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Postponement Of The Death Penalty: An Overview Of Human Rights And Restorative Justice

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Abstract

The implementation of the death penalty must be carried out with full consideration of the law and existing facts, so that in its implementation the death penalty must be measured and not imposed with careless considerations. One way to prevent errors in administering the death penalty is to provide a time lag between the execution and execution of the death sentence so that the convict is still given the opportunity to defend himself in order to explain the defense which can mitigate it. However, what is happening now is that many death sentences are being carried out with very quick executions. This certainly has an impact on potential violations of the rights of convicts. Therefore, this research will discuss further the retention of the death penalty from a human rights and restorative justice perspective. To analyze the problem, this research use normative method with regulatory, conceptual, and case approach. This research found in postponement of the execution of death row convicts has two jusctification are juridical justification and empirical justification. However, needs special regulation to arrange the posponement and it could be form in presidential regulation.

Keywords*: crime by the state; criminal justice process; restorative justice*

A. Background

Miscarriage of justice is an actual issue seriously being discussed today, especially regarding death row convicts who have not been executed even though their rights have been exercised. Failure of the death penalty execution makes the convicts subject to 2 (two) times punishmnet known as the "double track system", namely imprisonment and death penalty sanctions. Until now, the government has no intention to reconsider the death row convicts. The provisions of Law Number 39 of 1999 contain several provisions that have been regulated as in restorative justice by Indonesian National Police (POLRI), Public Prosecutor, and Judiciary, which can be used by investigators, prosecutors, and judges as manifestation of Law Number 48 of 2009 concerning Power Justice, the principle of fast, simple, and low-cost justice.

This is one of the problems that arises when miscarriage of justice occurs in the criminal justice system. The law loses its legitimacy in society. The law loses its essence as law and loses its justification and *raison d'etre*. The reason for the miscarriage of justice is injustice and law as well as law enforcement through unfair criminal justice system which is essentially not law as stated in the legal doctrine adopted by Cicero, Augustinus, and Aquinas, "*lex iniusta non*

est lex".[1]

This will further destroy the principles and ideals of the modern rule of law. Miscarriage of justice is one of the forms of violation against human rights[2] by the state through law enforcement institutions/sub-systems within the criminal justice system. This also means that miscarriage of justice violates the basic constitutional rights of victims of miscarriage of justice.

According to B.N. Marbun, reconstruction is the return of something to its original place, the compilation or redrawing of existing materials and rearranged as they were or as the original incident.[3] Human rights (HAM) are basic rights for humans that exist and are gift from God Almighty. Besides, human rights are also natural rights which therefore cannot be revoked by other human beings. Human rights are believed to have universal value which meaning that there are no boundaries in time and space.[4] Their values are freedom, equality, autonomy, and security. Moreover, the core value of human rights is human dignity.[5]

The provisions of Article 28I of Constitution of the Republic of Indonesia (1945 Constitution) mandates that the right to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as person before the law, and the right not to be tried under a law with retrospective effects are all human rights that cannot be reduced under any circumstances. The death penalty is associated with human rights (HAM) which are closely related to the right to life categorized as cannot be reduced under any circumstances or are known as non-derogable rights. This is different from the opinion of Constitutional Court Decision No. 2-3/PUU-V/2007 considering that respecting human rights also meaning respecting the right to life as regulated in Article 28I cannot be waived and must also comply with the provisions of Article 28J paragraph (2) stating that: "In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law …". There are two different things between Article 28 paragraph (1) stating that it may not be reduced in any form (reduction), and the provisions of Article 28J paragraph (2) mention restrictions. The concepts of reduction and restriction are different things.[6]

The death penalty is a heinous form of penalty that does not have a deterrent effect on future criminals, this penalty also provides mental and physical torture

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[1] Joel Feinberg, "Problems at the Roots of Law: Essays in Legal and Political Theory" , (Oxford: University Press, 2003), p. 6

[2] Jack Donnelly, "Universal Human Rights in Theory & Practice, 2nd Ed"., (London: Cornell University Press, 2003).

[3] B.N. Marbun, "Kamus Politik" , (Jakarta: Pustaka Sinar Harapan, 1996), p. 469.

[4] Muladi, "Hak Asasi Manusia", (Bandung: Refika Aditama, 2005), p. 70.

[5] Artidjo Alkostar, "Pengadilan HAM, Indonesia, dan Peradaban", (Yogyakarta: Pusham UII, 2004)

[6] Mei Susanto Ajie Ramdan, Rully Herdita Ramadhani, "Kebijakan Pidana Mati dalam RKUP Ditinjau dalam Aspek Politik Hukum dan HAM," *Jurnal Arena Hukum*, 11 (2018): 602.

to the inmates and violates Universal Declaration of Human Rights (UDHR) and International Covenanton Civil and Political Rights or commonly abbreviated as ICCPR aim to strengthen the principles of human rights in the civil and political fields listed in the UDHR so that they become legally binding provisions and their elaboration includes other related points. Within the national legal framework, the right to life is also regulated in the Indonesian Constitution. Article 4 Law Number 39 of 1999 concerning Human Rights states that the right to life, freedom from torture, personal freedom, freedom of thoughts and conscience, freedom of religion, freedom from enslavement, recognition as a person and equality before the law, and not to be prosecuted on the basis of retroactive law are human rights that cannot be reduced under any circumstances and by anyone.[7]

In this regard, the application of the death penalty is actually still controversial in society, in relation to human rights. General Assembly of the United Nations has adopted a non-binding resolution calling for a global moratorium on the death penalty, which is Optional Protocol II to the International Covenant on Civil and Political Rights because the death penalty is considered contrary to the norms contained in the UDHR and ICCPR and hinders the advancement of the fulfillment of the right to life and finally prohibits the use of the death penalty in related state parties.[8]

The United Nations recommends against this form of punishment based on the Declaration of Human Rights adopted on 10 December 1948, guaranteeing the right to life and freedom from torture. Likewise, the guarantee of the right to life is contained in Article 6 of the International Covenant on Civil and Political Rights adopted in 1966 and ratified by Law Number 12 of 2005 concerning Ratification of the International Covenant on Civil and Political Rights.[9] Previously, Indonesia had ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, hereinafter referred to as Committee against Torture (CAT) and ratified by Law Number 5 of 1998 concerning Convention against Torture and Other Cruel Treatment or Punishment, Inhuman, or Degrading Human Dignity. The Indonesian criminal law system attempts to eliminate the death penalty from of the principal penalty by regulating it as an alternative penalty. Therefore, death penalty is no longer the first principal penalty, but becomes a special penalty.

A process is considered to be fair if it fulfills the following conditions: first, there is consistency in the application of standards to anyone and all the time;

[7] Amnesty Internasional, "Tren Vonis Hukuman Mati Di Indonesia Terus Meningkat.", *Amnesty Internasional, https://amnesty.id* , diakses tanggal 17 Maret 2023 pukul 17.00

[8] Ikhwanuddin, "Tinjauan Yuridis Tentang Penjatuhan Hukuman Mati Terhadap Perantara Jual Beli Narkotika Yang Disertai Dengan Pencucian Uang (Verdict Study Number 594/PID.SUS/2015?PN.TJB)," *Jurnal Prointegegrita* 2, No. 1 (2018), p. 50.

[9] Eva Achjani Zulfa, "Menakar Kembali Keberadaan Pidana Mati (Suatu Pergeseran Paradigma Pemidanaan Di Indonesia)," *Lex Jurnalica* 4, No. 2 (2007), p. 93–100.

second, it is not biased by personal interests; third, the decision is accurate based on reliable information and facts; fourth, it can be corrected in the sense that it is open for debate and comparison; fifth, it represents all mattersincluded therein; sixth, it is ethical in the sense of fulfilling ethical standards.[10]

These conditions need to be complemented by the fair process requirements put forward by Bias & Moag, namely: *"respectful, treating those effected with consideration and dignity; justified, in that explanations of the procedures and outcomes should be adequately reasoned and sincerely communicated."* These two are interactional justice.[11]

Fulfillment of the conditions mentioned above creates a procedural fairness, namely the idea that "*if the primary legal procedural safeguards are in place then the procedure must be fair, regardless of whether on actually thinks it is fair."*[12] The maintenance and guarantee of procedural fairness creates procedural justice and gives legitimacy to the criminal justice system.

In discussing the procedural justice, we are familiar with the procedural justice theory. This theory explains why perceptions of fairness are not only driven by results, outcomes, (as the goal of justice, distributive), but also driven by fair process used to achieve results. This theory allows people to look beyond short-term decision outcomes. So, when an unfavorable decision occurs, the decision can still be accepted provided the decision is based on a process that is perceived as fair.[13]

B. Identified Problems

As the explanation above, thus the problem formulation for this research as follows what is the urgency of postponing the death penalty for convicts from the perspective of human rights and restorative justice?

C. Research Methods

This research was a normative juridical research. As a normative juridical research, this research was based on an analysis of legal norms, where law is in the sense that *law as it is written in the books and statutes*.[14] The focus of the analysis was the legal norms contained in the books and statutes. The primary data that we used in this research is Constitution of Indonesia 1945, Criminal Code, Constitutional Court Decision Number: 2-3/PUU-V/2007, International

[10] Konovsky, M.A. and Folger, R., "The Effects of Procedures, Social Accounts, and Benefits Level on Victims "Layoff Reactions", *Journal of Applied Social Psychology*, 1991, p. 21, 630-650
[11] Bias, R.J. & Moag, J.S., "Interactional Justice; Communication Criteria of Fairness", *Research on Negotiation in Organizations*, 1, 1986: 43-45
[12] Jill Howieson, "Perception of Procedural Justice and Legitimacy in Local Court Mediation", *Mudroch University Electronic Journal of Law*, Vol. 9 No. 2, June 2002
[13] Greenberg., J. "A Taxonomy of Organization in Procedural Justice", *Administrative Science Quarterly*, 40, 1987, p. 495-523
[14] Ronald Dworkin, *Legal Research*, (Daedalus: Spring, 1973), p. 250

Covenant on Civil and Political Rights.

Normative legal research on the normative side of law as a normative practical science describes how the process of making a legal decision occurs and how related parties fill a legal vacuum, explains vague norms, narrows the meaning of a rule of law so that it can be applied to a concrete event requiring a legal settlement, even finding the rule of law.[15]

D. Research Findings and Discussions

The juridical basis for the application of death penalty in Indonesia is based on the provisions of Article 10 of Criminal Code (KUHP) stating that death penalty is one of the main types of penalty. The current Criminal Code is a legacy of the Netherlands first enacted in 1918 under the name "*Wetboek van Strafrecht voor nederlandsch Indie".* The Netherlands itself had abolished the death penalty for ordinary crimes since 1870, and abolished the death penalty for all crimes in 1982. In coontrast, Indonesia continues to maintain the application of death penalty.[16]

Death penalty in Indonesia does not only apply to criminal acts regulated in the Criminal Code, but also several criminal acts regulated outside the Criminal Code that contain the death penalty sanction.. The imposition of death penalty regulated outside the Criminal Code are Law on Corruption Eradication, Law on Terrorism, Law on Narcotics, Law on Psychotropics, and others.

The application of death penalty in Indonesia in its development remains a subject for debate, but until now Indonesia continues to maintain the death penalty which has also been confirmed constitutionally through the Constitutional Court (MK) Decision Number: 2-3/PUU-V/2007 dated 30 October 2007.

The Constitutional Court Decision Number: 2-3/PUU-V/2007 was a judicial review case filed by Edith Yunita Sianturi (Indonesian Citizen/Petitioner I), Rani Andriani (Indonesian Citizen/Petitioner II), Myuran Sukamaran (Indonesian Citizen/Petitioner III), and Andrew Chan (Australian Citizen/Petitioner IV). This case is a judicial review on the imposition of death penalty contained in Law Number 22 of 1997 concerning Narcotics. The conclusion in this Constitutional Court Decision stated that the provisions in Law Number 22 of 1997 concerning Narcotics in relation with the death penalty were not contradictory to Article 28A and Article 28I paragraph (1) of the 1945 NKRI Constitution. The Constitutional Court's verdict rejected the petition of Petitioner I and Petitioner II, and declared the petition of Petitioner III and Petitioner IV

[15] Johnny Ibrahim, *Teori & Metodologi Penelitian Hukum Normatif, Cet-III,* (Malang: Bayumedia Publishing, 2007), p.237.
[16] Yon Artiono Arba'I, *Aku Menolak Hukuman Mati: Telaah Atas Penerapan Pidana Mati,* (Jakarta: Kepustakaan Populer Gramedia, 2015), p. 2

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inadmissible (*niet ontvankelijk verklaard*) because the petitioners were foreign citizen with no legal standing.

Because of the large number of death row convicts who have not been executed, the government should immediately resolve this issue using resotarive justice (RJ), as regulated in Law Number 39 of 1999 concerning Human Rights Article 76 paragraph (1).

Death penalty is the most controversial punishment so that its imposition must be carried out efficiently, carefully, cautiously, humanely, and only used as the last method imposed on the perpetrators of extraordinary crimes,[17] such as premeditated murder, namely someone who kills another person intentionally and with premeditation.[18] The process of executing death row convicts is regulated in detail in the Laws and regulations of National Police Chief, executed in a private area by a firing squad until the convict is declared dead. The definition of death is a condition where there is no sign of life, such as cardiac arrest and respiratory arrest as stated by a doctor.

Death penalty decision should go through an honest criminal procedure by professional law enforcers so that the rights of convicts are fulfilled. However, the fact is that this decision has permanent legal force that does not always guarantee justice for all parties. Many executions of the death row convicts outside Indonesia are caused by miscarriage of justice, namely the process of imposing death penalty on someone, even though that person is not the perpetrator of a crime. According to Adami Chazawi, miscarriage of justice is the judicial activity by the court through the examination of the case and the defendants. However, the process contains elements of error, such as error in the procedure, errors in applying the rule of law so that the court's decision is detrimental to the defendants. Redactionally, Indonesian criminal procedural law contains the term "miscarriage of justice". The only editorial that the author uses as a consideration for mentioning a miscarriage of justice is "a clear error" as contained in Article 263 paragraph (2) letter c of the Criminal Procedure Code, stipulating that judicial review can be submitted to the convicts if "there is one of the reasons for filing a judicial review", namely if the decision clearly shows jusge's mistake or "a clear mistake".

There have been many negative responses from the public, experts, and activists for the protection of human rights towards the criminal justice process carried out against the death row convicts. They wanted a moratorium on the execution of death penalty. The reasons why they disagreed with the execution of death convicts include the fact that many death penalty decisions were the result of miscarriage of criminal justice, with indicators of dishonest proceedings, absence of a lawyer accompanying the convict from the start, and lack of

[17] Barda Nawawi Arief. *Kebijakan Legislatif: Dalam Penanggulangan Kejahatan dengan Hukum Pidana*, (Semarang: Badan Penerbit Universitas Diponegoro, 1994), p. 221
[18] R. Soesilo, *Kitab Undang-Undang Hukum Pidana serta komentar*, (Bogor: Politeia, 2013)

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professionalism of law enforcers. However, there were also many parties who wanted the execution of death row convicts to be carried out immediately by the state because this type of penalty was one of the solutions to resolve serious crime and created justice for all. Abolishing death penalty in Indonesia was not necessarily appropriate and carrying out the execution of death row convicts without caution was very dangerous because if the penalty was used arbitrarily and forcibly, it would become the main threat to human freedom.[19]

Based on the Criminal Procedure Code, in relation with the final attempt by death row convicts to test the truth of the contents of court decisions that have permanent legal force has strictly regulated in the Indonesian criminal procedural law, namely the application for judicial review. The legal remedy in the form of clemency from the president is not an attempt to examine the contents of the court decisions, but is only an attempt by death row convicts to ask for forgiveness from the president so that the sentence is abolished or commuted because they have admitted their guilt.

Based on two conflicting perspectives, which were the immediate execution of death penalty and the abolishment of the execution of death penalty, hen it is necessary from the legal side to have a mid-way solution, namely postponing the execution of death convicts within a certain period of time through legal norms. The function of this postponement was to provide an opportunity for the death row convicts to find new evidence that could be used as a basis for changing the type of death penalty through a judicial review. Based on these norms, the state (in this case the government) would be able to ensure that criminal justice has been carried out honestly, all legal remedies for death row convicts have been passed, so if there is forced execution of death convict, the convict would not become a victim of miscarriage of justice. The author's idea was in line with the state's goal to protect the entire Indonesian nation, and the content of the decision of Constitutional Court of the Republic of Indonesia, namely the right of a convict to file a judicial review more than once, and the purpose of the criminal procedure to find material truth, if the state does not provide sufficient time and the death row convicts have already been executed even though there is miscarriage of justice, it will have a very bad impact, among others for: the death row convicts (because they are arbitrarily deprived of their right to life by the state), the death row convicts' families (because they loss their loved ones), the state (because it will lower trust and authority before the national and international societies), law enforcers (because the law enforcers' professionalism is questionable), and Indonesian people (because of fear and disharmony).[20]

[19] Herbert L. Packer. *The Limits of the Criminal Sanction*, (Stanford California: Stanford University Press, 1968) p. 366

[20] Kelly and Foley, "Analysis of Last Statements prior to execution: methods, themes, and future directions", *International Journal of Medicine*, Vol. 111, Issue 1, 2018.

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A postponement of the death penalty is necessary when viewed from the context of international law. Because internationally it is recognized that the death penalty is not an effective solution and can be used continuously. Therefore, when making decisions related to the death penalty, all existing facts must be examined in detail. In this way, before deciding to give the death penalty to a convict, very careful consideration must be taken. With very careful consideration, this will prevent the convict from suffering losses in carrying out the death penalty.

Even when referring to current international legal regulations, the death penalty is considered not a solution for all criminal acts. For example, in the UDHR it is emphasized that all forms of punishment related to reducing a person's rights are prohibited, this provision is contained in Article 5 of the UDHR as follows: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Therefore, based on the principles of the UDHR, all activities against convicts that reduce the convict's rights related to acts of torture or inhumane acts are prohibited. The death penalty certainly falls into this category because the death penalty has the element of depriving another person of their right to life. So, if you look at the provisions in the UDHR, the death penalty should not be implemented.

However, if you look at the provisions contained in the ICCPR, it states that the provisions are different from the UDHR, this is because the ICCPR gives the state the opportunity to take the death penalty against convicts. However, this is of course limited to crimes that fall into serious crimes. These provisions can be seen in Article 6 paragraph 2 of the ICCPR, namely: In countries which have not abolished the death penalty, the sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out capable of a final judgment rendered by a competent court.

This serious crime must of course be interpreted as a crime that has a very massive impact on a country or a region. This means that the crimes committed are not just random crimes, but rather crimes that can truly have a broad impact on society. The ICCPR also regulates the right of convicts not to be sentenced to death by applying for amnesty or abolition. This is part of the rights that convicts have so that they cannot be sentenced to death. By looking at the provisions contained in the ICCPR, it is clear that the death penalty must be carried out carefully and must not be carried out carelessly. Even though the provisions contained in the ICCPR and UDHR are different, in essence the implementation of the death penalty must be minimized or not be a last option. Therefore, in every death penalty process, delay is something that must be done to ensure that the judge does not apply the law incorrectly.

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To guarantee legal certainty for the postponement of the execution of death row convicts, a valid legal product is needed, namely laws and regulations. The form of laws and regulations in Indonesia has been standarized, including the contents regulated therein and their respective hierarchies. To make the provisions of laws and regulations have binding force, they must be prepared by authorized parties based on the technique of drafting laws and regulations. Besides, the provisions regulated do not exceed the authority possessed by the legislator, and their contents do not conflict with regulations that are hierarchically above the legal products made, and the principles do not conflict with the values of Pancasila.

In addition to the use of Article 76 paragraph (1) of Law Number 39 of 1999 concerning Human Rights, currently there are also several provisions for restorative justice arrangements.

E. Conclusions

The conclusions that can be put forward by the author are as follows.

1. The postponement of the execution of death row convicts is necessary to anticipate the impact of a miscarriage of justice. The minimum period is five years from the date of the court decision which has permanent legal force. This period of time is sufficient to provide an opportunity for the death row convicts to submit a judicial review, and this period of time is sufficient for the government to think about justice for the death row convicts. The reasons for justifying the postponement of the execution of death row convicts are (a) juridical justification, namely providing sufficient time for the death convicts to carry out judicial reviews more than once in order to obtain material justice; (b) empirical justification, namely (1) as an anticipation of the occurrence of execution errors as it happens outside Indonesia, (2) as a compromise to mediate pro and con opinions against death penalty, (3) as a support to the Indonesian government so that it does not hesitate to carry out the execution of death row convicts, or if necessary immediately annul the execution of death convicts through clemency.
2. A legal product that can be used to regulate the postponement of death executions in Indonesia is Presidential Regulation because the Attorney General, as the executor of death row convicts, is the President's subordinate who should comply with the Presidential Decree. It is faster and easier to make Presidential regulation than take and amend laws.

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