Examining the Death Penalty in Indonesia using the Dignified Justice Theory

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ABSTRACT

The death penalty or capital punishment is still recognized and remains in effect within Indonesia's legal system. Although it was widely known during the Dutch colonial period and lately has been abolished in the Netherlands, Indonesia continues to retain it. Evidence of the death penalty's legacy from the Dutch can be found in Indonesia's 1946 Criminal Code Act. This study was conducted to provide a scientific description and explanation of the existence of the death penalty in Indonesia. Theoretical framework used in this research is the Indonesian legal theory known as the Dignified Justice theory. The basic premise of the theory is that the law serves as a meeting point between Divine thought and human thought, grounded in Pancasila, to uphold human dignity. Thus, the legislation governing the death penalty, as a derivative of Pancasila, is viewed as a manifestation of the derivative of the meeting point (Pancasila), aimed at making human being humane (nguwongke uwong). Guided by the Dignified Justice theory and employing normative legal research methods, the research has found that certain human rights, such as the right to life can indeed be restricted within Indonesia's Pancasila-based legal system, which allows for the death penalty. However, the death penalty has been softened under the newly enacted Indonesian National Criminal Code. This mitigation is achieved by making the death penalty a conditional punishment. Furthermore, for some time now, under Indonesia's human rights legislation, the death penalty can no longer be applied to children.

Keywords: Capital Punishment, Human Rights, Pancasila, Dignified Justice

INTRODUCTION

The death penalty or capital punishment in Indonesia was understood as firstly introduced and enforced during the Dutch colonial period. It was the Europeans, specifically the Dutch, who brought this severe form of criminal law punishment to Indonesia. The first death penalty sanction was ordered by Governor-General of the Dutch East Indies, Henry Willem Daendels, in 1808. This practice continued up until 1951, and to this day, the death penalty remains in place in Indonesia. It should be noted that the Dutch colonial government used the death penalty, the harshest form of criminal law punishment, as a tool to create a deterrent effect for those involved in rebellions against the Dutch. As is commonly known, during the Dutch colonial rule, the colonialists were deeply concerned about the numerous uprisings, especially acts of treason against the government that occurred across nearly all regions of what was then the Dutch East Indies, and later known as Indonesia.[1]

The regulation of the death penalty in Indonesia continues to evolve, as seen in the changing substance of legislation governing capital punishment. An example of this is observed in the differences between the old Criminal Code[2] and the new Criminal Code[3]. In the nCC, Law No. 1 of 2023 on the National Criminal Code of Indonesia, the approach to the death penalty has changed. This substantive change is marked by the death penalty being designated as an alternative form of criminal law punishment.

The "alternative" nature of the death penalty means that if a person is sentenced to death under the nCC, they are not immediately executed, as was the case in the regulations under the old Criminal Code. According to the

[1] Anugrahdwi, "Sejarah dan Metode Hukuman Mati di Indonesia" Juni 20, 2023.
[2] Hereafter is abbreviated as CC.
[3] Hereafter is abbreviated as nCC.

new Criminal Code's alternative death penalty system, a death row convict will only face execution after going through a probation period, as stipulated in the new code. If the convict fails to meet the conditions set by law during this probation period, their sentence remains unchanged. However, if the convict sentenced to death completes the probation period and meets specific criteria outlined in the new Criminal Code, their death sentence may be commuted to life imprisonment.

In contrast, the CC did not recognize the alternative arrangement for the death penalty. Under the old Criminal Code system, if a person was sentenced to death, they were required to undergo capital punishment unless they successfully sought clemency or amnesty. From the perspective of the CC, if the waiting period for execution was lengthy, there was no provision within the code allowing for the death sentence to be converted into life imprisonment, as is possible under the nCC.

According to the old Criminal Code's regulation on the death penalty, once a judge sentenced a person to death, and the court ruling became legally binding, the individual was obligated to undergo the death penalty. The execution could take place shortly after the sentence became legally binding, or the convict might endure a long waiting period between the finalization of the death sentence and the execution. Under the CC, a death row convict was required to carry out the sentence without the possibility of having it altered to a lesser punishment.

In the CC system, nothing apart from the granting of clemency or amnesty arises during the interval between the sentencing decision and the execution of the death penalty that could reduce or alter the death sentence once it has become legally binding. This key difference between the old and nCC death penalty regulations reflects an understanding that, under the old system, a death sentence handed down to a convict was almost impossible to change into another form of punishment. This rigidity offered little room for mitigating or acknowledging human rights as provided for in the law.[4]

Indonesia recognizes the death penalty not only in the CC but also for other criminal offenses regulated under separate laws outside the CC, such as terrorism, corruption, and narcotics offenses. The development of death penalty regulations in these laws has been influenced by the existence and role of the Constitutional Court.

This evolution can be observed, for instance, in judicial reviews of the death penalty as stipulated in Law No. 22 of 1997 on Narcotics. The societal dynamics in understanding the death penalty are reflected in the arguments presented in these reviews. On one side, some argue against the death penalty, while on the other side, particularly among law enforcement, some support maintaining the death penalty as legislated. In the judicial review of the Narcotics Law, for example, the Constitutional Court, with some justices dissenting, rejected the review and stated that the death penalty does not contradict the Constitution. The justices argued against abolishing the death penalty, stating, among other reasons, that the 1945 Constitution does not support an absolute or unconditional view of human rights.[5]

METHOD

The research conducted by the author in preparing this article uses the normative legal research method, commonly known as doctrinal legal research.[6] In every normative legal research, there are generally several approaches used. The most common approaches are the statutory approach and the case law approach. In addition to these two approaches, philosophical and conceptual approaches are also used. If necessary, a comparative law approach may also be added.

The sources of legal materials used include primary legal sources, mainly the applicable regulations. Besides primary legal sources, secondary legal materials such as textbooks and previous research findings are also

[4] Eksistensi Penerapan Penjatuhan Hukuman Mati di Indonesia Terhadap Kejahatan Narkotika di Indonesia Juan Valedra Sitorus, Hery Firmansyah, Fakultas Hukum, Universitas Tarumanagara, Jakarta, Indonesia, Unes Law Review, Vol. 6, No. 2, Desember 2023, hal., 6282-6288.
[5] Humas FHUI, "Topo Santoso (Media Indonesia): Menyoal Hukuman Mati", 01 Agustus
[6] Sri Mamudji, et. al., 2005, Metode Penelitian dan Penulisan Hukum, Badan Penerbit Fakultas Hukum Universitas Indonesia, Depok, h. 21; Soerjono Soekanto, 1990, Ringkasan Metodologi Penelitian Hukum Empiris, Indo Hill-Co, Jakarta, h. 106; Ruslan, Rosdi, 2003, Metode Penelitian Publik, Raja Grafindo Persada, h. 24; Tommy Hendra Purwaka, 2011, Metodologi Penelitian Hukum, Penerbit Universitas Atma Jaya, Jakarta, h.7.

studied. The technique used to analyze the collected legal materials through literature study is a qualitative analysis technique. Conclusions are obtained through this analysis technique by comparing the major premise with the minor premise, or what is known as deductive analysis.

FINDING AND DISCUSSION

Although Indonesia recognizes the existence of human rights, as stated in the Second Amendment of the 1945 Constitution of the Republic of Indonesia, human rights in the Indonesian Constitution are not absolute. The recognition of human rights in the Indonesian Constitution can be found in the constitutional provisions, specifically Articles 28A to 28J. However, it should be noted that the recognition of human rights in the Indonesian Constitution is not absolute, as there are limitations or it is restrictive. For example, the formulation of Article 28J paragraph (2) of the 1945 Constitution limits human rights in the following paraphrased manner: The exercise of rights and freedoms, as guaranteed by the Constitution, must be subject to limitations set by law. These limitations on rights and freedoms through legislation are intended solely to ensure the recognition and respect for the rights and freedoms of others and to fulfill just demands following moral considerations, religious values, security, and public order in a democratic society.[7]

As a follow-up to the constitutional formulation that appears to recognize human rights absolutely, this study finds that the formulation of human rights in the Indonesian Constitution is still further restricted by regulations that implement the provisions of the Constitution. As mentioned above, the regulations that further implement the legal provisions in the Indonesian Constitution are known in textbooks as organic legislation. The organic regulations that limit human rights in the constitutional formulation then provide a procedure for restricting these human rights. Law No. 26 of 2000 on the Human Rights Court provides the procedure for restricting the aforementioned human rights.

Several organic regulations or legislative provisions that further elaborate on the legal principles in the Indonesian Constitution, particularly those that specifically address human rights, include, for example, MPR Decree No. XVII of 1998 on the Establishment of the National Commission on Human Rights (NCHR), Law No. 39 of 1999 on Human Rights, and Law No. 26 of 2000 on the Human Rights Court. This study finds that the legal provisions regulating human rights in these organic regulations do not, in principle, abolish the death penalty in Indonesia.

Law No. 1 of 1946 on Criminal Procedure, commonly known as the CC, still firmly regulates the death penalty as a principal punishment. Article 10 letter (a) of the CC stipulates that principal punishments consist of the death penalty, imprisonment, detention, fines, and forfeiture of rights.
The CC, for example, outlines various crimes punishable by the death penalty. These crimes are set out in Article 104 of the CC, which includes treason involving the killing of a head of state. Additionally, Article 111 paragraph 2 of the CC provides for the death penalty for those who incite a foreign country to attack Indonesia. Similarly, Article 124 paragraph 3 of the CC threatens the death penalty for those who assist the enemy during wartime. The death penalty is also prescribed in Article 140 paragraph 4 of the CC for crimes related to the killing of a foreign head of state. Article 340 of the CC imposes the death penalty for premeditated murder. Article 365 paragraph 4 of the CC contains the death penalty for robbery with violence committed by two or more individuals, which results in severe injury or death.

Outside the CC, several regulations contain the death penalty provisions, such as those formulated in Law No. 35 of 2009 on Narcotics. The death penalty is imposed on narcotics offenders. In Article 2, paragraph 2 of Law No. 31 of 1999 on Corruption Eradication (CE), the death penalty is also found for corrupt individuals. Furthermore, Law No. 26 of 2000 on the Human Rights Court imposes the death penalty for gross human rights violations.

Additionally, the Constitutional Court has stated that there is no international legal obligation that Indonesia is violating by continuing to enforce the death penalty, whether in the CC or other laws regulating specific

[7] Compare with the General Explanation I of Law No. 26 of 2000 on the Human Rights Court.

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crimes. According to the Constitutional Court, the death penalty remains in force for various crimes as it is seen as a manifestation of Indonesia's responsibility and participation in global efforts to combat crime. For example, through the death penalty, Indonesia supports the spirit of the Narcotics and Psychotropic Substances Convention. In Article 3, paragraph 6 of the Convention, states parties are obligated to maximize the effectiveness of law enforcement concerning narcotics and psychotropic crimes as part of their commitment to preventing such crimes.

However, several countries in Europe and Latin America have abolished the death penalty. These countries view the death penalty as a violation of human rights. Not all countries have abolished it, though. The United States, China, Iran, and some countries in the Middle East still enforce the death penalty. The application of the death penalty in these countries continues, despite ongoing international pressure to abolish it.
International law does not explicitly recognizes the death penalty, as seen in the Article 3 of the Universal Declaration of Human Rights (UDHR) which states that "everyone has the right to life, liberty, and security of person." In addition to the UDHR, there is the International Covenant on Civil and Political Rights (ICCPR). Article 6 of the ICCPR addresses the right of every individual to life and further stipulates that the death penalty may only be applied to the most serious crimes and only after a fair trial.

The optional protocol and interpretative guidelines also touch on the issue of the death penalty. The protocol provides an option for countries that ratify the ICCPR to abolish the death penalty. All countries that ratify the protocol pledge not to impose or enforce the death penalty within their legal systems. However, countries that do not ratify the protocol may still apply the death penalty.

Several United Nations (UN) resolutions have also expressed concern about the use of the death penalty and encouraged countries to reduce or abolish it. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) does not explicitly prohibit the death penalty. CAT forbids torture and cruel, inhuman, or degrading treatment or punishment. However, some interpretations argue that the death penalty itself could be considered a form of inhuman treatment.[8]
International courts, such as the International Criminal Court (ICC), do not have jurisdiction or authority to try cases of the death penalty in general. However, the establishment of international courts reflects an effort to develop a broader international legal system.

Although the death penalty is normatively recognized within Indonesia's criminal justice system, its execution is ultimately at the discretion of the President. For example, during President Susilo Bambang Yudhoyono's administration, many death sentences were delayed for long periods or only carried out after a change in president. When President Joko Widodo took office in August 2016, he rejected all requests for clemency for death row prisoners convicted of drug-related crimes. This marked a significant point, showing that while the death penalty remains legal and applied in Indonesia, its execution tends to be delayed and not automatic.

The death penalty is regulated under Law No. 22 of 1997 on Narcotics and Law No. 15 of 2003 on the Eradication of Terrorism, as forms of punishment for serious crimes. In addition to the legal instruments that regulate the death penalty in Indonesia, the execution of the death penalty is carried out through court decisions. The death penalty is imposed by judges after a legal process involving various stages, including investigation, prosecution, trial, and appeals. Courts may decide to impose the death penalty if they find that the defendant is guilty of committing a crime that is following the applicable legal provisions.

In Indonesia, the death penalty decision is still subject to the President's authority to grant clemency or to change the death sentence to another form of punishment. Currently, the implementation of the death penalty depends on the sitting President. The prevailing stance on the death penalty follows that of President Joko Widodo, the seventh president of Indonesia, who has consistently emphasized his position not to grant

[8] Agung Ngurah Galang Widura Pandji, Gde Made Swardhana "Relevansi Pidana Mati Dalam Tindak Pidana Kejahatan Luar Biasa (Extraordinary Crime) Dalam Perspektif Pembaharuan Hukum Pidana Di Indonesia", Jurnal Hukum Pidana Fakultas Hukum Universitas Udayana.

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clemency in cases, particularly those involving narcotics. This has sparked widespread debate and controversy both nationally and internationally.

The death penalty in Indonesia has not only softened with the enactment of Law No. 1 of 2023 on the CC. Long before the formation of the nCC, Law No. 39 of 1999 on Human Rights had already been established. Even though Law No. 39 of 1999 is based on the consideration that human rights, such as the right to life, are fundamental rights inherent to all humans, universal, and enduring, and therefore must be protected, respected, and preserved, this law still provides exceptions.

Article 9, paragraph (1) of Law No. 39 of 1999 on Human Rights contains legal provisions that still recognize the death penalty in Indonesia. It states that everyone has the right to life, to defend their life, and to improve their quality of life. The right to life is even granted to unborn babies and those sentenced to death. The last phrase in the explanation of Article 9, paragraph (1) signals that the death penalty is still recognized. This acknowledgment of the death penalty is placed within a law that is specifically an organic law of the Indonesian Constitution, which fundamentally reaffirms that the right to life is a right that cannot be taken away by anyone, including the state.

The death penalty has been equated with the need to perform an abortion in certain extraordinary circumstances. As stated in the explanation of Article 9, paragraph (1) of the Law on Human Rights, in cases of abortion or based on a court decision regarding the death penalty, the actions of abortion or the death penalty may be permitted in these specific situations. It is emphasized in the final sentence of the explanation of Article 9, paragraph (1) of Law No. 39 of 1999 on Human Rights that the right to life, as a right that cannot be taken away by anyone, maybe deprived only in the case of abortion or the death penalty, but only if it is based on a court decision that has become legally binding.

However, if a crime is committed by a child, the protection of the right to life as an inalienable right is strongly legitimized. As stipulated in Article 66, paragraph (2) of Law No. 39 of 1999 on Human Rights, the death penalty or life imprisonment cannot be imposed on a perpetrator of a crime who is still a child.

If examined or discussed and analyzed from the perspective of the Dignified Justice Theory[9], which explains that law is the meeting point between the thoughts of God and the thoughts of humans in society, and ends its dialectic in Pancasila, the goal of such law is to humanize humans (*nguwongke uwong*). Based on this theory, the author can present the following argument: From the perspective of the Dignified Justice Theory, Indonesian law, in this case, several regulations as mentioned above, still acknowledges values that allow for the exclusion or mitigation of the severity of the death penalty.

The death penalty is a primary punishment still recognized in Indonesia's legal system, both in the old and nCC, as well as in several regulations outside the CC. In other words, when analyzed from the perspective of the Dignified Justice Theory, there remains the possibility that the death penalty may not be enforced in Indonesia. This is because, in principle, the regulations in question still allow for the imposition of the death penalty as a sanction for a convicted person who has been proven legally and convincingly, according to a final and binding court decision, to have committed a crime punishable by the death penalty.

CONCLUSION

The death penalty is still recognized and even enforced within Indonesia's legal system. However, research using the Dignified Justice Theory conducted by the author has shown and thus can prove that, in certain cases, the death penalty can be excluded. Two regulations as manifestations of the soul of the Indonesian nation, derived from Pancasila as the source of all sources of law, or the highest law in the Pancasila legal system, are involved.

9 Teguh Prasetyo, 2015, Keadilan Bermartabat Perspektif Teori Hukum, Cetakan I, Nusa Media, Bandung, h. 3; Cf., Teguh Prasetyo, 2020, Hukum & Teori Hukum: Perspektif Teori Keadilan Bermartabat, Cetakan I, Nusa Media, Bandung, h. 37.

The two regulations in question are Law No. 1 of 2023 on the nCC, and Law No. 39 of 1999 on Human Rights, which still allow for the mitigation of the death penalty as one of the most severe punishments in human history. The mitigation provided in the nCC is that the death penalty is an alternative punishment, where the convicted individual is given a probation period during which their death sentence can be converted into a life sentence. Additionally, Law No. 39 of 1999 states that the death penalty cannot be imposed on minors. Using the perspective of the Dignified Justice Theory, the death penalty in Indonesia can be understood more wisely and judiciously.

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