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Research Article

History and Development of Death Sentencing in Indonesia: Current Policy and Regulations

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ABSTRACT

The controversies on death sentencing are not new. The debates over the existence of death sentencing policies and regulations can be flashed back to the existence of human beings. Many instruments have been created, discussed, and agreed upon to protect the use of death penalty sentencing through manifesting human rights. Death sentencing, under the current view, cannot be seen and treated outside the scope of human rights issues. Indonesia has issued Law No.1 of 2023 regarding the Criminal Code. Meanwhile, many countries have tried to abolish the use of death sentencing, and this new law on criminal law has incorporated death sentencing in its provisions and applications by courts. The research aims to discuss the death sentencing policies and regulations in Indonesia before and after the new Criminal Code issuance in 2023. The research is normative legal research that discusses death sentencing in Indonesia. The data used in this research are secondary, which consists of primary, secondary, and tertiary legal sources. Primary legal sources will consist of laws and regulations that were and are currently applicable. Secondary legal sources are writings and journal articles that discuss death sentencing in Indonesia, besides Law No.1 of 2023. Tertiary legal sources are other sources outside the above scope that may be useful to provide more understanding of the subject matters, such as web-based sources. Analysis was conducted using a qualitative approach to describe and explain the conceptual norm and its application to death sentencing. Findings and discussion proved that irrespective of the debate over the morality of death sentencing, Indonesia still recognized the use of death sentencing in some instances, such as premeditated murder, corruption, terrorism, narcotics, and illegal drug trafficking. They came from court decisions that followed prior laws and legislations before promulgating the new Criminal Code 2023.

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Introduction

Debate and discussion over pro and contra-death sentencing can be traced back to human life. Ever since human beings existed, the morality debate on death sentencing has never ended. Roeslan Saleh stated that (Poernomo, 1982) death sentencing is the heaviest sentencing according to our laws and legislations. For most countries, the issue of the death sentence is only taken as a cultural-historical meaning. In most countries, the death sentence has been removed from their Penal Code.

Some scholars who objected to death sentencing, such as C.Beccaria, Voltaire, Van Bemmelen, Roling, Ernest Bowen Rowlands, Von Hentig, Damstee, Leo Polak, J.E. Sahetapy, Ing Dei Tjo lam in the view that the death sentencing is against the God divinity and human rights (Prasetyo, 2013 in Pujiyono & Purwoto, 2017). According to them, once the death sentence is rendered, there will be no way to correct it even though there was an incorrect or false error in the sentencing. It will automatically close the convict's rights to correct or improve his behaviors to be a good person. There is also no strong evidence that death sentencing will reduce the outcome of the crime (Pujiyono & Purwoto, 2017). As quoted by Khairani (1977), Beccaria, in the 18th century, denounced the death sentence of Jean C'allas in France, who was accused of killing his son, which later turned out that it was somebody else who murdered his son.

Meanwhile, scholars who agree with death sentencing argue that death sentencing is more effective than other kinds of penalties, especially in murder cases. It is also more economical compared to other kinds of penalties. It can avoid or at least reduce the public emotion to take vigilante actions against the convict after his release caused by dissatisfaction with the court verdict. This may make the convict suffer for the rest of his life. Besides, the death sentence provides the lost legal certainty that the convict will be punished according to the sentence. In many cases, the convict is given forgiveness utilizing clemency, abolition, amnesty, and rehabilitation (Soedjono, 1974). Others said that the death sentence will reduce repetition by the convict, and the convict will not escape from prison, so the community

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will feel free and shall not be afraid that the same crime will happen again. Wirjono Prodjodikoro (1986), in his book Principles of Criminal Law in Indonesia, mentioned that the main objective of death sentencing is to make the people in the society afraid to commit crimes in the future. It is. Therefore, the enforcement of death sentencing was also conducted in public so that people could see it.

The research will explain and discuss the development of policies and regulations for death sentencing in Indonesia. The discussion will start even before the Indonesian independence, the application of death sentencing in the *Wetboek van Strafrecht voor Nederlands-Indië*, *Staatsblad* of 1915 No.732 enforceable as from 1 January 1918 (the WvS) until the promulgation of the new Indonesian Penal Code, Law No.1 of 2023 regarding the Penal Code (the New Penal Code).

Methodology

Death sentencing is the most researched item in penal law because it contains controversies between law enforcement and protection against human rights. Those who agree to death sentencing are those who see and view that the guilty deserve death sentencing because of or as a result of the crimes they have committed, which might be seen as crimes against the population or sometimes against the humanities. Others see it as against the human rights of the guilty; even if the guilty has committed crimes, killing him provides no benefit as if the guilty remained alive. Further, there might be hope that the guilty might regret his previous conduct and behaviors and change in the future (Syarifuddin, 2020).

In 2000, Malik conducted an in-depth study through an empirical case law analysis of the appellate courts' decisions in Bangladesh. Rahman, in 2017, examined and compared the trial courts that awarded the death penalty during the period 1972-2010. His study concludes that "the choice between taking and saving life as a sentencing option does not necessarily follow any consistent pattern. Rather, the choice largely depends on who sentences." Bilia, in 2019, provided a significant study based on the empirical study that studied the court decision towards the death penalty in particular. (Rahman, 2020).

The research is normative legal research. It used a descriptive-analytical method. Data used in the research are secondary data, which are data available to the public. The data consisted mainly of primary legal sources, secondary legal sources, and tertiary legal sources. Primary legal sources are the statutory laws and regulations, including the 1945 Constitution, the Penal Codes, and other laws that regulated and provided death sentences, including the Constitutional Court Decisions. The secondary legal sources are books, manuscripts in journals, articles, and other kinds of presentations by scholars and experts that provide explanations for easier understanding of the primary legal sources. The tertiary legal sources do not directly refer to any legal matters. However, they may provide references to legal understanding, meaning, or concepts of a particular subject or institution that can provide a better understanding of the subject matter or institution.

The analysis will be conducted through a qualitative approach. The qualitative approach will explain the legal value attached to a particular norm, which in this research is focused on the death sentence or death penalty. The analysis will go through the historical period prior to the independence of Indonesia, which implemented the WvS, which, after the independence of Indonesia, became the Old Penal Code until the promulgation of the New Penal Code. The analysis will be accompanied by a conclusion to answer the policy and regulations of death sentencing in Indonesia.

Findings and Discussion

The principles of international human rights have created sets of instruments to induce the protection of the citizens of a country from the abuse of authority by the governments. Such instruments shall provide a shield that will protect the citizen with rules and regulations that apply universally, which will and can be used against the corrupt government. Among those is the International Covenant on Civil and Political Rights – ICCPR which limits the use of death penalty sentencing. Indonesia ratified the ICCPR in 2005, which forces Indonesia to reduce or, if possible, eliminate the death penalty sentencing in court decisions (Hoyle, 2021). Sahetapy (1982) wrote that action against abolishing death sentencing appeared in 1847 in Michigan State United Stats of California, which abolished death sentencing. It was then in Venezuela in 1849 and the Netherlands in 1870

As mentioned above, the formal regulation on death sentencing in Indonesia is the promulgation of the WvS (which later became the Old Penal Code). The WvS started to be enforced in the Dutch Indie (Indonesia before the independence date – 17 August 1945) from 1 January 1918. Before the WvS was implemented, many adat (customary) laws in several adat societies in Dutch Indie were implemented. Purba mentioned the death sentence for an adultery woman in Aceh, a murderer who failed to compensate in Batak. Purba also stated several ways of executing the death penalty, such as stopping giving food on Bonerate Island, being beheaded in Tanah Toraja, being killed by keris, being drowned, being speared, and other means (Purba, n.d.).

The WvS is still in use and was promulgated as part of Indonesian laws based on Law No.1 of 1946 regarding Criminal Law Regulation (Law No.1/1946). Based on Law No.1/1946, the applicable criminal laws are the laws that existed and were implemented in Dutch Indie as of 8 March 1942, including the WvS. Law No.1/1946 actually changed the WvS, which became the Old Penal Code. However, it did not change the death sentencing stipulated in the WvS.

The death sentence was clearly stated in Article 10 of the Old Penal Code as one of the primary sentences. Following Article 10 of the Old Penal Code, there were at least seven paragraphs in the Old Penal Code that regulated the kinds of crimes that were subject to death penalties. They were:

1. Article 104 regarding the treason to the murder of the president;
2. Article 111 paragraph (2) regarding the invitation to foreign countries to attack Indonesia in a war;
3. Article 124 paragraph (3) regarding the giving of assistance to the enemy of Indonesia during the war;
4. Article 140 paragraphs (2) and (3) regarding premeditated treason against other state's heads that causes death;
5. Article 340 regarding premeditated murder;
6. Article 365 paragraph (4) regarding stealing followed by violent acts that cause serious injury or death;
7. Article 368 paragraph (2) regarding extortion by violent acts that cause serious injury or death;
8. Article 444 regarding piracy that causes death.

Besides those paragraphs, there are also several laws outside the Old Penal Code that regulate the death sentencing. They are:

1. Article 2 paragraph 2 Law No.31 of 1999 regarding the Eradication of Corruption, as amended by Law No.20 of 2001, applies when the State is in a dangerous situation,

national natural disaster, war, or during an economic and monetary crisis.

2. Articles 7, 8, 9, 36, and 37 of Law No.26 of 2000 regarding the Human Rights Court, for genocide crime (Article 36 jo. Article 8) and a crime against humanity (Article 37 jo. Article 9 point a, b, d, e, and j).
3. Article 113 paragraph (2) by producing, importing First Group of Narcotics in the form of its plant of minimum 1kg or 5 stems or 5 gram if it is not in the form of a plant; Article 114 paragraph (2) for selling or buying or trading First Group of Narcotics in the form of its plant of minimum 1kg or 5 stems or 5 gram if it is not in the form of a plant, Article 116 paragraph (2) by giving others to consume First Group of Narcotics which causes the others dead or permanently disabled, Article 118 paragraph (2) by producing or importing Second Group of Narcotics more than 5 grams, Article 119 paragraph (2) by selling or buying or trading Second Group of Narcotics more than 5 grams, Article 121 paragraph (2) by giving others to consume the Second Group of Narcotics which causes the others dead or permanently disabled, Article 126 paragraph (2) by giving others to consume the Third Group of Narcotics which causes the others dead or permanently disabled and Article 133 by making other people conducting crimes as stipulated in Article 111 to 126 and Article 129 of Law No.35 of 2009 regarding Narcotics.
4. Articles 6, 8, and 10 of Law No.15 of 2003 regarding the Establishment of Government Regulation in lieu of Law No.1 of 2002 regarding Eradication of Terrorism Crime to become Law jo. the Government Regulation in lieu of Law No.1 of 2002 regarding Eradication of Terrorism Crime.
5. Article 59 paragraph (2) of Law No.5 of 1997 regarding Psychotropics.
6. Article 1 paragraph (2) of Law No.21 of 1959 regarding Increasement of Threat for Punishing the Economics Crime.
7. Article 89 paragraph (1) of Law No.23 of 2002 regarding Child Protection.
8. Article 1 paragraph (1) of Emergency Law No.12 of 1951 regarding the Amendment of "*Ordonnantie Tijdelijke Byzondere Strafbepalingen*" (Stbl. 1948 No. 17) and Law No. 8 of 1948) (Firearms).

From the laws mentioned above that were made, promulgated, and enforced after the independence of the Republic of Indonesia, we can say that the Indonesian government is policy still allows death sentencing to be enforceable for certain crimes.

Several judicial reviews have been submitted to the Constitutional Court concerning laws that allow death sentencing. However, it is not the judicial review that refuses death sentencing; two cases want death sentencing to be applied without any specific condition. They are:

1. *Decision of case No.2/PUU-V/2007 and No.3/PUU-V/2007*

The purpose of the judicial review is to declare Article 80 paragraph (1) point a paragraph (2) point a, and paragraph (3) point a; Article 81 paragraph (3) point a; Article 82 paragraph (1) point a; paragraph (2) point a, and paragraph (3) point a, of Law No.22 of 1997 regarding Narcotics (the law had been revoked and replaced by Law No.35 of 2009 regarding Narcotics) were against or not in line with Article 28A and Article 28I of 1945 Constitution.

Article 28A of the 1945 Constitution stated, " Every person has the right to live as well as to defend his life and livelihood." Article 28I paragraph (1) of the 1945 Constitution declared, "The right to live, the right not to be tortured, the right to freedom of thought and conscience, the right to have a religion, the right to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted based on a law that applies retroactively is a human right that cannot be reduced in any circumstances."

The Constitutional Court stated that to understand the content of a law, people must see it from the philosophical, sociological, and juridical foundations and the purpose of making the law, which can be seen from consideration. In the consideration of Law No.22 of 1997, it is clearly stated that narcotics crime is a transnational crime using a sophisticated high technology modus operandi. Because of Article 28I, the Constitutional Court stated that there is an exception for the applicability of Article 28I, which is Article 28J. Article 28J of the 1945 Constitution stated that:

"(1) Everyone is obliged to respect the human rights of others in an orderly life of society, nation, and state.

(2) In exercising their rights and freedoms, everyone is obliged to comply with the limitations stipulated by law with the sole purpose of securing the recognition and respect for the rights and freedoms of others and fulfilling fair demands under the morality consideration, religious values, security and public order in a democratic society."

The judicial review was refused and rejected. The Constitutional Court thinks that the death sentencing mentioned in the articles in Law No.22 of 1997 regarding Narcotics is not in violation of the 1945 Constitution.

2. *Decision of case No.15/PUU-X/2012*

The case concerns the objection to death sentencing mentioned in Article 365, paragraph (4) of the Old Penal Code. According to the applicants, the content of death sentencing in Article 365 of the Old Penal Code contradicts the content of Article 28A and Article 28I of the 1945 Constitution. The Constitutional Court referred to the decision made in cases No.2/PUU-V/2007 and No.3/PUU-V/2007. Since the objection to death sentencing referred to the same articles, Article 28A and Article 28I of the 1945 Constitution, the Constitutional Court rejected the case.

3. *Decision of case No.44//PUUXII/2014*

The judicial review was about the phrase "Certain Condition" in Article 2 paragraph (2) of Law No.31 of 1999 regarding the Eradication of Corruption as amended by Law No.20 of 2001. The Elucidation of Article 2 paragraph (2) Law No.31 of 1999 regarding the Eradication of Corruption as amended by Law No.20 of 2001 among al stated that "… if the crime is conducted to the fund that was contributed to …, national natural disaster, …."

The Constitutional Court believes that the gradation of sanction or penalty determined by the legislative is not an issue that is subject to Constitutional Court authority. Therefore, the Constitutional Court dismissed the judicial review by stating that it could not be accepted.

4. *Decision of case No.4/PUU-XVII/2019*

The judicial review was submitted for the Constitutional Court to declare the invalidity of the wording "National" after the phrase "Natural Disaster" as stipulated in Law No.31 of 1999

regarding the Eradication of Corruption as amended by Law No.20 of 2001. According to the applicants to the judicial review, the wording "National" has made the corruptors that took advantage of natural disasters not be punished with the death penalty unless the natural disaster has been declared as a National natural disaster. The Constitutional Court did not accept the judicial review for the same reason used in case No.44/PUU-XII/2014.

The above Constitutional Court decisions and the application for judicial review show that the philosophy, sociology, and juridically Indonesian government and society still accept the formulation and implementation of death sentencing under certain conditions and circumstances. The politics of legislation in death sentencing can be found in the new Penal Code. Some of the essential articles can be found below.

1. Article 8, paragraph (1), regarding the application of the national active principle of death sentencing to all Indonesian citizens, unless the country where the crime was committed prohibited death sentencing (Article 8 paragraph (5)).
2. Article 67 states that the death penalty is treated as a special penalty that can always be substituted for other kinds of penalties.
3. Article 98 states that death sentencing is treated as an alternative to the last resort to avoid the commission of the crime and to protect society.
4. Article 102 mentions that the implementation of the death penalty will be regulated in law.
5. Article 191 regarding treason against the president or vice president.
6. Article 192 regarding treason against the Republic of Indonesia.
7. Article 212, paragraph (3) regarding sabotage and crimes committed during a war.
8. Article 459 on premeditated murder.
9. Articles 586, 587, and 588 paragraph (1) on crimes that endanger the safety of a flight.
10. Article 598 on genocides.
11. Article 599 on crimes against humanity.
12. Article 600 on terrorism.
13. Article 610 paragraph (2) on crimes of narcotics.

The contents of the new Penal Code might seem to see and interpret that the restrictions on the right to life regulated by the 1945 Constitution only applied to the provisions of Article 28J of the 1945 Constitution, namely regarding Human Rights, which the Human Rights of other people limit. In 2005, Indonesia's ratification of the International Covenant on Civil and Political Rights through Law No. 12 of 2005 might allow countries to include the death penalty in their legislation. The content of Article 6 paragraph (2) of the ICCPR only permits death sentencing for serious crimes. The concept of the most severe crimes in international law is very limited to crimes with the characteristics of criminal acts committed as being heinous and cruel, shaking the conscience of humanity (deeply shocking the conscience of humanity) to causing death or other severe consequences (extremely grave consequences); and in an awful way (crime with extremely heinous methods) and cruel beyond the limits of humanity and posing a threat or endangering state security.

In addition, as a country that consists of a majority of Muslims, Al Qurán provides guidelines for particular crimes that can be given death sentencing (Faal, 1990). Further, for comparison purposes, in 2008, in the United States of America 50 states, there were only 12 states that abolished death penalty sentencing. Meanwhile, there are still 38 states that maintain the provisions that impose the death penalty for certain crimes (Ali, 2008). Meanwhile, France is one among many countries that firmly oppose the death penalty, and it has become one of the leading States involved in combating the death sentence (France Diplomacy, 2024). Further, according to Amnesty International (2023), as of December 2022, 144 countries have abolished the death sentence in their laws and practices. It left about 55 countries that allowed the use of death sentences against criminals. Several countries that are known to execute death sentencing in the year 2020 are China, Iran, Egypt, Iraq, Saudi Arabia, and the USA (Amnesty International, 2021). Therefore, to remain in good hands to enforce the death sentence, the government should develop good guidance for the future that will provide a better understanding for future generations of good human rights education because of the need for death sentences in some instances that do not contradict human rights (Lon, 2020).

Conclusion

Findings, discussions, and analyses have proven that until today, death sentencing cannot be separated from the legal politics of crimes in Indonesia. Ever since the independence of Indonesia on 17 August 1945 until today, the articles and provisions in the law that mention, contain, and regulate the death penalty have always come up when it deals with certain types of crimes. It can also be seen that the types of crimes that are marked with death sentencing are identical to international views. Among them are premeditated murder, corruption, terrorism, narcotics, and illegal drug trafficking.

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