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A Review of the Death Penalty Under the New Indonesian Criminal Code in the Perspective of Critical Legal Studies

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ABSTRACT: Death penalty is a punishment that has a long history. In fact, it has been carried out since humans have run civilisation systematically. The study on death penalty has developed rapidly, starting from the political aspect, spiritualistic aspect, philosophical aspect, and implicating to the juridical aspect as the guideline to execute the punishment itself. The development in the study of death penalty is divided into two major axes, namely abolitionists who oppose death penalty and are oriented towards the abolition of death penalty in the entire legal system. Then, the retentionist axis, which still carries out the death penalty as part of the punishment system. The debate and polemics over the death penalty can be seen ontologically and epistemologically with a critical perspective within the scope of Legal Studies. Critical Legal Studies with reference to KUHP 2023 provides a critical perspective in presenting two views on death penalty.

KEYWORDS: Death Penalty; KUHP 2023; Critical Legal Studies.

I. INTRODUCTION

Death penalty is part of the main punishment as stated in the Wetboek Van Strafrecht Criminal Code (KUHP WvS). It is different with Law Number 1 Year 2023 (KUHP 2023) which does not place death penalty as part of the main punishment. This has significant juridical consequences, because with such juridical provisions, it is as if Indonesia is no longer in a position to legally legalise death penalty. The question that can be asked is whether this is true. Article 98 of the 2023 Criminal Code reads "Death penalty is imposed alternatively as the last resort to prevent the committing of criminal offences and to protect the society". Then several conditions for the implementation of death penalty are contained in article 99, which reads;

(1) Death penalty can be executed after the clemency request for the convict is rejected by the President;
(2) Death penalty as referred to in paragraph (1) is not executed in public;
(3) Death penalty is executed by shooting the convict to death by firing squad or by other means stipulated in the Law;
(4) The execution of death penalty against a pregnant woman, a woman who is breastfeeding her baby, or a mentally ill person is postponed until the woman gives birth, the woman is no longer breastfeeding her baby, or the mentally ill person recovers.

Article 100, which contains how death penalty is implemented in practice, in other words, the continuation of death penalty implementation, reads;

(1) The judge shall impose death penalty with probation period for 10 (ten) years by considering:
    a. the defendant's remorse and hope to improve himself; or
    b. the role of the defendant in the criminal offence.
(2) Death penalty with probation period as referred to in paragraph (l) must be stated in the court decision;
(3) The probation period of 10 (ten) years starts 1 (one) day after the court decision has obtained permanent legal force;
(4) If the convict during the probation period as referred to in paragraph (1) shows commendable attitude and action, the death penalty can be changed into life imprisonment by Presidential Decree after obtaining consideration from the Supreme Court;
(5) Life imprisonment as referred to in paragraph (4) shall be calculated since the Presidential Decree is enacted;
(6) If the convict during the probation period as referred to in paragraph (1) does not show commendable attitude and behaviour and there is no hope for improvement, the death penalty can be executed by order of the Attorney General.

In the formulation of the article, the death penalty is still part of the punishment that can be imposed on the defendant. Because it is outside the main punishment. Philosophically, the relationship between death penalty and human rights is very close, this is

based on a reason that the imposition of death penalty is closely related to the most basic rights for humans (Dewi, 2020). According to Law No. 39/1999, what is meant by human rights as stipulated in Article 1 which reads that human rights are a set of rights inherent in the nature and existence of humans as creatures of God Almighty and are His gifts that must be respected, upheld and protected and protected by the state, law and government and everyone for the sake of honour and protection of human dignity, even from an extreme point of view, including defendants who commit crimes. Every human right of a person has imperative consequences for the state, which gives rise to a basic obligation and responsibility to respect the human rights of others reciprocally and it is the duty of the government to respect, protect, uphold and promote them.

The 1945 Constitution of the Republic of Indonesia, as Indonesia's constitution, accommodates formulations of human rights. This can be found in the preamble as well as in the body, with the existence of these formulations means that the Indonesian state recognises the principle of protection of human rights, and imperatively makes the protection of human rights a valid obligation. However, in terms of sociological review, there are many opinions that state that the death penalty is inappropriate because it violates human rights and there are also those who think that the death penalty is appropriate for perpetrators who commit serious crimes. So, diametrically, there are views that are pro called retentionists and those that are against are called abolitionists.

These sharp perspectives are based on several considerations, which will be expanded in the discussion including how to present these two polar perspectives in a critical review and paired with the existing social conditions in the realm of law enforcement in Indonesia.

II. RESEARCH METHOD

This research is a type of normative legal research that focuses on studying the normative aspects of the law itself. This research does not look at the law based on facts or social events in the field, but rather delves into the main and supporting legal materials, such as legislation, legal doctrine, and court decisions (jurisprudence) and uses literature related to the topic being discussed (Marzuki, 2005).

III. DISCUSSION

The discussion on death penalty is not limited to the juridical aspect, but on a broader spectrum. In the Introduction, it has been briefly mentioned about the issue of death penalty in the context of Human Rights, where human beings by nature should not be limited in their rights and have the right to enjoy their life without being reduced or increased by anyone, even by the state. In this context, the issue of life and death of a person is an inherent aspect and not coherent. This indicates that human life, which is inherently his right, is an internal human concept that only God can take away. However, the view that refers to this prima causa is not only limited to theological aspects. Secular groups that are oriented towards individual freedom in the extreme also reject the death penalty by the state, but refer to the aspect of profanity, namely a position/status of individuals or groups that are not based on religion or spirituality.

The sharpness of the axis in the issue of death penalty then leads to a philosophical debate about liberal groups who strongly reject death penalty because individual freedom is an absolute matter including the freedom to live and die. On the other hand, conservative groups based on the status quo still maintain death penalty as part of the punishment system.

The development of the punishment system aimed at fulfilling social welfare according to Barda Nawawi Arief must lead to rational formulation efforts (Arief N. B., 2016). The meaning of the word rational itself must be based on an academic approach. In this case, both have a strong academic basis and should be considered. In addition to questioning whether or not it is appropriate to maintain death penalty as part of the punishment system, it is important to question who and what is the measure to impose death penalty. If the 2023 Criminal Code has explained how the death penalty is carried out and how it can be avoided, then there should be a significant development from the use of death penalty which in practice is unclear when it will be carried out by the convict, because in the codification of Criminal Law, Indonesia does not yet have guidelines in carrying out/executing the punishment.

A. Theory and Purpose of Punishment

Death penalty is an instrument to protect society and the state both in preventive and repressive forms. Repressive here does not make those who are governed become vulnerable and weak (Nonet & Selznick, 2007). The purpose of death penalty is to make people notice that the government does not want any disturbance to the peace that is highly feared by the public. With the death penalty, the perpetrator of the crime will undo the intention to commit the crime. Based on the theory of punishment is divided into 3 groups, namely;

1. **Absolute Theory or Retaliation Theory**

   Humans have a feeling of wanting to retaliate or there is a tendency to retaliate which is the effect of a normal social symptom. In absolute theory, the basis for this theory is retaliation. Retaliation, according to many people, is used as a reason to punish a crime; it is the satisfaction of the heart that is pursued. Criminals do not care about the consequences that arise from the

imposition of punishment against a person. This is because the purpose of this punishment is only to pursue the satisfaction of the injured party to avenge the person who has committed a criminal offence.

2. Relative Theory or Goal Theory

This relative theory sees that the imposition of punishment aims to improve the criminal to become a good person and will not commit a crime again. This relative theory is also called as goal theory. According to this theory, a crime is not always followed by a criminal charge, other alternatives can be used as a reference to implement education in punishment. The purpose of punishment should be directed towards efforts so that in the future the crime that has been committed will not be repeated. The imposition of punishment according to this theory prioritises the goal of eliminating the revenge aspect of the imposition of punishment. Criminal punishment is aimed at making other people reluctant to commit a crime and the crime that has been committed does not happen again in the future, in other words, the punishment aims to improve the criminal to become a good person and not commit the crime again in the future.

3. Combined Theory

The purpose of punishment in addition to the two theories, namely; absolute theory and relative theory, also recognises the so-called joint theory. This joint theory recognises the element of retaliation in criminal law, but on the other hand, it also recognises the element of prevention and the element of correcting criminals inherent in each punishment. This joint theory is a combination of absolute theory and relative theory.

Wirjono Prodjodikoro stated that: It is easy to find a synthesis between two axes that appear to be extreme or distant from each other (Prodjodikoro, 2011). In carrying out the criminal justice function, there is usually an agreement or integration of opinions that a certain crime must be responded to with a certain punishment. If this happens, then the particular punishment provides satisfaction to all parties because it is the "retribution" intended by the absolute theory group or in this case the retentionist group and at the same time fulfils the requirements of the relative theories towards the goal of prevention or correcting criminals.

Eddy O.S Hiariej stated that the purpose of criminal law is sharply divided into 2 (Hiariej, 2024). Namely, the classical Criminal Law Objective which prioritises retaliation and the Modern Criminal Law Objective which one of its components is to pay attention to other scientific fields.

Muladi as quoted by J.E Sahetapy said that criminal law is not only oriented towards human actions (daadstrafrecht), because then criminal law becomes inhumane and prioritises retaliation. Referring to what Eddy previously stated about the purpose of criminal law that has undergone a transition from classical to modern. Criminal law is only oriented towards the fulfilment of criminal offence elements in the legislation (Sahetapy, 2007). Criminal law is also inappropriate if it only pays attention to the orientation of the perpetrator, because then the application of criminal law will have the impression of looking at the aspect of the criminal and giving minimal attention to a much broader interest, namely the interests of society, and especially the interests of victims of crime. Thus, the most appropriate integral criminal law must protect the various interests above, so that the criminal law adopted must be daad-dader-strafrecht. Of course, this cannot be separated from the criminological approach taken by Sahetapy in formulating the interests and objectives in punishment.

Integrating the Criminological aspect as well as the Juridical approach, there are various interests to accommodate the importance of punishment. An illustration of the application of integrative theory in punishment can be seen from the understanding of the National Criminal Code Drafting Team in formulating the death penalty in the new Criminal Code concept. The range of law enforcement journey until now proves that Indonesia is a retentionist group towards death penalty, both de jure and de facto (Latumaerissa, 2014). The main problem is how to maintain the balance of feelings between the retentionists and abolitionists among the people in Indonesia, each of which is not small in number with a variety of existing epistemic capital.

B. Ethical Views in Philosophy

Franz Magnis Suseno as a philosopher who talks a lot about ethical issues and is also a Catholic Jesuit as an epistemic capital in his thinking says that: Humanity advances not only in science and technology, but also in the understanding of itself, of the meaning of life, of what is good and what is bad, of human dignity (Kusumadewi & Asriningsih, 2016). In other words, the development of knowledge integrally develops human civilisation and also provides more space for understanding moral consciousness. What is good and what is clearly not good, what is just, reasonable, right, as well as attitudes that under no circumstances can be justified: in all these matters humanity is evolving, meaning that the development of knowledge including the development of the definition of action and the various forms of complexity of human action and thinking has reached a high culmination point. Humanity has become more morally sensitive. Humanity's moral feelings have become more profound. In this case the issue of the death penalty is one of the things where humanity has become more sensitive.

The death penalty in Franz Magnis' notes indicates a political position of power and also a spiritualistic position. In order to maintain its power, both to punish political opponents and not to be considered weak by its own society, capital punishment is not only a necessity, but also a legitimisation of power.

Immanuel Kant (1724-1804) was a philosopher who discussed ethical issues through his book; Kritik der Praktischen Vernunft, or criticism of practical reason which sharply and clearly formulates the consciousness underlying modern human ethics. Through the approach of Deontology or imperative category/ethics of obligation, Kant said: that a human being should not be used merely as a means to an end (Suseno, 2019). Kant wants to say that every person, because he is human, so whether he is a man or a woman, a slave or a free person, an upper class or a lower class person, an educated person or a person without education, is a value and an end in itself. Therefore, human sacrifice can never be justified.

Kant, on the other hand, in the ethics of duty makes a claim that humans should have strict moral guidelines. Although one of the components of Kant's ethics is based on autonomy or freedom, the obligation to respect others, and the effort to always be kind without any pretensions must be avoided. Kant forbids the human aspect as a means to an end. For example, one is forbidden to punish another who commits an offence because the aim is to prevent others from committing the same offence, meaning that he is sacrificed for the benefit of others, even the prohibition to create public order. This sacrifice is considered illogical and demeaning to human dignity, what guarantee is there that society will become more peaceful and others will be prevented because of the shock of the punishment they see.

Kant's argument seems to be reversed here, that there is a loophole that is not realised. The issue of punishment to educate and deter society contradicts Kant's ethics from himself. A person is punished precisely because he is inherently wrong and coherently creates instability in others. Kant actually sounds accommodating to the classical school in the purpose of Criminal law, that a person is punished not for others, but rather he should be punished because he is guilty. Education is not directed towards society but towards oneself. Kant's singular perspective can even create the opposite position in looking at the issue of justification for punishment.

Utilitarianism, on the other hand, starts from a situation where we are faced with various possibilities to act and we do not know which alternative to choose. Utilitarianism in practice addresses the question: what is the measure of moral action? If the starting point is deontology then Kant argues that the morality of an action is inherent in the action itself. For example, the act we call "lying" is not morally justifiable in itself. In contrast to Kant, utilitarism measures the morality of a rule or action by its consequences. If the effect sought is good, the action is morally right; if it is not good, the action is wrong. In other words, in addition to the goal - if it is related to the Utilitarian etymology itself - it also looks at the benefit aspect, namely the benefits that are presented must be greater in providing happiness and aiming for the greatest happiness that can be achieved by a society.

Linking between Kant with his Deontology and Utilitarianism that was initiated after Kant, becomes the main reference in suspecting the existence of death penalty. Kant on the one hand, rejects the death penalty for broader means, which places humans as tools (utility), but Kant also agrees that punishment of the wrong is also an inherent obligation if someone is guilty. Utilitarians on the other hand, favour the quantity approach. The amount used by Utilitarians will then make a society have its own characteristics. In fact, the amount that exists in the universe of Indonesian law enforcement still uses the death penalty as a means to educate the public and a means to bring order and provide a sense of security. Diametrically, progressive education must also be put forward. That efforts to eliminate criminogenic factors in society are also an urgency to minimise the growing crime. In the future, prisons, and various ideological apparatuses to curb human rights can be set aside. Emancipation of society through the availability of basic rights must be considered more comprehensively.

IV. CONCLUSIONS

The 2023 Criminal Code has accommodated 2 sharp axes in the effort to maintain death penalty and the effort to eliminate death penalty. Juridically, death penalty is no longer the main punishment that can be imposed easily. The objectives and guidelines of punishment must be the main stage in seeking the imposition of punishment. Thus, death penalty is strictly enforced and is no longer imposed without a capable and comprehensive consideration. By considering the abolitionist axis, the imposition of death penalty is no longer used as a tool to seek legal education, but as an inherent means of punishment itself. The abolitionist view that departs from both Spiritual and Philosophical aspects, especially Ethics by considering the opinions of Immanuel Kant and Utilitarianism, has considerations that are also open to sharp debate.

The community at large that exists within the Indonesian law enforcement system still uses the death penalty as a means to educate the community and a means to bring order and provide a sense of security. Diametrically, progressive education must also be put forward. That efforts to eliminate criminogenic factors in society are also an urgency to minimise the growing crime. In the future, prisons, and various ideological apparatuses to curb human rights can be set aside. Emancipation of society through the availability of basic rights must be considered more comprehensively.

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