

Formulative Policy on Death Penalty as a Form of Criminal Sanctions under the Perspective of Human Rights Protection in Indonesian Framework

Wenly Ronald Jefferson Lolong, Koesno Adi, Masruchin Ruba'i, Muhammad Ridwan

Faculty of Law, Brawijaya University Malang,
INDONESIA.

ABSTRACT

The death penalty is one type of criminal sanctions that continues to be applied in the practice of Indonesian criminal law as a form of responsibility taken by criminal offenders. Along with the idea of human rights protection that is growing globally today, the idea nationally turns out to influence the development of the country's laws. Based on the dynamic conditions of Indonesian society today, it is in fact the death penalty is still considered essential in the fight against crime. However, related to the idea of human rights protection, the death penalty has in fact pushed into a problem of its own when it comes to the enforcement. The issue of human rights violations, especially the right to live, has long been raised related to the issue of the death penalty. Thus, the death penalty needs to be explored under the academic framework in order to find and reconstruct every single substance associated with it to find its real value for the development of law in the future.

Keywords: Crime, death penalty, human rights

INTRODUCTION

The Universal Declaration of Human Rights on December 10, 1948 (UDHR 1948) was a milestone in the history of the universal legal recognition of the importance of the protection of human rights. This declaration succeeded in realizing a new standard about human rights where the intent is not only to clarify what is meant by human rights but rather a noble purpose, that is for the development and improvement of the enforcement of human rights for the sake of human dignity.

At the national level, in line with the changing of the political landscape in Indonesia with the fall of Orde Baru regime in 1998, the law that specifically regulates human rights began to come into existence. Sidang Istimewa MPR in November 1998, for example, produced Decree No. XVII/MPR/1998 on Human Rights and was followed by the issuance of Law No. 39 Year 1999 on Human Rights. The presence of this law has opened up a new condition in which the instrument becomes a milestone to begin a new awareness to promote and implement human rights. In turn, these legal instruments then become a reference for the endorsement of a number of advanced legislation related to the protection of human rights. The Act itself then gives a definition for what is meant by Human Rights.

Law No. 39 Year 1999 on Human Rights Article 1 paragraph 1 explains that "human rights mean a set of rights bestowed by God Almighty in the essence and being of humans as creations of God which must be respected, held in the highest esteem and protected by the state, law, government, and all people in order to protect human dignity and worth".

Amid the positive growing conditions of the statehood with the legitimation of legal instruments that focus on efforts to promote and enforce human rights, then an old problem in the realm of criminal law has come into surface again. The issue is related to the application of the death penalty as one of the types of criminal sanctions in the national legal systems,

more specifically in the criminal justice system; this has led to continuous debate in various aspects of the statehood.

In fact, the death penalty has inflicted pros and cons related to its application. A number of issues appear problematic related to the application of the death penalty in this country's national laws. The first issue raised is the relationship between the death penalty with a right to life. The second issue deals with the fact that the constitution guarantees the right to life in particular Article 28 I, which mentions that the right to life is a right that cannot be seized under any circumstances. The third issue deals with the issue of crime prevention. The fourth issue deals with whether or not the death penalty is in accordance with Pancasila. The fifth issue is related to the history of the death penalty which is a legacy passed by the colonial law; is the kind of punishment still worth to be exercised when Indonesia has become independent? The sixth issue is related to the value of justice—in this case is justice for the perpetrators and the victims, which is relative in nature. The seventh issue is related to ethics and morals. The question arising is about the foundation of ethics and morals to the existence of the death penalty in this country.

The complexity of the issue of capital punishment stems from the spread of evil crime that can hinder the realization of the state purpose of a peaceful life for every citizen. The death penalty in this case becomes an option in tackling crime. However, in fact Indonesia is a country that is based on Pancasila, in which one of its principles deals with the principle of humanity, the concept of human rights, including the right to life. As an option in tackling crime, the question is then whether the death penalty is the best option for Indonesia or whether there is another choice of the type of criminal sanction that is not polemical; this could be argued as the most critical issue under the death penalty frame in Indonesia.

Capital punishment is also problematic globally, emerged as an important issue in the discussion of many parties in an effort to encourage other forms of recognition and respect to human dignity. International Amnesty record states that 95 countries have abolished the death penalty as a form of criminal sanction on all types of crime in the criminal justice system, 9 countries have removed the death penalty for ordinary crimes and have it for exceptional crimes (extraordinary crimes), 35 states no longer carry out further the death penalty in practice yet in theory. Interestingly, in Southeast Asia, the institution records East Timor and the Philippines as countries that no longer have this type of criminal sanction.

Support for abolishing the death penalty comes in the form of international agreements, open for public ratification by countries in the world, some of which may be noted as follows:

1. The Second Optional Protocol to the International Covenant on Civil and Political Rights. Recorded to have been ratified by 63 and 6 countries, signing stage.
2. The Protocol to the American Convention on Human Rights to abolish the death penalty. Recorded been ratified by to have been 8 and 2 countries, signing stage.
3. Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). Recorded to have been ratified by 46 countries and 1 country, signing stage.
4. Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). It has been ratified by 39 and 6 countries, has-been-signing stage.

Nationally, the existence of capital punishment can be found in the draft of Criminal Code, Article 10 letter a. The full read is "Criminal sanctions consist of: a. criminal subject: 1.

capital punishment; 2. imprisonment; 3. light imprisonment; 4. fine; 5. deprivation of certain rights; 6. forfeiture of specific property; and 7. publication of judicial verdict."

While the procedures for capital punishment is regulated through Law No. 2/PNPS/1964 of the Criminal Sanctions Procedure of The death penalty by Courts in General and Military Courts, the execution will be done in which the convict will be shot to death. Article 1 This Law defines it as follows:

"Without prejudice to the provisions of the existing law of criminal sanctions procedure according to the court's decision, then the implementation of the death penalty, which is imposed by the courts in the general court or military tribunal, is conducted by shooting the convict to death, according to the provisions of the following articles."

Currently, the draft on Criminal Code includes the death penalty as one of the types of sanctions. In the Criminal Code Draft, the death penalty is put as basic punishments, yet it is special and will always be treat as an alternative. The death penalty in the draft of the bill is under Article 66, and can be described more as follows "the the death penalty is a punishment that is subjected to be specific and always alternatively threatened." While the detailed explanation of Article 66 states that, "The the death penalty is included in a separate article to show that this type of criminal sanction is really special". The death penalty is the most severe type of sanction and should always be an alternative to life imprisonment or a maximum of twenty-year imprisonment. The death penalty can also be imposed on parole, by providing probation, in which within the probation period, the convicted person can improve himself or herself so that the death penalty does not need to be implemented."

It is interesting to comprehend the concept of capital punishment for the near future as defined in the Criminal Code Bill above. Capital punishment has always opened up to debate in the history of its existence, and this has made the designers of the Criminal Code to compromise to offer a new concept in the penal system of the future. As confirmed by Barda Nawawi Arief, the types of severe punishments like the death penalty and life imprisonment are sustained based on the basic idea and purpose of public protection.

In the development of the death penalty policy, which has been debated by many, a follow-up took place when the request for substantive examination (judicial review) on Act No. 22 Year 1997 on Narcotics related to 1945 Constitution of the Republic of Indonesia to the Constitutional Court; the death penalty clause in act was filed. Glimmer of hope on the abolition of the death penalty in the act and in other laws suddenly was gone when the Constitutional Court ruled that the death penalty does not violate the constitution. It thus becomes clear that with the presence of such decision, there should not be any doubt to impose a death sentence for someone convicted of criminal acts since the act has a death sentence in it.

RESULTS AND DISCUSSION

TAP MPR RI No. XVII/MPR/1998 on Human Rights (hereinafter referred to as TAP MPR on Human Rights), at the section on views and attitudes of the Nation (Indonesia) Against Human Rights, particularly on the description of its foundation explains that Indonesia has its very own views and attitudes regarding human rights sourced from religion, universal moral values, and cultural values of the nation, as well as Pancasila and the 1945 Constitution of the Republic. In the next section, it is stated that Indonesia as a member of the United Nations has a responsibility to respect the Universal Declaration of Human Rights and other various international instruments on human rights.

The positive values forming the basic elements of Indonesian human rights are religion, universal moral values, and cultural values of the nation, as well as Pancasila and the 1945 Constitution of the Republic have made Indonesian human rights different from human rights concepts from other countries, in terms of the source of the view. Religious values, universal moral values, culture, Pancasila, and the 1945 Constitution thus hold a very important position in the search of paradigm of human rights and the implementation in the country. In this regard, comprehensive explanation about the Indonesian human rights paradigm, claimed to be different from other paradigms of the human rights (of other countries), is needed.

The TAP MPR can be said to be so special when it refers to its existence and content background. From the historical view, the TAP MPR should be recognized as the result of severe political struggle of the people that seek protection of the human rights of citizens, that was so constrained during Orde Baru. The substance of Indonesian human rights model can be referred to the TAP MPR. In the sections of this document, some things related to the core elements forming the concept of human rights in Indonesia are explained; the elements are unique in comparison with other concept of human rights.

On the issue of the death penalty in relation to human rights, there is another element more urgent than the human element that has previously been described above, that is the right to life. The right to life is something important to study and is present in a context when the death penalty is executed, that is the loss of human life. The loss of life refers to the removal of the right to life of human beings. Apart from the issue of the appropriateness of the death penalty for human beings, the utmost priority is to justify the removal of the right to life philosophically, which is outlined in the discussion.

In the context of Indonesia, the death penalty is executed in a state law in which the law of this country legalizes the death penalty as a form of punishment for criminals. When the death penalty against offenders is executed, then there will be the question on the right to life of the convicted. Can we ignore this right to life simply because the person had committed crimes? This is what we need to discuss later, especially from the philosophical aspect.

In Aquinas' view of natural law, the right to life does not appear out of nowhere along with the presence of men, but appears as a gift from God Almighty. The existentialist view in comparison, for example, would look the right to life as an absolute human right. Although in reality, there are differences between the cases, but it is not important compared with a review of the right to life itself.

Internationally, in addition to the Universal Declaration of Human Rights in 1948, the right to life and regulations on the death penalty are actually also written in the International Covenant on Civil and Political Rights 1966 (ICCPR). ICCPR has been ratified by Indonesia in 2005 through Law No. 12 Year 2005 on Ratification of the International Covenant on Civil and Political Rights. Article 6 paragraph 1 of ICCPR mentions, "Every human being has the inherent right to life on him. This right shall be protected by law.

Paragraph 4 of the same article explains that "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases." Paragraph 5 of the same article explains that "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." Lastly, paragraph 6 of the same article explains that "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."

In the context of the juridical philosophy, then question on the basic validity of capital punishment in the conception of human rights in Indonesia must be raised. The answer to this question is that the death penalty has a basic enforceability in Indonesia. Taking into account that Pancasila provides freedom open to be interpreted according to the needs, the situation, and the condition of the nation, thus the capital punishment then has the basic validity in Indonesia.

So far, we can conclude that there are at least two points to the relationship between human rights and Pancasila—firstly, Pancasila is the main and fundamental source of human rights in Indonesia, and secondly, Pancasila is the ideal law (*Rechtsidee*) on the implementation of human rights protection in Indonesia. In practical manners, Suko Wiyono elaborates the relationship between the two, in which Pancasila contains human rights components needed to be described more straightforwardly. According to him, if it is examined deeply, it would appear that there is a deep relationship between Pancasila and human rights, in which each *sila* of Pancasila contains the principles of human rights. The relationship can be found in the first *sila*, Sila Ketuhanan Yang Maha Esa, which implies the recognition to God Almighty and at the same time guaranteeing every person to worship Him according to his or her respective beliefs. The state guarantees freedom of each citizen to embrace and worship Him according to his or her religion and belief, respectively. His view is that devotion to God Almighty can be implemented when respect for human rights is recognized in the form of a guarantee of freedom of religion as one of the most important human rights.

According to Maria Farida Indrati, the fundamental norm of the country, which is the highest in the state norm, is a norm that is not formed by a higher norm but is pre-supposed or pre-determined in advance by the people in a country and become the dependent norms underlying other norms. Again, the highest norm itself is not formed by the other norm. Further by Maria Farida Indrati, that Hans Nawiaski views that the content of *staats fundamental noormis* the basis for the formation of the constitution of a country (*staatsverfassung*). The interesting thing, according to Hans Nawiaski, is that the basic norm (*grundnoorm*) which is pre supposed cannot be traced further of the basic enactment and incontrovertible. He explains that Pancasila is a fundamental norm of the state (*staats fundamental noorm*) as well as the ideal of laws, meaning that it is the source, the basis, and the guidelines for 1945 Constitution and other legislations. As the consequence, all norms that exist in this country must be based on Pancasila.

From the socio-juridical dimension, in relation to the existence of the capital punishment in this country, the focus of the discussion deals with the existence of the will of individuals and groups of individuals, communities and community groups in this country to live safely and securely. The will appears on the content of the 1945 Constitution, one of which (especially paragraphs one and two) is that the Indonesia citizens earned their independence after struggling for such long time that they now achieve and realize their dream of united, sovereign, just, and prosperous country. In this context, it can be regarded that something evil may threaten the existence of the ideals and the will of the people. When the death penalty is presented in the criminal justice system of this country, then in a glance it would seem that this sanction is logical and based on strong legal considerations. Considering that the crime rate is so high these present times, and towards the needs of a variety of crime prevention, the death penalty can actually be made public. It can be said that from this point of view that the death penalty has a legitimate basis to be applied in Indonesia.

The current formulation of capital punishment that often becomes public debate should have made us to become more aware of the essence of the presence of laws in this country. It is true that currently there are positive law exercised, but is also an undeniable fact that these

positive laws have been behind the development of the community life now. When the development of global human rights demands that human rights be put forward on each country's policy-making in the field of criminal law, not to mention Indonesian criminal law, the we are supposed to adjust to this condition.

Indonesian criminal law cannot close its eyes to the possibilities of adjustment to the needs of the community. Criminal law should instead be responsive to every movement of the development of people's lives. In fact, when the present international legal instruments encourage states parties to immediately remove the death penalty, then this should be a serious concern for Indonesian criminal law. However, on the other hand, it cannot be denied that the development of crime is extremely dangerous to human existence and the state itself. Indonesia is not immune from this danger. Crime does require a multi-aspect approach to solve; however, what are central to overcome crime is the criminal law itself and its system of sanctions therein. Criminal sanctions would be able to produce good quality condition for the life of the community.

The option for Indonesia to continue delivering the death penalty in criminal law today and in the future will be seen as a form of punishment for criminals, and this is a much-unfounded decision. From the sociological aspects, the death penalty is necessary, given the needs of the community to defeat crime. Crime which is growing and expanding demands tougher sanction systems; and in this context, the death penalty is considered important.

In another aspect, of as a sovereign state, the country does have the power and authority to regulate and organize its life. However, what should be noted here is that in implementing the power and the authority, there are restrictions seen from the perspective of criminal law through the presence of the basic idea of punishment itself—whereas the basic idea of punishment continues to undergo transformation from time to time. Many changes in values accompany the presence of the idea of punishment.

CONCLUSION

Based on the description above, it can be concluded that the existence of the death penalty is still very important and needed in the fight against crime in Indonesia. The retention of capital punishment in the midst of national criminal law issues-of its existence as a form of violation of human rights (human rights)-is actually not so much true. The death penalty is there; it continues to exist based on the philosophical grounds for the protection of human rights itself. Pancasila, the 1945 Constitution, and the Law No. 39 Year 1999 has made the form of human rights and its implementation model in Indonesia so unique and have its own characteristics. It can be said that Indonesian human rights in fact have different characteristics from the concept of international human rights. In an effort to present the national criminal law in humanistic, independent, and just criminal sanctions system, that is in harmony with the national identity, the concept of punishment in the future must be based on the values of human rights by taking into account the concept of the protection of human rights of Indonesia, Pancasila as Indonesian concept of natural law, as well as the concept of balanced public protection and the protection of individuals.

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