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An Analysis of the Death Penalty in Indonesia Criminal Law

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Abstract: This research uses normative juridical approach to study on the analysis of the death penalty executions and the legal policy of death executions in Indonesia. There are delays on death executions for the convicted person since they entitled to using rights namely filing a judicial review (PK/*Peninjauan Kembali*). Furthermore, the legal loophole in the execution of the death penalty by the publication of the Constitutional Court Number 107 / PUU-XIII / 2015 which assert that the Attorney as the executor can ask the convicted person or his family whether to use their rights or not if the convict clearly does not want to use his rights, the executions will be carried out. Legal policy on threats and the implementation of the death penalty in the draft of criminal code was agreed by draftsman of the bill with the solutions. The draftsman of the bill agrees that the death penalty will be an alternative punishment sentenced as a last resort to protect the society. The bill also regulates that the execution among others include that the execution can be delayed by ten years probations. If the public reaction on the convict is not too large or convict has regret and could fix it or the role in the crime is not very important and there is a reason to reduce punishment, the death penalty may be changed. For pregnant women and the mentally ill convicts the execution can only be carried after the birth and the person has recovered from mental illness. The existence of this solutions is still kept putting the death penalty in criminal law, whereas the effectiveness of the death penalty is scientifically still in doubt to solve crimes and to prevent crimes by the death penalty punishment.

Keywords: death penalty; execution; implementation of execution; legal policy; political law.

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INTRODUCTION

The problem of the death penalty in Indonesia does not only arise in the criminal stelsel as stated in Article 10 of the Criminal Code regarding the sentence of death and the other several criminal laws,

but is also found in the process of executions. In the past, the execution as asserted in Article 11 of the Penal Code stated that: "Death punishment run by the executioner is in the hanger with a rope attached to person's neck then drop the board to make convict standing".

This provision is considered incompatible with the development of sentencing in Indonesia, since one of its objectives is "*Punishment is not intended to make suffering and is not allowed to degrade*", so that the new arrangements was held on the implementation of the death

penalty i.e the Act 2/PNPS/1964 on Procedures for Execution of Criminal Death commanded by the Court in General and Military Courts. Executions were carried out by a firing squad of the Police Mobile Brigade formed by the Chief of Police in the seat of the court that imposes the death penalty. The firing squad consisted of an NCO, 12 enlisted men, under the command of an officer (Article 10, paragraph [1] Act 2/PNPS/1964).

The process of implementation of the death penalty in Indonesia apparently does not have a clear timetable for execution, since there is death penalty execution that is done faster, meanwhile there is also the execution that is very long since the verdict is asserted to inmates. Further, the Head of the Legal Information Center of Attorney General's Office, Setia Untung Arimuladi, said that one of the reasons of why the execution of a death penalty has been delayed so long after the verdict, because they are given their rights as convicts. The convict is entitled to file legal clemency to the president in the form of application for the change, mitigation, reduction, or elimination of criminal enforcement against him, as for assert in Law No. 22 of 2002 on clemency.

Hence, the rights have become a legal loophole to delay the death penalty execution. As an example, the case decision that has been legally enforceable (in-kracht van gewijsde) Case No: 1093 K /Pid.Sus/2014 on behalf of Freddy Budiman who was sentenced to death for a criminal offense of smuggling 1.4 million ecstasy pills from China to Indonesia. Smuggling was done in 2012, and although it was in Cipinang, East Jakarta,

Freddy still controls narcotics. Attorney General command a sentence for the death penalty punishment twice, to Freddy Budiman, because they are playing for the time of submission Review (PK) and clemency to the President. Twice the subpoena was granted on April 20 and May 20, 2015. Freddy Budiman has sent a letter to present a judicial statement to the prosecutor and clemency to the President, but there is no deadline timeline written in PK and clemency. Therefore, the Prosecutor gave a deadline until June 20, 2015 to register a PK or a pardon, if until the time limit it was not done, then the rights will be deemed void.¹

According to Muladi, independent judicial power is closely related to the UN human rights charter and the 1948 Covenant on Civil and Political Rights of 1966, in particular, the recognition of the principle of Fair Trial. The definition of Fair Trial is the right to equality of fair trials and open to the public and the courts, without delay and are independent, competent and impartial in determining the rights and obligations of a person, hence the criminal cases established under law. Further, the process of implementation of the death penalty which is uncertain is a violation of the Fair Trial closely related to human rights².

The death penalty can be imposed under criminal law in Indonesia. This is because the death penalty is still the principal criminal as stated in Article 10 of the Code of Criminal Law (Penal Code) Indonesia, such as Article 340 of the Criminal Code (murder) which states that

¹ Kompas Newspaper, September 1st, 2015.

² Kompas Newspaper, June 20, 2016.

"The person who with deliberate intent and with premeditation takes the life of another person, shall, being guilty of murder, be punished by capital punishment of life imprisonment or a maximum imprisonment of twenty years".

In addition to the Criminal Code, there are several laws that condemn the death punishment, namely Law 31 of 1999 *jo.* Law No. 20 of 2001 on the Eradication of Corruption, Law No. 15 of 2003 on Terrorism and Law No. 35 of 2009 on Narcotics and the Military Criminal Code, even in Government Regulation No. 1 Year 2016 on the amendment of Law No. 23 of 2002 on Child Protection assert the death penalty. In the practice of criminal justice in Indonesia, the courts have never imposed the death penalty in cases of corruption, it is only for the death penalty in a criminal case such as the intended murder³, terrorism⁴, and narcotics⁵, as well as the Military Criminal Code⁶. Some of the issues which arise related to the threat of death penalty under criminal law in Indonesia are the effectiveness of death penalty to deter the perpetrator who wants to commit a criminal offense as threatened with the death penalty. Is the death penalty in accordance with the philosophy of Pancasila in Indonesia? Is capital punishment not contrary to human rights?

The connection with the effectiveness of death punishment against pepe-

trators of the crime of murder, terrorism, and narcotics, has not shown adequate results. It can be seen from the number of crimes of premeditated murder, terrorism, and narcotics in Indonesia. Studies on the death penalty with the philosophy of Pancasila as the nation of Indonesia is until now still disputed by the parties that arise the pros and cons.

The pro assume that the death penalty is in accordance with the philosophy of Pancasila, while the counter parties claimed that capital punishment does not fit with the philosophy of Pancasila. The death penalty is also a debate related to human rights. In Act No. 39 of 1999 on Human Rights, the right to life recognized as the most inherent in humans that cannot be revoked or removed by anyone⁷. The practice which still applies regarding the death penalty in Indonesia in the criminal case of intended murder has been there since 70 years ago. Such as the criminal case of theft of sheep in Britain in the days of yesteryear. At that time in the 16th, 17th, and 18th century in the UK not only sheep theft was punishable by death, but also of petty larceny or theft punishable by death. It is surprising that although the death penalty was carried out before the public in a terrible atmosphere, the thief did not become a deterrent and fear. Conversely, at times during the executions running, the thief was still in action. In other words, the death penalty is not an effective drug offenses in the past in the UK, because the sheep were

³ <http://news.liputan6.com/> accessed on June 17, 2016.

⁴ <http://news.okezone.com/> accessed on June 18, 2016.

⁵ <http://news.detik.com/> accessed on June 18, 2016.

⁶ <http://www.cnnindonesia.com/>, accessed July 14, 2016.

⁷ Article 4, Law Number 39 of 1999 regarding Human Rights.

still stolen, the thief was still in action, anytime and anywhere in the UK.⁸

For the comparison, in Indonesia, the imposition of the death penalty against intended murder, terrorism, and narcotics, increases the perpetrator's number of criminal acts of intended murder, terrorism, and narcotics. Further, there the perpetrators who commit intended murder by the reasons of customs for example as Madura people, when the honor is violated then the only solution is intended murder, the death penalty threat did not deter the confidence and culture to do these things so that death punishment is meaningless as well as aspects of the retaliation and frightening aspect⁹. In relation to the criminal acts of terrorism, terrorists also did not feel afraid and threatened with the death penalty because the people who commit such act usually have a religious faith and belief that his actions are rewarded from the God. Hence, it did not deter the offender to commit a criminal act of terrorism. The threat of the death penalty against drug dealers also does not reduce the number of drug dealers.¹⁰ That is because the narcotics business generates huge profits i.e easy money business. Hence there are a lot of drug dealers who still sell the narcotics, even if the threat of death punishment is against perpetrators of drug dealers.

Enforcement of the criminal law is part of a criminal policy which is derived from the term policy (UK) or politik

(Netherlands). The term of policy can also be referred to as a political criminal. Foreign literature suggests that the term political criminals are often known by various terms, including penal policy, criminal law policy or *strafrechtspolitik*. Definition of policy or politics can be seen from a political criminal law and criminal politics. According to Sudarto, political laws are: (a) Efforts to realize the good of the rules in accordance with the circumstances and the situation at a time; (B) The policy of the state through the agencies authorized to assign the desired regulation rules are expected to be used to express what is contained in the community and to achieve what is aspired envisioned.¹¹

Based on the said definitions, further, Sudarto stated that criminal conduct politics means to hold elections in order to achieve the result of criminal laws and the most greater good. Efforts and policies to make the rules of criminal law, which is good by nature, cannot be separated from the crime prevention goals. So the policy or political criminal law is also part of a political criminal. In other words, from the standpoint of criminal politics, politics is synonymous with the notion of criminal law policy of crime prevention. Therefore, it is often said that the political/criminal law policy is also part of the policy of law enforcement. The efforts to prevent crime through the enactment of legislation criminal law are essentially an integral part of the business community protection (social welfare). It is only natural that a political policy or criminal law is an integral part of the pol-

⁸ J.E., Sahetapy, 1982, *Suatu Studi Khusus Mengenai Ancaman Pidana Mati Terhadap Pembunuhan Berencana*, CV Rajawali, Jakarta.

⁹ Ibid.

¹⁰ BNN, <http://indonesia.coconuts.co/>, accessed on 18 June 2016.

¹¹ Sudarto, 1981, *Kapita Selekta Hukum Pidana*, Alumni, Bandung.

icy or social policy. Criminal policies in the prevention and control of crime are one policy, in addition to other development policies (social policy). Barda Nawawi Arief stated "the prevention of crime need to be taken with a policy approach, in the sense that there is coherence between political crime and social policy; No cohesion (integral) between crime prevention efforts with penal and non-penal¹². Social policy can be defined as any rational effort to achieve the welfare of society and also includes the protection of society. Thus, in the sense of "social policy" once covered in it "social welfare policy" and "social defense" policy.

The efforts to prevent crime can be broadly divided into two substances, namely via the "penal" (criminal law) and via the "non-penal" (outside the criminal law). The efforts to prevent crime through means of "penal" are more focused on the nature of "repressive" (suppression/eradication) of the crime, while the "nonpenal" is more focused on the nature of "preventive" (prevention/deterrence) before the crime occurred. Hence, the difference is hard to notice, because the repressive action can also be seen as a preventative measure in a broad sense.

Furthermore, the use of criminal means in criminal policy has suggested that every organized society has the criminal justice system which consists of the rules of criminal law and sanctions, a criminal law procedure, and a mechanism for the implementation. The non-penal is the use of measures outside the criminal

law to prevent the crime. The politic of the death penalty in Indonesia has been regulated in the Criminal Code, the Military Penal Code and some criminal legislation. But the meaning of the death penalty is still not clear. Further, the existence of the death penalty is associated with the philosophy of Pancasila and human rights, as well as the issue of capital punishment implementation process relating to Fair Trial and human rights.

Based on the above description regarding the problem in this research, hence we assert that first, how is the implementation of executions in Indonesia carried out? Second, how is political death penalty law in Indonesia carried out?

METHOD

This research is descriptive analytical research that seeks to describe and elaborate on issues relating to the implementation of political executions and death penalty law in Indonesia. The approach used is a normative juridical approach that is based on legislation, theories and concepts related to writing research.

ANALYSIS AND DISCUSSION

Implementation of Executions in Indonesia

In early July 2016, the President of Indonesia Joko Widodo has prepared the execution of phase III. The information circulating among journalists was there were 16 convicts in the list of executions.¹³ In contrast to the execution of phase I and phase II which got the international spot-

¹² Barda Nawawi Arief, 2002. Bunga Rampai Kebijakan Hukum Pidana: Citra Aditya Bakti, Bandung.

¹³ "Ahead of Execution, The Name of Drug Lord Which Will Be Shot to Dead", <http://news.okezone.com>, accessed July 14, 2016".

light, the execution of phase III is prepared with care by the government. Juridicial constraints delay the execution on death row for the convict to exercise their rights to apply for a judicial review (PK) to the Supreme Court (MA) and clemency to the President such as the executions against Freddy Budiman who was sentenced to death because he was proven to smuggle 1.4 million ecstasy pills from China in 2012, but remains in control of narcotics business from his cell. Hence it gives rise to pressure from society to execute the convict.

However, the Attorney General has not been able to verify whether Freddy Budiman's name was on the list of convicts executed because Freddy still filed an extra ordinary legal remedy reconsideration (PK) to the Supreme Court. The above issues have been anticipated by the Decision of the Constitutional Court (MK) No. 107 / PUU-XIII / 2015 dated June 15, 2016 pronounced overall grant the petition on death penalty for Suud Rusli, hence Suud Rusli can apply for clemency to the President. The petition has over 1 (one) year that is based on Law No. 5 Year 2010 jo Law No. 22 of 2002 and was likely he filed a request for clemency. Based on this decision, the implementation of the death penalty will be more certain.¹⁴

In conclusion, according to the Constitutional Court Decision No. 107 / PUU-XIII / 2015 it may be overcome by the prosecutor as the executor of the convict or his family ask whether to exercise their rights or not. Obviously if not, then the execution can be carried out. In fact,

¹⁴ Kompas Newspaper, June 16, 2016.

the problem is not only that, but the convict stated using rights, but did not specify a time to postpone the execution. Therefore, the decision of the Court above does not provide a solution to their death row inmate who delays the execution, when the death row inmates said they would use their rights to apply for a judicial review (PK) or a pardon, but did not specify when. Moreover, the decision of the Court also overturned the provisions clemency maximum of 1 year from the verdict which is legally binding stipulated in the Act pardon, so pardon the submission was not timed.

Political Death Penalty Law in Indonesia

The existence of death punishment under criminal law in Indonesia has long raised the pros and cons. Rudi Satrio claimed that sociological benefits, punishment including the death penalty, are for: maintenance of public order, protection of citizens from crime, loss, or hazards which do others; promote re-offenders (except for death penalty) and to maintain and preserve the integrity of certain basic insights regarding social justice, human dignity, and justice individuals. Moreover narcotics crime is an extraordinary crime, hence the death penalty should be retained.¹⁵

Further, J.E. Sahetapy stated that he rejected the death penalty, because the death penalty is contrary to *Weltanschauung* of Pancasila which is not only a "Leitstar" life of the nation, but also the source of all sources of law, so that the

¹⁵ Rudi Satrio, Minutes of Session Case Number 2 / PUU-V / 2007 and Case Number 3 / PUU-V / 2007, Jakarta, October 30, 2007.

death penalty has no "*raison d'etre*" in the life of a nation and Indonesian state and the death penalty cannot be explained in terms of criminal law, especially in legalistic positivistic, in terms of both retributive and "deterrent", but must be seen in terms of criminology and victimology that it will reject the "*raison d'etre*" the death penalty.¹⁶ The purpose of punishment is needed to determine the nature and basis of the criminal law. In that context Hugo De Groot said "*malum passionis (quod inglignitur) actions propter malum*" evil befall the suffering caused by evil deeds.¹⁷ Hence, there is contradiction of the purpose of punishment, ie, between those who believe crime as a means of retaliation or theory of absolute (*retributive/vergeltings theorieen*) and those who claim that the criminal has a positive goal or theory of interest (*utilitarian/doeltheorieen*), as well as the view that combines the two objectives the criminalization (combined theory/ *verenigings theorieen*).

Therefore, the objective of sentencing as a guideline in giving and convict, then the draft Criminal Code, Article 55 is formulated as follows:

The purpose of punishment

(1) Punishment aims at:

- a. preventing the perpetration of crime by enforcing the rule of law for the sake of the community shelter;

- b. socializing convicted by conducting coaching so as to be good and useful;
- c. resolving conflicts caused by a criminal act, restoring balance, and bring a sense of peace in society; and
- d. relieving guilt on the convict

(2) Punishment is not intended to suffer and degrade.

Furthermore, in the explanation, the punishment is a process. Prior to this process, the role of a judge is very important. Hence, this goal contains a dual purpose to be achieved through criminal prosecution. The first goal is the protection of public view (compare with social defense)¹⁸. Second goal had the purpose not only to rehabilitate, but also to re-socialize the convict and integrate them into the community. The third objective is in line with the views of customary law, in the sense of "indigenous reactions", which was meant to restore the balance which was disturbed by acts contrary to customary law. Hence, the sentence imposed is expected to resolve the conflict or disagreement and also bring a sense of peace in society. The fourth goal is spiritual reflected in the Pancasila as the foundation of the Republic of Indonesia.

Paragraph (2) gives meaning to the criminal law system in Indonesia. Although the criminal was essentially an evil, but the punishment is not intended to suffer and not allowed to degrade. This

¹⁶ Note.

¹⁷ Alf Ross, 1975. *On Guilt, Responsibility and Punishment*. Steven & Sons Ltd, London.

¹⁸ Edy Lisdiyono, 2017, Improving Legal Argument Critically In The Litigation Mechanism In Indonesia (An Empirical Study Of Environmental Verdicts), *Sriwijaya Law Review*, Vol. 1 Issue 1, January (2017).

provision will affect the implementation of a real criminal to be charged to the convict. To determine that whether or not the threat of death punishment is essential in the penal code, the preparation of draft legislation (Bill) Criminal Code between the government and the House of Representatives (Shaping the Act), which in the end by using the approach of balance as the purpose of punishment above, forming Law reached an agreement by making the middle way" solutions of threats and execution of capital punishment in the draft criminal Code Year 2015. Shaping the Law is an alternative punishment imposed as a last resort to protect the public (Article 89 of the draft penal Code). The bill also regulates the execution of the Penal Code that could be delayed by 10 years of probation. If the public reaction on the convict is not too large or convict has regret and could fix it or the role in the crime is not very important and there is a reason to reduce punishment, the death penalty may be changed. For pregnant women and the mentally ill convicts the execution can only be carried after the birth and the person has recovered from mental illness.

The existence of this solutions is still kept putting the death penalty in criminal law nationally, whereas the effectiveness of the death penalty is scientifically still in doubt to solve crimes and to prevent crimes by the death penalty punishment. Regardless of the number of issues in an agreed draft Criminal Code, such an arrangement would be a middle ground or compromise measure between the pro and cons of the death penalty.

However, the implementation of phase III executions to be carried out in

July-August 2016 will still be carried out without using a middle way that the new application will be implemented after the passage of the Criminal Code into the Criminal Code. In addition, the middle solutions remained the death penalty in national criminal law, whereas the effectiveness of the death penalty is still in doubt scientifically to solve crimes and prevent crimes punishable by the death penalty.

CONCLUSION

Based on the above research, it can be concluded, firstly the implementation of the executions in Indonesia phase I and phase II, which 14 people have been executed in 2015, amidst international pressure and raised opinions for death punishment. There are also delays on death penalty execution, since the convict has exercised their rights which filed reconsideration (PK) or clemency. In July 2016, the execution of the death penalty for a number of 16 people has been prepared with caution and anticipate the legal loopholes the execution of the death penalty by the publication of the Constitutional Court Number 107/PUU-XIII/2015 which specify that the Attorney as executor can ask the convicted person or his family regarding the use of their rights. If the convict does not want to exercise their rights, the executions will be carried out. The problem of executions is not only that. If the convict states that they will use the rights, but does not specify the time, hence it will postpone the execution. Therefore, the decision of the Court above does not provide a solution to their death penalty execution, when the inmates said they would use their rights

to apply for a judicial review (PK) or a pardon, but did not specify when the time. Hence, the decision of the Court also overturned the provisions clemency maximum of 1 year from the verdict which is legally binding stipulated in the law, hence the submission was not timed.

Secondly, political laws against threats and implementation of capital punishment in the Criminal Code draft agreed by the new law are “the middle way” solution. The draft agrees that the death penalty will be an alternative punishment imposed as a last resort to protect the public (Article 89 of the draft Penal Code). The draft also regulates the execution of the Penal Code, among others, that the execution could be delayed by ten years probations. If the public reaction on the convict is not too large or convict has regret and could fix it or the role in the crime is not very important, then there is a reason to reduce punishment. The death penalty may be changed. For pregnant women and the mentally ill convicts the execution can only be carried after the birth and the person has recovered from mental illness. The existence of this solutions is still kept putting the death penalty in criminal law nationally, whereas the effectiveness of the death penalty is scientifically still in doubt to solve crimes and to prevent crimes by the death penalty punishment.

SUGGESTION

Firstly, Constitutional Court Decision Number 107/PUU-XIII/2015 may not be a solution to overcome the death penalty execution for inmate who delays the implementation of executions, since the problem is related to the issue of time on

death execution, filed a judicial review (PK) or clemency, while the Constitutional Court's decision only regulates death row of inmate who did not ask for their rights so that the death row inmate who filed their rights will still postpone executions. Therefore, there needs to be a new solution to overcome the death row inmate who delays the implementation of executions.

Secondly, policy of criminal law who held the middle ground solution has put the death penalty as an alternative punishment which essentially threatened the death penalty as a criminal threat in national criminal law. Therefore, basically, the death penalty punishment still exists. Though based on a scientific study of the death penalty is not effective in combating crime and prevention against the perpetrators of crimes are threatened with the death penalty.

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