

State Responsibility for Delays in the Implementation of Death Penalty

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Abstract. The implementation of the death penalty in Indonesia is currently a serious problem, and this is due to the pros and cons of its implementation. On the one hand, the death penalty is still regulated in existing statutory regulations, while on the other hand, it is contrary to the human rights that apply in Indonesia. In order to resolve the number of death row inmates who have not yet been shot, execute them after they have exercised their rights. The best way in this case is first to carry out reconstruction of the laws currently in force and also do this with Restorative Justice, which is a legal breakthrough. From the research results, it was concluded that postponing the execution of death row inmates is necessary to anticipate the impact of misguided justice. The minimum period is five years starting from the date of the court decision, which has permanent legal force. The legal product that can be used to regulate the postponement of death executions in Indonesia is a Presidential Regulation because the Attorney General, as the executor of death row inmates, is a subordinate of the president who must comply with the Presidential Decree. Presidential regulations are faster and easier to make than making or changing laws. Apart from that, the State, in this case, is an institution that protects its people in whatever way its citizens do. The execution of the death penalty still occurs. It is because the implementation of statutory regulations still regulates it. The author believes that the government must execute death row inmates if their legal rights have been sought and denied by the government. If not done, the government will have committed crimes against humanity.

Keyword: State Responsibility, Human Right, Death Penalty

1 Introduction

The implementation of the death penalty in Indonesia is currently a serious problem, and this is due to the pros and cons of its implementation. On the one hand, the death penalty is still regulated by existing statutory regulations, while on the other hand, it is contrary to the religion that applies in Indonesia. In this research, the researcher focuses on the non-carrying out of executions, which the government should carry out after death row inmates have completed their constitutional rights (law). If the President rejects this, then the execution of the convict must be carried out. In order to resolve the large number of death row convicts who have not yet been shot execution after the person concerned has exercised their rights, the best way, in this case, is first to carry out reconstruction of the current law and also carry out Restorative Justice, namely legal breakthrough. Reconstruction can be interpreted as the process of rebuilding or reorganizing something (Garner & Black, 2004). Returning it to the original arrangement (depiction) again. According to B.N Marbun, reconstruction is returning something to its original place, arrangement or re-imagining of existing materials and rearranging them as they were or originally occurred (Marbun, 2009)

The application of the death penalty actually still contains controversy in society in connection with human rights. The UN General Assembly has adopted a non-binding resolution calling for a global moratorium on the death penalty. Optional Protocol II of the International Covenant on Civil and Political Rights because the death penalty is considered to be contrary to the norms contained in the UDHR and ICCPR, hinders the promotion of the fulfilment of the right to life and ultimately prohibits the use of the death penalty in the countries involved (Ikhwanudin, 2019). Indonesia is one of the countries that still applies the death penalty in its positive law. This is proven by recognizing the principle of legality of the death penalty through several articles contained in laws that are still in use, such as the Criminal Code, Law No. 5 of 1997 concerning Psychotropic Substances, Law Number 35 of 2009 concerning Narcotics, Law Number 20 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption Crimes, Law Number 26 of 2000 concerning Human Rights Courts, Law Number 35 of 2014 concerning Amendments to Law Number 15 of 2003 concerning Implementation of

Government Regulations Substitute Law Number 1 of 2002 concerning the Eradication of Criminal Acts of Terrorism into Law. All of this is considered to be an extraordinary crime (extraordinary crimes) that endangers the life of the nation and state (Kumalasari, 2018).

The striking difference between the old and new Criminal Codes is the placement of the death penalty. In the old Criminal Code, the death penalty was included in the main type of crime. Meanwhile, in Law Number 1 of 2023, the death penalty is classified as a special crime, which is an alternative. It should be remembered that the death penalty in the new KUHP is only applied in cases of criminal acts of terrorism and kidnapping with the threat of murder resulting in death. The death penalty in the new Criminal Procedure Code is also mandatory to meet strict standards and procedures in accordance with applicable laws and regulations.

2 Theoretical Review

2.1 Legal Certainty Theory

Legal certainty, as one of the goals of the law, is part of efforts to realize justice. The real form of legal certainty is the implementation or legal enforcement of an action regardless of who carries it out. With legal certainty, everyone can predict what they will experience if they take certain legal actions. Certainty is needed to realize the principle of equality before the law without discrimination (MD, Moh. Mahfud, 2009).

The word "certainty" is closely related to the principle of truth, namely something that can be strictly defined in a legal-formal way. Through deductive logic, positive legal rules are placed as major premises, while concrete events become minor premises. Through a closed logic system, conclusions can be immediately obtained. The conclusion must be something that can be predicted so that everyone is obliged to stick to it. With this handle, society becomes orderly. Therefore, certainty will direct society towards order (Gunarsa & Sidharta, 2013).

Gustav Radbruch put forward 4 (four) basic things related to the meaning of legal certainty, namely. First, that law is positive, meaning that positive law is legislation. Second, that law is based on facts, meaning it is based on reality. Third, the facts must be formulated clearly so as to avoid mistakes in meaning, besides being easy to implement. Fourth, positive law must be kept the same. Gustav Radbruch's opinion is based on his view that legal certainty is certainty about the law itself. Legal certainty is a product of law or, more specifically, legislation. Based on this opinion, according to Gustav Radbruch, positive law, which regulates human interests in society, must always be obeyed even though positive law is unfair (Syafri & Hartati, 2020).

Furthermore, legal certainty is a matter (circumstances) that are certain provisions or provisions. Laws must be certain and fair. It must be a guide to behaviour and is fair because the code of behaviour must support an order that is considered reasonable. Only because it is fair and implemented with certainty can the law carry out its function. Legal certainty is a question that can only be answered normatively, not sociologically (Rato, 2017).

Legal certainty will guarantee that a person carries out behaviour in accordance with applicable legal provisions; on the other hand, without legal certainty, a person does not have standard provisions for carrying out behaviour. Thus, it is not wrong if Gustav Radbruch puts forward certainty as one of the goals of the law. In the order of social life, it is closely related to certainty in the law.

3 Research Methodology

The method used in this research is a normative legal research method/descriptive analysis approach. Analytical descriptive means describing and describing something that is the object of research critically through qualitative analysis. Because what we want to study is within the scope of legal science, the normative approach includes legal principles, synchronization of statutory regulations, including unconcreted legal discovery efforts (Soekanto, Soerjono, 2009).

4 Result and Discussion

4.1 Law Enforcement Implementing Death Executions by Human Rights

Law enforcement of executions by Human Rights (HAM) is a complex and controversial topic. Approaches and practices relating to execution vary across countries. Several human rights organizations and activists argue that execution violates human rights, such as the right to life and the right not to be tortured or treated cruelly, as well as the right to a fair trial. They argue that executions are unacceptable in the context of human rights protection. On the other hand, some countries still apply the death penalty, with varying levels of policies and procedures to ensure the protection of human rights. Some countries may impose strict restrictions on who can be sentenced to death and under what circumstances. In contrast, others may face challenges in carrying out executions by human rights standards. It is important to note that views on executions in a human rights context may vary, and there is ongoing debate at national and international levels about related policies and practices.

Human rights standards and perspectives continue to evolve, and legal approaches to executions may change over time.

Decisions for death row convicts need to be reviewed because in the latest Criminal Code, the death penalty, which was originally the main punishment, has now changed to a special or alternative punishment. After the convict's death sentence, there will be a trial period of imprisonment for 10 (ten) years per the 2023 Criminal Code. This requires firmness from the Prosecutor's Office regarding the time limit for the death penalty execution to be carried out and what the procedures for the execution will be after the ratification of Constitutional Court Decision Number 2 -3/PUU-V/2007 (whether the procedure is to be shot to death or lethal injection) so that it does not violate human rights. During the trial period of detention for 10 years in prison, spiritual formation should be provided specifically for death row inmates supported by certain legal grounds because, so far, there have been no statutory regulations regarding special formation for death row inmates. Several aspects that need to be considered by death row inmates and the families of death row inmates are as follows:

A. Aspects of Justice for Death Row Prisoners

The death penalty or death penalty is a punishment that takes a person's life, thus triggering debate between law enforcers and human rights enforcers. When viewed from the perspective of criminal law and human rights, the death penalty aims to provide a deterrent effect against law violators. However, on the other hand, the death penalty violates a person's right to life. S.R. Sianturi said that every human has the right to live and is protected by law, and no one can take away this right. Many parties agree with the abolition of the death penalty from the Indonesian penal system. However, the death penalty is recognized by the provisions of the country's constitution, and it is not easy to abolish it. This debate raises the question of whether the death penalty law is appropriate to be implemented as a punishment system in the country (BandungBergerak.id, 2022). The death penalty is the highest and special form of sanction whose nature is to take a person's life, as well as the highest form of justice so that there is no bias between the victim and the perpetrator. However, on the other hand, the death penalty violates human rights because it takes away a person's right to life. The purpose of the death penalty is an effort to realize the highest justice in society. According to preventive-intimidate and repressive-depressive theories, the death penalty aims to create balanced justice in society. Perpetrators who commit crimes are punished criminally as an encouragement not to commit crimes again (Denadin, 2023). With the death penalty, society does not take the law into its own hands against criminals.

B. Human Rights Aspects of Death Row Prisoners

The aspect of human rights (HAM) in this dissertation is directed at the uncertainty regarding the time limit for executions for death row convicts. This condition has a negative impact from not regulating the time limit for executions, which is contrary to human rights, including Article 28D paragraph (1), Article 28G paragraph (2) of the 1945 Constitution, Article 28D paragraph (1), and Article 28I paragraph (2) 1945 Constitution. Article 28D paragraph (1) of the 1945 Constitution explicitly mandates that:

"Everyone has the right to recognition, guarantees, protection and fair legal certainty as well as equal treatment before the law".

The provisions of Article 28D paragraph (1) of the 1945 Constitution substantially explain that everyone has the right to a sense of legal certainty and justice, including death row prisoners. So, the government's action of hanging the fate of death row inmates is a violation of human rights. Article 28G paragraph (2) of the 1945 Constitution mandates that

"Every person has the right to be free from torture or treatment that degrades human dignity and has the right to obtain political asylum from another country".

The substance of the article above emphasizes the prohibition of all forms of torture, both physical and psychological, against everyone. Regulations regarding the time limit for the execution of the death penalty are not strictly regulated, causing the condition of death row inmates to be under psychological pressure because they are thinking about the time of their execution. The psychological pressure experienced by convicts can be qualified as an act of torture, especially psychological, and this is contrary to human rights. Furthermore, Article 28I paragraph (2) of the 1945 Constitution mandates that:

"Everyone has the right to be free from discriminatory treatment on any basis and has the right to receive protection against discriminatory treatment".

The discriminatory nature here can be seen from the differences between one convict and another in terms of awaiting execution. Apart from that, it is also related to the treatment of death row inmates while in prison.

"Executing the death penalty quickly will certainly provide a basis for fair legal certainty in the process. Providing protection of human rights for death row inmates, victims and the wider community, and even increasing its authority as a rule of law".

Article 1 paragraph (3) of the 1945 Constitution states that Indonesia is a rule of law country, so it is appropriate that as an embodiment of the rule of law, it needs to be further regulated firmly and definitely regarding updating regulations regarding the time limit for the execution of the death penalty. Reforms must be implemented comprehensively by focusing on the aftermath of the President's rejection of clemency and the provisions governing extraordinary legal remedies for judicial review and pardon (Denadin, 2023).

The law develops along with the development of social life. Therefore, the law is undergoing reform, including in the field of criminal law. Criminal law reform is a continuous effort with the method of forming legislation that actualizes the principles of criminal law and the development of values in society both at the national and international levels. The adaptability of the Criminal Code to developments in global criminal law, especially in the implementation of the death penalty, is a basis for assessing how relevant the death penalty reforms formulated in the Criminal Code are. The Criminal Code is a formulation policy; according to M. Cherif Bassiouni, criminal law policy is carried out in 3 (three) stages, namely the formulation stage, application stage and execution stage. The formulation stage is a legislative process that regulates not only material criminal law but also formal criminal law and criminal implementation law.

The uniqueness of law in Indonesia compared to other countries is that every legal product is formulated with a legal, political direction based on Pancasila, which is the source of all legal sources. According to Barda Nawawi Arief, this uniqueness also influences the viewpoints of the pro and contra groups regarding the death penalty as a substance of the Criminal Code; each group uses Pancasila as an argument to provide its point of view.

Muladi explained that there are 6 (six) scopes of balance. This balance is a pattern that does not choose one of two or more criminal law concepts. The six balances referred to include:

- a. In the form of community interests that do not override individual interests.
- b. In the form of the idea of protecting victims without ignoring the idea of criminal individualization.
- c. In the form of integration between the act element and the maker element.
- d. In the form of integration between formal and material criteria.
- e. In the form of a balance between legal certainty, flexibility and justice, and sixth, in the form of national values that are in line with universal values.

In fact, the postponement shows Indonesia's need for more determination to prove its legal sovereignty. Therefore, Indonesia should not pay attention to various criticisms from other countries who intervene in efforts to implement Indonesian national law; Indonesian law enforcement must show the firmness of the laws implemented in its country so that domestic and foreign parties comply with the legal rules implemented by Indonesia so that the legal aim of realizing an orderly order of life between communities can be realized. Efforts to apply the death penalty in Indonesia can run well without any intervention from within or outside the country.

4.2 State Responsibility for Delays in The Execution of Death Penalty

During the waiting period for the death penalty, 2 (two) terms describe the condition of death row inmates, namely first, death row phenomenon, and second, death row syndrome. Hudson defines the death row phenomenon as a prolonged delay with cruel conditions during the waiting period (death row) (Hudson, 2000), while what is meant by death row syndrome, according to Smith, is the psychological danger resulting from a series of psychological effects for prisoners resulting from the waiting period spent (Smith, 2008). In Indonesia at 2020, 58 death row inmates have to wait 10 (ten) years for their execution schedule, and five death row inmates are waiting for their turn to face the firing squad for up to 20 years (Karim, 2020). The convicts had to experience the death row phenomenon and death row syndrome for years. You can imagine how tormented the prisoners were in waiting that long. The Special Rapporteur of the UN Human Rights Council on torture and other atrocities (2010-2016 period) has discussed that the death row phenomenon results in inhumane or degrading treatment as a result of physical conditions and the consequences of mental anguish due to the long waiting period for the execution of the death penalty. Sitting on death row for a long time in these conditions is already a form of torture.

Based on the results of the author's search through secondary materials, there are 7 (seven) limitations on the implementation of the death penalty. Limitations regarding the application of the death penalty are contained in the International Covenant on Civil and Political Rights (ICCPR) agreement to which Indonesia is a party.

Explicitly, this treaty does not forbid the use of the death penalty but provides a series of strict requirements for state parties in implementing the death penalty. The limitations in question consist of:

- a. Only for "Most Serious Crimes". The death penalty only applies to intentional "most serious crimes."
- b. The Right to a "Fair Trial Fulfilled". The death penalty cannot be carried out if the right to a fair trial is violated during the legal process.
- c. Protection of the Right to Identity. The death penalty does not apply to the "crime" of adultery, same-sex relations (homosexuality), religious "blasphemy", forming a political opposition group, or insulting the head of state.
- d. Using the Retroactive Principle. The death penalty does not apply when the crime does not yet carry the death penalty.
- e. Convicted Minors. The death penalty cannot be carried out if the convict is under 18 years of age.
- f. Pregnant Convict. The death penalty does not apply to female convicts who are pregnant.
- g. Convicts with Mental Disorders. Death sentences and executions only apply to convicts who are free from mental disorders.

The points of limitation above emphasize that imposing the death penalty on a person must specifically pay attention to the interpretation that the practice of the death penalty is not only contrary to the right to life but is contrary to the guarantee of not being tortured, subjected to cruel or degrading treatment or punishment. Based on the facts in Indonesia, Komnas HAM, as an independent institution which has a mandate to develop conditions conducive to the implementation and protection of human rights, found that many death penalty cases had severe defects in the judicial process. Starting from the lack of access to legal representation, the practice of torture and ill-treatment during interrogations, the lack of adequate translators for suspects who do not understand Indonesian, and the general denial of clemency for death row inmates for certain crimes. These conditions are influenced by the lack of firmness in determining waiting period limits and poor prison services, thereby exacerbating the effects of the waiting row phenomenon experienced by death row inmates.

Even though Indonesia has legal instruments that regulate the implementation of death executions, such as the Criminal Code, Law Number 2/PNPS/1964, Police Chief Regulation Number 12 of 2010, pardon regulations, and Circular Letter of the Deputy Attorney General for General Crimes Number B-235/ E/3/1994 concerning the Execution of Court Decisions. However, none of them mentioned the limitations of the waiting period for executions. The lack of firmness in determining waiting period limits and poor prison services exacerbate the effects of the waiting row phenomenon experienced by death row inmates (Napitupulu, 2020).

Apart from that, there are also issues regarding the provisions governing changes to the death penalty, namely that executions are not carried out after a pardon has been refused for ten years. It is stated that these changes "can" be changed by presidential decree and are not "mandatory" or occur without waiting for presidential approval. Arrangements like this will continue to provide uncertainty regarding the condition of death row inmates. Death row inmates can wait even more than 20 years in prison. Not to mention the possibility of legal action to change the sentence through Judicial Review (PK) or pardon being rejected, the mental condition of the convict will decline again. This uncertainty about the time of execution will further damage the mental condition of death row inmates as time approaches the execution.

Official findings from state institutions also show evidence of unfair trial practices in death penalty cases. In July 2017, the Indonesian Ombudsman stated that the Attorney General committed maladministration because he executed Humphrey "Jeff" Jefferson Ejike (a death row convict) in July 2016, whose application for clemency was still ongoing. In another case, the Supreme Court changed the death sentence to 5 years through a judicial review process when the sentence assistant conducted a forensic test which showed that the death row inmate was still under 18 years old when the crime occurred. The finding of unfair trial practices in death penalty cases, as well as the absence of regulations regarding terms and timeframes for executions, is a severe human rights problem for countries that still implement it.

Ultimately, the state is also responsible for postponing the execution of suspects by the applicable law and legal system. In some legal systems, the state must ensure that a fair legal process by human rights is carried out before a death execution is carried out. If there is a delay in carrying out a death execution, the state must ensure that the reasons for the delay are by applicable law. For example, delays may be caused by the appeals process or other efforts to reexamine the case

5 Conclusion

Based on the discussion outlined previously, it can be concluded that postponing the execution of death row inmates is necessary to anticipate the impact of misguided justice. The minimum period is five years starting from the court decision date, which has permanent legal force. This time period is sufficient to allow death row inmates to submit a judicial review, and this period is sufficient for the government to think about justice for death row inmates and consider the human rights of death row inmates. Apart from that, the state, through the government, is responsible for designing legal products that can be used to regulate the postponement of death

executions in Indonesia. The legal product in question could be a Presidential Regulation because the Attorney General, as the executor of death row inmates, is a president's subordinate who must comply with the Presidential Decree. Presidential Regulations are the legal product chosen because they are faster and easier to create than making or amending laws.

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