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RECONSTRUCTION OF CONDITIONAL DEATH PENALTY NORMS IN THE PERSPECTIVE OF RENEWING INDONESIAN CRIMINAL LAW

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ABSTRACT

Penal reform is something that must be done as a form of adjustment to applicable law with changes in values, times, technology, national and international insights. Death penalty in Indonesia also needs to be updated to adjust these developments, especially in the adjustment of the values adopted by the Indonesian people. This study aims to determine the policy on conditional death penalty formulation in the law currently in force in Indonesia, and analyze the policy formulation of the ideals of conditional death penalty in Indonesia. This research uses a qualitative method with a normative approach. This research results in the fact that the law in Indonesia has not yet regulated the conditional death sentence, so there is still a conflict between those who want to abolish capital punishment and those who want to continue implementing capital punishment. Conditional death penalty is needed as a middle ground between the two groups. Conditional death penalty is also needed as an evaluatif process for prisoners in serving their sentences and respecting human rights in accordance with national and international perspectives.

Keywords: Formulation Poilcy, Conditional Death Penalty, Penal Reform

INTRODUCTION

Legal reform is a necessity because it will certainly occur along with the development of science. Likewise, criminal law changes according to human development as lawmakers. Criminal law reform can be interpreted as a continuous effort through legislation to harmonize criminal legislation with legal principles, as well as values that develop in society at both national and international levels(Jaya, 2016).

The values that develop in society are influenced by national insights and international insights from the people of a country. In Indonesia, of course, the most influential national insight is the values contained in Pancasila. Pancasila is the basic norm (grundnorm) that uniquely distinguishes Indonesia from other countries. The renewal of criminal law is also influenced by global (international) insights

such as the results of the agreement of United Nations conference, international agreements, the results of international seminars, and so on (Arief, 2014) .

Wetboek van Starfrecht (WvS) or what can be called the Criminal Code (KUHP) is a general rule in the criminal system in Indonesia that is also not spared from reform. The Indonesian Criminal Code, which is a legacy of the Dutch during the colonial era, continues to be used by Indonesia to this day with some minor adjustments. The development of the times and the differences in values adopted by the Netherlands and Indonesia made the values in the Criminal Code need to be adjusted to the values of the nation and state of Indonesia as an independent country (Rado, Arief, & Soponyono, 2016).

Legal reform in Indonesia is shown through the drafting of a new Criminal Code as a law that the Indonesian nation aspires to (ius constituendum), not a colonial legacy. This is because the values adopted by the Dutch during the colonial era were the values of liberalism, non-religion, racial discrimination, unlimited respect for human rights, individualism, and rigid state absolutism. This value is not in line with the values of the Indonesian nation's identity which are divinity, cooperation, respect for the public interest, and deliberation to reach a consensus (Maulidah & Jaya, 2019).

The preparation of the Draft Criminal Code (RKUHP) should adapt to the values of the Indonesian people's identity. The values of the Indonesian nation's identity can be found in Pancasila or the so-called Five Guiding Principles. It consists of Belief in One Supreme God, Justice and Civilized Humanity, Indonesian Unity, Democracy Led by Wisdom and Wisdom in Representative Deliberations, and Social Justice for All Indonesian People. This value is a form of discovery, not the formation of values compiled by the national founding fathers. The law must follow the values adopted by law enforcers (Lindsey, 2017).

The death penalty is regulated in Chapter II regarding the crime in Article 10 letter number 1 of the Criminal Code. The death penalty is included in the main criminal group, namely a sentence that is threatened directly with the core. The location of the death penalty in the first order of the main punishment is also an analysis that the death penalty is the most severe crime compared to other basic crimes such as imprisonment, confinement, fines, and criminal closures. This is also confirmed by the provisions in Article 69 paragraph 3 Article 10 of the Criminal Code, which states that the ratio of the severity of the different principal crimes is determined according to the sequence. In various other countries that have not abolished the death penalty, they place the death penalty as the most severe punishment compared to other forms of punishment (Then, 2015).

In the process of reforming the Criminal Code in Indonesia, several parties disagree with the death penalty. From the groups who support full respect for human rights and want to completely abolish the death penalty in Indonesia, this group in the international world is commonly referred to as the abolitionist group. The groups that still maintain the death penalty in Indonesia are usually influenced by cultural and religious backgrounds that allow and even view the death penalty as the main and effective punishment in tackling crimes. This group in the international world is often referred to as the retentionist group (Beltran de Felip & Martin, 2012).

The abolitionists want to completely abolish the death penalty in the Criminal Code because they argue that the right to life is a right inherent in human beings. This inherent right cannot be contested by anything except by the giver of life, namely God Almighty. In a constitutional study, the abolitionists adhered to Article 28 A of the 1945 Amendment to the 1945 Constitution which states that everyone has the right to live and the right to defend their life. Amendment to the 1945 Constitution. The abolitionists also adhered to the International Convention of Civil and Political Rights (ICCPR). Article 6 paragraph (1) of the ICCPR states that "every human being has the right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life" or it can be interpreted that every human being has the right to life which is protected by law, there is nothing that can interfere with that right (Corteen & Steele, 2018).

Meanwhile, retentionists, who mostly come from religious groups, argue that the death penalty is a punishment ordered by God through religious scriptures, therefore it is indeed permissible to do it to save the greater interest. Constitutionally, retentionists adhere to Article 28 J paragraph (2) of the second amendment to the 1945 Constitution, which states that: "In exercising their rights and freedoms, everyone is obliged to comply with the restrictions stipulated by law for the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and to fulfill just demands under considerations of morals, religious values, security and public order in a democratic society". This is an argument that the right to life can be taken through the death penalty for the sake of a larger society. In international instruments, namely article 6 paragraph (2) of the ICCPR, it is explained that the death penalty can be imposed only for the most serious crimes under the law in force at the time the crime was committed and does not conflict with the articles of the ICCPR (Jaya, 2016).

The conflict between the retentionist and abolitionist groups should not interfere with the reform of Indonesian criminal law, especially in the formulation of policies for the formulation of the death penalty following the values of the Indonesian nation. The criminal law reform must indeed follow the national insight and the nation's ideology, namely Pancasila, then only be adjusted to international legal instruments. So that the aspired criminal law is achieved and follows the values adopted by the community (Christianto, 2009). Therefore, this study aims to determine the conditional death penalty formulation policy in the Indonesian Criminal Code which is currently in force, and the conditional death penalty in the Indonesian RKUHP 2019. So that after knowing the formulation policy it can be analyzed with the theory of criminal law reform that every legal reform must progress in the form of law that accommodates something that is considered good and right (value) of a nation (Alviolita & Arief, 2019).

Previous similar research was research conducted by Sapto Handoyo Dwi Putra on the implementation of conditional punishment in the criminal system in Indonesia, but not specifically on the conditional death penalty (Putra & Sutanti, 2020). Then research by Toule discusses the existence of the threat of capital punishment specifically in the case of corruption ((Toule, 2016). Then Anjari's research on capital punishment in Indonesia from the perspective of Human Rights

(Anjari, 2015). Furthermore, research on capital punishment conducted by foreign researchers is the imposition of capital punishment from an international perspective by Hood and Hoyle (Hood & Hoyle, 2015), and research on the deterrent effect of the death penalty by Nagin and Pepper (Council, Nagin, & Pepper, 2012).

Therefore, the novelty of this research focuses on the middle way of peace between the retentionists and abolisonists in the policy of formulating the death penalty into conditional capital punishment in the perspective of reforming the national criminal law. This study will find out about the policy on the formulation of the death penalty in Indonesian criminal legislation in the present and then compare it with the policy on the formulation of the conditional death penalty in Indonesian criminal legislation in the future.

RESEARCH METHOD

The discussion of conditional capital punishment from the perspective of Indonesian criminal law reform uses a qualitative normative legal research approach. What is meant by a qualitative normative legal approach is research that uses a method of describing, explaining, analyzing, and developing the construction of the death penalty law from the perspective of the identity of the Indonesian nation (Barus, 2013). The data collection method in this study is by analyzing phenomena, identifying regulations, describing words from research materials (scientific works), and other sources of legal materials that have relevance to the research discussion raised (Irianto, 2017).

RESULT AND DISCUSSION

A. The Formalation of the Death Penalty in Indonesian Laws at the Present Time

The death penalty in the Indonesian criminal law system is regulated in Article 10 of the Criminal Code as a principal crime, namely a crime that is threatened directly by the perpetrator of a crime. The execution of the death penalty is carried out by being shot using a firearm with the criminal provisions contained in Law no. 2/PNPS/1964. Based on this law, the procedure for implementing the death penalty in Indonesia is carried out by being shot to death by a firing squad, which is carried out somewhere within the jurisdiction of the court that renders the first-degree decision, unless otherwise determined by the Minister of Justice and Human Rights. whose implementation is attended by the regional commissariat (Kapolres) or an officer appointed by him together with the responsible High Prosecutor/Prosecutor.

The existence of the death penalty in Indonesia, apart from being a cultural and religious issue, is also political. The Dutch colonial government seems to have intentionally left a "ticking time bomb" regarding the death penalty, because in 1870 the Dutch themselves abolished the death penalty for general crimes, but still enforced it for military crimes and war crimes until 1983. been implemented since 1950.

The Netherlands has ratified “Protocol No. 6 European Convention on Human Rights on the Abolition of the Death Penalty" (1982). On the other hand, the death penalty was still applied in the Dutch East Indies for serious crimes for colonial interests (Johnson, 2010).

Explanation: the Indonesian Criminal Code is a "copy" of the Dutch Criminal Code 1886 and has been in effect since January 1, 1918, which was then based on Transitional Rules No. II of the 1945 Constitution and Law no. 1 the year 1946 jo. UU no. 73/1958 remains in effect, while the death penalty is still threatened for serious crimes: crimes against state security, premeditated murder, theft by weight, piracy at sea, etc. Post-independence products increase the number of criminal acts that are punishable by the death penalty: firearms, air piracy, terrorism, drugs, gross human rights violations, corruption during natural disasters or economic crises, etc. (Putra & Sutanti, 2020).

In the Criminal Code itself, there are nine types of crimes that are punishable by the death penalty, including 1. Makar with the intention of killing the President and Vice President (Article 104 of the Criminal Code); 2. Conducting relations with foreign countries resulting in war (Article 111 paragraph (2) of the Criminal Code); 3. Betrayal informing the enemy in time of war (Article 124 paragraph (3) of the Criminal Code); 4. Instigating and facilitating the occurrence of riots (Article 124 bis of the Criminal Code); 5. Premeditated murder of heads of friendly countries (Article 140 paragraph (3) of the Criminal Code); Premeditated murder (Article 340 of the Criminal Code); 7. Theft with violence in an alliance results in serious injury or death (Article 365 paragraph of the Criminal Code); 8. Piracy at sea that causes death (Article 444 of the Criminal Code); 9. Aviation crimes and aviation facilities (Article 149 K paragraph (2), Article 149 O paragraph (2) of the Criminal Code).

Meanwhile, the threat of capital punishment outside the Criminal Code which is a special crime, among others: 1. Criminal Acts of Firearms, Ammunition, or Explosives (Law No. 12/DRT/1951); 2. Economic Crimes (Law No. 7 /DRT/1955); 3. Criminal Acts concerning Atomic Energy (Law No. 3/1964); 4. Narcotics and Psychotropic Crimes (Law No. 22 of 1997 and Law No. 5 of 1997); 5. Corruption Crimes (Law No. 31 of 1999 in conjunction with Law NO. 20 of 2001); 6. Crimes against Human Rights (Law No. 26 of 2000); 7. Criminal Acts of Terrorism (Perppu No.1 of 2002).

The problems that arise because of the threat of capital punishment (primary punishment) in the Indonesian criminal law system include the issue of executions using firearms by firing squad which are considered inhumane by retentionists and abolisonists. Then the unclear waiting time for the execution of the death penalty has made the convict unstable in extraordinary legal efforts, namely the submission of a judicial review (PK) and the application of clemency to the president. The death penalty is considered a form of punishment that is not evaluative against criminals or does not have a restorative justice perspective ((Bindler & Hjalmarsson, 2020).

In Indonesia's national criminal law system, it is not known that there is a conditional death penalty regulation because the death penalty is always threatened as a principal crime against certain crimes both inside and outside the

Criminal Code. The execution of the death penalty often causes various problems, namely, the waiting time is not clear for the convict because he is waiting for the receipt of a clemency application and an uncertain reconsideration application, there are even those whose clemency decisions have been rejected but have not been executed ((Zaini & NPM, 2013). Then the potential for a wrong decision (error in persona) makes the death penalty a "non-evaluative" crime. This is because after being executed, the convict's life cannot be returned..

B. Conditional Death Penalty in the Indonesian Criminal Code in the Future

In Article 64 of the 2019 RKUHP, the death penalty is not included in the main punishment but is a special crime that is threatened with always being side by side with other crimes so it is called a conditional death penalty. The conditional death penalty arrangement in the RKUHP is a middle-way solution that is characterized by Indonesia (Indonesian Way). This is under article 98 of the RKUHP where the purpose of the death penalty is the last resort (ultimum remidium) to prevent criminal acts and protect the community. This article is also a resolution of conflicts between the retentionist and abolitionist groups where a middle way is taken that the death penalty is still carried out as a last resort for the greater interest of protecting and protecting the community. (principle of law)

The provision that a conditional death penalty can be imposed is regulated in Article 99 of the RKUHP, 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 its implementation is not carried out in public, then in paragraph (3) regarding the method of execution by firing squad or by other means determined by law, as well as paragraph (4) regarding the postponement of execution of pregnant women until they give birth, breastfeeding women until they are no longer breastfeeding their babies, and crazy to get well.

Then in Article 100 paragraph (1) of the RKUHP, it is explained about a probationary period of 10 years which can be imposed by a judge if it fulfills three conditions, namely: a) the defendant shows regret and there is hope for improvement; b) the role of the accused in the crime is not very important, or c) there are mitigating reasons. Then in article 100 paragraph (2) of the RKUHP, it is explained that the probationary period must be included in the court decision. Furthermore, in Article 100 paragraph (3) of the RKUHP, it is explained that the calculation of the day 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 (Kyambalesa, 2019).

Article 100 paragraph (4) of the RKUHP explains that the convict during the probationary period as referred to in paragraph (1) shows commendable attitudes and actions, the death penalty can be changed to life imprisonment by a Presidential Decree after obtaining consideration from the Supreme Court. Here it is explained about the evaluative side of the conditional death penalty where if there is the hope of the convict to repent then the death penalty can be changed to life imprisonment (Zoomers, 2010). Article 100 paragraph (5) of the RKUHP states that if the convict during the probationary period as referred to in paragraph (1) does not show commendable attitudes and actions and there is no hope for improvement, the death penalty can be carried out on the orders of the Attorney General. This shows the government's firmness to continue executing death row inmates if there is no hope for improvement (Putra & Sutanti, 2020).

Article 101 of the RKUHP states that if the request for clemency of the death row convict is rejected and the death penalty is not carried out for 10 (ten) years since the clemency was rejected, not because the convict has fled, the death penalty can be changed to life imprisonment by Presidential Decree (Keepers). The death penalty can be changed to life imprisonment or a maximum of 20 years in prison if during the probationary period concerned, shows a commendable attitude and action with the Presidential Decree with the consideration of the Supreme Court.

Then in Article 102 of the RKUHP, it is explained that further provisions regarding the procedure for implementing the death penalty are regulated by law. This implies that the RKUHP still provides an opportunity for policymakers to be able to correct how the execution of the death penalty is best following the development of insight and the times. Such an arrangement implies that the RKUHP adheres to the principle of flexibility/elasticity (Khasan, 2017).

Prof. Muladi provides the conditions for determining the types of crimes that need to be sentenced to death (capital crimes) and the limitations of their application (Muladi, Diah Sulistyani, & SH, 2021): a. Very serious crimes (the most serious crimes, ICCPR 1966); b. Intentional crimes with lethal or other extremely grave consequences, (ECOSOC, 1984); c. Exceptions: political crimes, non-violent financial crimes, non-violent religious practices (UN Commission on Human Rights, 1999); d. The ECOSOC standard regulates the guidelines for imposing the death penalty and(Khasan, 2017) emphasizes that: (1). The death penalty is only applied to very serious crimes with deadly or very serious consequences; (2). The death penalty must have been regulated 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; the same goes for pregnant women or new mothers and people who have gone insane; based on clear and convincing evidence; (4). The final decision (Final judgment) made by the competent court based on the principle of a fair trial (air trial) is not due to a misguided trial (Article 14 ICCP); (5). The right to appeal is mandatory for the convict (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 pending due to an appeal or there are other procedures in connection with clemency or commutation;

Various countries varied (based on socio-cultural and political environment) mentioned: crimes against humanity; murder; drug trafficking; terrorism; treason; espionage; crimes against state security; political protest (Saudi Arabia); rape; economic crime; kidnapping; separatism; adultery (some Middle Eastern countries); sodomy (some Muslim countries); hudud, for example, Apostasy (some Islamic countries); flashphemy (some Islamic countries); robbery by weighting and others is punishable by death.

In Article 52 of the RKUHP concerning the purpose of punishment, it is formulated that a crime must not demean human dignity. This is in line with the ECOSOC Res. 1984/50 which states that "when capital punishment occurs, it shall be carried out to inflict the minimum possible suffering". So it can be interpreted that when the death penalty decision is imposed, it must be imposed by applying the least suffering to the convict (Turner, 2018).

CONCLUSION

Based on the description in the discussion of research on conditional capital punishment in Indonesia, it can be concluded, among other things, that the formulation policy in Indonesian criminal legislation still causes many problems in its execution. The

problem of the uncertainty of the waiting period and the assumption that it does not provide a deterrent effect is a problem that interferes with the sense of justice and legal certainty in Indonesia. The conditional death penalty is also not regulated in the current criminal law in Indonesia, and the regulation of capital punishment in the future Indonesian RKUHP will take the "middle way" or the so-called "Indonesian Way" between the retentionist and abolitionist state groups. 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 Constitution of the Republic of Indonesia, Human Rights & Human Obligations and general legal principles recognized by civilized nations. . The imposition of a conditional death penalty is in accordance with the principle of due process of law and to avoid extrajudicial killing, summary execution, and killing without trial, which are gross violations of human rights. Then there is still a need for guidelines for imposing the death penalty for judges, with an alternative to life imprisonment or 20 years in prison. Regarding the total abolition of the death penalty, it is very difficult to do in Indonesia, because its existence is inseparable from the social, cultural, and religious values of each nation as well as from the history of the nation itself.

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