

Death Sentencing on Perspective Law and Human Rights

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ABSTRACT

The issue of the application of capital punishment has become a circle by lawyers and human rights actors, both at the international level and in Indonesia itself until the implementation of the death penalty has led to the pro (the parties agree) and the counter (the party that leads). Although the death penalty is still enforced in the current regulation in Indonesia, to respond to the pros and cons of saying, later in the 2004 National Criminal Code Rules of Criminal Law, sex is no longer in the central prison. The criminal amendment may turn into a life-long parent and imprisonment for 20 years. Responding to the policy of the State of Indonesia in the context of the application of capital punishment, in the National Criminal Code Act of 2004. So it should be that the ASEAN countries follow the steps of the Indonesian State policy.

Keywords: *Death Sentencing, Law, Human Rights*

1. INTRODUCTION

Crime is always happened [1][2]. In the era of Constitutio Criminalis Carolina in the XVII and XVIII centuries, the threat of capital punishment began to be limited, and the cruel execution was reduced. This is due to criticism from the opponents, such as Cesare Beccaria in his article entitled "Dei delitti e delle pene," mentioning that capital punishment cannot prevent crime and even it is a numbness [3].

Indonesia still enforces capital punishment based on the applicable law which is Criminal Code, wherein Article 10 of Criminal Code mentioned criminal type, that is principal punishment consists of capital punishment, imprisonment and fine penalty.

Although the death penalty is still in force today, in its development, there have been policy changes in some countries in the world. There are 134 countries have abolished capital punishment, more than ten countries have only followed the policy since 2003 [4]. In the United States, as many as 12 states have banned capital punishment, and in 2004 New York state states the death penalty violates the Constitution [5].

Noting the number of countries in the world that have eliminated capital punishment, including the Netherlands, where the Indonesian Criminal Code is derived from the Dutch Criminal Code, Indonesia should also abolish capital punishment.

The issuance of capital punishment from the main criminal composition and serve as a special/exceptional crime based on the following considerations (principal): judging from the purpose of punishment, capital punishment is not

essentially the main means to regulate, discipline and improve the individual/society. Capital punishment is only the last means/exceptions. This can be identified as "amputation/surgery" in the medical field, which is not essentially the main ingredient/drug, but only an exclusionary effort as the last means/drug. Therefore, it is affirmed in the Concept (Article 20/2000, Article 84/2004) that "Capital punishment is alternatively dropped as the last resort to protect the community." This provision is also motivated by the results of research as stated above, that most respondents (56.63%) stated that the necessity of capital punishment is maintained as "the last means of protecting people from sadistic criminals and difficult to repair again [6].

2. THEORIES

2.1 Purpose of Crime

Criminalization according to Prof. Sudarto is synonymous with the words of punishment, where he declares that this punishment comes from the basic word of the law, so it can be interpreted as establishing the law or deciding about the law. Establishing the law for an event does not only concern the field of criminal law, but also civil law. So the punishment in a criminal case, often synonymous with criminal prosecution or granting or punishment by the Judge, the punishment, in this case, has the same meaning as *senrende* or *veroor deling* [7].

While R. Soesilo [8] which is contained in the *memorie van toeliching* of the Criminal Code mentioned:

1. The meaning of punishment is: "An unhappy feeling (miserable) imposed by the Judge by a verdict to a person who has violated the criminal law.

2. According to philosophy, the purpose of punishment is to some extent depending on which angle the matter is reviewed, for example:

- German poet E. Kant says punishment is a retaliation based on the old adage: "who kills to be killed". That opinion is called "Theory of retaliation (Vergeldings - theories)".
- Feurbach poet argues that punishment must be able to fear people not to do evil, this theorist is called "afraid theories (afchrikking - theories)". Other poets are of the opinion that this punishment also intends to correct those who have committed crimes. This theory is commonly called "Theorie fix" (verbeternigs - theories).
- Another poet is of the opinion that the punishment also aims to correct those who have committed evil. Theorie is commonly called "Theorie fix" (verbeterings theories).
- Apart from that there are poets who claim that the basis of the punishment is retaliation, but other intentions (prevention, fear, defending, the order of common life fixing those who have done) should not be ignored, they adhered to the theory commonly called "combined theories".

In the opinion of Wiyono, Prajodikoro, that the purpose of the criminal law is to sense justice. In addition, some law scholars have expressed the purpose of criminal law, such as:

1. To frighten people not to commit crimes, either scaring the people (general prevention) or frightening certain people who have run the crime so that in the future do not do again (special prevention).
2. To educate or improve people who have planned to commit crimes, in order to be good people nature, so beneficial to the community.
3. To prevent the commission of criminal acts for the protection of the state of society and the population.
4. To compare the criminal Insyaf and become a good and useful member of society.
5. To remove the stains caused by the crime [9].

2.2 Pros and Cons Death Sentencing

Observing from several responses to the imposition of capital punishment, there have been two conflicting and contradictory significant groups in which there is a group of Pro (approving capital punishment) and counter-

groups (rejecting capital punishment), with each argumentation respectively.

The Pro group argues:

- The traditional belief and sentiment stance says that "the conscience of justice in man" requires that the murderer should remove his own life or the man has no right to take his life. But the conscience of justice in humans varies, because the world is now divided firmly between those who have abolished and still retained.
- A utilitarian or empirical standpoint holds that the death penalty gives certain and prominent effects. This flow is primarily the belief that the death penalty has the unique power of preventing people from doing evil.
- Based on religious beliefs, where Islam justifies the execution of the death penalty, the so-called "Qishaas." Qur'an in Surat Al-Baqarah 178 and 179 mentions, the translation is: "You who believe, are required of you qishaas about the slain; the free man with the free; a servant with a slave; women with women. Then whoever gets forgiveness from a brother is killed, let (the forgiving) follow in a good way and let (the forgiven) pay the diyah to the forgiving party in good (also) way ". That is a leniency that your God has hinted at, while for you is to be mercy too. Whoever breaks afterward will gain a painful punishment. Qishaas in Islamic law is a slay to be executed against a person who has committed murder.
- The right and freedom to guarantee the recognition and respect or the rights and freedoms of others and fulfill fair demands by the moral, security and public order considerations. In society, this proves that the death penalty as a punishment policy does not lose institutional legitimation, and explicitly the Constitution 1945 imbue the existence of capital punishment described in various laws such as the Criminal Code, Narcotics/Psychotropic Act, Human Rights Court Act, Tipikot Law and its sanctions.

The Cons group argues:

- The type of death sentence outlined in the Criminal Code is no longer relevant, since the current Criminal Code is a product made in Dutch colonial, while in the Netherlands the death penalty has been abolished, while the amended constitution (amended 1945) is based on the spirit of global civilization. How could the nation still follow the colonial spirit? On the other hand, we have a constitution that respects life.
- There is no evidence that capital punishment is better able to prevent or protect people

than life imprisonment. The wrong judge's decision will execute an innocent defendant. It is absolutely intolerable that sterilization will prevent effective procreation.

- The death penalty is contrary to the Constitution of the Republic of Indonesia, where the 1945 Constitution of the amendment result stated in Article 28 A states: "Everyone has the right to live and have the right to survive and live" so that all applicable laws should not be contradictory to the 1945 Constitution. In the Constitution 39 of 1999 on Human Rights explicitly states that: "Human Rights is a set of rights inherent in the nature and existence of human beings as creatures of God Almighty and is a gift that must be respected, upheld and protected by the state, law and government, and every people for the sake of honor and protection of human dignity" as well as Law no. 5 of 1998 on the ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment against torture and other cruel, inhuman or degrading treatment or cruel punishment.
- The United Nations review of the death penalty and murder rate between 1988 and 2002 concluded that the death penalty had no effect on the crime rate, so there is no scientific evidence that the death penalty reduces the crime [10].
- The purpose of punishment is to educate and improve oneself and to make the deterrent, thus the execution of the death penalty means to make the guilty person unable to be given another chance to repair or repent, so that the execution is very contrary to the purpose of conviction, let alone in practice the execution of punishment death is imposed very long and protracted after the convict languished in prison.
- In the international provisions on Human Rights as stated in the Universal Declaration of Human Rights and the Convention on Civil and Political Rights, the right to life. In 1989, members of the United Nations ruled that "the abolition of the death penalty makes human dignity and human development progressively gradual." The second protocol aims to abolish the death penalty for ordinary crimes. On this matter, the envoys of EU countries urged the Indonesian state to abolish the death penalty; it was conveyed during a meeting with Vice President of Indonesia Yusuf Kalla, Tuesday, July, 4th 2006 at the vice presidential office Jl. Medan Merdeka Selatan - Jakarta (Medan Business Daily, 5 July 2006).

- Capital punishment is not the best way to reduce crime, but it makes the state as a lifting (judge and executioner) whereas the right to deprive people's lives is an absolute right of the God.

3. RESULT AND DISCUSSION

The procedure for the execution of capital punishment within the scope of the general court is provided for in Articles 2 through Article 16 of Law Number 2 PNPS 1964, dated 27 April 1964, subject to the following provisions:

1. Within a period of three times twenty-four hours before the time when the death penalty is carried out, the High Prosecutor or the Attorney concerned shall notify the Terpidana of the death penalty. If the Terpidana wishes to express something, then the information or message is received by the Prosecutor or the Attorney
2. If the Accused is a woman who is pregnant, then the execution of capital punishment shall be postponed until the child is born
3. The place of execution of capital punishment shall be determined by the Minister of Justice, namely in the jurisdiction of the Court of First Instance that has determined the death penalty in question.
4. The Chief of Police of the concerned area shall be responsible for the execution of the death penalty after hearing the advice of the High Prosecutor or the Prosecutor who has filed the capital punishment in the first instance
5. The execution of capital punishment was carried out by a police squad team under the command of a police officer
6. The Chief of Police of the area concerned (or appointed officer) shall attend the execution of the death penalty, while the defendant of the convicted on his request or at the request of the Terpidana may attend.
7. The execution of the capital punishment shall not be done in public.
8. The burial of the corpse The criminal shall be handed over to the family or friends of the Convicted, and shall be prevented from performing any demonstrative burial, except in the public interest of the High Prosecutor or the attorney concerned to determine otherwise.
9. After the execution of the death penalty has been completed, the attorney general or the attorney concerned shall make an official report on the execution of the death penalty, in which the contents of the proceeding shall then be included in the Decision Letter of the Court concerned.

From some of the arguments given about the execution of capital punishment, either from the pros group (approving the death penalty) or from the cons group (rejecting capital punishment) can be analyzed as follows:

1. Although Islam confirms the existence of the death penalty, "Qishaas", many narrations illustrate the rarity of punishment in the era of the Prophet and Khalifaaurasyidin, as an indication that punishment is not a favorite for the rulers of the time. A profound philosophical review of punishment in Islam, the law of something to be done and hence the mere identity of the puppet from the face of Islamic law. In Islam, the death penalty is the very last resort and is in the final sequence of alternative punishment to be handed down to the person who will commit the premeditated murder, while for the semi-deliberate slayer (sibh al'and) and unintentionally (ghair al'and) Islam not punishes Qishaas to them. It can be concluded that the main role of Islam is that the death penalty as part of Qishaas' law is the most important thing to avoid. How to avoid it is Islam gives the highest esteem to the person who can give forgiveness to the Prisoner dies and frees from the demands of Diyat (Faisar Ananda arief's paper, entitled "Death Penalty in Islamic Law Perspective).
2. Applying the death penalty for the offender does not make the crime rate less, as the result of the United Nations (UN) study and how much punishment does not absolute will change the behavior of a criminal. A full story of satire ever disclosed J.E. Sahetapy tells us that when the crowd watches the hanging of pickpockets, the other pickpockets are not afraid, they are fondling witnesses who are eager to enjoy the deaths of the Accused. Another story of an 18th century criminal justice in England, when dropping the death penalty against a horse thief, lancing before the Court: "You (a horse thief) will be hanged as a punishment for theft, not for stealing a horse, but in order the future, the horses are not stolen anymore ", but what happens then? Horses have remained stolen until now. Even now the "horse" changed in the form of "luxury car." "BLBI fund," "Illegal Logging / Fishing" or "sugar smuggling" and so on [11].
3. Judicial sentencing by a Judge in a criminal case still needs to be debated. It can be seen with the process of law enforcement so far, which has not shown transparency, accountable and responsible. In the history of law enforcement ever recorded black sheets against the judgment of misguided judiciary in Indonesia, where the Judge has been wrong and mistaken in giving punishment to 2 (two) defendants, "SENGKON and KARTA." Sengkon and Karta have been sentenced for 12 years and 17 years respectively (Decision of Bekasi District Court No. 2 / Kts / Bks / 1997 dated October 22, 1997) and the decision of Bekasi District Court is also confirmed by Bandung High Court, May 1998 with Number: 38/1978 / Pid / PT.Bandung. On the verdict of PT. Bandung, Sengkon, and Karta did not propose Cassation's last effort. At the time Sengkon was dying of illness in the Penitentiary Cipinang, a prisoner named "GUNEL" honestly and felt guilty apologizing to Sengkon who had to languish in prison because of an act he did not commit. Based on the decision of the District Court of Bekasi, each with a number: 6/1980 / Pd / PN.Bks dated October 15, 1980, and Number 7/1980 / Pid / PN.Bks dated November 13, 1980, Gunel and his comrades were punishment for being found guilty of committing a crime against the victim, as previously alleged to Sengkon and Karta. Finally, the Supreme Court of the Republic of Indonesia with its verdict Number: 6 / PK / Kr / 1980, Sengkon and Karta's appeal for Judicial Review was accepted by relieving both of them (paper Ikhwaluddin Simatupang and Irham Buana Nst, entitled: "Two-way Legal Break Through of PK and the Emergence of Human Rights Protection").
4. In the practice of the execution of capital punishment, the execution is carried out too long. Some of the death rows have also felt the death penalty. For example, Ayodhya Prasad Chaubey (66), an Indian citizen, arrested on February 22, 1994, had 12.19 kg of Heroin. In the Decision of the Medan District Court Number: 544 / Pid.B / 1994 / PN.Mdn, dated September 8, 1994, has been sentenced to the death sentence and also confirmed by the decision of Medan High Court, Number 159 / Pid / 1994 / PT. Mdn, dated December 14, 1994, in which the decision of the Supreme Court of the Republic of Indonesia also confirmed these two decisions. Other efforts such as review and clemency remain rejected, which in the end on 5 August 2004 Ayodhya Prasad Chaubay was executed and buried in the Muslim City of Medan. It can be observed that Ayodhya Prasad Chaubay has experienced two types of punishment simultaneously, prison sentence (has been sentenced to 10 years) and the death penalty, and while in the Prison Correctional Institution Ayodhya Prasad Chaubay has

been awarded for three times as the best Prisoner.

5. The International Covenant on Civil and Political Rights convened in 1966 stated that the right to life is a fundamental right and cannot be violated under any circumstances where it encourages the abolition of the death penalty. The second optional protocol of the International Covenant on Civil and Political Rights, aimed at the abolition of the death penalty. This can be seen in the provisions of Article 1 Paragraph (1), which reads: "No one in the power of the participating countries of this Protocol shall be liable to death", and Paragraph (2) reads: "Every the participating countries shall use all the necessary measures to eliminate the death penalty under its control." Bachr [12] says that the death penalty is the cruelest, inhuman and degrading punishment for human rights violations, Facts of Human Rights, No.9 / Yr.I / 2000). According to Dr. Paul Budi Kleden, SUD in the article entitled "death penalty and human rights" states that respect for human rights can only be enforced if the community is consistent with this attitude (still respecting the human dignity that has done a lot of damage). It also when dealing with perpetrators of human rights violations based on the principle that the state does not grant rights and therefore can not also be repealed by the state. Besides the fact that the state and society have no right to deprive someone's right to life, including a human rights violator, the attitude of rejecting the death penalty can encourage a culture of life that prioritizes and upholds the attitude of respecting the nobility of the dignity as a whole. People and countries become promoters of human rights enforcement if the state and society dare to abolish capital punishment, to reject the death penalty is proof of the awareness of the nobility of human dignity and will encourage the implementation of consciousness.
6. The existence of opinions that the application of capital punishment is essential to be applied primarily to the corruptors as well as the narcotics/psychotropic dealers. The practice of corruption has destroyed the country in the field of economy and drugs/psychotropic. It will eliminate the generation of the nation, It is unfounded and unwarranted, because until now the practice of corruption still running, as well as drug/psychotropic cases increasingly widespread, even in Indonesia has been encountered the largest ecstasy factory.

4. CONCLUSION

From the opinion of legal experts and human rights activists, and viewed from the study of law and human rights, the Republic of Indonesia should immediately to abolish the death penalty and welcome the National Criminal Code Bill. The most severe crime is life imprisonment or 20 years imprisonment, and ASEAN countries should follow the abolition of capital punishment.

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