Death Criminal Policy is Conditional from the Perspective of Criminal Law and Human Rights

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DOI : https://dx.doi.org/10.47772/IJRISS.2024.803163S

Received: 13 June 2024; Revised: 23 June 2024; Accepted: 27 June 2024; Published: 01 August 2024

ABSTRACT

The conditional death penalty in Indonesia is imposed using the principle of balance as a limit of tolerance and legitimacy which originates from the Pancasila Ideology, the 1945 Constitution of the Republic of Indonesia, Human Rights and Human Obligations as well as general legal principles recognized by civilized nations. For this reason, it is necessary to carry out more in-depth research regarding the conditional death penalty from the perspective of criminal law and human rights. The research method used is a normative legal method, namely in the form of library research *using* a statutory approach *and* a conceptual *approach.* The aim of the research is to find out how the concept of conditional death penalty is in view of criminal law and human rights. The results of this research are that the conditional death penalty which will later apply in Indonesia with the existence of the Criminal Code has taken a middle path or what is called *the Indonesian way* between retentionist and abolitionist groups which is very appropriate. Philosophical and sociological interpretation, especially of article 28 A and article 28 J of the 1945 Constitution of the Republic of Indonesia, where these two articles are certainly not intended to protect perpetrators of criminal acts that have endangered and reduced the right to life of other people, society and other individuals who are victims the criminal act. The conclusion is that the conditional death penalty which has very strict procedures for imposing it is regulated in the criminal law (KUHP) does not conflict with human rights because it only exists *de jure* and does not exist *de facto*.

Keywords: Conditional death penalty, Criminal Law, Human Rights (HAM)

INTRODUCTION

Legal reform in Indonesia is demonstrated through the preparation of a new Criminal Code (hereinafter referred to as **the Criminal Code** based on Article 623 of Law Number 1 of 2023) as the law that the Indonesian people aspire to (*ius constituendum*) not a legacy of colonialism. This is because the values adhered to by the Dutch during the colonial era were liberalism, non-religiousness, racial discrimination, unlimited respect for human rights, individualism and rigid state absolutism. These values are clearly not in accordance with the values of Indonesian national identity which are divine, mutual cooperation, respect for public interests and deliberation for consensus.[3]

The preparation of the new Criminal Code should adapt to the identity values of Indonesian society. The values of Indonesian national identity can be found in Pancasila or what are called *the Five Guiding Principles* which consist of belief in one God, just and civilized humanity, Indonesian unity, democracy led by wisdom in representative deliberations and social justice for all Indonesian people. These values are a form of discovery, not the formation of values compiled by the founding fathers. The law must be in accordance with the values held by the law implementer.[4]

The values that develop in society are influenced by the national insight and international insight of the people of a country. In Indonesia, of course the most influential national insight is the values contained in Pancasila.Pancasila as the basic norm *(grundnorm)* which distinguishes Indonesia from other countries. Criminal law reform is also influenced by global (international) insights such as the results of United Nations conference agreements, international agreements results of international seminars and so on.

Criminal law has the aim of achieving justice, certainty and usefulness for society and the state, while its function is to maintain order *(social control).* Achieving this is done through penal and non-penal means which are determined through the criminal law policy process *(penal policy).* Penal means are carried out by imposing penalties that are retaliatory in nature and actions that are in the nature of guidance *(treatment)* and recovery *(restoration).* Meanwhile, non-penal means are carried out by prioritizing a social approach as a preventive effort to prevent criminal acts from occurring. In modern criminal law *(modern criminal science),* it consists of 3 components, namely criminology, *criminal law* and criminal policy.

The death penalty has the status of a basic crime as regulated in Article 10 of the Criminal Code (WvS) (hereinafter referred to **as the Criminal Code** based on Article VI paragraph (2) of Law Number 1 of 1946) which states that there are 2 types of crimes, namely: (1) Criminal Principal, which consists of: (a) Death penalty (b) Imprisonment (c) Imprisonment and (d) Fine (2) Additional punishment, which consists of: (a) Revocation of certain rights (b) Confiscation of certain goods (c) Announcement of the judge's decision (3). Covered Crimes based on Law Number 20 of 1946 concerning Covered Crimes.

The death penalty is a type of crime that contains pros and cons. At the international level, this type of crime is prohibited from being imposed on convicts. The United Nations (UN) is pushing for the elimination of the application of this type of crime based on the *Universal Declaration of Human Rights* which was adopted on December 101948, by guaranteeing the right to life and protection against torture. Likewise, the guaranteed right to life is contained in Article 6 of *the International Covenant on Civil and Political Rights* (ICCPR) which was adopted in 1966 and ratified by Law Number 12 of 2005 concerning Ratification of the ICCPR. **[5]**

The Indonesian criminal law system tries to remove the death penalty outside of the main punishment, by regulating it as an alternative punishment. The death penalty is no longer the first basic punishment, but is a special punishment. This step was taken considering that the application of the death penalty is contrary to Human Rights (HAM). Concrete evidence of changes regarding the status of the death penalty is contained in the Criminal Code that the death penalty is a special crime (article 64 letter c), is punishable alternatively (article 98) and the implementation of this crime is by shooting the convict to death and is not carried out in public.

The debate regarding the death penalty has become a classic discourse that originates from two major poles, namely the Abolitionist and Retensionist schools. The extreme point of the death penalty debate is the abolition of the death penalty on the one hand and its retention on the other. This condition ultimately led to a debate on the basic concepts, methods and objectives of punishment. Philosophical, juridical and sociological aspects also remain variables in this debate to this day. Even though in its development all possibilities regarding the application of the death penalty have been attempted, as well as a shift in paradigm or approach, criticism of the emergence of the death penalty still surfaces.

Based on the background description above, the problem formulation is as follows:

1. Conditional death penalty policy from a criminal law perspective?
2. How does the conditional death penalty policy look like from a human rights perspective?

RESEARCH METHODOLOGY

This research uses a normative juridical research method, namely legal research carried out by examining library materials or secondary data as basic material for research by conducting searches on regulations and literature related to the problem being studied.**[6]**

This research uses a statutory approach *which* will explore the applicable regulations, namely the 1945 Constitution of the Republic of Indonesia, the Criminal Code and Law Number 39 of 1999 concerning Human Rights. Researchers also use a conceptual approach, which is meant by a conceptual approach as Peter Mahmud Marzuki explains in his book, namely moving from the views and doctrines that develop in legal science.[7]

DISCUSSION AND RESEARCH RESULTS

Conditional Death Penalty from a Criminal Law Perspective

In Article 64 of the Criminal Code, the death penalty is not included in the main punishment but is a special punishment which is always threatened side by side with other crimes, so it is called the conditional death penalty. The provision of conditional death penalty in the Criminal Code is a middle way solution with Indonesian characteristics *(Indonesian ways).* This is in accordance with article 98 of the Criminal Code where the purpose of the death penalty is the last resort *(ultimum remedium)* to prevent the commission of criminal acts and protect society. This article is also a resolution of the conflict between retentionist and abolitionist groups the middle way is taken that the death penalty is still carried out as a last resort in the greater interest of protecting and protecting society.

The provisions for the conditional death penalty *to* be imposed are regulated in Article 99, namely in Article 99 paragraph (1) that the execution of the death penalty can be carried out after the request for clemency is rejected by the president, then in paragraph (2) it is explained that the implementation is not carried out in advance general, then in paragraph (3) concerning the method of execution by firing squad or by other means determined by law, as well as paragraph (4) concerning the postponement of execution of pregnant women until they give birth, breastfeeding women until they no longer breastfeed their babies and insane people until healed. Then in article 100 paragraph (1) of the Criminal Code it is explained about the 10 year probation period which the judge can impose if three conditions are met, namely:

a. The defendant showed regret and there was hope for improvement

b. The defendant's role in the crime is not very important

c. There are extenuating reasons.

Then in article 100 paragraph (2) it is explained that the probation period must be included in the court decision. Furthermore, article 100 paragraph (3) explains that the calculation of days is carried out one day after the decision has permanent legal force *(inkracht).* This provision is intended to provide legal certainty regarding the waiting period for convicts.

In article 100 Paragraph (4) of the Criminal Code, it is explained that the convict during the probation period as intended in paragraph (1) shows commendable attitudes and actions, the death penalty can be changed to life imprisonment by Presidential Decree after receiving consideration from the Supreme Court. Here we explain the evaluative side of the conditional death penalty, where if there is hope that the convict will repent, the death penalty can be changed to life imprisonment. Article 100 paragraph (5) of the Criminal Code states that if a convict during the probation period as referred to in paragraph (1) does not show commendable attitudes and actions and has no hope of improvement, the death penalty can be carried out on the order of the Attorney General. This shows the government's firmness in continuing to execute death row inmates if there is no hope of improvement.[8]

Article 101 of the Criminal Code includes provisions that if a death row convict's request for clemency is rejected and the death penalty has not been carried out for 10 (ten) years since the pardon was rejected not because the convict escaped, the death penalty can be changed to life imprisonment by Presidential Decree (keppres). The death penalty can be changed to life imprisonment or a maximum of 20 years in prison if during the probation period the person in question shows commendable attitudes and actions in accordance with the Presidential Decree with the consideration of the Supreme Court. This shows the aspect of legal certainty for carrying out executions after pardon was rejected by the President.

Then in Article 102 of the Criminal Code it is explained that further provisions regarding the procedures for carrying out the death penalty are regulated by law. This suggests that the Criminal Code still provides an opportunity for policy makers to be able to correct the best method of executing the death penalty in accordance with developments in insight and the times. Arrangements like this indicate that the Criminal Code adheres to the principle of flexibility/elasticity.[9]

ISSN No. 2454-6186 | DOI: 10.47772/IJRISS |Volume VIII Issue IIIS June 2024 | Special Issue on Education

Muladi and Diah Sulistyani provide conditions for determining the types of criminal acts that need to be sentenced to death *(capital crimes)* and the limitations of their application.[10]

a. Very serious crimes *(the most serious crimes*, ICCPR 1966)

b. International crimes with lethal or other extremely grave consequences *(*ECOSOC, 1984)

c. Exceptions: Political Crimes, *non-violent financial crimes, non-violent religious practice* (*United Nation Commission on Human Rights*, 1999)

d. ECOSOC standards set out guidelines for the imposition of the death penalty and emphasize that:

1. The death penalty is only applied for very serious crimes with deadly or very serious consequences
2. The death penalty must have been stipulated at the time the act was committed
3. Children under 18 years of age at the time of committing a crime cannot be sentenced to death, as well as pregnant women or new mothers and people who have become crazy, on the basis of very clear evidence and witnesses *(clear and convincing evidence).*
4. The final decision *(Final judgment)* is made by an authorized court based on the principles of a fair trial, not because the judiciary is perverted (Article 14 ICCPR)
5. The right to appeal is mandatory for convicts *(The right to appeal is mandatory)*
6. The death penalty does not eliminate the convict's right to seek forgiveness or clemency *(The right to seek pardon)*
7. The death penalty must be suspended if the case is being postponed because it is being appealed or there are other procedures related to pardon or commutation.

Conditional Death Penalty from a Human Rights (HAM) Perspective

In Indonesia, a complex and problematic situation also exists in the decision of the Constitutional Court (MK) Number 2-3/PUU-V/2007 which ultimately states that regarding the constitutionality of the death penalty in Indonesia. The complexity of the decision can be seen from: first, the length of the examination time, second, the number of experts involved (a total of 29 experts) in order to explore all kinds of considerations in depth, third, the judge's dissenting opinion, where of the 9 judges, 5 one of them stated that the death penalty was constitutional in the Indonesian legal system, but 4 judges stated that the death penalty was unconstitutional.**[11]** This last part shows that the decision to declare the death penalty constitutional cannot be reached unanimously. Even a very narrow margin (5 to 4) shows a tight problematic debate regarding the death penalty. This also seems to illustrate the debate on a wider scale related to the death penalty in Indonesia.

From a human rights perspective as offered by Abolitionists, the death penalty essentially violates the human right to life as a *non-derogable right*. Constitutively, this right is explicitly regulated in Article 28 A which states that everyone has the right to live and defend their life. Article 28 I even stipulates that the right to life cannot be reduced under any circumstances.

In the view of Retentionism, eliminating the death penalty totally is the same as eliminating a larger collective.**[12]** The constitutive guidelines for the implementation of the death penalty, apart from the decision of the Constitutional Court as explained, are also closely related to Article 28 J paragraph (2) of the second amendment to the 1945 Constitution which states that in exercising their rights and freedoms, every person is obliged to comply with the restrictions stipulated by law-laws with the sole intention of guaranteeing recognition and respect for the rights and freedoms of other people and to fulfill fair demands in accordance with moral considerations, religious values, security and public order in a democratic society. Maintaining the

ISSN No. 2454-6186 | DOI: 10.47772/IJRISS |Volume VIII Issue IIIS June 2024 | Special Issue on Education

death penalty is also very much in line with the international instrument Article 6 paragraph (2) of the International Covenant on Civil and Political Rights (ICCPR) which explains that the death penalty can be applied to very serious crimes. **[13]**

The two views described above illustrate that the debate about the death penalty each has a strong foundation. Considerations regarding respect for human rights and the state's interests in regulating and protecting citizens are two fundamental things that have brought problematic and dilemmatic debates to this day. **[14]** The right to life is a very important and fundamental part of Human Rights (HAM). There are many categories of human rights, but few rights are categorized as important and fundamental rights. The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights are two human rights instruments that explicitly reject the implementation of the death penalty practice. Article 3 of the UDHR states, “everyone has the right to life, liberty and security as an individual”. [15] This provision is emphasized again in Article 6 paragraph (1) of the International Covenant on Civil and Political Rights (ICCPR) which states, *“Every human being has the right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.* Apart from that, Optional Protocol II of the International Covenant on Civil and Political Rights which was adopted by the General Assembly of the United Nations (UN) in 1989 also stipulates a prohibition on the death penalty because it is considered as reducing the protection of the right to life and human rights (HAM). However, it should be noted that until now this optional protocol has not been ratified by Indonesia. Several international instruments emphasize how the right to life as an individual right cannot be distorted by any situation/condition. Absolute recognition of human rights as individual rights will in fact intersect with collective (society) interests. This is a logical consequence of social relations and interactions. The compatibility of individual rights will be relatively feasible in a particular structure, interaction or social relationship.

In the Indonesian context, quoting what Eldridge said, the human rights protection system in Indonesia is greatly influenced by social issues such as poverty, culture, religion, stability and national order.[16] The emergence of this influence in turn brings a philosophical and sociological interpretation, especially of article 28 A and article 28 J of the 1945 Constitution of the Republic of Indonesia. In a philosophical and sociological context, these two articles are certainly not intended to protect criminal perpetrators who have endangered and reducing the right to life of other people, society and other individuals who are victims of criminal acts.[17]

Apart from that, if we look closely at the considerations in the Constitutional Court decision Number 2-3/PUU-V/2007, basically the discussion carried out by the MK on issues related to human rights and the death penalty, the MK believes that human rights for certain conditions must be limited to some extent. These restrictions are in accordance with the morality that grows in wider society as conceptualized in Indonesian religion, culture and history. This may be a guideline regarding the importance of balancing the protection of human rights for both individuals and society. By looking at the types and impact of crimes which are extraordinarily serious for both victims and society, this balance of protection finds its context. A person sentenced to death for committing a serious crime must be punished on the basis of just law, not on the basis of revenge and exclusion. Reading the balance of individual and societal rights cannot be done by negating one by seeing one as more important or both.

The existence of a form of legislation that regulates the threat of the death penalty has raised pros and cons in Indonesian society, especially from observers and human rights institutions who oppose the imposition of the death penalty against perpetrators of criminal acts. Those who oppose the use of the death penalty argue that this method of punishment violates human rights.**[18]** These groups argue that the death penalty is contrary to the constitution and Law Number 39 of 1999 concerning Human Rights, as well as international human rights instruments that have been ratified by the Indonesian State, such as the International Covenant *on Civil and Political Rights* and *the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

On the other hand, those who support the application of the death penalty argue that the death penalty is carried out to prevent cruel criminal acts from recurring. The death penalty should only be imposed on perpetrators of criminal acts that clearly endanger society. However, these groups also suggest that the death penalty should be applied selectively and not as a “legalization” of revenge. So it is very appropriate to take the middle path taken by the legislators by formulating a conditional death penalty with a trial period of 10 years in prison in Article 100 of the Criminal Code as the Indonesian way.

CONCLUSION

The conditional death penalty which will later apply in Indonesia with the enactment of the Criminal Code has taken a middle path or what is called *the Indonesian way* between retentionist and abolitionist groups which is very appropriate. The conditional death penalty is imposed using the principle of balance as a limit of tolerance and legitimacy *(margin of appreciation and legitimacy)* which originates from the Pancasila Ideology, the 1945 Republic of Indonesia Constitution, Human Rights and Human Obligations as well as general legal principles recognized by nations civilized. The imposition of the conditional death penalty is in accordance with the principle of legal interests *(due process of law)* and to avoid extrajudicial killings *(extra judicial killings, summary executions and killings without trial)* which are serious human rights violations. From a human rights perspective, the death penalty policy is a political effort in criminal law to provide respect and protection for human rights, especially the right to life as a non-derogable right.

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