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DEATH PENALTY EVALUATED FROM HUMAN RIGHTS PRESPECTIVE

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Abstract

Criminal imprisonment is the most important part of the criminal justice process. The application of death penalty by the state through a court decision means that the state takes the right to live of a convicted person which is a human right that cannot be reduced under any circumstances (non derogable rights). Therefore the application must pay attention to the human rights of the convicted person. This study aims to determine the nature of human rights in the implementation of the death penalty in Indonesia. The research method to complete this thesis includes "library research", the main method that the authors use in collecting data is documentation. While the primary data are in the form of sources of Indonesian Criminal Law in the form of the Criminal Code (Kitab Undang-Undang Hukum Pidana/KUHPP) and in particular some documentation on human rights and legislation outside the Criminal Code (KUHP) applicable in Indonesia. Secondary data are material or references obtained from books, articles, journals and from the internet that are relevant to this problem. The results obtained by the author in conducting this research are: Execution of death penalty invites many pros and cons.

Keywords: Punishment, Death Penalty, Human Rights

INTRODUCTION

Since the death penalty was enforced in Indonesia, there have been 134 death row inmates, but until now only 22 death row inmates have been executed, so there are still 112 more waiting to be executed. Of the 22 death row inmates who have been executed, there are six convicted narcotics cases. In terms of criminal convictions, judges have great freedom because of the Law Number 48 of 2009 concerning Judicial Power. According to Article 1 point 1 of the Law Number 48 Year 2009 the power of the judiciary is the power of an independent state to administer justice in order to enforce law and justice based on the Pancasila and the 1945 Constitution of the Republic of Indonesia, for the sake of the implementation of the Republic of Indonesia.

Criminal death comes from two syllables, criminal and death. Criminal comes from the word straf (Dutch), often referred to as punishment. The term criminal is more appropriate than the term sentence because the law is commonly a translation of recht. It can be said that the term *criminal* in the narrow sense is related to criminal law. Criminal is defined as a suffering that is deliberately inflicted / given by the state to a person or several people as a result of the law (sanctions) for him for his actions that have violated the prohibition of criminal law. In particular, this prohibition in criminal law is called a criminal act (strafbaar feit).

Death penalty at Indonesia is regulated in article 10 of the Penal Code in conjunction with article 11. Death penalty is one of the main crimes that is still maintained by the Indonesian Criminal Law. Article 10 which contains two types of punishment, namely the main sentence and additional punishment. The basic sentences consist of: Death, imprisonment, imprisonment and fines. Additional sentences consist of: Revocation of certain rights, confiscation of certain goods and announcement of the judge's decision.

Article 11 of the Criminal Code which reads: "Death penalty is carried out by the executioner in the place of a hanger by strapping a rope tied to the gallows on the neck of the convicted person then dropping the board where the convicted person stands." While the procedures for carrying out the death penalty are regulated in Law No. 2 / PnPs / 1964 which is still valid today.

Death penalty can be said to be one of the oldest criminal offenses, in addition to criminal damages (fines) and physical crimes (flogged, limbs cut off, and stamped burnt). This form of Death penalty has been known throughout the world although since the beginning of the 20th century many countries abolished it. There are also countries that do not abolish the death penalty, but have never implemented it, for example the abolition of the death penalty by de facto in Belgium. There are also countries that try

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to limit the application of death penalty by introducing a death sentence that is postponed, such as China. In general, developed countries, such as the Netherlands, Germany, Italy, Portugal, Austria, Switzerland, and developing countries, such as Indonesia, Malaysia, Singapore, Thailand, the Philippines, Pakistan, China, and Vietnam, still maintain it. (Yon, 2012)

The beginning of the existence of the death penalty in Indonesia is legally historically regulated in the Criminal Code, which is mostly from the Netherlands, namely WvS (Wetboek van Strafrecht). Although originating from the Netherlands, in its development and application in the Netherlands and Indonesia is very different. In the Netherlands, the death penalty has been abolished, even since 1870, except in a state of war. (Satochid, 1980). Meanwhile, Indonesia still recognizes and maintains the existence of the death penalty in several laws.

Pancasila is the philosophy or ideology of the Indonesian people. Pancasila contains fundamental values and is a basic characteristic of the Indonesian nation. In law, Pancasila is the source of all sources of law. Therefore, every legal product must adjust to Pancasila. In the Pancasila state, an understanding of human rights is seen as important according to what is stated in the second precepts, namely "just and civilized humanity" by placing human beings by their nature and dignity. The Indonesian state recognizes and upholds human rights and basic human freedoms as rights that are inherently inherent and cannot be separated from humans that must be protected, respected and upheld in order to improve human dignity, welfare, happiness, intelligence and justice.

INDONESIA AND HUMAN RIGHTS PROTECTION

Then confirmed again in a separate chapter that discusses human rights, namely in Chapter XA on Human Rights. Chapter XA contains 10 Articles concerning human rights. In Article 28I paragraph (4) of the 1945 Constitution the second amendment explains: The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law is retroactive is a human right that cannot be reduced under any circumstances.

Article 28A and Article 28I of the 1945 Constitution the second amendment is a human rights regulation relating to the issue that the author raises. Both Articles have the same purpose, but the difference is Article 28A of the 1945 Constitution. The second amendment only regulates the right to life of a person without information about the binding force of the article but Article 28I of the 1945 Constitution confirms human rights with the statement "cannot be reduced under any circumstances". Either in normal circumstances (not in a state of dispute, not in a state of war, or not in an emergency) or in an abnormal state (in a state of armed dispute, in a state of war, or in an emergency) the right to life cannot be reduced by the State, Government and society. The right to life is non derogable human right, meaning that the right to life of a person cannot be accompanied under any circumstances, in an emergency or there is a reason regulated in a statutory regulation, for example committing a crime that is threatened with Death penalty.

However, the human rights provisions contained in the 1945 Constitution do not appear to be in line with the facts, because the death penalty is still enforced in Indonesia even though the Netherlands itself is not enforcing it. Thus there seems to be a conflict between human rights provisions and the implementation of the death penalty in Indonesia. Therefore, the authors are interested in making research with the title of Death Penalty Viewed From the Perspective of Human Rights The problem that I want to discuss is how is the nature of human rights in the implementation of the death penalty in Indonesia

The research conducted is normative legal research, by examining library materials which are secondary data. In this case normative legal research is research conducted or focused on positive legal norms in the form of laws and regulations. Data collection is carried out by means of literature study, namely by collecting and studying data obtained from library materials and understanding books, literature, journals, and legislation relating to research problems. The data analysis method used is a process in arranging data sequences, organizing them in patterns, categories and unitary basic descriptions. Data obtained through the study of documents will be analyzed qualitatively then presented descriptively, namely by describing, explaining and describing the judges' considerations in making decisions.

RESULTS AND DISCUSSION

Although the right to life is protected by a constitution that is imbued with human values in Pancasila, to date the Indonesian legal system still applies the death penalty in its criminal system. According to the opinion of the writer is contradictory to the concept of humanity in the values of Pancasila. If examined more deeply in accordance with the provisions of human rights documents, there are several articles in human rights documents that do not prohibit the implementation of the death penalty because it is contrary to the right to life of a person. The application of the death penalty is classified as a cruel and inhuman form of punishment, in addition to that the execution violates Article 3 of the Universal Declaration of Human Rights. (Abdul, 2010)

The right to life and protection is contained in the UDHR (Universal Declaration of Human Rights) Article 3 of the Universal Declaration of Human Rights, which reads:

"Every person has the right to a person's life, independence and safety." This guarantee is also reinforced by Article 6 paragraph 1 and Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and at the same time strengthened by the Optional Protocol . Second (Second Optional Protocol) of the International Covenant on Civil and Political Rights in 1989 concerning the Elimination of the Death Penalty.

Article 6 of the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights (ICCPR)) states that the right to life must be protected by law and these rights must not be treated arbitrarily. Article 6 of the International Covenant on Civil and Political Rights, and the American Convention on Human Rights (American Convention on Human Rights) which contains provisions concerning the right to life, the article contains provisions relating to the right to life and the death penalty.

The provisions of the ICCPR relating to non-derogable rights are very relevant to be used as a reference in interpreting the phrase "Human rights that cannot be reduced under any circumstances" contained in Article 28 Paragraph (1) of the 1945 Constitution. Therefore, the implementation of the death penalty in Indonesia has violated the articles in the human rights instruments that the author pointed out above, where people sentenced to death have been deprived of their lives, independence, and personal safety. However, the execution of death penalty is a punishment that violates the right to live for humans as God's creatures. This can be seen by a lot of convicts who have been sentenced to death, including corruptors in China, Saddam Hussein in Iraq, or others.

But as is the case in Rwanda and Yugoslavia, perpetrators of human rights violations were only rewarded with a maximum sentence of life imprisonment, because the death sentence in modern times began to be abandoned by countries in the world, although there are still some countries that still apply it as in Indonesia. The International Covenant on Civil and Political Rights (ICCPR) aims to strengthen the basic human rights in the civil and political fields listed in the Universal Declaration of Human Rights so that they become binding conditions the law and its elaboration include other related subjects. Indonesia also adheres to the theory of monism, in order to realize world order. The theory of monism is based on the idea that national law and international law are a unified legal system. So, if a country has ratified and become a party to an international agreement to protect human rights, then that international agreement will automatically become its national law. (Mocinar, 2003)

Thus, the right to life includes rights that cannot be reduced under any circumstances (non derogable rights) even in emergencies that endanger the life of the nation. Global facts state that more than 170 countries in the world have committed to abolition.

This fact is followed by a number of countries in the Asia Pacific region, Africa and Latin America such as Madagascar, Mongolia, Fiji, Nauru, the Democratic Republic of Congo and Suriname to change their legal policy affiliation by being involved as a state of abolition of the death penalty. A positive trend is also present in the United States when 19 (nineteen) states have decided to move away from the practice of executions and it is certain this trend will continue. However, in the midst of progressive trends, the practice of death penalty is still often used as an instant solution for many state policy makers to face the complexities and changes in the character of global security politics. (Manfred, 2005)

The abolition of the death penalty in the Netherlands is not followed by Indonesia because of several considerations, as stated by Satochid Kartanegara, namely:

1. Indonesia consists of various ethnic groups. In the colonial period, with the population consisting of various tribes, it is very easy to cause various conflicts between tribes. To avoid conflicts and their consequences, the death penalty is considered necessary to maintain.

2. Indonesia consisted of a large number of islands and at that time the colonial government apparatus was imperfect, in addition to the inter-island transportation facilities which were also imperfect.
3. Apart from reasons related to geographical circumstances, some experts argue that the colonial region needs absolute power to maintain public order, so that it can be accounted for.

There are two regulations governing the death penalty, namely Article 11 of the Criminal Code which regulates the death penalty by hanging the guilty person and one regulation enacted by the Japanese government, which requires the death penalty to be carried out with gunfire.

DEATH PENALTY IN THE CONTEXT OF LAW IN INDONESIA

Once the size of the community's expectations of law enforcement in this reform era, it becomes a dilemma on one side that people want law certainty to be upheld consistently and consistently, but on the other hand there are also those that prioritize justice rather than legal certainty because they think something that is fair and good is above legal certainty (*aequum et bonum est lex legum*). Basically the law functions to protect human interests both individual and collective. The large number of people and the diversity of their interests is not impossible to cause a shift between one another. Therefore it is necessary to protect these interests for a better life. Protection can be done by establishing a rule or rule accompanied by sanctions that are binding and coercive.

The rule of law must be seriously believed to protect human interests that will apply in society as a guide on how humans should act both as individuals and groups. The community must realize that this is worth doing. Awareness from the community will be appropriate or inappropriate carried out in this community gives authority to the rule of law so that the law is obeyed. Without that authority the law will not be obeyed.

The death penalties listed in article 10 of the Criminal Code consist of principal and additional crimes. Death punishment, imprisonment, confinement, and fines are included in the main crime. Whereas additional crimes consist of revocation of certain rights, confiscation of certain items, and announcement of a judge's decision. Acts or criminal acts that are threatened with the death penalty in the Criminal Code, among others (Yon, 2012):

- 1.) Plots by killing the head of state. Article 104 mentions treason with the intention of killing the president or vice president or with the intention of depriving them of their independence or rendering them incapable of governing, threatened with death penalty or life imprisonment or imprisonment for a specified period of time, a maximum of twenty years.
- 2.) Inviting / inciting other countries to attack Indonesia (Article 111 paragraph 2).
- 3.) Protect or help the enemy who fights against Indonesia (Article 124 paragraph 3).
- 4.) Kill the head of a friendly state (Article 140 paragraph 3).
- 5.) Homicide is planned in advance (Article 140 paragraph 3 and Article 340).
- 6.) Burglary by violence by two or more friends at night by damaging the house which results in severe injury or death (Article 365 paragraph 4).
- 7.) Piracy at sea, by the sea, by the beach, at the river so that someone dies (Article 444).
- 8.) Encourage workers' revolt or riots against state defense companies in time of war (Article 124 bis).
- 9.) During the war committed fraud in the supply of goods needed by the army (Article 124 bis).
- 10.) Extortion with violence (Article 386 paragraph 2).

The basic considerations are (BPHN, 2004):

- a.) The act of treason is deemed to have occurred (completed or perfect) while the criminal threat is still in a commutable 1/3 condition, but in article 104 the Criminal Code actually becomes a death penalty.
- b.) Agreement on criminal sanctions in article 104 is a death penalty, whereas agreement is an act that is still very far from the beginning of the implementation, but the penalty is the same as if it has entered the initial stage of implementation.
- c.) Providing or facilitating the construction of criminal law is also included in the issue of *deelneming* in the assistance section. Penalties for this role are commuted 1/3, whereas the criminal acts stipulated in article 104 of the criminal are the same as those of the perpetrators.
- d.) Finally, the president certainly deserves more treatment than ordinary people. Therefore, article 104 and other articles in the Criminal Code can be legal instruments oriented to the interests of those who are holding power (the government), not the public interest. That is, the crime seems more intended to get rid of political opponents of the ruling party in an effort to maintain power. Did not rule out the possibility of law enforcement becoming an obstacle in a country's democratic life.

DEATH PENALTY IN LEGISLATION OUTSIDE THE CRIMINAL CODE

In addition to the Criminal Code, there are still criminal acts that are threatened with death, namely legislation outside the Criminal Code. These laws and regulations include:

1. Emergency Law No. 12 of 1951 concerning firearms enacted on September 4, 1951 article 1 paragraph 1. It reads: "Whoever, without the right to enter into Indonesia, makes, receives, tries to obtain, surrenders or tries to surrender, control, carry, have supplies to him or own in his possession, storing, transporting, hiding, using or removing from Indonesia a firearm, ammunition or explosives, sentenced to death or life imprisonment or a maximum prison sentence of twenty years".
2. Presidential Decree No. 5 of 1959 concerning the Authority of the Attorney General / Attorney General of the Armed Forces and about aggravating the threat of punishment for criminal acts that endanger the implementation of food and clothing equipment in article 2. This Presidential Decree was promulgated on 27 July 1959 in State Gazette 1959 No. 80
3. Government Regulation in Lieu of Law No. 21 of 1959 concerning aggravating the threat of punishment for economic crimes. Promulgated on November 16, 1959 in Statute Book No. 1959 130.
4. Law No. 4 of 1976 concerning Amendments and Additions to several articles in the Criminal Code related to the expansion of the enactment of the provisions of criminal legislation, aviation crime, and crimes against aviation facilities / infrastructure. Promulgated on April 27, 1976 in Statute Book No. 1976 26.
5. Presidential Decree No. 2 of 1964 concerning Procedures for the Implementation of Death Penalty handed down by the courts in the general court and military environment.
6. Law No. 5 of 1997 concerning Psychotropics. Criminal threats in psychotropic crimes are regulated in Chapter XIV concerning criminal provisions, articles 59 to 72 of Law No. 5 of 1997. Crimes that can be handed down to a defendant, based on general provisions of the Criminal Code are one main criminal and one additional criminal. In article 59 paragraph (1) of Law No. 5 of 1997 these provisions were distorted because two basic crimes could be handed down at once. Criminal imprisonment of a defendant can be in the form of imprisonment and fines. The length of imprisonment is also regulated in the Criminal Code, which is life or temporary. In provisional penalties, the minimum length of imprisonment is 1 day and a maximum of 15 years. While in Law No. 5 of 1997, also stipulates the minimum and maximum length of temporary penalties that can be imposed by a judge. Likewise, the minimum criminal fine.

Regardless of the problems, all the laws that have been made by and for the Indonesian people represented by the government and the Parliament and applied to the Indonesian people themselves show that legal awareness or feelings of justice still require the existence of the death penalty. There is no reason for those who are sentenced to die to say that death penalty is no longer appropriate in the current era of democracy. The existence of the death penalty in the Penal Code of national products can be accounted for when viewed from the perspective of the compiler and the stipulator.

VIEWS ON THE IMPLEMENTATION OF THE DEATH PENALTY AND ITS REASONS

This type of criminal terminates one's life in a hierarchical and substantive way. Article 10 of the Criminal Code puts the death penalty at the top which implicitly indicates that the death penalty is the heaviest of the many basic crimes in the world, and the criminal law system in Indonesia is no exception. The death penalty can be carried out if all the efforts of the defendant's appeal, legal counsel, or heir have been completed, and usually end with the issuance of a pardon. Each country has a different basis for the application of death penalty. In Middle Eastern and North African countries, for example, persistence in defending the death penalty is the result of clear words in Islam, in contrast to liberal parliamentary Western democracies where law is based on a mandate given to elected representatives. Public opinion is often the deciding factor of a decision whether a country will retain, abolish, or reinstate death penalty. Penal policy measures (criminal law policy) without public support will damage people's trust in the law, trigger acts of personal retaliation, and are considered anti-democratic. (Muladi, 2006)

In principle, punishment in Indonesia is not a revenge, but a preventive effort by suppressing the effect of the row (base) of the development of crime itself. While substantively, the death penalty has been regulated in KUHP article 10, but its implementation still refers to the Presidential Decree of the Republic of Indonesia No. 2 of 1964 concerning Procedures for the Implementation of Death Penalty handed down by the courts in the general court and military environment.

Death punishment is one of the oldest criminal types in the world. The holy books say that death penalty can be classified as retribution (*lex salionis*). There's also an adagium that stated "eyes are paid for eyes and teeth are paid for teeth" that is well known. The Torah, the Gospel, and the Qur'an are also familiar with death penalty. In fact, Balinese Hindus recognize the crime of banishment to the sea, such as the disposal of people who have intercourse with animals (Yon, 2012)

In addition, for the same reason, imprisonment in the Criminal Code is more severe than the penalties in the Dutch WvS which entered into force on September 17, 1870. The death sentence is indeed still controversial, otherwise some people still consider that the death penalty is still needed for reasons of fulfilling a sense of justice and preventing similar crimes, while groups who are contrary to the statement, make humanity as the basis of their arguments. (Yon, 2012)

CONCLUSION

Based on historical records, the death penalty has been in effect for centuries. In fact, death penalty is applied in customary criminal sanctions. Criminal death in Indonesia legally, applies since the enactment of Law no. 1 of 1946 concerning Criminal Law Regulations. Until now the Criminal Code still lists the death penalty as one of the main criminal punishment types in addition to imprisonment, confinement, and fines. The pros and cons of the implementation of death penalty in Indonesia has been going on for a long time. The ups and downs are in tune with the legal developments in the land. But surely a person cannot act arbitrarily or freely in the name of human rights because everyone's actions are limited by laws. If someone has violated or disturbed the human rights of another person, then it is obligatory to take responsibility for his actions to achieve just demands in accordance with moral considerations, security, and public order in a democratic society. Every independent and sovereign country has its own limits on human rights and freedom. One of which needs to be applied to the death penalty is drug crimes. Where Narcotics Crimes is one of the extraordinary crimes. Because the effects of losses resulting from this act is very large, which threatens everyone, both children, young people and parents can even damage a generation and the future of a country.

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