

DEATH PENALTY IN INDONESIA: WHAT AND WHY? IS IT NOT AGAINST UNIVERSAL HUMAN RIGHT PRINCIPLE?

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Abstract

Even though Indonesia has ratified International Covenant on Civil and Political Rights (ICCPR) in 2005 which directly recognizes the right to life, at the same time Indonesia has committed to apply the death penalty in its law system. Strengthened by the Constitutional Court of the Republic of Indonesia through its verdict, the legality of the death penalty implementation in Indonesia cannot be void, considering the natures of the Court verdict which are final and binding. However, the issue of the death penalty is debatable among society because it is clear that under article 28I paragraph (1) of the 1945 Constitution to protect its people right to life. Besides, the ineffectiveness justice system in Indonesia also become one of the main grounds for cons groups to propose to the government for abolishing the death penalty as a form of punishment in the Indonesian law system. Aiming to comprehend this issue reasonably, this paper is not only going to explore the grounds of the government of the Republic of Indonesia for promoting and supporting the death penalty as one of real punishment in Indonesia but also explain the details of types crimes in which can be sentenced a death. Under article 6 paragraph (2) of ICCPR, there is a room for a country which has not to abolish the death penalty to sentence a death but only for only the most serious crimes. Thus, Do the type of crimes which can be convicted a death in Indonesia meet the definition of the most serious crimes agreed by international law and the national security interest? If so, Is this policy against the human right to life? This article will expose some scholars' arguments, cases, jurisprudence, and verdicts to show the standing of the author in this issue.

Keywords: Death Penalty, Indonesia, 1945 Constitution, Right to Life, the most serious crime

1. Introduction

The paper covers the grounds of the government of the Republic Indonesia for applying the death penalty in its law system, despite at the same time Indonesia has ratified ICCPR, which directly recognizing the right to life for all people. This issue has become a hot issue since this topic is never ended among society. However, it is clear that in this stage, it is essential to bear in mind that not all the types of crimes can be sentenced to death in Indonesia. Since the finding reveals that drugs narcotics dealers' cases are a crime which its defendant mostly sentenced to death, this paper will elaborate the grounds of the government and the district court to sentence a death to the defendant for drugs narcotics cases. Also, since the Constitutional Court of the Republic of Indonesia ("the Court") has been affirmed that the death penalty is constitutional under the law, this paper will explore the perspective of the Court regarding the death penalty in such a particular case. Accordingly, in the end, the readers can find the answers to these kinds of questions.

1. Does such a case meet the definition of the most serious crimes which notably agreed by international laws and the national security interest?
2. If so, is this policy against the principle of the human right to life?

and then comprehend the grounds of the government of the Republic of Indonesia ("the government") to the supports death penalty under the Court's perspective.

This topic is necessary to discuss because it is important to straighten out misunderstandings among society about the implementation of the death penalty in Indonesia. The recent research published that the most type of crime which sentenced a death is that drugs (narcotics) cases.¹ It reaches about 63.5% of the total cases which sentenced death. It is safe to submit that the government commits to fight drugs (Narcotics) cases and consider it as a crime which equals to the most serious crimes. By ratifying United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substance 1988 ("the Convention") through Act Number 7 Year 1997, the Court affirms that sentencing a death for drugs (narcotics) cases is a form of Indonesia as a state parties and it is a form of national implementation which following as consequence of ratifying the Convention.²

However, there are many negative speculations addressed to the district courts, which has authority to handle this such of cases, such as the accusations of unfair trial proceedings and ineffective trial process before sentencing the death penalty to the defendant. At the same time, those groups of people also submit that drugs (narcotics) cases are not supposed to be considered as one of the categories for the most serious crimes under international law perspective.

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¹ ICJR. Naskah Fair Trial in Indonesia. Accessed March 2019. http://icjr.or.id/data/wp-content/uploads/2019/01/15012019_NASKAH-FAIR-TRIAL-FULL_15-JANUARI_FINAL.pdf. p.130

² The Court Verdict for the case number 2-3/PUU-V/2007, p.425

Accordingly, misperceptions about the death penalties for drugs cases which is supported by the government grows more extensive from time to time. By writing this topic in this paper, the writer submits that the public needs to know well about the government's considerations of supporting the death penalty. It is also essential in this stage to clarify the missing points about this issue which is likely to lead the public's perceptions or opinions about the government or the district courts in Indonesia.

To answer the questions above, the writer uses research based-desk methodology to gather all academic information needed in this paper. The resources which used are that related Court verdicts, the national or domestic laws, the international laws, the research findings, and some journals articles.

Regarding the question about the relation between the paper and the already existent specialized literature, it submits that the existence of this paper serves as a complementary paper. Aiming for balancing the debate about the death penalty in Indonesia, this paper stands on pro groups, but it will be more concern on elaborating the Court and the government's perspective on supporting the death penalty in Indonesia.

2. Right to Life: Non-Derogable Rights and Death Penalty in Indonesia

Those who argue that by sentencing death penalty as punishment after committing in a crime, such as drugs dealers cases in Indonesia, it means that there is an act which attempts to abolish one of the people non-derogable right, namely right to live. Under international law, the right to live is a right which is protected and recognized under article 6 paragraph (1) of ICCPR. In other words, the commitment for not arbitrarily deprived of people's lives is a form of another way to affirm that everyone in this world, including a criminal, has the same right to life and has a right to be protected. Recognizing the same spirit as article 6 paragraph (2) of ICCPR³ about the right to life, Indonesia has its national law which acknowledges and preserve the right to live. Under article 28A and article 28I paragraph (1) of the 1945 Constitution ("the Constitution"), it is clear that every person shall have the right to live and to defend his/her and existence. Thus, it is safe to submit that Indonesia is a state which commits to protecting its citizen's right to live. However, it is essential to bear in mind that discussing about death penalty, it means that the court has obligations to consider some aspects before taking a decision, such as the death penalty perspective itself, the categories of crimes which can be sentenced a

death, criminals sentenced to death, victims perspective, and perspective of the victims' families.⁴

Further, for answering the arguments which concern on non-derogable rights in death penalties cases, the Court submits that these views eliminate the quality of the evil nature from a crime which threatened with the death penalty. What means by this is that the crimes, which are threatened by the death penalty, are such crimes which attacking other people's rights to life directly or indirectly. In this stage, criminal punishment shall be seen as an effort to restore the social harmony which has been disturbed by those kinds a form of crimes. As a way to restore social balance, abolishing criminal punishment in the law system is hurt justice among society. In this stage, the Court also highlights the big question, "why does the defense of the criminal's right to life, who is threatened with capital punishment, is more valuable than the defense of the victim's right to life?"

2.1. The Limitations

Under article 29 paragraph (2) of Universal Declarations of Human Rights⁵ ("UDHR"), it is clear that in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due to recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society. It is safe to submit that there is no absolute way to exercise right and freedoms but limited by law to secure and respecting other people's right and freedom. In national law, article 28J paragraph (2)⁶ of the constitution and article 73 of Act Number 39 the Year 1999 about Human Rights ("Act of Human Rights") regulate same spirit and rules as article 29 paragraph (2) of the UDHR

Article 28J paragraph (2) of the Constitution stipulates:

"In exercising hi/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society."

Regarding non-derogable rights, on a national scale, there is a law explaining about the right to life in Indonesia and mentioning two limitations about right to life. Under article 9 paragraph (1) and its explanation of Act of Human Rights, it is safe to submit that right to life can be limited into two points, namely:

1. In the case of an abortion for the benefit of his/her mother's life;
2. In the case of capital punishment based on a court decision.

³ For more detailed about ICCPR, it can be seen through <https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>.

⁴ The Court Verdict for the case number 2-3/PUU-V/2007, p.405

⁵ UDHR. Accessed March 26, 2019. http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf

⁶ Further detailed about the Constitution can be read through https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/ilo_aids/documents/legaldocument/wcms_174556.pdf.

Under only to the two reasons above, the right to life can be limited.

Article 6 paragraph (2) of ICCPR stipulates:

"In countries which have not abolished the death penalty, 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 pursuant to a final judgement rendered by a competent court."

In this stage, it is safe to submit that right to life cannot be applied entirely absolute and ICCPR allows states parties to impose capital punishment in their respective national laws. However, the UN Commission on Human Rights identified this limitation as one of the critical safeguards 'guaranteeing the protection of the rights of those facing the death penalty.' And the UN Human Rights Committee has called upon states to abolish [capital punishment] for other than the "most serious crimes".⁷

2.2. The Most Serious Crimes

Drug-related executions are on the rise in some regions, including Iran, Indonesia, and China.⁸ In Indonesia, the majority of those who sentenced a death penalty is that the convicted person in the drugs cases. The percentage for drugs dealers case reaches around 63.5%, and premeditated murder cases get the second largest rate, namely 24.5%. The rest, for premeditated murder accompanied by other criminal acts cases and premeditated murder accompanied by criminal acts of rape against children cases respectively reach 7% and 5%.⁹ It is essential to bear in mind that there are 4.5 million people in Indonesia suffers from drug-related problems, and around 1.2 million people of them cannot be cured. It means that there are approximately 33 to 50 people each day die because of it.¹⁰ Comparing to the number of people who suffered caused by drugs narcotics in 2007, 4.5 million is a massive number of people. The data shows that in 2007, the number of drugs narcotics suffered people reach about 15.000 people a year.¹¹ In other words, less than ten years, the number of drugs narcotics victims increased dramatically. Moreover, data in 2007 revealed that the community funds which spent in drugs narcotics cycle are about 292 trillion per year. This data proves that the

spread of cycling of illicit drugs trafficking is widespread.¹²

Based on the data mentioned above, it is clear to submit that in Indonesia, drugs dealers cases are considered to be a type of crime which can endanger the generation in Indonesia. Seeing from the significant impact can be caused by the danger of drugs narcotic cycle in Indonesia, the government needs to maximize the necessary step to prevent the threat grows bigger. A death penalty is an answer for the defendant who is legally proven distributing drugs narcotics before the court. In this point, the debatable about the death penalty emerges. Many people start questioning the law system in Indonesia. Most of them also start asking about the international legal basis which defining drugs cases as a type of the most serious crimes.

These cons groups submit that drugs cases do not meet the requirement of the most serious crimes by adding the argument that the submission of categorizing drugs cases as one of the most serious crimes is against the international definition. Besides, the UN Human Rights Committee and the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stressed that drug crimes do not meet the definition of the most serious crimes.¹³ The UN Human Rights Committee has indicated that the definition of 'the most serious crimes' is limited to those directly resulting in death.¹⁴ Further based on the reports of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions have consistently emphasized that 'the death penalty must under all circumstances be regarded as an extreme exception to the fundamental right to life, and must as such be interpreted in the most restrictive manner possible.' Therefore, from the perspective of UN Human Rights treaty bodies and special rapporteurs, the interpretation of the most serious crimes has to satisfy¹⁵:

1. 'Most serious crimes' should be interpreted in the most restrictive and exceptional manner possible;
2. The death penalty should be considered in cases where the crime is intentional and results in lethal or extremely grave consequences;
3. Countries should repeal legislation prescribing capital punishment for economic, non-violent or victimless offences.

Regarding argument which stated that drugs cases do not meet the definition of the most serious crimes, the Court in this stage submits¹⁶ that phrase "the most

⁷ Rick Lines, "The Death Penalty for Drugs Offences: A Violation of International Human Rights Law", p. 14 https://www.researchgate.net/publication/237484349_The_Death_Penalty_for_Drug_Offences_A_Violation_of_International_Human_Rights_Law.

⁸ Felicity Gerry and Narelle Sherwill, "Human Trafficking, Drug Trafficking, and the Death Penalty", Indonesia Law Review 6, (2016). 269

⁹ Institute For Criminal Justice Reform (ICJR), Menyelisik Keadilan Yang Rentan: Hukuman Mati dan Penerapan Fair Trial di Indonesia. Accessed March 26, 2019. p.130 http://icjr.or.id/data/wp-content/uploads/2019/01/15012019_NASKAH-FAIR-TRIAL-FULL_15-JANUARI_FINAL.pdf.

¹⁰ M Iman Santoso, "The Pros and Cons of the Death Penalty for the Drug Abuse in Indonesia"

¹¹ The Court Verdict for the case number 2-3/PUU-V/2007, p.377

¹² The Court Verdict for the case number 2-3/PUU-V/2007 p.380

¹³ Felicity Gerry and Narelle Sherwill, "Human Trafficking, Drug Trafficking, and the Death Penalty", Indonesia Law Review 6, (2016). 270

¹⁴ Rick Lines, "The Death Penalty for Drugs Offences: A Violation of International Human Rights Law", p. 17 https://www.researchgate.net/publication/237484349_The_Death_Penalty_for_Drug_Offences_A_Violation_of_International_Human_Rights_Law

¹⁵ Ibid, page 18

¹⁶ The Court Verdict for the case number 2-3/PUU-V/2007, p.422

serious crimes" under article 6 paragraph (2) of ICCPR cannot be read separately with the phrase "in accordance with the law in force at the time of the commission of the crime.", Which also stipulates in the same article. In the national level, the applicable law is that Act about narcotic drugs, meanwhile in international level, the applicable law is that the Convention. As a consequence of ratifying the Convention, Indonesia obliges to maximize the effectiveness of law enforcement measures in respect of those offenses as stipulated under article 3 paragraph (6) of the Convention.

Besides, Indonesia shall consider the drugs crimes as a serious offense as mandated under article 3 paragraph (5) of the Convention. By interpreting the articles in the Convention systematically, the attacks which mentioned in the Convention classify as particularly serious crimes. Further, the Court also notes that if the offenses specified in the Convention consider as particularly serious crimes compared to the other crimes, which has been recognized as the most serious crimes, such as genocide crime and crimes against humanity, then there is no different substantively between the two groups of crimes. It is because both groups of crimes adversely affect the economic, cultural and political foundation of society and bring a danger of incalculable gravity. Accordingly, the Court affirms that drugs narcotics cases are equals to the most serious crimes as referred under article 6 of ICCPR.

In different pages, the Court also declares that Indonesia is a state which has the largest Muslim population in the world and becomes a member of the Organisation of Islamic Cooperation. Accordingly, it is essential for Indonesia to consider the content of the Cairo Declaration on Human Rights in Islam¹⁷. Under article 2 (a) of Cairo Declaration, it is stipulated that:

"Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to protect this right from any violation, and its prohibited to take away life except for a Shari'ah prescribed reason."

Based on those rules, the writer submits that the state has no authority to sentence a death to a man without a clear regulation, laws, and purpose. In other words, the countries which recognize death penalty as a form of punishment in its law system, the aim must be related to the state's obligation to protect its national security and public safety purpose. If a state arbitrarily takes away other people live without clear purpose and prescribed reason, under Islamic law, it is prohibited. In this case, the government of the Republic of Indonesia obliges to obey the Convention's mandates and keep

the social harmony in sync. By considering drugs narcotics cases as one of the most serious crimes, Indonesia attempts to protect its national security and public safety purpose. As mentioned above, there are 4.5 million people in Indonesia suffers from drug-related problems and around 1.2 million people of them cannot be cured.¹⁸ Thus, based on those data that drugs narcotics cases only bring adverse effect to society, threaten public safety which leads to national security in Indonesia, it is safe to submit that those reasons meet the standard of prescribed reason referring under article 2 (a) of the Cairo Declaration and sentence a death to those drugs narcotics dealers are allowed.

Moreover, based on the survey result conducted by Indo Barometer 2015, it shows that about 84,1% of Indonesians agree that the drugs dealers deserve a death penalty punishment because drugs endanger Indonesians generations' life.¹⁹ Accordingly, most of Indonesians comprehend well that the impact caused by drugs narcotics endanger its state safety.

2.3. Death Penalty Against the Constitution and Principle of Human Right?

National Anti-Narcotics Agency ("NANA") affirms that perpetrators of narcotics crimes do not only eliminate the right to life, but also disturb the social harmony among society and damage the young generation. Further, NANA states that the impact of drugs narcotics can also omit the freedom of thought and the right not to be enslaved.²⁰

Regarding the human right violated in the death penalty issue, it is essential to comprehend the human right which recognized in the Constitution. As mentioned earlier that there is a limitation stated in the constitution under article 28J paragraph (2). What limits the people right in Indonesia are that stating in the article 28J paragraph (2), namely: the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society; and the norms in the PANCASILA.

PANCASILA, pronounced Panchaseela, is the philosophical basis of the Indonesian state.²¹ In other words, Pancasila is a guidance for the government to run the state, to be a direction of the development and the ideals of the Indonesia. PANCASILA comprises five inseparable and interrelated principles, namely:

1. Belief in the One and Only God;
2. Just and Civilized Humanity;
3. The Unity of Indonesia;

¹⁷The Cairo Declaration on Human Rights in Islam (1990) can be read further through [https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/2TheCairoDeclarationonHumanRightsinIslam\(1990\).aspx](https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/2TheCairoDeclarationonHumanRightsinIslam(1990).aspx)

¹⁸ M Iman Santoso, "The Pros and Cons of the Death Penalty for the Drug Abuse in Indonesia"

¹⁹ Institute For Criminal Justice Reform (ICJR), Menyelidik Keadilan Yang Rentan: Hukuman Mati dan Penerapan Fair Trial di Indonesia. Accessed March 26, 2019. p.287

²⁰ The Court Verdict for the case number 2-3/PUU-V/2007, p.377

²¹ <http://www.indonezia.ro/republic.htm>

4. Democracy Guided by the Inner Wisdom in the Unanimity Arising Out of Deliberations Among Representatives;
5. Social Justice for the Whole of the People of Indonesia.

Prof. Achmad Ali, former National Commission on Human Rights has stated that there are two principles inside PANCASILA in favor of death-sentenced for the most serious crimes, namely: the first principle and second principle. The meaning of the two laws contained in PANCASILA cannot be separable. It is essential to bear in mind that there must be a balance of injustice by taking into account the position of the victims of narcotics crimes. The justice cannot be seen on the perpetrator side only, but it shall recognize the victim side.²²

Considering the impact of drugs narcotics circle which threaten to omit other people's right and potentially damage other's people live, it is safe to submit that it is against the ideology of a state, especially a goal and the idea of the government as mentioned under the Constitution. In other words, there is no respect and recognition of the rights and freedoms of others in drugs narcotics dealers cases because they are well-proven acting beyond their limit in term of recognizing other people right to live well and well aware that their actions can harm and risk other people life. It is safe to submit that this such a crime against consideration of morality, religious values, security and public order in a democratic society, as mandated under article 28J paragraph (2) of the Constitution.

Conclusion

There are 4.5 million people in Indonesia suffers from drug-related problems, and around 1.2 million people of them cannot be cured. It means that there are approximately 33 to 50 people each day die because of it. Comparing to the number of people who suffered caused by drugs narcotics in 2007, 4.5 million is a massive number of people. The data shows that in 2007, the number of drugs narcotics suffered people reach about 15.000 people a year. In other words, in less than ten years, the number of drugs narcotics victims increased dramatically. Moreover, data in 2007 revealed that the community funds which spent in drugs narcotics cycle are about 292 trillion per year. This data proves that the spread of cycling of illicit drugs trafficking is widespread rapidly.

In this stage, it is essential to bear in mind that In Indonesia, the majority of those who sentenced a death penalty is that the one in the drugs cases. It reaches about 63.5% of the total death penalty cases in percentages. Indonesia considers drugs narcotics cases as equals to the most serious crimes. Although there are many groups of people who disagree with this rule, the government keeps supporting this such a capital punishment for drugs narcotics cases. Besides, the

Court through its verdict submits that phrase "the most serious crimes" under article 6 paragraph (2) of ICCPR cannot be read separately with the phrase "in accordance with the law in force at the time of the commission of the crime.", Which also stipulates in the same article. In the national level, the applicable law is that Act about narcotic drugs, meanwhile in international level, the applicable law is that the Convention. As a consequence of ratifying the Convention, Indonesia obliges to maximize the effectiveness of law enforcement measures in respect of those offenses as stipulated under article 3 paragraph (6) of the Convention.

In addition, Indonesia shall consider the drugs crimes as a serious offense as mandated under article 3 paragraph (5) of the Convention. By interpreting the articles in the Convention systematically, the attacks which mentioned in the Convention classify as particularly serious crimes. Further, the Court also notes that if the offenses mentioned in the Convention consider as particularly serious crimes compared to the other crimes, which has been considered as the most serious crimes, such as genocide crime and crimes against humanity, then there is no different substantively between the two groups of crimes. It is because both groups of crimes adversely affect the economic, cultural and political foundation of society and bring a danger of incalculable gravity. Accordingly, the Court affirms that drugs narcotics cases are equals to the most serious crimes as referred under article 6 of ICCPR.

Then, does the death penalty against the principle of human right, especially the right to life? As mentioned above that there is a limitation regulated in the law system, either in the international level or on a national scale. In the international level, it is regulated under article 29 paragraph (2) of UDHR which is also similar to article 28J paragraph (2) of the Constitution. It is safe to submit that under both laws; there is no absolute way to exercise the human right. Specifically, stipulate that we are the people have to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others based upon considerations of morality, religious values, security and public order in a democratic society. Furthermore, under article 9 paragraph (1) and its explanation of Act of Human Rights, capital punishment based on a court decision is one out of two reasons that right to life can be limited in Indonesia. Accordingly, the death penalty has a legal basis in Indonesia, and those legal bases are in line with international law and respect the human right principle.

By presenting the implementation of the death penalty in Indonesia, the writer expects that the wider society, especially the international community, can comprehend the reasons on why the government supports the death penalty for drugs cases. Also, this paper is expected to answer those who are question the

²² This statement is read before the Court and it is written in the Court Verdict for the case number 2-3/PUU-V/2007, p. 378-379

legal basis of death penalty implementation in Indonesia. Since this is a sensitive issue and many people are likely to take misperception about Indonesia and its policy, the writer hopes that this paper can give a clear description of the death penalty issue. In this section, the writer also suggests to the other writers or researchers to do some research about the death penalty system in Indonesia. Many scopes can be dug in details, such as the specific law of death penalties, the judges'

consideration while handling the case, or the possibility of Indonesia to abolish the death penalty in the future when drugs cases do not exist anymore.

To sum up, sentence a death to the drugs narcotics dealers is in line with the laws, including national/domestic and international; and respect and recognize the human right principles. In this stage, the writer also invites the other researchers to take part in this issue by researching the death penalty in Indonesia.

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