

Death Crime Regulation As A Formal Legal Concept In Justice In Indonesia

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ABSTRACT

Sentences of death penalty by judges in the norms of Indonesian criminal justice law are still the pattern of punishment in several specific criminal act laws such as terrorism, corruption, narcotics, psychotropics and human rights justice the death penalty is still regulated, as well as in the Constitution Criminal law in Indonesia the death penalty is still applied. There are groups that disagree with the conception and application of the death penalty, arguing that killing is not a solution, it is not within the authority of humans to revoke it. This study used a normative method to produce the fact that the law must regulate capital punishment under certain conditions from a humanitarian point of view, as well as answering the conflict between groups who wish to abolish capital punishment and groups who wish to continue to apply capital punishment. Conditional capital punishment is needed as a middle way between these two conflicting opinions. Conditional death sentences are also needed as an evaluative process for convicts in serving their sentence and the right to life as a human being in accordance with national and international humanitarian perspectives.

Keywords: Death Penalty, Legal Concept

Abstrak

Vonis hukuman mati oleh hakim dalam dalam norma hukum peradilan pidana Indonesia masih tetap menjadi pola menghukum dalam beberapa undang-undang tindak pidana khusus seperti terorisme, korupsi, narkoba, psikotropika dan peradilan hak asasi manusia pidana mati masih diatur, begitu juga didalam Kitab Undang-Undang Hukum Pidana di Indonesia pidana mati masih tetap diterapkan. Adanya kelompok yang tidak setuju dengan konsepsi dan aplikasi pidana mati ini berdalih bahwa membunuh bukan solusi, bukan menjadi kewenangan manusia untuk mencabutnya. Penelitian ini menggunakan metode normatif menghasilkan fakta bahwa hukum harus mengatur tenang pidana mati dengan syarat tertentu dalam pandangan kemanusiaan, serta menjawab pertentangan antara golongan yang ingin menghapus pidana mati dan golongan yang ingin tetap menerapkan pidana mati. Pidana mati bersyarat diperlukan sebagai jalan tengah antara dua pendapat yang saling bertentangan tersebut. Pidana mati bersyarat juga diperlukan sebagai proses evaluatif narapidana dalam menjalani hukuman dan hak hidup sebagai asasi manusia sesuai dengan wawasan kemanusiaan nasional dan internasional.

Kata kunci : Pidana Mati, Konsep Hukum

A. Introduction

The imposition of death penalty in Indonesia is still divided into two pro and contra groups, the retentionist group or those who agree that they still maintain the application of death penalty with arguments and the basis of criminal progress with the modus operandi and classification of extra ordinary crimes. Meanwhile, the anti-capital punishment group (abolitionist group) under the pretext and the basis of humanitarian philosophical and theological reasons on the basis of taking refuge behind the justification of human rights.

The form of general criminal offenses in Indonesia that until now have been most prosecuted with the death penalty are cases of premeditated murder (Article 340 of the Criminal Code) where the actions were preceded, followed and accompanied by violence (in accordance with the fulfillment of the elements of Article 89 of the Criminal Code), or accompanying criminal acts such as robbery mode. , severe abuse, mutilation, rape and so on.

The development of crimes committed by combining the currents of globalization, the development of advanced science and technology, such as the flow of advances in information and technology, such modes correlate with supporting unconventional crime facilities and are classified as extra ordinary crimes, and are even classified as crimes against humanity and are carried out covertly (hidden crimes). Forms of crime that fall under the criteria of extraordinary crime and require extraordinary efforts to handle such as the most prominent crimes today are narcotics crimes, not terrorism crimes and corruption crimes. It seems that the perpetrators of the three forms of crime above deserve the death penalty. In fact, the phenomenon of imposing capital punishment in Indonesia for drug and terrorism offenders has been running without a hitch. Except for the accused of corruption, Indonesia has not yet implemented it, even though the regulation is already available in its legislative products, in Article 2 of Law Number 31 of 1999 jo. Law Number 20 of 2001 concerning Eradication of Corruption Crimes.

The promulgation and application of capital punishment for non-criminal offenders is extraordinary in various special criminal laws and regulations using careful justification because capital punishment is still an element of a dilemma. Death penalty executions will be faced with a legal choice between doing or not doing, it remains a policy. Because according to a policy, doing or not doing is still a policy, said Thomas R. Dye's statement. In the sense that the need for criminal law is to protect the interests of society at large from criminal disturbances. The main function of criminal law (*primum remidium*) is to eradicate crime, while still prioritizing the function of the *ultimum remidium* principle. On the other hand,

respecting the most basic rights that each person has as a human being, that from conception to birth and development, the right to live and live is still protected by law, this is in accordance with the essence of the birth of a generation of human rights.

Almost all religions convey a philosophy of life and destiny which believes that birth, death, sustenance and soul mate are determined by God as His creator. Especially the element of death, this is used as the basis for abolitionist groups (opponents) of capital punishment. The retentionist group (agree) considers the death penalty for various things, including as an effort to deal with serious crimes, efforts to frighten prospective fathers to commit crimes that carry a high risk of other people as victims or as social, juridical, economic, political reasons for certain crimes. which are special and very extraordinary, such as terrorism, narcotics, corruption, violence against vulnerable people such as children, women and the elderly, especially crimes against humanity.

So that the imposition of capital punishment remains a conflict between the two pro and contra groups, each of which issued its own justification argument. It is difficult to find common ground between the viewpoints of each, because each also has a mission and goals which are almost all true according to their respective versions, between lawsuits for the sake of law enforcement with justice and certainty, on the other hand for the protection of human life. which cannot be created by humans.

B. Focus of Problem

Oriented from the above phenomena, factually the death penalty still creates problems socially, juridically and politically, such as:

1. How is the concept of capital punishment in criminal justice in Indonesia?
2. What are the considerations for legislators and judges to impose death penalty in criminal justice in Indonesia?

C. Research Metodology

This research belongs to the type of normative legal research or library law research, because this legal research is carried out by examining library research which consists of primary legal materials and is supported by secondary legal materials. Normative legal research

or literature includes:¹ Research on legal principles, legal systematics, vertical and horizontal synchronization, comparative law and legal history.

Legal research is of a normative type, so the types of legal materials that are commonly used are:² Primary Law, such as: the Criminal Code, the Terrorism Law, the Narcotics Law, the Psychotropic Law and the Human Rights Court Law. Secondary legal materials, namely providing explanations regarding primary legal materials and tertiary legal materials, including dictionaries or encyclopedias, journals, magazines, and the internet.

D. Finding and Discussion

1. Crimes that are punishable by death in the Indonesian Positive Law Concept (Ius Constituentum)

The formulative policy used by legislators in determining which actions (crimes) are punishable by death penalty uses a conditional selective approach. Selective means that not all criminal acts are punishable by death penalty, but limited to certain criminal acts, which the legislators view as serious crimes. One concrete example in the Criminal Code, for example, is that murder is punishable by death only for premeditated murder (Article 340 of the Criminal Code), while murders committed without prior planning/ordinary murder (Article 338 of the Criminal Code) are not punishable by death. Based on this policy, criminal acts in the Criminal Code that are punishable by death penalty are limited to:

1. Article 104 of the Criminal Code (treason against the President and Vice President);
2. Article 111 paragraph (2) of the Criminal Code (Persuading a foreign country to be hostile or to war, if the hostilities are carried out or it turns into war);
3. Article 124 paragraph (3) (Assisting the enemy during war, Causing or facilitating or encouraging riots among the armed forces);
4. Article 140 paragraph (3) of the Criminal Code (Treason against the King or Head of State, Head of friendly countries which was planned and resulted in death);
5. Article 340 of the Criminal Code (Premeditated Murder);

¹ Soerjono Soekanto dan Sri Mamudji, 2001, Penelitian Hukum Normatif, Jakarta: PT. Raja Grafindo Persada, hlm. 14.

² Ronny Hamijoyo Soemantri, 1998, Metode Penelitian Hukum dan Jurimetri, Jakarta: Ghalia Indonesia, hlm.11-12

6. Article 365 paragraph (4) of the Criminal Code (Theft with violence resulting in serious injury-or death);
7. Article 444 of the Criminal Code (Piracy at sea, on the coast, and in rivers resulting in death);
8. Article 479 k paragraph (2) of the Criminal Code (Aircraft hijacking);
9. Article 479 o paragraph (2) of the Criminal Code (Committing acts of violence on an airplane, if it results in the destruction of the aircraft or the death of people).

The development of science and technology is followed by trends in crime by utilizing the modus operandi of technological advances such as the field of information technology and communication so that crimes are difficult to track and prove. Several types of criminal acts have not been and are not regulated in the Criminal Code, giving rise to special crimes which are also classified as extraordinary forms of crime.

Because the nature and consequences arising from this type of crime are classified as special and exceptional, have a broad network, are very detrimental to the wider community, are carried out in an organized manner, are seen as enemies of humanity, the victims are without distinction whether men are sinful or not and are classified as serious crimes against humanity, it is very appropriate and appropriate for the perpetrator to be sentenced to death.

As for several types of criminal acts classified as special crimes (outside the Criminal Code) which have been codified in the lex specialist criminal legislation with the inclusion of the death penalty in the formulation of the offense in the *ius constitutum* and *ius operatum* including the following:

- a) Law Number 31 of 1999 which has been amended by Law Number 20 of 2001 concerning the Eradication of Corruption, in Article 2 paragraph (2) it stipulates the death penalty. It is written: "... in certain circumstances, the death penalty can be imposed". (The point is that for the accused of corruption the perpetrators can be sentenced to death).
- b) Law Number 15 of 2003 concerning Eradication of Criminal Acts of Terrorism, stipulated in Article 6 that perpetrators of criminal acts of terrorism can be sentenced to death.

- c) Law Number 5 of 1997 concerning Psychotropics in Article 59 paragraph (2) states, if the perpetrator commits it in an organized manner then he can be sentenced to death.
- d) Law No. 35 of 2009 concerning Narcotics, in Article 113 paragraph (2), Article 114 paragraph (2), Article 116 paragraph (2), Article 118 paragraph (2), Article 119 paragraph (2) and Article 121 paragraph (2), against the actions of the perpetrators listed in the aforementioned articles as formulations of offenses can be sentenced to death.
- e) Law Number 26 of 2000 concerning the Human Rights Court (HAM) for perpetrators of genocide and serious crimes against humanity, the perpetrators of which can be sentenced to death (Articles 36 and 37)

Oriented towards the balance of sentencing objectives and the objectives of the two main targets, the requirement for the holding/use of a criminal penal law according to the Concept also (as a means of "policy starting from criminal balance" and monodualistic "social policy" between the interests of the death penalty is indeed not a means society and individual interests, the main thing (primum remedium) for between subjective factors and regulating, orderly, and objective factors. Therefore the condition for improving society Death penalty also departs from two only is a means of exclusion of pillars which are very fundamental in nature and are subsidiary , meaning that if criminal law, namely "the principle of legality" other means are inadequate (it is a societal principle) then the death penalty is used. According to Barda Nawai Arief "the principle of error/principle of culpability of such thinking (is a principle of humanity). can be identified by means of other words, responsibility is only n criminal exceptions as a means of last resort (ultimum remedium).³

It should also be stated that the protection of the interests of the community, even though the punishment is maintained, the sanctions focus or are oriented towards life imprisonment and death penalty. Nevertheless, according to the concept, it is hoped that the application will be a death penalty sanction, not selective, be careful, because of that in the concept there is a provision regarding the postponement of the execution of capital punishment or conditional capital punishment with a probationary period of 10 years. These provisions are outlined in the concept of capital punishment placed as a special

³ Barda Nawawi Arief, 1984, Teori – Teori dan Kebijakan Pidana, Alumni, Bandung, hlm. 2

punishment, and it is possible to postpone the implementation of capital punishment/conditional capital punishment. This is in accordance with Australia's proposal at the VIIth UN Congress regarding the Prevention of Crime and Treatment of Offenders. Australia as an abolitionist country (rejects/abolishes death penalty) appeals to countries which have not abolished capital punishment, to consider the possibility of procurement within the framework of its national legislation, a moratorium (delay) in its implementation, or by creating other conditions in which death penalty is not needed and not enforced.

Even so, the death penalty should be used with due regard to the principles of subsidiarity, *ultimum remedium*, is exceptional in nature and pays attention to the feelings of justice in society and is applied based on the precautionary principle, against extraordinary forms of crime.

2. Concept of Classification and Criteria for a Crime classified as an Extra Ordinary Crime.

Extraordinary crimes are certainly difficult to deal with in ordinary ways, of course they require extraordinary methods as well. Extra legal instruments are also needed, in the form of progressive nuances of criminal law politics (criminal politics), discretionary power, when necessary in law enforcement, deviations are used/applied. specifically from the general provisions of material criminal law substance as well as criminal procedural law which is temporary *lexspecialist*, but still upholds due process of law.

It is necessary to apply the law of irregularities in the criminal justice process, because in the judicial process or mechanism dealing with extraordinary crimes the aspect of proving is very difficult. The *modus operandi* of the perpetrators is sophisticated, their network is extensive and highly confidential and involves organized networks such as the virtual world of cyberspace. It is very difficult to detect and pursue the perpetrators, in that extra ordinary crimes deserve the death penalty. The retentionist group for the application of the death penalty prioritizes the protection of society at large from the massive number of innocent victims as the act of criminals without regard for the victims.

Criminal law expert Mardjono Reksodiputro stated that the death penalty is still needed but not the main sentence. It must be a special punishment that is applied carefully, selectively, specifically for dangerous cases and must be unanimously determined by the

panel of judges. The Criminal Code also applies what is known as a suspended death penalty or often called an alternative, initially punishable by death with a probationary period of ten years. If within ten years the convict shows commendable deeds, then the death penalty is changed to life imprisonment or a maximum imprisonment of 20 years, so it is a kind of expiration.

So far, the death penalty in the Criminal Code in Indonesia has no expiration date. So there is a possibility that a death row convict will not be executed for more than ten years.

In the Criminal Code, the Indonesian government is again pushing for the imposition of the death penalty. For criminal decisions and actions that have obtained permanent legal force, changes or adjustments can still be made taking into account the development of convicts and the purpose of sentencing. In fact, it is stated that the implementation of capital punishment can be postponed with a probationary period of 10 (ten) years if: a. public reaction to the convict is not too great; b. the convict shows remorse and hopes for improvement; c. the position of the convict in the inclusion of a criminal act is not very important; and D. there are mitigating reasons. If the convict while on probation shows commendable attitudes and actions, the death penalty can be changed to life imprisonment or imprisonment for a maximum of 20 (twenty) years through a Ministerial Decree administering it; governance in the field of law and human rights. However, if the convict during the probation period as referred to in paragraph (1) does not show commendable attitudes and actions and there is no hope of improvement, the death penalty may be carried out on the order of the Attorney General.

The function of criminal law is *primum remedium* and the function of criminal law is as a measurable means or tool in fighting offenders. Faced with perpetrators of criminal offenses that qualify as extraordinary crimes or classified as special crimes, the death penalty as the heaviest criminal sanction in the *strata sort* and *straf maat* criminal law is suitable and appropriate and appropriate to apply to the perpetrators.

The principle of *ultimum remidium*⁴ serve as a foothold or as a basis for justification for prosecutors in accusing and prosecuting the perpetrators of these very extraordinary crimes. Likewise for judges in deciding, by slightly setting aside the humanitarian aspect but prioritizing the interests of the law and the interests of the wider community in

⁴ Sudikno Mertokusumo, 2006, *Penemuan Hukum Sebuah Pengantar*, Liberty, Yogyakarta, hlm.7

preventing and fighting crime, for judges deciding with the death penalty is to get legal justification in an attributive way to the law in sentencing the perpetrators/defendants of extraordinary crimes to death. widely spread and expressed in Indonesian criminal law. Discretionary authority, as well as the impartiality and independence of judges are justified by the essence of the theory of retaliation/absolute theory in the sentencing of perpetrators of crimes especially fathers who qualify as extraordinary crimes. According to the author's analysis, the imposition of capital punishment for perpetrators of extraordinary crimes is appropriate and agreeable, when faced with the conceptions and views of criminal law experts and criminal justice scientists Helbert L. Packer who conceptualizes that the role of death penalty sanctions is still needed at any time, in his statement stated as follows following :

1. Criminal sanctions are necessary, we cannot live now or in the future without punishment;
2. Criminal sanctions are the best available means at our disposal to deal with threats of harm;
3. Once upon a time criminal sanctions were the main guarantor of human freedom. It is a guarantor if it is used sparingly and humanely, it is a threat if it is used carelessly and by force;⁵

The Importance of Criminal Law, Criminal and Punishment

1. Punishment is the most important part of criminal law because it is the culmination of the whole process of accountability for someone who will be guilty of committing a crime.⁶
2. HL. Packer there are 3 principle things in criminal law:
 - a) What actions can be called a criminal act;
 - b) What are the criteria for determining whether a person can be called a criminal offender?;
 - c) What should be done against the perpetrator of a crime;?⁷

E. Conclusion

⁵ Herbert. L. Packer, 1967, *The Limits Of The Criminal Sanction*, Stanford California University Pres, hlm : 344

⁶ Andrew Ash Worth, 1991, *Principle of criminal law*, Oxfoard, Clarendon press, hlm.72

⁷ Hl. Packer, *Op Cit* , P. 17

1. The *ius constitutum* and *ius operatum* perspectives in several laws in Indonesia still proclaim and apply death penalty provisions as the main type of punishment (*strafsort*), such as the Criminal Code, Law No. 31 of 1990, Law No. 20 of 2001 concerning Eradication of Crime Corruption, Law No.26 of 2000 concerning Human Rights Courts, Law no. 35 of 2009 concerning Narcotics, Law No. 5 of 1997 concerning Psychotropics and Law No. 15 of 2003 concerning Eradication of Terrorism from an *Insconstituendum* Perspective in the Criminal Code death penalty is still conceptualized and even excluded from the placement of the main punishment, but it is regulated separately and conditionally.
2. As a basis for justification or justification in theory, the death penalty for perpetrators of crimes classified as extraordinary/or even classified as serious crimes against humanity based on the theory of retributivism or proportionality, the theory of balance, the theory of reciprocity, the theory of absolute punishment, the theory of distributive justice, the theory of human rights Humans and the theory of utilitarianism are still justifiably enforced.

F. Recommendations

1. In order for law enforcers, in carrying out regulations and laws on death penalty, to look carefully at the code of ethics and code of conduct in a comprehensive manner;
2. So that law enforcers, who have the authority to judge whether or not a person is sentenced to death, must look at the human side of the perpetrators of crimes and the human consequences of their actions.

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