

# The Problem of Implementing the Death Penalty From the Perspective of Human Rights and Criminal Law

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## Abstract

This study aims to analyze the application of the death penalty in relation to Human Rights (HAM) and criminal law. The study was conducted using a juridical-normative approach. The results of the study show several main findings. First, the death penalty is a topic that raises various views from legal experts. Second, from a human rights perspective as regulated in the Constitution of the Republic of Indonesia and Law Number 39 of 1999 concerning Human Rights, there are efforts to adopt international human rights principles, including the UN Charter of Human Rights, to encourage the abolition of the death penalty. Third, although it is still maintained in the Criminal Code (KUHP) and a number of laws and regulations in Indonesia, the death penalty has received sharp criticism from human rights activists. Therefore, in the new Draft Criminal Code, there is a policy compromise by changing the death penalty from the main punishment to an alternative punishment that is only applied for extraordinary crimes.

## Keyword:

Death Penalty, Human Rights, Criminal Law

## 1. INTRODUCTION

Sentencing of criminals is the authority of the judge who must consider the legal and sociological aspects so that the punishment imposed can provide benefits for both the convict and the community. Therefore, the concept of deterrence is modified in the implementation of prison sentences by adopting a coaching approach. In the application of punishment, it is necessary to pay attention to the purpose of punishment (strafsoort), the severity of the punishment (straf), and the method of sentencing (strafmodus). The Constitution of the Republic of Indonesia, namely the 1945 Constitution, guarantees Human Rights as stated in Articles 28A to 28J. The Constitution emphasizes that Human Rights (HAM) must be respected and upheld by every individual. Further provisions regarding HAM are regulated in applicable laws and regulations. Meanwhile, the criminal punishment system in the Indonesian Criminal Code (KUHP) is regulated in Article 10. This article divides the types of criminal acts into:

1. Principal Criminal Penalties, which include: (a) death penalty, (b) imprisonment, (c) detention, and (d) fines;
2. Additional criminal penalties, which include: (a) revocation of certain rights, (b) confiscation of certain goods, and (c) announcement of the judge's decision; and
3. Covert Criminal Procedure, as regulated in Law Number 20 of 1946 concerning Covert Criminal Procedure.

The death penalty, which is included in the category of principal punishment, is a type of punishment that raises pros and cons. At the international level, this punishment is prohibited from being applied to convicts. The United Nations (UN) encourages the abolition of the death penalty through the Universal Declaration of Human Rights adopted on December 10, 1948. The declaration guarantees the right to life and prohibits torture. The right to life is also emphasized in Article 6 of the International Covenant on Civil and Political Rights (ICCPR) adopted in 1966 and ratified by Indonesia through Law Number 12 of 2005. In the Indonesian criminal law system, the death penalty has begun to be placed outside the category of principal punishment and is regulated as an alternative punishment. Thus, the death penalty is no longer the main option, but is applied specifically for certain cases. Discussions on the death penalty in Indonesia, as a country based on the Pancasila philosophy, are still a complex issue to this day. This topic often raises debates between those who support and those who reject the death penalty. These differences in views are

caused by various different legal perspectives. For those who reject the death penalty, this punishment is considered contrary to the principles of Human Rights (HAM). One of their efforts is seen in the change in the status of the death penalty in the new Draft Criminal Code proposed to the House of Representatives. In Article 66 of the Draft Criminal Code, the death penalty is regulated as a special principal punishment, which can be replaced with other principal punishments as an alternative. Its implementation is carried out by shooting the convict to death, but not in public. Opposition to the death penalty is based on the view that this punishment violates a person's right to life, while Article 28A of the 1945 Constitution states that everyone has the right to life and to defend their life. Rejection of the death penalty is also based on the assumption that this punishment is no longer in line with the development of human rights. As a country that upholds human rights, Indonesia is expected to play an active role in realizing respect for human rights in the world. Opponents argue that by regulating human rights legally and formally in the 1945 Constitution, Indonesia should abandon the practice of the death penalty. The right to life, which is part of human rights, is defined as non-derogable rights or rights that cannot be reduced under any circumstances. This is emphasized in Article 28I paragraph (1) and Article 28J paragraph (2) of the 1945 Constitution, as well as Article 4 of Law Number 39 of 1999 concerning Human Rights. In practice, the application of the death penalty is still often imposed by judges. For example, in the murder case of Sisca Yofie, the Supreme Court on November 11, 2014 changed the sentence of the defendant Wawan from life imprisonment to the death penalty. The consideration of the decision was the defendant's actions which were considered very sadistic, as well as to provide a deterrent effect and increase public respect for the right to life of others (tempo.com). The Attorney General also planned to execute five convicts in 2014 and 20 people in 2015 (hukumonline.com). In addition, President Jokowi rejected the clemency request from 64 convicts on death row in drug cases (Kompas, December 10, 2014). One of the prominent death penalty executions was against drug lord Fredy Budiman.

## 2. RESEARCH METHODOLOGY

This study uses a juridical-normative research method. The juridical approach refers to the law, applicable laws and regulations, legal theory, and expert opinions. Meanwhile, the normative approach is carried out by analyzing secondary library materials.

## 3. RESULT AND DISCUSSION

### *Death Penalty in Human Rights (HAM) Perspective*

Historically, Human Rights (HAM) emerged as an effort to protect society from arbitrary actions by the state and the imbalance of power between the state and society. In the context of the Universal Declaration of Human Rights (UDHR), the death penalty is considered contrary to human rights. Article 3 of the Universal Declaration affirms that "every human being has the right to life, and this right must be protected by law. No one shall be deprived of his life arbitrarily." This principle was later affirmed in Article 6 paragraph 1 and Article 7 of the International Covenant on Civil and Political Rights (ICCPR), and strengthened by the Second Optional Protocol of 1989, which aims to abolish the death penalty. Article 6 of the International Covenant on Civil and Political Rights includes complete provisions on this matter as follows:

1. Every individual has an inherent right to life, and this right must be protected by law. No one should be deprived of their right to life arbitrarily.
2. In countries which still apply the death penalty, this punishment may be imposed only for the most serious crimes, in accordance with the law in force at the time the crime was committed and not contrary to the Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide. Execution The death penalty is only permitted based on a final decision of a competent court.
3. If deprivation of life constitutes the crime of genocide, this article does not authorize a State party to the Covenant to derogate from its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Every person sentenced to death has the right to apply for pardon or commutation of sentence. Amnesty, pardon or commutation of death sentence may be granted in any case.
5. The death penalty may not be imposed on individuals who commit crimes when they are under 18 years of age, and may not be imposed on women who are pregnant.

6. Nothing in this article shall be invoked as a pretext for preventing or delaying efforts by any State party to the Covenant to abolish the death penalty.

Meanwhile, Article 7 of the International Covenant on Civil and Political Rights states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be made the subject of medical or scientific experiments without their free and informed consent. In some human rights instruments, the prohibition of the death penalty is set out in special protocols. The International Covenant on Civil and Political Rights and the American Convention limit the use of the death penalty to the "most serious crimes." Both instruments provide that the death penalty may be imposed only by a "final judgment of a competent court" in accordance with non-retroactive law. In the perspective of the Universal Declaration of Human Rights, the death penalty is prohibited. According to the UN's human rights perspective, the death penalty is categorized as a form of cruel, inhumane punishment and a violation of human dignity, contrary to Article 3 of the Universal Declaration of Human Rights (UDHR) and Article 7 of the International Covenant on Civil and Political Rights (ICCPR). Although the general principle prohibits the death penalty, countries that still apply it may only apply the punishment to certain very serious crimes or criminal acts, such as genocide or terrorism, as regulated in Article 6 paragraph 2 of the ICCPR. Indonesia has recently begun to adopt the global idea of Human Rights (HAM), including integrating the principles contained in the UN Universal Declaration of Human Rights (UDHR) into the constitution and Law Number 39 of 1999 concerning Human Rights. In addition, Indonesia has also established the National Human Rights Commission (Komnas HAM). In the amended Constitution of the Republic of Indonesia, Article 28A states: "Everyone has the right to live and the right to defend his life and existence." This provision is similar to the content of Article 3 of the UN UDHR. The provisions of Article 28A of the 1945 Constitution are then further elaborated in Law Number 39 of 1999 concerning Human Rights, particularly in Chapter III which discusses Human Rights and Basic Human Freedoms. The first part of this chapter, concerning the Right to Life, is regulated in Article 9:

1. Everyone has the right to live, to maintain their life, and to improve their standard of living.
2. Every individual has the right to live in peace, security, happiness, and physical and spiritual well-being.
3. Everyone also has the right to a healthy and good living environment.

In addition, in Chapter IV on Basic Human Obligations, Article 67 states that every individual in the territory of the Republic of Indonesia must comply with statutory regulations, unwritten laws, and international laws regarding human rights that have been accepted by the state. Article 69 of Law Number 39 of 1999 concerning Human Rights regulates: (1) Everyone is obliged to respect the human rights of others, and to uphold morals, ethics and order in social, national and state life (2) Every person's human rights carry an obligation and responsibility to respect the human rights of others in a reciprocal manner, with the Government's obligation to respect, protect, uphold and promote human rights. Article 70 of Law Number 39 of 1999 concerning Human Rights stipulates that in exercising their rights and obligations, every individual must comply with the limitations set by law. These limitations aim to ensure recognition and respect for the rights and freedoms of others, as well as to fulfill just demands based on considerations of morality, security and public order in a democratic society. Meanwhile, Article 73 states that the rights and freedoms regulated in this law may only be limited by law. Such restrictions are made solely to guarantee respect for human rights and basic freedoms of others, maintain morality, public order, and protect the interests of the nation.

#### *The Death Penalty in the Perspective of Indonesian Criminal Law*

The death penalty is generally defined as a punishment that inflicts suffering or torture on the perpetrator, who is considered to have violated the norms of human life. This punishment is closely related to the concept of criminal and punishment, where punishment focuses on the imposition of sanctions, while punishment is aimed at the perpetrator of the crime. The imposition of the death penalty is expected to show the public that serious crimes are dealt with firmly. In Indonesian criminal law, there are several types of crimes that are punishable by the death penalty, including:

- a) The crime of treason, regulated in Article 104 of the Criminal Code, includes the murder of the president and vice president, as well as Article 111 paragraph (2) regarding relations with foreign countries that trigger war.
- b) The crime of premeditated murder, regulated in Article 340 of the Criminal Code, is the act of intentionally and premeditatedly taking the life of another person.

- c) Criminal acts of corruption are regulated in Article 2 paragraph (2) of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001, which includes corruption in certain situations.
- d) The crime of genocide and crimes against humanity are regulated in Law Number 26 of 2000 concerning Human Rights. Article 36 regulates genocide, which is an act aimed at destroying or exterminating part or all of a national, racial, ethnic, or religious group. Article 37 regulates crimes against humanity, which is an act carried out as part of a widespread or systematic attack on a civilian population.
- e) Narcotics crimes are regulated in Articles 114, 116, 118, 119, and 121 of Law Number 35 of 2009, which include activities of offering, selling, buying, receiving, acting as an intermediary, exchanging, or handing over narcotics.
- f) Criminal acts involving children in narcotics trafficking are regulated in Article 89 of Law Number 23 of 2002 concerning Child Protection, which includes the deliberate involvement of children in the abuse, production, or distribution of narcotics and psychotropics.

The death penalty imposed based on a court decision has been applied in several cases, including:

- a) Premeditated murder in South Sumatra in 1992 of convict Suiyadi Swabhuana alias Adi Kumis alias Dodi bin Soekamo;
- b) The murder and mutilation in South Sumatra in 1997 of convict Jurit bin Abdullah;
- c) The murder and mutilation in South Sumatra in 1997 of convict Ibrahim bin Ujang;
- d) Smuggling of 100 grams of heroin by Adami Wilson alias Adam alias Abu who was arrested in 2003 and executed on March 14, 2014;
- e) Carrying 1050 grams of heroin by convict Muhammad Abdul Hafeez who was arrested in 2001 and executed on 17 November 2013 (Kompas, Friday 14 November 2014:14);
- f) Murder accompanied by sodomy of children by convict Baekuni who was sentenced on April 21, 2011;
- g) Premeditated murder of 11 people by means of mutilation by convict Verry Idham Henyansyah who was sentenced on July 5, 2012;
- h) The sadistic murder and rape by convict Herris Marbun who was sentenced on January 8, 2014;
- i) The murder of his wife and two children by convict Herman Jumat Masan who was sentenced on February 11, 2014;
- j) Premeditated murder and serious assault by convict Slamet Riyanto who was sentenced on September 17, 2014;
- k) Violent theft resulting in the loss of a person's life on August 5 2013 by convict Wawan (Kompas, Thursday 13 November 2013:1).

At the end of 2014, there were 148 prisoners sentenced to death and awaiting execution. Cases involving death row inmates are usually related to premeditated murder or drug crimes (Kompas, Friday, November 14, 2014:4). However, this is different from the case of convict Wawan, who was initially proven to have committed violent theft that resulted in the loss of a person's life. This murder was committed without a strong reason, without empathy, in a sadistic and inhumane manner. In its considerations, the Panel of Judges of the Supreme Court stated that the convict was legally and convincingly proven to have committed premeditated murder of the victim, in which the perpetrator dragged the victim 800 meters while alive and then executed him (Kompas, Saturday, November 15, 2014:2). The death penalty imposed by the Supreme Court was based on the defense of human rights, accompanied by violence and abuse of the victim, as stated in Article 28 J of the 1945 Constitution, which states that everyone is obliged to respect the human rights of others and is subject to restrictions set by law to guarantee respect for the rights and freedoms of others. Meanwhile, the Indonesian criminal law system still maintains the death penalty, which is strengthened by Constitutional Court Decision Number 2-3/PUUV/2007 dated October 30, 2007. The application of the death penalty has given rise to various controversies. Based on the concept of human rights, the right to life is considered a non-derogable right. International instruments support the existence of the right to life, as stated in the Declaration of Human Rights and the ICCPR. This is also reflected in Article 28 A of the 1945 Constitution, which emphasizes that everyone has the right to live and defend their life. Article 28 I states that the right to life is a basic right that cannot be reduced under any circumstances. This article emphasizes the importance of respecting the right to life, while Article 28 J stipulates that everyone is obliged to respect the basic rights of others and is subject to restrictions set by law to ensure respect for the rights and freedoms of others. The article also provides accountability for those who violate human rights.



However, the Indonesian criminal law system still applies the death penalty. The judge's consideration in imposing the death penalty is basically to protect the human rights of the victim that have been violated by the convict. The message that is to be conveyed is that no one has the right to take another person's life and must respect each other's human rights, in accordance with Article 28 J of the 1945 Constitution.

The controversy over the implementation of the death penalty, including objections filed by the National Human Rights Commission, the Witness and Victim Protection Agency, and Kontras, is rooted in humanitarian reasons, where the right to life is considered a right that cannot be reduced under any circumstances. This is stated in Article 6 paragraph (1) of the ICCPR, Article 28 A, and Article 28 I of the 1945 Constitution. In addition, Indonesian criminal law is considered to be discriminatory, with many errors occurring in criminal justice practices, such as in several cases of mistaken arrests. For example, in the case of the murder of convicts Sengkon and Karta who were initially sentenced for murder, but they met the real killer in prison. In another case, convicts Rusman Lakoro and Rostin Mahaji were forced to confess to killing their child who was later found alive after escaping. A similar case also occurred with convicts Imam Hambali and David Eko Priyanto, who were sentenced to 17 and 12 years in prison for allegedly killing Asrori, even though the perpetrator was someone else. In the case of Budi Harjono, the convict was convicted of killing his father, but after 4 years, Marsin admitted to being the real perpetrator. Groups opposed to the death penalty argue that the death penalty only perpetuates violence and is retaliatory, making it a form of regression. They argue that the death penalty does not solve the problem of crime that continues to grow along with human civilization. If the death penalty is imposed and then new facts (*novum*) are found that show that the convict is not the real perpetrator, then there is no way to fix it. The expected deterrent effect is not achieved through the death penalty. On the contrary, a decrease in the crime rate can be achieved if law enforcement officers follow up on every crime in accordance with applicable laws and provide certainty of a transparent process. In their view, human rights are rights inherent to every individual, and punishment of perpetrators of crimes must focus on protecting human rights.

This punishment model emphasizes a more humanistic approach or is oriented towards individualization of punishment, with the following characteristics: (1) application of the principle of culpability (no punishment without fault), (2) flexibility in punishment, and (3) modification of punishment. In this model, judges are given the freedom to determine punishments that are appropriate to the condition of the perpetrator, both in terms of their mental and physical condition, with the hope of creating changes in the perpetrator to return to society through the resocialization process. The application of these principles is reflected in the Draft Indonesian Criminal Code (KUHP) regarding the death penalty or deprivation of the right to life, namely: (1) the death penalty is not considered the main punishment, but rather a special punishment aimed at protecting society (social defense); (2) the death penalty cannot be imposed on children under the age of 18; (3) the implementation of the death penalty for pregnant women is postponed until they give birth; and (4) the death penalty can only be carried out after obtaining approval or rejection of clemency from the President. The policies in the Draft Criminal Code show a tendency to abolish the death penalty through restrictions, reductions, or even complete abolition. This trend is in line with the global trend seen in many countries seeking to abolish the death penalty. The limitations on the application of the death penalty, according to the draft, include: (a) it must only be applied to very serious crimes, (b) it must not be contrary to the provisions relating to the crime of genocide, and (c) it must be decided by a competent court. For countries that have abolished the death penalty, these provisions are not permitted to be used as a basis for reinstating the death penalty, and they may not be involved in the execution of the death penalty by extraditing convicts to countries that still apply the death penalty.

#### *Criteria for Imposing the Death Penalty that Do Not Contradict Human Rights*

Criminal law basically functions as a tool to ensure the implementation of social order in society. In Indonesia, the objectives of criminal law are directed at aspects of social welfare and social defense, as stated in the objectives of the state in the fourth paragraph of the 1945 Constitution. Sentencing is an important part of the criminal justice process, the implementation of which must be based on a humanistic perspective and integrative criminal objectives, emphasizing the protection of society. The humanistic perspective prioritizes the requirements for imposing criminal penalties that include criminal acts (criminal act/*actus reus*) and criminal responsibility (criminal responsibility/*mens rea*). In criminal law, this is known as the law that emphasizes the act (*strafbaarheid van het feit*) and the law that focuses on the individual (*strafbaarheid van de persoon*). The three main things discussed in criminal law are criminal acts (criminal act), criminal

responsibility (criminal responsibility), and the imposition of punishment (punishment). The application of punishment from a humanistic perspective must be based on the perpetrator's fault, or known as the principle of culpability. This principle states that "Nulla Poena Sine Culpa," which means there is no punishment without the fault of the perpetrator. This fault is reflected in the perpetrator's inner attitude, which can be in the form of evil intentions or negligence. With the application of dualism in examining the elements of a criminal act, both forms of inner attitude become core elements in a criminal act. The court has an important role in imposing criminal penalties, especially the death penalty, by ensuring that the convict's guilt is proven through a fair trial process and evidence in accordance with applicable law. Integrative sentencing, especially in cases of the death penalty, must consider the human rights of the convict and make the punishment effective and function well. Therefore, a multidimensional approach is important to assess the impact of punishment both individually and socially. The imposition of the death penalty must also consider its impact on the protection of society and the convict himself.

In the modern criminal justice system, the doctrine of determinism emphasizes that humans do not have complete free will, because their actions are influenced by their character and external environment. Thus, accountability for actions is more of a protection for society, rather than retribution based on subjective guilt. In this context, the death penalty can be applied to perpetrators of crimes that meet the following criteria: (1) exceeding the limits of humanity, (2) endangering and threatening many people, (3) destroying the nation's generation, (4) destroying civilization, (5) destroying the world order, and (6) harming and destroying the country's economy. Types of crimes that can be sentenced to death include drugs, terrorism, premeditated murder, abuse resulting in death with cruelty, and corruption. The imposition of the death penalty must still take into account the following matters: (1) the trial process must be carried out fairly with valid evidence, (2) the convict's guilt must be clearly proven in court, (3) the court handling the case must have valid authority, (4) the law applied must be in accordance with applicable law, (5) the death penalty must be imposed selectively and must have permanent legal force, (6) the convict sentenced to death must be accompanied by a cleric from the time the decision is final until the execution, (7) the last request of the convict sentenced to death must be fulfilled by the state, (8) the execution is only carried out after all the rights of the convict sentenced to death have been fulfilled, (9) the execution must be carried out as well as possible, without causing suffering to the convict, and (10) the body of the convict sentenced to death must be treated with respect and without discrimination.

#### 4. CONCLUSION

Based on the discussion that has been presented, it can be concluded as follows: First, regarding the death penalty, there are various views from legal experts. Human rights activists (HAM) view the death penalty as a violation of human rights because it is considered a cruel punishment and violates the right to life, in accordance with the provisions of the UN Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights. Second, although in the human rights perspective stated in the 1945 Constitution of the Republic of Indonesia and Law Number 39 of 1999 concerning Human Rights there are efforts to adopt the UN Human Rights Charter to abolish the death penalty, the death penalty is still maintained for several types of extraordinary crimes. Third, although there is still a threat of the death penalty in the Criminal Code and several laws and regulations in Indonesia, it continues to receive criticism from human rights activists. Therefore, in the new Draft Criminal Code, there is an attempt at compromise (penal policy) by making the death penalty an alternative punishment, not the main punishment, which is only applied to extraordinary crimes.

#### REFERENCES

- Anjari, Warih, 2015, The Imposition of the Death Penalty in Indonesia from a Human Rights Perspective, Widya Yustisia Journal, 1 (2).
- Asnawi, Habib Shulton, 2012, Islamic and Western Human Rights: A Critical Study of Islamic Criminal Law and the Death Penalty, Supremacy of Law, 1(1).
- Astuti, Laras, 2016, Enforcement of Indonesian Criminal Law in Resolving Human Rights Violations, Kosmik Hukum Journal, 16 (2).
- Daming, Saharuddin, 2016, Configuration of the Struggle between Abolitionism and Retentionism in the Discourse on the Existence of the Death Penalty Institution at the Global and National Levels, Yustisi, 3 (1).

- Eleanora, Fransiska Novita, 2012, The Existence of the Death Penalty from the Perspective of Criminal Law, Widya, 29 (318).
- Ferawati, 2015, Legal and Human Rights Study on the Imposition of the Death Penalty for Drug Convicts, Journal of Legal Studies, 4 (3).
- Haling, Syamsul, et.all,. 2018., Protection of Street Children's Human Rights in the Field of Education According to National Law and International Conventions, Journal of Law & Development, 48 (2).
- Huda, Chairul, 2011, Criminal Sentence Intensification Patterns in Special Criminal Law, Journal of Law, 18 (4).
- Sumanto, Atet, 2004, Contradictions of the Death Penalty in Indonesia Viewed from the Aspect of Human Rights. Religion and Legal Experts, Perspective, 9(3).
- Supriyadi W., Eddyono and Napitupuhi, Erasmus AT, 2015. The Death Penalty in the Draft Criminal Code: A Dubious Middle Way, Institute for Criminal Justice Reform, Jakarta