The Constitution-Based Death Crime and Pancasila Values

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Abstract. The death penalty is not a new form of punishment, but it is a crime that has existed for hundreds of years, this is not only in Indonesia but also in various countries in the world. In Indonesia itself, it can be seen that during the time the kingdoms had implemented the death penalty, while in other countries, for example, Rome, Greece, Germany, and others countries. The death penalty is part of the types of crimes that apply based on Indonesian positive criminal law. This form of crime is a punishment carried out by taking the soul of someone who violates the provisions of the law. This punishment is also the oldest and most controversial punishment for various other forms of crime. The purpose of holding and implementing the death penalty is so that the public pays attention that the government does not want any disturbance to the peace which is very much feared by the public. The existence of this death penalty from the past until now still reaps the pros and cons with their respective logical and rational reasons. These pros and cons do not only occur in Indonesia but also in various parts of the world. Pancasila values? From these problems the author discusses them as follows: The constitutional view of the death penalty, even though "everyone has the right to live" (Article 28A in conjunction with Article 28 I of the 1945 Constitution and Article 9 paragraph 1 in conjunction with Article 4 of the Human Rights Law); and "Everyone has the right to be free from enforced disappearances and disappearances of life" (Article 33 paragraph 2 of the Human Rights Law), but all human rights listed in Chapter XA of the 1945 Constitution can be limited. by the placement of Article 28J, and the death penalty according to the values of Pancasila, namely: Belief in One God, just and civilized humanity, Indonesian unity, Democracy led by wisdom in deliberation/representation, and social justice for all Indonesian people.

Keywords: Death penalty · Constitution and Pancasila

1 Introduction

The death penalty is not a new form of punishment, but it is a crime that has existed for hundreds of years, this is not only in Indonesia but also in various countries in the world. In Indonesia itself, it can be seen that during the time the kingdoms had implemented the death penalty, while in other countries, for example, Rome, Greece, Germany, and others countries.

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Juridically, the death penalty in Indonesia officially came into force on January 1, 1918, as stated in the Wetboek Van Strafrecht (WvS) which can also be called the Criminal Code (KUHP) which was stipulated by the Dutch colonial government based on the KB October 15, 1915 No. 33, S.15–732 jis. 17–497, 645 which is WvS which has been applied in the Dutch East Indies. WvS is changed from WvS NI which has been transformed and is contained in the main column of Law Number 1 of 1946. Article 6 paragraph 1 of Law no. 1 of 1946 jo. UU no. 73 of 1958, which is the second law produced during the independence era and the first law on criminal law.

The death penalty is part of the types of crimes that apply based on Indonesian positive criminal law. This form of crime is a punishment carried out by taking the soul of someone who violates the provisions of the law. This punishment is also the oldest and most controversial punishment for various other forms of crime. The purpose of holding and implementing the death penalty is so that the public pays attention that the government does not want any disturbance to the peace which is very much feared by the public [1].

The existence of this death penalty from the past until now still reaps the pros and cons with their respective logical and rational reasons. These pros and cons do not only occur in Indonesia but also in various countries in the world. For experts who are pro against the death penalty, its existence is generally reasoned that: The death penalty is still very much needed to eliminate people who are considered to be endangering the community or the public interest and even endangering the state and it is deemed irreparable, while for those who are against the death penalty generally because the death penalty is contrary to human rights and is a form of crime that cannot be punished. Will be corrected if after the execution is found an error in the verdict handed down by the judge or the defendant is not guilty.

Figures or experts who are pro against the death penalty are still maintained, for exampleJonkers, Lombroso, Garofalo, Hazewinkel Suringa, Van Hanttum, Bambang Poernomo, Barda Nawawi Arief, Oemar Senoadji, and TB Simatupang.

Jonkers said that the death penalty cannot be withdrawn once it has been carried out.is not an acceptable reason to declare “that the death penalty is unacceptable. Because in court the judge’s decision is usually based on the right reasons and this model of law cannot be simply abolished if it is recognized as state criminal law. And that even if there is an error and/or error in the judge’s decision, it does not mean that efforts to repair and restore the actual rights of the death row convict, because the convict is already dead. Then for those who are about to be sentenced to death, the injustice they have experienced cannot be repaired [2].

Furthermore, Lambroso and Garofalo argue that a death penalty is an absolute tool that must exist in society to eliminate individuals who cannot be repaired anymore. These individuals are, of course, people who commit extraordinarily serious crimes [3]. Meanwhile, according to Suringa, the death penalty is a form of punishment that is needed for a certain period, especially in terms of the transition of power that switches in a short time. Surya also stated that the death penalty is a radical cleansing tool that in every revolutionary period we can quickly use it [3].

In addition to these legal experts, several Indonesian legal experts who are pro the existence of the death penalty, including Bambang Poernomo, support the death penalty

based on the consideration that there is a need for the death penalty, especially for serious crimes, crimes of treason, crimes of corruption and smuggling crimes. This is based on the idea that capital punishment should be viewed as "Dordrecht" and within the framework of criminal law thinking as a means of criminal law "ultimum remedium" (as the last remedy). Also, the threat of capital punishment is still needed for crimes that attack human life that is carried out ruthlessly, to control crime, severe criminal threats are still needed, such as the death penalty [4]. Then Barda Nawawi Arief one of the criminal law experts and leaders of national criminal law reform currently states that the death penalty still needs to be maintained in the context of the renewal of the National Criminal Code.

is expected to be selective, careful, and oriented also to the protection/interest of the individual (the perpetrator of the crime) [5]. Then Hartawi AM in The Death Penalty, which was published in the Year I Journal No. 5, this former prosecutor stated that the threat and implementation of the death penalty are considered a social defense and that the death penalty is a form of social defense to prevent the general public from disasters and dangers or threats of major dangers that may occur and will befall the community. From disasters or dangers, crime will result in misery and disrupt public order and security in the association of human life and society and the state [6].

Vice versa, there are not a few experts and figures who are against the death penalty and rely on their arguments on a scientific basis for thinking. One of the classical school figures who is very famous for his vocals against the death penalty is Beccaria, an Italian national. Beccaria reasoned that the death penalty was a process carried out in a very bad way against a person accused of killing his child (sometime after the execution it could be proven that the verdict was wrong) [7].

Then Ferri, who is also an Italian national, said that to protect people who have a predisposition to crime, it is enough to be sentenced to life imprisonment, not to the death penalty [8]. Kleintjes rejects the existence of capital punishment because capital punishment as an event that cannot be reviewed once it has been carried out, is difficult to accept in a moral situation and some witnesses do not assist the judges in their testimony. While Van Deventer also opposed the death penalty in the Dutch East Indies, in this connection he mentioned the existence of an animistic belief in indigenous peoples, namely that each implementation of the death penalty would increase the strength of the Dutch government in Indonesia (A review of the history of capital punishment in Indonesia). So from the point of view of the interests of the colonizers, it is very profitable.

Meanwhile, Indonesian legal experts who oppose the death penalty, one of them is JE Sahetapy (1979) who in his dissertation entitled Threats to the Death Penalty Against Premeditated Murder put forward the following hypothesis:

1. In the context of the perspective of the preparation of the National Criminal Code which is of particular relevance because it is rare for the death penalty to be imposed in criminal cases involving Article 340 WvS, even if there is a death penalty imposed only six cases, except for the decision of the High Court in Semarang, there appears to be a de facto abolition.
2. Because the threat of capital punishment in Article 340 WvS historically did not originate from Pancasila.

3. Because in addition to doubtful benefits to efforts to reduce premeditated killings, especially those with a background of "shame culture" and "mores" in Indonesia [9].

2 Findings and Discussion

A. Constitutional view on capital punishment

Regarding the existence of the death penalty from the point of view of Pancasila, does it not contradict the Second Amendment of the 1945 Constitution and the Human Rights Law (No. 39/1999) which states that: "everyone has the right to live" (Article 28A in conjunction with Article 28 I of the Constitution). '45 and Article 9 paragraph 1 in conjunction with Article 4 of the Human Rights Law); and "Everyone has the right to be free from enforced disappearances and disappearances of life" (Article 33 paragraph 2 of the Human Rights Law), this question is often used as an excuse by people who are against the death penalty to abolish the death penalty.

From the questions above, the reasons why the death penalty is still used in the Indonesian criminal law system:

1. Seen as a unit, Pancasila contains the value of balance between one precept and another. However, if Pancasila is seen partially (emphasizing one of the precepts), then there are opinions stating that the death penalty is contrary to Pancasila and some are stating that it is not contrary to Pancasila. So the opinions that reject and accept the death penalty are both based on Pancasila. This can be seen in the research conducted by the Faculty of Law UNDIP in collaboration with the Attorney General's Office in 1981/1982. In the research report, it was stated that "there is a tendency among those who are pro and contra (against the death penalty, pen.), to use Pancasila as a "justification".
2. "The right to life" (Article 28A in conjunction with Article 28 I of the 1945 Constitution and Article 9 paragraph 1 in conjunction with Article 4 of the Human Rights Law) and the "right to be free from loss of life" (Article 33 of the Human Rights Law) cannot be confronted diametrically (totally contrary) to the "death penalty". This is the same as the "right to personal freedom" (Article 4 UU-HAM) or the "right to freedom" (Preamble of the 1945 Constitution) which also cannot be dealt with diametrically with "imprisonment". Also contradicts the 1945 Constitution and the Human Rights Law because imprisonment is essentially a deprivation of liberty/freedom.
3. The statement in the 1945 Constitution and the Human Rights Law that "everyone has the right to live" is identical to Article 6 (1) of the ICCPR which states that "every human being has the right to life". However, in Article 6 (1) of the ICCPR, the statement is continued with a firm sentence, that "No one shall be arbitrarily deprived of his life". So even though Article 6 (1) of the ICCPR states that "every human being has the right to live", it does not mean that his right to life cannot be taken away. What should not be "arbitrarily deprived of his life" ("arbitrarily deprived of his life")? Even in Article 6 (2), it is stated that the death penalty is still

possible for “the most serious crimes”. Furthermore, it is even regulated in various international documents regarding “guidelines for the implementation of the death penalty” (See UN Ecosoc Resolution 1984/50 jo. Resolution 1989/64 and Resolution 1996/15 which regulate “the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty”). In the Commission on Human Rights Resolution 1999/61 there is also an affirmation that the death penalty should not be imposed except for “the most serious crimes” (with restrictions/signs: “intentional crimes with lethal or extremely grave consequences”).

4. Likewise in the Human Rights Law there is a limitation in Article 73 which states: “The rights and freedoms regulated in this Law can only be limited by and based on the law, solely to ensure the recognition and respect for human rights and basic freedoms of others, morality, public order and the interests of the nation”. Article 73 of the Human Rights Law is identical to Article 28 J of the 1945 Constitution (2nd Amendment 2000).

According to Barda Nawawi Ariefapabila looking at the second amendment of the 1945 Constitution and the Human Rights Law Number 39 of 1999 which states that: [10].

1. "Everyone has the right to live” (Article 28A in conjunction with Article 28I of the 1945 Constitution and Article 9 (1) in conjunction with Article 4 of the Human Rights Law) and
2. “Everyone has the right to be free from enforced disappearances and loss of life” (Article 33 (2) of the Human Rights Law.

Regarding the problems above, the following can be stated:

a) Seen as a unit, Pancasila contains the value of balance between one precept and another. However, if Pancasila is seen partially (emphasizing one of the precepts), some opinions say that the death penalty is contrary to Pancasila, and some state that the death penalty is not contrary to Pancasila. So, opinions that reject and accept the death penalty are both based on Pancasila.
b) "The right to life” (Article 28A in conjunction with Article 28I of the 1945 Constitution and Article 9 (1) in conjunction with Article 4 of the Human Rights Law) and “the right to be killed” (Article 33 of the Human Rights Law) cannot be confronted diametrically (totally contradictory to) with the “death penalty” this is the same as “the right to personal freedom” (Article 4 of the Human Rights Law) or “the right to independence” (Preamble to the 1945 Constitution) which also cannot be confronted diametrically with “imprisonment”. When confronted diametrically, it means “imprisonment” is also contrary to the 1945 Constitution and the Human Rights Law because imprisonment is essential “deprivation of freedom/liberty.
c) The statement in the 1945 Constitution and the Human Rights Law that “everyone has the right to live”, is identical to Article 6 (1) of the ICCPR which states that “every human being has the right to life.“ However, in Article 6 (1) of the ICCPR, the statement is followed by a clear sentence: *“no one shall be arbitrarily deprived of his life.”*So, although article 6 (1) of the ICCPR states that “every human being

has the right to life", it does not mean that the right to life cannot be taken away. What should not be "arbitrarily deprived of his life" is even though Article 6 (2) is stated that the death penalty is still possible for "the most serious crimes.

d) Similarly, in the Human Rights Law, there are limitations in Article 73 which states: "The rights and freedoms regulated in this law can only be limited by and based on the law, solely to ensure the recognition and respect for human rights and freedoms. The basis of others, morality, public order and the interests of the nation".

Article 73 of the Human Rights Law is a representation of Article 28J of the 1945 Constitution which states that "everyone is obliged to respect the human rights of others".

Article 28J is the only article, which consists of two paragraphs that talk about obligations, even though the chapter is on human rights. And deliberately placed in the last article as the key from Article 28A to Article 28I" With all the descriptions above, it appears that from the perspective of the original intent of the formation of the 1945 Constitution, the validity of all human rights contained in Chapter XA of the 1945 Constitution can be limited. The original intent of forming the 1945 Constitution which stated that human rights could be limited was also strengthened by the placement of Article 28J as the closing article of all provisions governing human rights in Chapter XA of the 1945 Constitution. So, in a systematic interpretation (systematize interpretatie), human rights as regulated in Article 28A to Article 28I of the 1945 Constitution are subject to the limitations stipulated in Article 28J of the 1945 Constitution.

In addition to the regulation of basic rights, namely the right to life as regulated in the UDHR which in this case is related to the death penalty, there is an exception to the exercise of this right, namely by having a deep understanding of the existence of derogable rights, namely in the first case "a public emergency which threatens the life of the nation" can be used as a basis for limiting the implementation of basic freedoms, provided that the state of emergency (public emergency) must be officially declared (be officially proclaimed), limited in nature and should not be discriminatory. (Muladi, 2004: 101). This is regulated in a limited manner in the International Covenant on Civil and Political Rights, Article 4 paragraph (1) of the ICCPR states,

Furthermore, whether or not the death penalty is unconstitutional has been answered in the decision of the Constitutional Court on the Application for Material Review of Law No. 22 of 1997 concerning Narcotics against the 1945 Constitution which was proposed by four death row convicts in narcotics cases through their legal counsel regarding the unconstitutionality of the death penalty which contained in Law No. 22 of 1997 concerning Narcotics. Based on the decision of the Constitutional Court, it is expressly stated that the death penalty in Law Number 22 of 1997 concerning Narcotics is not contrary to the Constitution. By analogy, a conclusion can be drawn that the death penalty is not an unconstitutional act.

The conclusion of the Constitutional Court's Decision on the petition, states: 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 in the Narcotics Law, as long as those concerning

the death penalty are not in conflict with Article 28A and Article 28I paragraph (1) of the 1945 Constitution.

B. Death penalty based on Pancasila values

Pancasila as the basis of the philosophy and ideology of the Indonesian nation and state was formed through a long process in the history of the Indonesian nation. Causally, Pancasila before being ratified as the basis for state philosophy, values already existed and came from the Indonesian people themselves in the form of traditional values, culture, and religious values.

Pancasila as the basis of the state philosophy of the Republic of Indonesia has functions and roles which include: [11].

1. Pancasila as the nation's view of life

Pancasila as the nation's view of life implies that Pancasila is a series of noble values, which are comprehensive for life itself and serve as a frame of reference both for organizing personal life and in the interaction between humans in society and the natural surroundings.

With Pancasila as a way of life, the Indonesian nation will know which direction it wants to achieve and will be able to view and solve all the problems it faces appropriately. At its peak, Pancasila is the nation's moral ideals that provide guidance and spiritual strength for the Indonesian people in the life of society, nation, and state.

2. Pancasila as the State Foundation of the Republic of Indonesia

Pancasila as the basis of the state has the intention that Pancasila is a basic value and norm to regulate state government/state organizers.

Pancasila in its position as the State Foundation is often referred to as the Basic Philosophy or Basic State Philosophy (philosofische Gronslas) of the state, state ideology, or (stateside). Consequently, the entire implementation and administration of the state, especially all state laws and regulations, is translated from the values of Pancasila.

3. Pancasila as the Ideology of the Indonesian Nation and State

Pancasila as an ideology for the Indonesian nation, Pancasila is essentially lifted from the views of the Indonesian people, ideology as a teaching/doctrine/theory that is believed to be true, systematically compiled, and given instructions for its implementation in responding to and resolving problems faced in society, nation, and state.

4. Pancasila as an Open Ideology

Pancasila as a state ideology is open, actual, dynamic, anticipatory, and always able to adapt to the times, science and technology as well as the dynamics of community development. The openness of the Pancasila ideology does not mean changing the basic

values contained in it, but in the application of the open Pancasila ideology, it is known that there are 3 levels of values, namely the basic values that have not changed, namely the Preamble of the 1945 Constitution which is a reflection of Pancasila, then instrumental values as a means of realizing basic values that are always by the situation, and practical values in the form of real implementation values in life, namely laws and other implementing regulations, which can change at any time along with the times.

The implementation of the death penalty is generally related to one of the main problems, namely the philosophical basis.

In the 18th century, Cesare Beccaria had already rejected the death penalty, besides Beccaria, many other scholars rejected the death penalty, such as Ferri, Von Hentig, Van Bemmelen, Ernest Bowen Rowlands, and others. In this case, what we want to find is the philosophical basis for the implementation of the death penalty from the perspective of Pancasila values.

Pancasila as Rechtsbeginsel (legal principle) is the highest source of law (source of all sources of law) for the rule of law in Indonesia. This means that legal problems in Indonesia must be resolved and sourced from the values of Pancasila, including the rule of law regarding the death penalty, as stated in the precepts of Pancasila: [12].

1) Death Penalty and the Value of God Almighty

To find the philosophical basis for the application of the death penalty in the context of the value of the One Godhead, it is necessary to first understand the notion of the One Godhead.

In the description given by Mohammad Hatta, it is concluded that "the One Godhead animates the ideals of Indonesian law", thus in every legal arrangement in Indonesia, the death penalty issue must also be rooted in the values of the One Supreme God. In Islamic teachings, there is qishash, where according to Islamic law the death penalty is a must for those who have taken the lives of others. The law of qishash is seen in the Qur'an Surah Al Baqarah verse 178: which means in Indonesian it is "O you who believe, qishaash is required of you concerning those who are killed; free man free, slave for a servant, woman for woman. So whoever receives forgiveness from his brother, let (who forgives) follow in a good way, and let (who is forgiven) pay (diet) to those who forgive in a good way (also). That is a relief from your Lord and mercy. Whoever exceeds the limit after that, then for him a very painful torment."

While verse 179 is "And in qishaash, there is (guaranteed continuity) life for you, O people of understanding, so that you may become pious."

The death penalty is also justified by the teachings of Christianity. Christian scholars agree to apply the death penalty because it refers to Paul's view, that the state is God's representative in exercising worldly power, given the sword that is used to ensure the survival of the state Romans 13:4 and Genesis 9:4. Then Exodus 21:23–25: "But if the woman gets into a fatal accident, then you must give life for life, eye for an eye, tooth for tooth, hand for hand, foot for foot, scar for scar, wound for wound, swelling for swelling. "[13] Likewise in Hinduism, according to IB Oka Puniatmaja, Chairperson of the Parisada Hindu Dharma, crimes of killing, taking property, and raping may be

avenged by taking the life of the perpetrator [14]. In Buddhism, the Chairperson of the Indonesian Buddhist Representative, Suparto HS, said he would not be surprised if someone was sentenced to death. So Buddhism approves of the death penalty [14].

2) Death Penalty and Humane Values

According to Drijarkoro's view, humanity is divided into two formulations, namely:

1. Negative formulation, that is what you don't want for yourself, don't do that to your fellow human beings.

2. Positive formulation, namely love your fellow human beings as yourself, treat him what you want for yourself.

More sharply, Rachmad Djatmiko argues that the death penalty is not against humanity, because the basis of justice for the death penalty is humanity which prevents arbitrary bloodshed. Observing this view, the death penalty is a radical tool to prevent acts beyond the limits of humanity to achieve a just and prosperous society.

3) Death Penalty and National Values

To find a point of contact or a relationship between the death penalty and national values, we must first put forward the meaning or meaning of nationality (Indonesian unity).

Mohammad Hatta on the notion of Indonesian national unity thought that the homeland of Indonesia is one and cannot be divided. The unity of Indonesia reflects the composition of the national state with the pattern of Bhineka Tunggal Ika, united in various ethnic groups whose boundaries are determined in the Proclamation of Indonesia. This view implies that unity and nationality in the context of regional unity, unity in diversity, and the unity of social life are things that absolutely must exist and must be maintained in the state.

If we connect these national values with the existence of the death penalty, it can be concluded that the death penalty is a means or a tool to prevent all actions that attempt to break up national unity.

4) Death Penalty and People's Values

To provide an answer to the question of whether or not the death penalty is contrary to popular values (democracy), of course, it must first be understood what democracy means. According to Mohammad Hatta, the principle of democracy (democracy) creates a just government that is carried out with a sense of responsibility, so that the Indonesian Democracy can be structured as well as possible, which includes economic democracy and political democracy.

5) Death Penalty and Social Justice

Social justice is justice that is evenly distributed in all fields of life, in the economic, social, and cultural fields that can be felt by the people. Every step or effort to maintain the joints of community life must be carried out in a conditional and proportional context.

In this regard, the presence of the death penalty to maintain the integrity of the joints of human life is also very relevant. Based on the understanding of social justice mentioned above, there is no conflict between the death penalty and the value of social justice, because the main principle of capital punishment is to guarantee social justice based on equal rights.

Based on the description above, it can be seen that the existence and philosophy of the implementation of the death penalty are closely related and cannot be separated from Pancasila values themselves. So it is not surprising, that even though the death penalty is felt as a harsh and cruel criminal sanction, it is still maintained in positive law.

According to the author, the death penalty is still needed because it protects the interests of the community as a result of the perpetrator's actions, in addition to protecting the interests of the perpetrator and his family, there is revenge from the victim's family. Perpetrators are deterred. However, even though the death penalty is still required, it must be used with care and cannot be used arbitrarily because the crime is special or in the Draft Criminal Code is called an exception, as well as in the Criminal Code of other countries, for example. Article 30 paragraph 2 of the Polish Criminal Code and Article 24 paragraph 2 of the Yugoslav Criminal Code.

Therefore, the imposition of the death penalty must have clear parameters and other alternatives must also be given, so that the death penalty is not absolute.

3 Conclusion

a. The death penalty does not contradict the constitution, although "everyone has the right to live" (Article 28A in conjunction with Article 28 I of the 1945 Constitution and Article 9 paragraph 1 in conjunction with Article 4 of the Human Rights Law); and "Everyone has the right to be free from enforced disappearances and disappearances of life" (Article 33 paragraph 2 of the Human Rights Law), but all human rights listed in Chapter XA of the 1945 Constitution can be limited. The original intent of forming the 1945 Constitution which stated that human rights could be limited was also strengthened by the placement of Article 28J as the closing article of all provisions governing human rights in Chapter XA of the 1945 Constitution. So, in a systematic interpretation (sistematische interpretatie), human rights as regulated in Article 28A to Article 28I of the 1945 Constitution are subject to the restrictions regulated in Article 28J of the 1945 Constitution.
b. The death penalty is by the Pancasila values contained in the 5 (five) precepts of the Pancasila.

4 Suggestions

a. In imposing the death penalty, law enforcers should be guided by existing rules and uphold the rights of the convict.
b. In imposing the death penalty, there should be clear parameters so that law enforcers do not hesitate in imposing the death penalty.

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