

## UNDERSTANDING DEATH PUNISHMENT: HISTORICAL PERSPECTIVE, JUSTIFICATION, AND CRITICAL ANALYSIS

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### ABSTRACT

Debatable of the death penalty based on the issues of justice, humanity, and the prevention of the possibility of crime. The reasons for the rejection of the death penalty are not justified in the view of life as well as humanitarian factors and the imposition of capital punishment will not be capable of preventing crime and reducing crime rates. But for those who agree with the imposition of capital punishment because of the sense of justice and peace that is in the community. The portrait is just a glance at the issues that colored the discourse on the pros and cons of the existence of capital punishment. The retentionist and the abolitionist against the death penalty have an argument based on his theoretical framework and norms. Indonesia as one of the countries with the European Continental legal system still applies the death penalty in the punishment system besides Saudi Arabia with qhisash which is applied in the Islamic Law system. Both countries have a legal standing built on the meta norms, their theories, and philosophies each, of course, has its urgency to be discussed in the middle of countries that condemn the existence of capital punishment. Here's an article that analyzes comparative relations to the applications of the death penalty in both countries that embrace different legal systems, this comparative study will contribute thoughts on the reforms of criminal law in Indonesia.

**Keywords:** *death penalty, crime, justice*

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### INTRODUCTION

Currently, there is a global tendency for countries in the world to no longer use the death penalty in their legal systems, as can be seen from the issuance of the UN Resolution in December 2007 concerning the prohibition of the death penalty (Hood & Hoyle, 2012). However, in practice, it shows the opposite. The practice of the death penalty as a form of criminal sanction still occurs. Throughout 2022, executions of the death penalty globally decreased compared to the previous year (2021). At least 114 people were executed in 2022: a decrease of 112 execution cases compared to 2014 (Hood & Hoyle, 2009).

The global trend of countries responding to the death penalty in their criminal policies can be seen as follows: (i) abolishing the death penalty for all types of criminal offenses in 102 countries; (ii) abolishing the death penalty only for ordinary crimes in 6 countries; (iii) abolishing the death penalty in practice in 32 countries; and (iv) retaining the death penalty in 58 countries (Bayhaki, 2022). In the Indonesian legal system, there are at least thirteen (13) laws and regulations that still include the death penalty as a punishment outside the provisions regulated by the Criminal Code (KUHP). These sanctions are imposed for criminal acts regulated in the Criminal Code as well as those regulated in several special laws (Muhammad Ekaputra, 2010).

At this point, it is important to carry out a study to map out the main arguments for the inclusion of criminal sanctions in the form of the death penalty in several regulations in Indonesia. Tracking this argument is very important to understand the rationalization and background of public policy for the use of death penalty sanctions in the Indonesian legal

system. Without understanding the roots and background as well as the arguments for the death penalty still being maintained in Indonesia in several laws, the use of the death penalty as a part of criminal sanctions may continue to be maintained and used.

## **METHOD**

Research is a scientific activity related to analysis and construction that is determined methodologically, systematically, and consistently. Methodology means according to a certain method or method, systematic is based on a system, while consistency means the absence of things that conflict with a certain framework.

To analyze the questions asked, this research uses normative legal research, namely a way of writing that is based on an analysis of several legal principles and legal theories as well as appropriate laws and regulations related to problems in writing legal research. Normative legal research is a procedure for finding the truth based on the logic of legal science from a normative perspective. The approach taken is a statutory-regulatory (statute) approach Approach) and case approach (Case Approach).

Research using a legal approach is research that prioritizes legal materials in the form of statutory regulations as basic reference material in conducting research. Regulatory-legislative approach (statute Approach) is usually used to examine statutory regulations whose norms still contain deficiencies or even foster irregular practices either at the technical level or in their implementation in the field. This approach is carried out by reviewing all statutory regulations related to the legal problem being faced. This approach to regulating laws is, for example, carried out by studying the consistency or suitability between the Constitution and the Laws, or between one Law and another Law. Research using cases.

The approach is taken by examining cases related to the legal issues being faced. The cases reviewed are cases that have received court decisions that have permanent legal force. The main thing that is studied in each decision is the judge's considerations in deciding so that it can be used as an argument in solving the legal problems faced.

## **RESULTS AND DISCUSSION**

### **History of the Death Penalty**

#### ***Early Death Penalty Law***

Death penalty laws were first established as early as the 18th century BC in the Code of King Hammurabi of Babylon, which codified the death penalty for 25 different crimes. The death penalty was also part of the Hittite Code of the 14th century BC, the Draconian Code of Athens of the 7th century BC, which made death the sole punishment for all crimes, and the Roman Law of the Twelve Tablets of the 5th century BC. The death penalty was carried out using crucifixion, drowning, beating to death, burning alive, and stabbing.

In the tenth century AD, hanging became a common method of execution in England. In the following century, William the Conqueror did not allow anyone to be hanged or executed for any crime, except in times of war. This trend would not last long, as in the 16th century, under Henry VIII, an estimated 72,000 people were executed. Some of the common execution methods at that time were boiling, burning at the stake, hanging, beheading, and being drawn and quartered. Executions were carried out for serious offenses such as marrying a Jew, not confessing to a crime, and treason.

The number of serious crimes in England continued to increase over the next two centuries. In the 1700s, 222 crimes were punishable by death in England, including theft, felling trees, and robbing rabbits. Because of the severity of the death penalty, many juries will not convict a defendant if the offense is not serious. This led to the reform of the death penalty in England. From 1823 to 1837, the death penalty was abolished for more than 100 of the 222 crimes punishable by death (Meijer, 1996).

### ***The Death Penalty in America***

Britain had more influence on the use of the death penalty in America than any other country. When European settlers came to the new world, they brought with them the practice of capital punishment. The first recorded execution in a new colony was that of Captain George Kendall at the Jamestown colony in Virginia in 1608. Kendall was executed for being a Spanish spy. In 1612, Virginia Governor Sir Thomas Dale enacted the Divine, Moral, and War Laws, which provided for the death penalty for even minor offenses such as stealing grapes, killing chickens, and trading with Indians.

Laws regarding capital punishment varied from colony to colony. The Massachusetts Bay Colony held its first execution in 1630, although the New England Capital Act did not take effect until several years later. The New York Colony instituted the Duke's Law in 1665. Under this law, offenses such as beating one's mother or father, or denying the "true God," were punishable by death (Cribb, 1994).

### ***Federal Death Penalty***

In addition to the death penalty laws in many states, the federal government also applies the death penalty for certain federal offenses, such as murder of government officials, kidnapping resulting in death, running a large-scale drug enterprise, and treason. When the Supreme Court struck down state death penalty laws in *Furman*, federal death penalty laws suffered from the same constitutional flaws as state laws. As a result, the death penalty under the old federal death penalty law was not enforced.

A new federal death penalty law was enacted in 1988 for murder in the context of a drug lord conspiracy. The law is modeled on post-Gregg laws that have been approved by the Supreme Court. In 1994, President Bill Clinton signed the Violent Crime Control and Law Enforcement Act which expanded the federal death penalty to approximately 60 crimes, some of which did not involve murder.

Oklahoma City Bombing, President Clinton signed the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). These laws, which affect state and federal prisoners, limit review in federal court by setting stricter filing deadlines, limiting opportunities for evidentiary hearings, and generally allowing only one habeas corpus filing with federal court. Proponents of the death penalty argue that this streamlining would speed up the death penalty process and significantly reduce the cost of capital punishment, although others worry that a quicker and more limited federal review could increase the risk of executing innocent defendants (Leifer, 1992; Wertheim, 1993).

### ***International View***

In April 1999, the UN Commission on Human Rights passed a resolution supporting a worldwide moratorium on executions. The resolution calls on countries that have not abolished the death penalty to limit the use of the death penalty, including not applying the death penalty against juvenile offenders and limiting the number of offenses that can be imposed. As of

December 2020, 144 countries adhere to abolitionist views in law and practice, leaving only 55 countries actively implementing the death penalty. Of the thousands of executions known to have occurred in 2020, the majority were carried out by China, Iran, Egypt, Iraq, Saudi Arabia, and the United States (Kandelina, 2016).

### **Death Penalty Law in Law no. 26 of 2000 concerning Human Rights Courts**

After the collapse of the New Order's authoritarian regime and the advent of the reform era, demands for resolving various human rights violations that occurred and for changes at the instrumental level to encourage law enforcement and respect for human rights have increased. One of the important instruments that was born during this reform period was the emergence of a mechanism for resolving cases of human rights violations through the Human Rights Court (Human Rights Court). The birth of the Human Rights Court mechanism was accelerated by pressure from the UN High Commissioner for Human Rights in 1999, as a result of allegations of serious human rights violations in East Timor during the 1999 opinion poll process. This pressure prompted the Indonesian government under President Habibie to issue a Government Regulation instead of Law (Perppu) No. 1 of 1999, which was announced by the President on October 8, 1999, three days before the accountability speech at the MPR (Abidin, 2008). The issuance of this Perppu at least shows to the international community that the Indonesian government is willing to establish a human rights court at the domestic level. However, the existence of this Perpu was rejected by the DPR in a plenary session in March 2000, because it was considered constitutionally without strong reasons related to compelling urgency. In less than two weeks after the DPR's rejection, the government submitted a Human Rights Court Bill. Pressure over the possibility of establishing an international tribunal forced the government to submit a draft of new legislation to replace this Perppu. Within this limited time, the process of discussing the bill took less than seven months. In November 2000 the DPR passed the bill, which later became Law No. 26 of 2000 concerning Human Rights Courts. Law no. 26 of 2000 regulates 2 (two) types of crimes that receive heavy sanctions, namely the crime of genocide and crimes against humanity.

This crime is the most serious crime assessed by the international community and deserves more demands, even if amnesty is not given to the perpetrators. These two crimes are international crimes that under international law are prohibited from being granted amnesty (Abidin, 2022). In the event of genocide and crimes against humanity, every country has the duty and responsibility to prosecute and adequately punish the perpetrators and not grant amnesty to officials or state apparatus until they are charged before a court. So there is an obligation on the state to punish the perpetrator and compensate the victim (Pakpahan, 2017). The crimes of genocide and crimes against humanity have a very special status in International Law. This crime is the most serious crime of international concern as a whole or the most serious crime for the international community as a whole. These crimes include violations of Jus cogens and Erga Omnes is the highest norm in international law that trumps other norms (overriding) and all countries must prosecute.

## **Death Penalty Law in Law no. 15 of 2003 concerning Eradication of Criminal Acts of Terrorism**

The destruction of the WTC building in the United States in September 2001 had an impact on increasing cases of terrorism in the world, including in Indonesia. There were various bombing incidents, marked by the bombing of the Cathedral church on Christmas Eve 2000 which became the biggest terror event since the reform era. Furthermore, terror incidents continued, such as the Bali bombings I and II and the bombing at the JW Marriot Kuningan Hotel, Jakarta. This condition makes the Indonesian government think about making regulations governing terrorism crimes. Efforts to anticipate and overcome the problem of criminal acts of terrorism are in line with the opening of the 1945 Constitution. The Republic of Indonesia is a unitary state based on law and has duties and responsibilities to maintain a safe, peaceful, and prosperous life and actively participates in maintaining peace. world, then the government is obliged to maintain and uphold the sovereignty and protect every citizen from any threat or destructive threats both from within the country and abroad (Byrnes, 2011). The government in forming regulations to eradicate criminal acts of terrorism takes several considerations into account. The crime of terrorism is a crime against humanity and civilization and a serious threat to the sovereignty of every country. Apart from that, terrorism is an international crime that poses a danger to security, and world peace and is detrimental to the welfare of society, so it is necessary to eradicate it in a planned and sustainable manner so that the human rights of many people (the public) can be protected and upheld.

The Government of the Republic of Indonesia has responded to efforts and tips to anticipate and overcome acts of terrorism by simultaneously passing two laws, namely RI Law no. 16 of 2003 concerning the establishment of government regulations instead of Law no. 1 of 2002 concerning the eradication of terrorism became a law which was ratified by the President of the Republic of Indonesia on April 4, 2002. This regulation was strengthened by Law no. 15 of 2003 concerning the Establishment of Government Regulations instead of Law no. 2 of 2002 concerning the Implementation of Government Regulations instead of Law no. 1 of 2002 concerning the Eradication of Criminal Acts of Terrorism, during the Bomb Explosion Incident in Bali on 12 October 2002 became a law which was passed on 4 April 2003 with the approval of the DPR. The enactment of Law No. 15 of 2003, which contains the stipulation of Government Regulations instead of Law No. 1 of 2002 concerning the Eradication of Criminal Acts of Terrorism, into Law has no other purpose except to realize national goals as intended in the preamble to the 1945 Constitution. 459 Apart from that, a series of bombing incidents that occurred in the territory of the Republic of Indonesia has resulted in the loss of life regardless of the victim, causing widespread public fear, and loss of property, thus having a broad impact on social life, economics, politics, and international relations.

The effectiveness of the punishment and deterrent effect that has been campaigned by the government and legislature in providing the death penalty for perpetrators of terrorism is somewhat inaccurate, this is because there are points of view that appear to be contradictory. For the government and the DPR, by imposing the death penalty for perpetrators of terror, people will feel afraid of committing the same act, but if we look at the opposite, the perpetrators of terrorism think that if they die while carrying out their actions or are executed, then they will very honorable and they will be considered heroes by their group or community. This is what the government and the DPR did not see when formulating the Terrorism Law,

they still think that punishing terrorists to death will have a deterrent effect and that no one will repeat it in the future, but this is not true, in fact, terrorism still exists and There are no definite figures that say that terrorism cases have decreased in Indonesia, although there have been people executed for crimes of terrorism, such as Amrozi cs. The enthusiasm for punishing criminals who commit serious crimes such as terrorism must be based on legal awareness and not legal feelings, because if the government and the DPR continue to use legal feelings in formulating laws in the DPR, then in the future the death penalty may continue to appear in every event that is considered an “emergency” is a crime that occurs in Indonesia.

### **The emergence of the death penalty and castration in Law No. 17 of 2016: Pros and Cons**

Historically, the ratification of this Perppu cannot be separated from the case of sexual crimes against children that occurred in Bengkulu on April 5, 2016. This case sparked a polemic among the public regarding the effectiveness of Law No. 23 of 2002 concerning Child Protection and Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection. In this case, a 14-year-old girl was gang raped and the victim died. Not long after, another case of rape of a 7-year-old child occurred in South Kalimantan which resulted in the victim's death. This is what encourages society to punish perpetrators of child sexual crimes as severely as possible, including imposing the death penalty (Cribb, 1990). The high rate of violence against children, especially sexual violence against children, has created momentum for supporters of the death penalty to include the death penalty article in Perppu Number 1 of 2016. This cannot be separated from the Government's view, as explained in the previous section, that violence against children is an extraordinary event because it can damage the personality growth and development of children, and disrupt peace and comfort in society, so extraordinary action is needed. It is also hoped that the most severe punishment for the perpetrators will be able to deter the perpetrators. The government, society, and most social organizations seem to agree on toughening sentences for perpetrators of sexual crimes and they also agree with KPAI's proposal regarding the death penalty for perpetrators of child abuse (Handoko, 2017).

The death penalty in Law No. 17 of 2016 raises the pros and cons in the formation of laws and regulations in Indonesia, especially when viewed from the perspective of the foundations of Pancasila, the Constitution, and the protection of human rights. From a philosophical aspect, the formation of the Perppu has negated the constitutionality of the right to life as a right that cannot be reduced under any circumstances as stated in Article 28 I paragraph (1) of the 1945 Constitution. This article qualifies the right to life as a right that cannot be reduced under any circumstances (non-derogable rights). This provision is a manifestation of the 2nd Principle of Pancasila, namely "Just and Civilized Humanity", as a principle that reflects the awareness of the Indonesian people as part of universal humanity. At this point, it is important to place and contextualize Pancasila in the reality of the global trend that calls for the abolition of the death penalty. The international will to abolish the death penalty as stated in the ICCPR and strengthened through the ratification of the ICCPR Optional Protocol (Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty). To date, there are 84 parties and 38 countries that are signatories (signatories) of this agreement. Thus, the effort to execute the death penalty is by the spirit of the Preamble to the 1945 Constitution which states that *raison d'être* of Indonesia's

presence is to participate in implementing world order based on independence, eternal peace, and social justice (Manik & Sunarso, 2020).

The government should take steps to immediately ratify the Draft Law on the Elimination of Sexual Violence (RUU PKS) as a strategic step to reduce cases of sexual violence. This Perppu on Castration does not regulate the victim's right to obtain justice and recovery because it is too focused on handling the perpetrator. 530 In addition, the Government should make maximum efforts to prevent prevention by providing a sense of security to women and children. The government's efforts to always prioritize punishment for the perpetrators, but ignore the victims, show that policymakers have not sided with the victims. This Perppu shows that policymakers do not project the experiences of women, especially victims of sexual violence, into legislative products.

The government also needs to make various legislative reform efforts to prevent violence against women. The Committee on the Elimination of Discrimination against Women recommends that States Parties: (i) ensure that laws against domestic violence and harassment, rape, sexual violence, and other gender-based violence provide adequate protection for all women, and respect their integrity and dignity; and (ii) take all legal and other actions necessary to provide effective protection for women against gender-based violence, including effective legal action, including criminal sanctions, remedies and civil compensation provisions to protect women from all types of violence. 531 Based on these recommendations, effective legal action does not only emphasize the dimension of imposing criminal sanctions on perpetrators, but the treatment of victims must receive attention from the state. This is also reinforced through the UN Secretary General's Report on the intensification of efforts to eliminate all forms of violence against women.

## **CONCLUSION**

Understanding legal texts should be done by understanding the social and political aspects and conditions that apply and accompany the enactment of a particular law. Regardless of the social and political conditions that occur, legal texts no longer have meaning and have a high tendency to be unresponsive to current developments. The death penalty as a form or type of punishment has long existed in human civilization and history. The campaign to abolish the death penalty only emerged in 1764, when Cesare Beccaria wrote about *On Crimes and Punishment*. It took 84 years for Beccaria's ideas to be adopted in San Marino - a small country in Europe - which was the first to abolish the death penalty for ordinary crimes. Fifteen years later, this call is echoing in South America. This idea was adopted by Venezuela which abolished the death penalty for all types of crimes. Outside Europe and Latin America, progress in abolishing the death penalty will take longer. Of course, this dynamic cannot be seen solely from the available legal texts, but also looks at the dynamics and all conditions of social life that occur in a country or region. The dynamics that occurred in various countries were also reflected when the UN was founded and when the UN was about to issue a resolution with the Universal Declaration of Human Rights (UDHR) or Universal Declaration of Human Rights (UDHR). In Article 3 of the UDHR, it is determined that "Everyone has the right to the livelihood, freedom, and safety of individuals."

However, there is no explanation regarding the death penalty in the declaration. Even though there was discussion of the death penalty in the draft declaration, the UN General Assembly

decided not to discuss the death penalty for the reason of not hindering the development of countries' practices towards abolishing the death penalty. In discussing the ratification of the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Civil and Political Rights (Covenant Sipol), the general regulations in Article 3 of the UDHR are revised with more detailed regulations. These rules then appear in the provisions of Article 6 of the Covenant Sipol. Formulation of Article 6 of the Covenant Sipol reflects the conflict between two poles, namely the desire to convey a message about guaranteeing the right to life which is in line with the human rights mission contained in the Covenant. Political issues and considerations regarding the implementation of the death penalty in many countries at that time. Therefore the provisions of Article 6 of the Covenant Civil Affairs cannot be separated from the socio-political context that occurred during the Covenant period Sipol was formulated and ratified. It is not surprising that the provisions of Article 6 paragraph (2) of the Covenant appear Sipol is unusual for an international treaty because it is in its entirety the Covenant Sipol is an international agreement that has a strong tendency to abolish the death penalty.

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