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## **PREFACE**

Praise being said to Allah Almighty God for all the grace and guidance that has been given to us all, so the Proceedings of the 15<sup>th</sup> ADRI 2017 International Conference Rata Ampat, Papua Barat, November 10-12, 2017 can be realized. Proceedings contains a number of articles and research papers from lecturers, teachers, students, researchers and / or observer of the development of science and technology.

Hopefully, these proceedings may give benefit to us all, for the development of science, technology, arts, culture, and sports. In addition, is also expected to be a reference for the nation and state-building efforts so that science and technology become a strong pillar in the face of the ASEAN Economic Community.

Lastly, there is no ivory that is not cracked. We are sorry if there are things that are less pleasing.

Thanks you very much.

Raja Ampat, November 10, 2017.

Publisher Manager of Perkumpulan Ahli & Dosen Republik Indonesia (ADRI),

Andi Mursidi



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# Death Penalty in Constitutional Dimensions and Human Rights in Indonesia

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**Abstract.** The implementation of death penalty in Indonesia is still a topic of debate among legal thinkers. For those who contend with death penalty, it is contrary to the constitution and human rights. As for the death penalty, it is argued that it is a proper form of punishment for the perpetrators of serious crimes such as drug trafficking, premeditated murder, gross violations of human rights, and various crimes that have a wide negative impact on society. The existence of death penalty has also received legal recognition through the decision of the Constitutional Court which considers that death penalty is not contradictory to the constitution and human rights values.

Keywords: death penalty; constitution; human rights.

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## I. INTRODUCTION

"Why should we prioritize the rights of the perpetrators of crimes, rather than the rights of the victims of the crime themselves?"[1]. The statement was once conveyed by Achmad Ali when giving expert information (expertise)[2] before the session of the Constitutional Court of the Republic of Indonesia concerning the case of examining the constitutionality of death penalty in Law of the Republic of Indonesia Number 22 Year 1997 on Narcotics[3] as well as the judicial review of Law of the Republic of Indonesia Number 02/PNPS/1964 on the Procedures for the Implementation of Death Penalty[4]. The above statement seems to justify and reinforce the constitutionality of the Constitutional Court of the Republic of Indonesia which reject the application of judicial review of Law of the Republic of Indonesia Number 22 Year 1997 on Narcotics over the Constitution of the Republic of Indonesia 1945, that death penalty is not at all contrary to the constitution and does not violate the basic values of human rights as well as a form of sympathy for victims of crime.

The debate on death penalty has been going on for a long time with different arguments. For the death penalty counter, the imposition of death penalty is considered as an inhumane and ineffective punishment as well as contrary to the right of life guaranteed by the constitution either through national legal instruments or international legal instruments[5]. Meanwhile, for the pro-death penalty group, the death penalty is related to the deterrence effect for the most serious crime, such as terrorist, narcotics, corruption, murder in a sadistic way, and a series of crimes which is considered very heavy and disturbing and injure the sense of community justice.

Nowadays, the pro-death penalty are no less numerous than the followers of the death penalty cons. An example of debate and disagreement on the implementation of death penalty can be taken in the United States. Uncle Sam's country consists of 50 states (state), only 12 states that do not apply death penalty, and 38 states still retain death penalty. Nevertheless, the abolition of death penalty has been intensively conducted in recent years. On the other hand, there are still a number of countries that recognize and apply death penalty. Currently there are 68 countries that still apply the practice of death penalty, including Indonesia. While the state that abolishes death penalty for all types of crime is as much as 75 countries. In addition, there are 14 countries that abolished death penalty for ordinary criminal category, 34 countries that de facto did not enforce death penalty despite the imposition of death penalty. Such debates and differences will remain and continue in the future.

This paper is not representative of support for the death penalty who continuously support the execution of death penalty, nor is it a new chapter of the long debate with the death penalty contestants who are constantly fighting for the death penalty to be abolished, but this paper represents sympathy of the victims of serious crimes whose effects of these crimes can be felt widely by anyone. This paper only explains that death penalty is not at all contrary to the constitution and basic human rights values adopted in Indonesia. This article also does not neglect the right to life, the right not to be tortured, a person's human right not to be diminished under any circumstances, but as a citizen of a lawful country, we shall also recognize that in exercising such rights and freedoms, any persons shall be subject to the restrictions established by law and the constitution with the sole intent of ensuring the recognition and respect of the rights and freedoms of others.

On the basis of the foregoing thought, the problem in this paper is to find out how far the normative basis of death penalty which is a form of punishment in Indonesia recognized in the constitution, which in no way conflict with the basic values of human rights adopted by Indonesia.

## II. RESEARCH METHOD

Type of research in this writing is normative-juridical by using the statute approach[6]. Technique of collecting data is done by library study which then all the data is analyzed descriptively to answer topic problem to be discussed.

## III. RESULT AND DISCUSSION

### A. Death Penalty in the State Legal Framework

According to Frederick Julius Stahl, a country can be categorized as a state of law if it has met four important elements consisting of: 1). The existence of recognition and protection of human rights; 2). There is separation and/or power sharing; 3). Any government action should be based on prevailing laws and regulations; and 4). The existence of state administrative courts in charge of handling cases of unlawful acts by the government. The concept of the legal state put forward by Stahl above shows clearly that the protection of human rights is the first and foremost element of a legal state[7].

Indonesia as a legal state also has the obligation to fulfill all the above elements of the legal concept without exception, including guaranteeing and providing human rights protection for every citizen. Discussion of this paper begins with the study that the state of law actually requires the implementation and execution of death penalty. Beyond the polemic and the long debate, whether the death penalty is a denial of basic human rights values, but the author still assesses the death penalty is a form of empathy for the victims of serious crimes. In addition, according to the opinion of the author, death penalty is a media in the achievement and enforcement of human rights itself.

Even in the Indonesian legal system, death penalty is a legitimate positive law, expressly provided for in the provisions on types of punishment in Article 10 of the Penal Code. In addition, death penalty in *lex specialis* is regulated in special laws, such as anti-corruption laws, drug laws, anti-terrorism laws and human rights tribunals.

However, how to respond to the request of the death penalty for the execution of death penalty is abolished in the legal system in Indonesia, a statement that assesses death penalty contradictory to the 1945 Constitution of the Republic of Indonesia can be counter by arguing that our constitution besides guaranteeing human rights, also allowing human rights to be restricted provided that, in accordance with the provisions of applicable law, or for the sake of moral considerations, public order and security of the community as stipulated in Article 28J of the 1945 Constitution of the Republic of Indonesia[8].

Not all crimes are worthy of death penalty. For minor crimes, of course, not charged with severe rewards, let alone death penalty. On the other hand, not all serious crimes are worthy of death. According to Achmad Ali[9], a serious crime

worthy of death sentence is a "very serious" crime that is very cruel, or has a large humanitarian impact. Including premeditated and rigorous planning murder, for example killing and subsequently mutilating the victim in large numbers. There is also a criminal act of terrorism which, by its very cruel act, has caused the loss of life and property. The death toll of the terrorists is usually not just one or two people, but tens or even hundreds of people. Not to mention the psychological impact on hundreds of millions or even billions of human beings who are no longer peaceful and secure, with the possibility at any time can be victims of bombing and other terror mode

In addition, corruption which is categorized as "korupsi kelas kakap" or by various terms "mega corruption" or "severe corruption" can be categorized as a very serious crime. The perpetrators of corruption have robbed the state money which at once of course the people's money, with a very large amount. So the impact has devastated the country's economy and resulted in the increasing of the poor and the suffering of their lives.

In addition to the above forms of crime, there is also a crime of narcotics circulation whose crime impact destroys the next generation of the nation and humanity, and indirectly contributes to the spread of the HIV/AIDS virus, a disease that has not yet found its healing medicine, which has destroyed the lives of millions of people all over world. From a series of previous serious crimes, there is also a crime of genocide and crime against humanity with various forms and modes also bring tremendous impact for human survival on earth.

Especially for the criminal act of narcotics circulation, one of the criminal law expert from Airlangga University, Didik Endro Purwoleksono (when giving expert testimony before the trial of the Constitutional Court regarding the case of judicial review of the constitutionality of death penalty in Law of the Republic of Indonesia Number 22 Year 1997 regarding Narcotics of the 1945 Constitution of the Republic of Indonesia) supporting the execution of death penalty for narcotics dealers. Didik Endro Purwoleksono assumed that with the threat of death penalty only, the criminal sanction imposed on the perpetrators of narcotics crime is still very light, not worth the actions that destroy the generation of the nation and threaten the life of nation, state, and society, especially if the threat of death penalty is abolished. In other words, with the inclusion of death penalty only, the circulation of narcotics is still vibrant and carried out by the old actors, let alone they know that the criminal threat will not be subject to death penalty. They will surely be eager to distribute the narcotics[10].

Likewise leading advocate Adnan Buyung Nasution believes that drug dealers should be rewarded with death penalty. He revealed that in principle, he rejects death penalty. However, he considers that narcotics crime is already classified as the most serious crime. The death penalty according to Adnan Buyung Nasution deserves to be imposed on the narcotics dealer because the crime is categorized as a cruel crime, let alone the people also want or demand for a punishment that will make the narcotics perpetrators of deterrent[11].

Of the several types of serious crimes mentioned above which for the perpetrators are worthy of death is the manifestation of the form of justice and sympathy for the

victims of these serious crimes. According to the authors, a state law that guarantees basic human rights values, is still very much in need of the application of death penalty in terms of providing justice for the victims and their families. In line with that, Achmad Ali also argues that the reason why people agree with the prosecution, punishment and execution of death penalty for perpetrators of serious crimes, because only the death penalty that makes the balance of justice balance in terms of these serious crimes. Added again according to Achmad Ali, that to prevent mistakes, then the judges only sentenced to death the convict who really has been very convincing as the culprit. All the evidence has supported that there is no doubt. Especially if the defendant has publicly acknowledged that he was the perpetrator of the crime he charged[12]. Therefore it is necessary the conviction of a judge in sentencing the death penalty to someone who has committed a serious crime, in addition the judge must also consider the sense of justice and common sense[13] from victims of serious crimes or to their families.

Therefore, the authors believe that the execution of death penalty for a state law like in Indonesia, is still very necessary for the enforcement and protection of human rights because the execution of death penalty actually supports the creation of a legal state that always based on the basic values of human rights and of course essential justice. The writer's opinion is also endorsed by David Anderson who considers that a civilized state institutionalizes the fairest possible punishment by imposing death penalty for serious offenders, and this is also in accordance with Sila II Pancasila "Just and Civilized Humanity", as listed firmly in the Preamble to the 1945 Constitution of the Republic of Indonesia[14].

#### B. Objectives of Death Penalty as a Deterrent Effect

Essentially, death penalty actually has the power of deterrence against serious offenders, and is urgently needed to prevent the increasingly widespread crime in the serious category whose impact and negative effects can be felt by the wider community. One of the modern concepts of punishment purposes is deterrence/preventie which according to Andi Hamzah[15] is the purpose of punishment intended to provide a deterrent effect or prevent, so that both the defendant as an individual and others who potentially become criminals will be deterrent or afraid to commit a crime, see the criminal sanctioned to the defendant.

The purpose of punishment which intends to provide a deterrent or preventive effect is in accordance with the view of the utilitarians who see punishment in terms of benefits or usefulness, where seen is the situation or circumstances that want to be produced by the imposition of death penalty. This view is oriented to the front and also has the nature of prevention (preventive)[16]. So that an individual who has the potential to commit a similar crime is committed by a convicted criminal offender, can think long to do it again. Therefore, the threat of death penalty contained in a number of legislation is considered very effective to prevent the occurrence of crime in the serious category

#### C. Death Penalty Not Contradictory with the 1945 Constitution

In accordance with the existence of the Constitutional Court as the guardian of the Constitution mandated by the

1945 Constitution, for groups that cons penalty of death see an opportunity to attempt to eliminate death penalty under the pretext, death penalty is very contradictory to our constitution, especially in Article 28A of the 1945 Constitution which states: "Everyone has the right live, sustain life and life ". Then the aforementioned article by the death penal conflict group is connected again with Article 28 I Paragraph (1) which reads:

"The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right of religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on the basis of retroactive law are human rights that do not can be reduced under any circumstances".

The question then arises, is it true that the execution of death penalty violates human rights to live for anyone who has the death penalty status? Achmad Ali[17] replied to the question representing the criminal counter-conscious group by turning to the question "Why the question is not reversed to be, whether serious crimes such as narcotics, terrorism, heavy corruption, the sadistic murder is not part of the most violent crimes, most inhuman and harassing the lives and human dignity of all people and children of men ?. If the answer is "Yes!", And it is true "Yes", then there is nothing more violating the human right to live, other than the perpetrators of the serious crimes, and not the lawful and legal courts that have sentenced him to death.

The connection that death penalty is contrary to the basic values of human rights, according to the author is wrong. Because in Law of the Republic of Indonesia Number 39 Year 1999 on Human Rights in Article 1 it is affirmed that human rights are a set of rights inherent to the nature and existence of human beings as creatures of God Almighty and is a gift that is obligatory to be respected, upheld and protected by the state, law, government, and every person for the honor and protection of human dignity and prestige.

From the provisions of the aforementioned article it is clear that there is a strong correlation between the will of God Almighty with the existence of human rights. That human rights are a gift from God, and for certain things God has also allowed the imposition and execution of death penalty for serious perpetrators such as terrorists, premeditated murder with sadistic modus operandi, genocide, narcotics circulation, corruption "big classes", and various forms of crime that openly violate the basic values of human rights itself. In other words, the authors judge that the imposition of death penalty can actually be a media in terms of enforcement of basic values of human rights and not as a realisis form of rebellion against the basic values of human rights that is the right to live.

Related to the constitutional review of a number of articles in Law of the Republic of Indonesia Number 22 Year 1997 on Narcotics which regulates the sanction of death penalty for narcotics and illegal drug dealer, then according to the author is appropriate that the judges of the Constitutional Court of the Republic of Indonesia have rightly decided that death penalty is not contradictory to the constitution contained in Article 28 A and Article 28 I Paragraph (1) of the 1945 Constitution of the Republic of Indonesia. The conclusion of the Constitutional Court is based on the provisions of Article 80 Paragraph (1) letter a, Paragraph (2) letter a, Paragraph (3) letter a; Article 81 Paragraph (3) letter a; Article 82 Paragraph



(1) letter a, Paragraph (2) letter a and Paragraph (3) letter a of Law of the Republic of Indonesia Number 22 Year 1997 on Narcotics shall not be contradictory to Article 28A and Article 28I Paragraph (1) of the 1945 Constitution of the Republic of Indonesia.

In addition, the constitutional panel of judges is of the opinion that Law of the Republic of Indonesia Number 39 Year 1999 on Human Rights in Article 9 Paragraph (1) contains the provisions on the right to life and in Article 4 it is determined that the right to life includes human rights which are not can be reduced under any circumstances and by anyone. However, in the elucidation of Article 9 of Law of the Republic of Indonesia Number 39 Year 1999 on Human Rights states that the right to life can be limited in two cases, namely in the case of abortion for the benefit of his mother's life and in the case of death penalty based on court decision. In addition, Article 73 of Law of the Republic of Indonesia Number 39 Year 1999 on Human Rights also contains provisions concerning restrictions on human rights as follows: "The rights and freedoms provided for in this law can only be limited by and based on law, solely to ensure the recognition and respect of human rights and fundamental freedoms of others, morals, public order, and the interests of the nation"[18].

#### IV. CONCLUSION

Indonesia as a legal state shall recognize the existence of the execution of death penalty as a form of criminal process which is not contradictory to our basic constitution of the 1945 Constitution of the Republic of Indonesia and is not contrary to the basic values of human rights. As the guardian of the constitution, the final interpreter of the constitution and the protector of human rights, the Constitutional Court of the Republic of Indonesia in its final and binding decision (subject to the examination of the Constitution) a law on narcotics whose criminal provisions contain the threat of death penalty and the law on the procedures for the execution of death penalty of the 1945 Constitution of the Republic of Indonesia), decides that the threat and imposition of death penalty is not contrary to the constitution and human rights. This affirms that Indonesia as a legal state still needs to maintain the existence of death penalty in our legal system, for the sake of the achievement of justice and the upholding of human rights.

The threat of death penalty on a number of laws and the implementation of death penalty has received recognition from the Constitutional Court of the Republic of Indonesia that it is not contrary to the constitution and human rights. The only thing that needs to be reviewed is the technical implementation needs to be revised, so as to reduce the pain of the convicted person. In addition, there needs to be a more intense socialization from the government to the public, regarding the threat of death penalty on a number of criminal laws that fall into the category of serious crimes. This is intended, so that the purpose of punishment that is the deterrence of the results can be maximized and the assessment of various circles, that the adanya threat of death penalty has a positive impact and is directly proportional to the decrease in the volume level of serious crime category in society.

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- [3] Decision of the Constitutional Court of the Republic of Indonesia Number 2-3/PUU-V/2007 concerning Judicial Review of Law of the Republic of Indonesia Number 22 Year 1997 on Narcotics. The Decision was pronounced in court open to the public on October 23, 2007.
- [4] Decision of the Constitutional Court of the Republic of Indonesia Number 21/PUU-VI/2008 concerning Judicial Review of Law of the Republic of Indonesia Number 02/PNPS/1964 on the Procedures for the Execution of Death Penalty. The Decision was pronounced in court open to the public on October 15, 2008.
- [5] Some instruments that prohibit death penalty include: 1). Article 6 of the International Covenant on Civil and Political Rights (ICCPR) 1966. This article is a derivation of the 1948 Universal Declaration of Human Rights that the right to life is included in non-derogable rights under any circumstances. As of November 2, 2003, 151 countries have ratified; 2). Second Optional Protocol of the ICCPR aiming of The Abolition of Death Penalty 1990. This instrument aims to abolish the death penalty. To date, 50 countries have ratified; 3). Protocol No. The instrument aims to eliminate the death penalty in the European region; and 4). Article 7 of the Rome Statute of International Criminal Court 1998. Article 7 of this instrument does not govern the death penalty as a method of punishment. To date, 94 countries have ratified. see: Imparsial Team, *Inveighing Against Death Penalty in Indonesia*, (Jakarta: Imparsial, 2010), p. 125.
- [6] Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta: Kencana, 2010, p. 96.
- [7] Syawal Abdulajid & Anshar, *Pertanggungjawaban Pidana Komando Militer pada Pelanggaran HAM Berat, Suatu Kajian dalam Teori Pembaharuan Pidana*, Yogyakarta-Ternate: Laksbang-LepKhair, 2010, p. 1-2.
- [8] Pasal 28 J Ayat (1) berbunyi bahwa "Setiap orang wajib menghormati hak asasi manusia orang lain dalam tertib kehidupan bermasyarakat, berbangsa, dan bernegara". Namun pada Pasal 28 J Ayat (2) ditegaskan kembali bahwa "Dalam menjalankan hak dan kebebasannya, setiap orang wajib tunduk kepada pembatasan yang ditetapkan dengan undang-undang dengan maksud semata-mata untuk menjamin pengakuan serta penghormatan atas hak dan kebebasan orang lain dan memenuhi tuntutan yang adil sesuai dengan pertimbangan moral, nilai-nilai agama, keamanan, dan ketertiban umum dalam suatu masyarakat demokratis".
- [9] Achmad Ali, *ibid.*, p. 13-16.
- [10] Todung Mulya Lubis & Alexander Lay, *Kontroversi Hukuman Mati*, Jakarta: Kompas, 2009, p. 263.
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- [16] Position Paper Advokasi RUU KUHP Seri #3, "Pemidanaan, Pidana dan Tindakan dalam Rancangan KUHP", Jakarta: ELSAM, 2005, p. 8.
- [17] Achmad Ali, *Op.Cit.*, p. 39.
- [18] Cited from Decision of the Constitutional Court. 2-3/PUU-V/2007. The full verdict is accessible at [www.mahkamahkonstitusi.go.id](http://www.mahkamahkonstitusi.go.id)