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Controversy over Death Sentence in Indonesian Legal System (Human Rights Perspective)

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Abstract: This research examines the existence of death sentence in Indonesian legal system. It uses normative approach, that is, to analyze regulations related to death sentence. Discussion indicates that death sentence in Indonesian legal system is still controversial. Death sentence is contradictory with non derogable rights that is it is not deductible in any way even by the state. This can be found in several rules among other things: in Chapter XA of Constitution 1945, Article 4 of Act No. 39/1999 on Human Rights and Article 7 of Act No. 26/2000 on HAM trial. Death sentence is still operative in some rules in Indonesia. For instance, in the decision made by supreme court which becomes international issue is the case of one member of Bali Nine, namely Myuran Sukumaran (No. 38 PK/Pid.Sus/2011). MS was sentenced to death by PN Bali because of narcotic case. The verdict was confirmed to the level of cassation. Based on the verdict of cassation he requested judicial review. The PK request questioned death sentenced imposed on him. In one of the reason in his cassation, he raised the issue of ICCPR and rights to life governed in the amended constitution 1945.

Key words: Over death, legal system, human rights, non derogable rights, legal system

INTRODUCTION

Capital punishment in Indonesia always becomes an interesting issue to discuss. Some people consider that capital punishment violates human rights, it, therefore, has to be abolished from Indonesian legal system, at the same time, however, there are some other people who do not only say that capital punishment does not violate human rights, but they also encourage the supreme penalty to be applied to several kinds of cases for instance corruption. Constitutionality of death sentence has been reviewed in Constitutional Court (MK) in 2007 by some people who were death sentenced of narcotic cases but, MK by way of its verdict number 2-3/PUU-V/2007 stated that capital punishment does not violate constitution even though in this case, three Judges had dissenting opinions who suggested that capital punishment is unconstitutional (and one Judge had dissenting opinion because the applicants do not have legal standing to make the application).

Although, MK had stated that death sentence is still constitutional, the writer of MA (supreme court), unexpectedly, on 16 August 2011 in the case of PK (judicial review) No. 39 PK/Pid.Sus/2011 with the sentenced man, Hanky Gunawan denied the death sentence in a psychotropic case and changed the sentence into 15 years in prison. Death sentence had been denied several times by supreme court. For instance in the verdict No. 85K/Mil/2006 (Colonel M Irfan Jumroni) who had been sentenced to death by Court-martial in the case of murder against his ex wife and a judge, MA changed the sentence into a lifetime in prison.

This differed with the PK of Hanky Gunawan in the consideration of MA, why it changed the death sentence into 15 years in prison. Supreme court stated that death sentence violates constitution, especially Article 28 point 1 which governs rights to life where according to MA, it is non-derogable human rights, even by verdict. Based on this, MA stated that it had done real mistake.

The PK verdict was decided by MA on 16 August 2011 but on 5 July 2012 MA denied PK of other death convict, namely Very Idham H alias Ryan, a murderer of many people. Ryan's PK no 25 PK/Pid/2012 was decided by judges consisted of Dr. Artidjo Alkotsar as the chairman of the council and Dr. Salman Luthan and Prof. Gayus Lumbuun as the members of the council. This indicated indirectly that MA still considers the death sentence is not unconstitutional.

One interesting thing from PK decision to Hanky Gunawan is how judges' position who tried and decided the case before in relation to death sentence. Data indicated that at least two of three judges in this case have tried and decided cases related to death sentence, Judge Imron Anwari before this case had been as council member of the case No. 85 K/Mil/2006.

M Irfan Djumroni had been sentenced to death in 2007 by Pengadilan Militer Tinggi III Surabaya at first level. The verdict was confirmed by Pengadilan Milieter

Utama (martial-court). At appeal, MA denied the verdict or death sentence and changed it into life sentence by judging that death sentence should be applied selectively and only for extraordinary crimes which endanger the public or people whereas in the case, the defendant killed his ex-wife and a judge who tried to protect the woman did not qualify the criteria. But, the decision was not unanimously made, one judge had dissenting opinion (Hillary K. Chimeze (Nigeria); death sentence into 12 years in prison. Meirika Franola alias Ola (Indonesian); death sentence into lifetime. Tan Duc Thanh Nguyen (Philippine); death sentence into lifetime. Si Yi Chen (Chinese); death sentence into lifetime. Matthew James (Norman); death sentence into lifetime. Henky Gunawan (WNI); death sentence into 15 year in prison. These are six controversial sentences (verdict) made by MA).

In other case of murder, No. 1835/Pid/2010, defendant was Herri Darmawan, Judge Imron Anwari and other Judge whose position as council member in the case of Hanky Gunawan, namely Judge Achmad Yamani denied appeal made by Herri Darmawan whom by Pengadilan Negeri was sentenced to death confirmed by Pengadilan Tinggi (appellate court). In the verdict of appeal that was decided on 5 November 2010, there was one judge who had dissenting opinion where he said that in this case, death sentence is not appropriate to be imposed on the defendant. The Judge was Prof. Dr. Surya Jaya, SH, M. Hum. The other two Judges still stated that death sentence was appropriate and these days death sentence still prevails as positive law. Verdict to M Irfan Djumroni and Herri Darmawan were decided before the one to Hanky Gunawan, so it is possible for both Judges, namely Imron Anwari, SH, SpN, MH and Achmad Yamanie experienced development of thought, so that we cannot say they are inconsistent about application of death sentence. It will be possible in future that their viewpoint of death sentence is similar to their verdict in judicial review of Hanky Gunawan.

Other interesting case which becomes international issue is the case of one member of Bali Nine, namely Myuran Sukumaran (No. 38 PK/Pid.Sus/2011). MS was sentenced to death by PN Bali because of narcotic case. The verdict was confirmed to the level of cassation. Based on the verdict of cassation he requested judicial review. The PK request questioned death sentenced imposed on him. In one of the reason in his cassation, he raised the issue of ICCPR and rights to life governed in the amended Constitution 1945. But the reason of PK was denied by judges.

MATERIALS AND METHODS

The type of this research is categorized in type of legal research with normative-empirical juridical model of examination. Selection of the type is based on some assumptions from the writer, those are, first the subject is legislation or statute related to death sentence and non derogable rights. Second, the writer still uses empirical approach since values which develop and live in Indonesian society is for a certainty.

Based on this type of research, the writer chooses several relevant approaches. Those are statute, conceptual, analytical and philosophical approach. Statute approach is used to inquires statute related to non derogable rights which have tendency to be contradictory with statute which determines death sentence as criminal sanction and many articles which are discriminatory against women. Conceptual approach is to clarify theme or term related to non derogable rights. Because term of non derogable rights in English has meaning, it cannot be reduced in any way so that, it becomes ambiguity when it is included in a statute.

Philosophical approach has to be used. This approach tries to see comprehensively the clause of non derogable rights in the statute. So, that one can get comprehension and see concrete implication on the existing social justice.

Legal material (resource) used by the writer in writing this thesis consists of primary and secondary legal material. Primary legal resource comprises statute product related to theme of essay. Hierarchically, the writer presents the resource as follows: Constitution 1945, TAP MPR No. XVII/MPR/1998 on Human Rights, Act No. 39/1999 on Human Rights, Act No. 26/2000 on Human Rights Trial and other regulation which supports the research. Secondary legal resource consist of books, journals, paper, thesis and other material which is relevant to the theme of non derogable rights.

Rights to life in non derogable rights: The words derogable rights mean rights in which the fulfillment can be postponed or limited (deducted) by the state in certain condition. Non derogable rights mean rights in which the fulfillment cannot be suspended or limited (reduced) by the state, even in state of emergency (Setiawan Nurdjayasakti, Regulasi Non-Deregable Rights dalam Hukum Positif dan Implikasinya Pada Keberadaan Hukuman Mati in Moh Slamet, CS, Aneka Wacana tentang Hukum, Yogyakarta, Kanisius, 2003).

Two important convenants about International HAM, namely International Convenant on Civil and Political Rights (SIPOL) and International Convenant on Economic, Social and Cultural Rights (EKOSOSBUD) contain types of rights which have different characteristics in implementation. Convenant of SIPOL rights contains such rights as rights to life, rights to be

free of slavery, rights to not to be object of cruel abuses, rights to be treated humanly, right to legal recovery, rights to protection of criminal law application for debt, rights to be free of criminal law application for backward effectiveness, rights to be admitted as individual in public, freedom of thinking and faith. Those rights qualify the category of non derogable rights (In the Article 6 of Convenant SIPOL, there are statements: every individual is entitled for rights to life attached to him. The rights are protected by the law. Rights for life cannot be taken away arbitrarily. In countries which are not abolish capital punishment, death sentence can only be imposed on the most serious crime based on prevailing law and not in contradiction with convenant and convention about Prevention and Criminal Law of Genocide. This sentence can only be executed based on final decision made by an authorized court. When a seizure of life is genocidal crime, It should be noted that there is no one in this article which authorizes the state to deduce any obligation given by statute in the convention on prevention and sentence for genocidal crime. Every individual who has been sentenced to death is entitled for amnesty or substitution of death sentence. These can be granted in all cases. Death sentence cannot be imposed on crime committed by somebody under 18 year old and it cannot be executed against pregnant woman. There is no one in this article can be applied to suspend or prevent abolishment of death sentence by the state).

So, it cannot be justified for any country to reduce, restrict or even ignore the fulfillment of the aforementioned rights. When, the restriction has to be done, the cumulative terms specified by the convenant are fulfilled by the state in question. The cumulative terms are first, there is an urgent situation officially stated as emergency which threatens national activity. Second: suspension or restriction cannot be based on racial discrimination, color, gender, language, religion or social origin and third, the suspension and restriction should be reported to United Nations (This is in accordance with Article 4 of Convenant of Rights SIPOL as follows: In emergency which threatens national life and its existence, officially announced, convenant countries can take steps reducing their obligations based on this convenant as long as the steps are not contradictory with other obligations based on international law and do not contain discrimination merely based on race, gender, language, religion or social origin. Reduction of obligation on Articles 6-8 (points 1 and 2), 11, 15, 16 and 18 of the Convenant cannot be justified based on this regulation 3. Every convenant country which uses rights to impose reduction must immediately report, it to other countries via General Secretary of United Nations, regarding reduced regulations and the reasons of effeteness. Further, notice should be carried out via the same mediator when the reduction ends).

Second convenant is the Convenant of Rights EKOSOSBUD. Among other things what is meant as derogable rights are rights to work, rights to enjoy fair and good work condition, rights to form and join in organization, rights for education, rights for participation. The restriction has to be governed by law and with the objective is merely to advance public prosperity in a democratic society (Article 4 of Convenant of Rights Ekososbud).

Because the two aforementioned convenants are parts of The International Bill of Rights which universally prevails as law which binds all countries, so a country cannot ignore the rights of its citizens for protecting public interest, without regulation which previously announced in the effective laws in that country. Moreover, in fulfillment of rights SIPOL when one or two aforementioned requirements are fulfilled, it is still not strong enough to be the reason for the country to conduct restriction (Susilo, 2004).

The course of non deragable rights is closely related to concept of human rights. Human rights are natural rights owned by human as free-will creature. According to Louis Henkin, human rights are claim asserted recognized ‘as of rights’ not claims upon love or grace or brotherhood or charity one does not have to earn or deserve then. They are not merely aspiration or moral assertion but increasingly, legal umder some applicable law (Surabaya, 1985).

Concept of Human Rights (HAM) was initially known as natural rights and then developed to be human rights in the XVIII century which contained similarity or equality before the law (According to Masyhur Efendi in 1997, the terminology was developed by French and English scholars: Thomas Hobbes, John Locke, Montesqeau and JJ Rousseau. In history of its development, in addition to the terminology of human rights, it is also known terminology of fundamental rights consist of legal rights and moral rights. The rights is said to be fundamental is not because they are constitutional. A. Masyhur Efendi, Membangun Kesadaran HAM dalam Praktek Masyarakat Modern, Jurnal Dinamika HAM, Volume 1, No. 1, May-October 1997. (1), p: 35). This concept was a response to the early century which applied authoritarian government and society fettered by obligations but their rights were denied (Nirwanto, 1984).

HAM developed after experiencing fierce struggle vis a vis the state. HAM was accepted, since International Declaration on 10 December 1948. The declaration is known with Universal Declaration of Human Rights. The

declaration has striking characteristics: first, international declaration of 1948 is general consciousness that human rights are rights. Second, these rights are universal, owned by human because he or she is human being. The reason indirectly indicates that such characteristics as race, gender, religion, social position are not relevant to question whether someone has human rights or not. And, it also indicates that these rights are applied to whole world, so that it becomes international rights. Third, HAM exists automatically and it does not depend on acknowledgement and application in a political system (Nickel, 1987).

The terminology of Human rights developed after French Revolution, where bourgeoisie coalesced with church figures to seize people's rights. And after long suppression, people uprising developed and finally forced kings to acknowledged rules about human rights (Baehr, 1998a). King John announced human rights to the England people in 1216. In America, the announcement was made in 1773. Then, human rights were adopted by figures of French Revolution in clearer and wider form and declared on 26 August 1789. International declaration on human rights was made in December 1948 (Baehr, 1998b).

RESULTS AND DISCUSSION

Controversy of death sentence in indonesian law: As suggested earlier in this essay that there is contradiction in the statute in Indonesian law among other things, death sentence is still included as criminal sanction. But there are many regulations which govern rights for life as part of non derogable rights.

The writer wants to present the history of death sentence in Criminal Lawbook (KUHP). It is important as introductory examination, in tracking down the existence of death sentence in Indonesia. Article 10 of KUHP used to call death sentence as principal sentence, in 1870 was abolished in Holland (Criminal law politics in the Dutch in 1870 did not followed by Indonesia, because according to responses of most criminal law experts, special circumstance required criminals to be fought with death sentence. In a wide area, occupied by heterogeneous people, police instrument cannot guarantee security as in Europe).

Death sentence, however, is still maintained and included in KUHP which prevailed, since 1 January 1918 with approval of all advisers (Same as Modderman, De Bussy also defended the existence of death sentence in Indonesia by saying that in Indonesia there was a special circumstance. Threat against legal order in Indonesia was more substantial Why death sentence is still included in a lawbook in Indonesia whereas the sentence had been abolished at that time in Dutch. Andi Hamzah and A. Sumangelipu, Pidana Mati di Indonesia, di Masa Lalu, Kini dan Masa Depan, Ghalia Indonesia, Jakarta, 1985 in p: 24).

Death sentence in Memorie van Toelichting was defended by suggesting what was said by Judicial Minister Modderman in Parliament that state has rights to do all, without those rights the state cannot fulfills its obligations including to guarantee legal order. Lemaire wrote that designer of KUHP had strong reason that Indonesia as colony which has wide scope (area) with various population and has condition which is different from Netherland. "Government order and media to exercise power in Indonesia differ from those in Netherland and European countries". Therefore, such instrument as death sentence has frightening character, which it does not exist in prison sentence, cannot be thrown away (Argumentation of designer of W.v.S. (KUHP) was supported by reality thar advisers did not oppose death sentence, both W.v.S. for European community and W.v.S. for indigenous community. In practice, governor general did not exercised authority of granting clemency attached to him. Ibid, p: 25).

Designers explained their positions further, that when experience has indicated hat legal order in Indonesia is preserved by formulating without imposing death sentence on serious crimes, then this sentence can be abolished as in Netherland. However, because Indonesia is a wide area with various national ethnics, influences can cause tensions and inadequate instruments to the police and government, so death sentence is needed (Ibid).

Lambrosso and Garofalo said that death sentence is an instrument has to be present in society to get rid of individual who cannot be rehabilitated. And therefore, these two scholars become defenders of death sentence. H.G. Rambonnet suggested that to keep legal order is what government should do. As we have seen, sentencing is realized to keep legal order. Based on this, government has rights for sentencing, that is, to retaliate crime. When the crime disturbs legal order in a certain part, good relationship will be recovered by expelling the criminal from social milieu realized by seizing freedom, taken away his or her possession and so forth.

As for those who oppose death sentence, the well known person is Becceria. In the second part of 18th century, Becceria showed the existing contradiction between death sentence and concept of the state related to doctrine of social contract. He opposed death sentence which is contradictory with social contract because life is something which cannot be eliminated legally and killing is contemptible because any killing which allows death

sentence in the social contract is immoral and therefore it is illegal (Becceria opposed death sentence because the process took place so badly against Jean Callas accused of killing his son. Judge imposed death sentence on him. Later, Voltaire could prove that Jean Callas is not guilty, so that his name is rehabilitated. Although, his name was rehabilitated but what's the point? The man has already died because of death sentence. In his book, Dei Delliti E Delle in 1764 wrote judge should be bound to strict rule on sentence and the judge is the single ruler to impose sentence.

Rolling as cited by Roeslan Saleh suggested an argumentation that death sentence has destructive power, that is, when the state does not respect somebody's life, there is possibility one will have diminishing respect for human life. Moreover, there is still a danger that killing committed by the state will trigger aftereffect against it.

In addition to the demoralized reasons, death sentence also degrades state's authority. The state is the most principal protector of humankind interest; their life, liberty, possession, security and respectability. Indeed we cannot sentence without disturbing those things which should be protected by the state.

CONCLUSION

Article 10 of KUHP used to call death sentence as principal sentence, in 1870 was abolished in Holland. So, Holland had abolished long time ago death sentence in its criminal law. With the result that death sentence raises pro and contra between criminal-law experts. Death sentence, however, is still maintained and included in KUHP which prevailed, since 1 January 1918 with approval of all advisers. Death sentence in Memorie van Toelichting was defended by suggesting what was said by Judicial minister Modderman in Parliament that state has rights to do all, without those rights the state cannot fulfills its obligations, including to guarantee legal order. Death sentence in Indonesian legal system is still controversial. Death sentence is contradictory with non derogable rights that is it is not deductible under no circumstances, including by the state. Many countries claim to represent humanity but ignore human rights. Consequently, there are many men who "eat" other men. Men finally live in doctrine homo homoni lupus that actually is not the human essence. Non derogable rights can be found in several rules, among other things: in Chapter XA of Constitution 1945, Article 4 of Act No. 39/1999 on Human Rights and Article 7 of Act No. 26/2000 on HAM trial.

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