

Ineffective and Inhumane: Time to End Indonesia's Death Penalty for Drug Traffickers

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To eradicate the number of illicit drug trafficking, Indonesian Law No. 35 of 2009 provides a deterrent approach of punishment through the death penalty. However, most countries and regional treaties have abolished the death penalty. With regard to this issue, this study analysed the rationale of the law in regulating the death penalty for illicit drug traffickers. Moreover, this study also reviewed the legality of the death penalty for illicit drug traffickers under the 1945 constitution and international law generally. The later analysis described the incompatibility of the death penalty sanction with domestic and international laws. By utilising a normative legal methodology, this study found three rationales by imposing the death penalty: it provides a deterrent effect, it is supported by the majority of the society, and is in line with the country's constitution and international law. This study provides counter arguments to support the abolition of the death penalty. It found that penal populism supports the implementation of the death penalty to gain people votes; the deterrent effect rationale is unrealistic in a substantive matter; and most importantly, the death penalty for illicit drug traffickers is not compatible with the 1945 Constitution and international human rights laws.

Keywords: *Death Penalty, Illicit Drug Trafficking, 1945 Constitution, International Human Rights Law.*

Introduction

The amount of illicit drug trafficking has increased at both an international and domestic level. Over the last century the international community has entered into a global war on drugs (Sita Legac, 2010). The United Nations has set this issue as a priority and has strategised to counter the problem. The problem includes the illicit cultivation, production, manufacture, sale,

demand, trafficking and distribution of narcotic drugs and psychotropic substances, including amphetamine-type stimulants, the diversion of precursors and related criminal activities.

Some countries claim that the war on drug successfully reduced illicit drug trafficking. However, on the other hand, this war on drugs has created certain casualties within the area of human rights. Some countries have passed legislations that are in contradiction with international human rights laws i.e. imposing the death penalty and extrajudicial killing of drug traffickers. Some other countries violate certain human rights measures by enacting drug laws that over-regulate medically necessary drugs. This legal policy controls the availability of medically necessary drugs in areas with increasing demand. However, on the other side, if such control is weak in the implementation, accessibility to medically necessary drugs will be very limited for those who are genuinely in need.

Indonesia has fought against drugs. In 2019, there was an increase in drug trafficking of 0.03 percent in Indonesia and the number of users exceed three million, mostly aged 15 to 65 years old (BNN, 2019). The previous data revealed that around 50 people die every day due to drug abuse. Economic and social losses reached 63 trillion IDR per year. Not only are there economic and social losses, drug abuse potentially endangers the lives and cultural values of the nation which will ultimately weaken national security. The enormous threat from this crime has made the government committed to being assertive in the war on drugs. (Agus Purnomo, 2016).

The death penalty has been imposed for illicit drug traffickers in Indonesia since Law number 22 of 1997 was passed concerning narcotics which was later replaced by Law number 35 of 2009 concerning the same matter. The government insists that imposing the death penalty is still very effective since this crime has been very widespread and organised. Moreover, Indonesia is no longer a transit country but has become the target country for drug trafficking (ELSAM, 2015). This situation causes Indonesia to be in a state of emergency in relation to drugs (Suryandari and Soerachmat, 2019).

Indonesia's policy of continuing to use the death penalty is very different from the policy adopted by most countries in the world. More than half the countries in the world have abolished the death penalty in their legal systems. There are at least three countries every year that abolish the death penalty. Countries such as Angola, Côte d'Ivoire, Mauritius, Mozambique, South Africa, Serbia, Montenegro, Turkmenistan and Ukraine have decided to end arrangements regarding the death penalty. At present there are 112 countries which are abolitionist in law or practice. Even though 83 countries still impose the death penalty, the number of countries that carry out executions each year is far lower. Canada, Paraguay, Hong Kong, Nepal, Azerbaijan, Bulgaria, Cyprus, Georgia, Poland were assertive with the international trends /to abolish the death penalty (Eddyono et al, 2015).

In the era before the President Joko Widodo administration, the moratorium policy was implemented to improve Indonesia's image in the international community. However, the moratorium policy was ended by President Joko Widodo and the implementation of the death penalty was directly implemented without any holistic consideration. At least 6 prisoners were executed on 18 January 2015, 8 prisoners were executed on 29 April 2015, and 4 of 14 prisoners were executed on 29 July 2016 (Eddyono, et al, 2015). The high number of executions resulted in a break of diplomatic relations with other countries. Australia, Brazil and the Netherlands protested against Indonesia's policy of stopping the moratorium and imposing capital punishment (Juwana, 2017). Their protest was not heard, and Indonesia continued to execute illegal drug traffickers who had been sentenced to death by the court.

For many countries, the effort to abolish capital punishment in the country's legal system is not smooth or easy, and it requires a very long process (Hood and Hoyle, 2009). Abolishing the death penalty requires determined efforts to provide an in-depth study both philosophically, sociologically and juridically so that it can be accepted in all elements of society. Since the establishment of the European Convention on Human Rights, all EU member states have begun to adopt the abolition of the death penalty because it is contrary to the universal value of human rights. Each European Union member state is also required to respect the existence of the right to life by putting it in every internal and external policy. To become a new member of the European Union, it is required to show that the abolition of the death penalty has reflected in domestic law (Dieter, 2016).

The number of countries to drop the death penalty has significantly increased. The UN in 1998 reported that 102 countries had abolished the death penalty both *de facto* and *de jure*. Nevertheless in 2014, Amnesty International reported that there were still 58 countries that had not abolished the death penalty. Of the 58 countries, 22 of them still routinely carry out executions (Gerry and Sherwill, 2016). Most importantly, Amnesty also reports that globally, executions of the death penalty decreased by 31% from 993 executions in 2018 to 690 executions in 2019. This data shows that the decrease occurred very significantly compared to previous years. Based on the 2019 report, Iran still executed more than 250 people, then followed by Saudi Arabia, Vietnam and Iraq in executions. However, China is still in the top position before Iran (Amnesty International, 2019).

Countries have also changed their laws concerning the death penalty. In 2018, the enactment of a new criminal code effectively abolished the death penalty from the list of possible punishments in Burkina Faso. In the same year, the President of Gambia declared a moratorium on executions. Malaysia, after carrying out a moratorium on executions, has announced to reform the law to abolish death penalty. Still in 2018, the Supreme Court of the State Washington ruled that the state's capital-punishment statute is in violation of the Washington's state constitutional prohibition against "cruel punishment". In *State v. Gregory* (2018), the

Court declared that “The death penalty, as administered in our state, fails to serve any legitimate penological goal; thus, it violates article I, section 14 of our state constitution.”

The policy of the Indonesian government to continue to set the death penalty for illegal drug dealers in the country is considered a form of human rights coverage. However, the government approved the decision to enforce capital punishment not in accordance with international law (Cahyoputra, 2016). This becomes the interesting issue for this study: considering the policies taken by Indonesia that strongly oppose the trend of abolishing the death penalty by most countries in the world.

Research Method

This research is normative research which uses secondary data and an applied historical, conceptual and comparative approach. To provide comprehensive analysis, this study uses the descriptive analytical notion with the basis of the primary, secondary and tertiary legal materials.

Results and Discussions

Justification of Applying the Death Penalty for Narcotics Trafficker in Indonesian Perspective

The threat of the death penalty in Indonesian narcotics law is aimed at illicit drug traffickers, as mentioned in articles 113, 114, 116, 118, 119, and 121 of Law No. 35 of 2009 on Narcotics. There are several reasons that were founded why Indonesia has still not abolished the death penalty for drug traffickers.

1. Deterrent effect *rationale*

The Indo Barometer national survey on March 15-25, 2015, showed that 84.1 percent of respondents who represented various levels of Indonesian society, agreed to the death penalty for drug traffickers. The reasons they agreed to death penalty was because (i) drugs are destructive to the younger generation (60.8%), and (ii) the death penalty also provides a deterrent effect (23.7%). On the side of respondents who disagreed with death penalty, it was mention that (i) there are still other types of punishment that are more humane (36%), and (ii) the death penalty is a violation of human rights (28.4%) (Abidin and Eddyono, 2017).

Government officials have expressed confidence that executions would have a deterrent effect on crime, that the most serious crimes merit the death penalty, and that unrepentant or recidivist criminals deserve death (McRae, 2012). To decrease and to control the illegal drug trade in Indonesia, the death penalty is needed and highlighted as an important criminal punishment.

This support has been reflected by the government leadership of the country and even the National Narcotics Agency (BNN) who strongly support the death penalty to combat the ‘drug emergency’ in Indonesia (BNN, 2013). Moreover, a previous survey also presented that 84.1% of respondents urged the effectiveness of regulation that accommodates the aspirations of people who wish for a balance based on the degree of wrongdoing of the offender. Thus, from a sociological perspective, the death penalty represents a sense of justice demanded by the majority of the community (Purnomo, 2016).

From the perspective of rational choice theory where people will choose the most rational thing, the choice of applying the death penalty to drug traffickers is seen as the right and rational choice because of the enormous impact of this crime. Moreover, using the behaviourism theory, as mentioned by Giddens (1987), the death penalty could be imposed to stop repetitive unlawful actions (Fuadi, 2011). Thus, the latter two theories seem to support that a deterrent effect is needed to prevent illegal drug trafficking.

2. Saving the wider community

Based on the perspective of the public interest, the implementation of the death penalty can be assumed as a protection against the existence of a wider society whereby putting a trafficker to death can save many others. This also means that it protects other people from illegal drug trafficking (Anwar, 2016). Illegal drug trafficking not only kills people but destroy the lives and future of the nation's next generation. The death penalty for drug traffickers is a very rational choice to save the nation and state.

3. The death penalty does not violate the constitution

Two constitutional court decisions cited in this research explicitly refused to abolish the death penalty that exist within domestic law. First, decision number 2-3/PUU-V/2007, in which the court refused to abolish the death penalty in narcotics crime. Second, decision number 15/PUU-X/2012, in which the court refused to abolish Article 365 (4) of the Criminal Code concerning death penalty for robbery which caused his victim to die.

In both of the decisions, the court stated that the death penalty did not contradict human rights, especially the right to life guaranteed by the 1945 Constitution. This argument is in line with the Attorney General’s statement that the death penalty had nothing to do with the issue of human rights because all sentences were basically depriving people of their human rights. Furthermore, the death penalty is purely a matter of law enforcement. It cannot be said to be contrary to human rights because the state executes the person concerned after that person has taken all the legal remedies provided.

The court stated that death penalty did not violate article 28 A of Indonesian 1945’s constitution which reads as follows: “Every person shall have the right to live and to defend his/her life and

existence”. Moreover, it also did not violate article 28 I (1) of the constitution. The applicant insisted that the articles of the constitution must be read systematically. Thus, the right to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances.

However, human rights under the two provisions of the constitution are limited by article 28 J. It mentions that:

- (1) Every person shall have the duty to respect the human rights of others in the orderly life of the community, nation and state.
- (2) In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.

Paragraph 2 of article 28 J of the constitution explicitly legalised the restriction of the human rights. The court argued that the 1945’s constitution does not adhere to the principle of absolute conception of human rights (Hikmahanto, 2017). According to the Court, this systematics is in line with the Universal Declaration on Human Right (UDHR) which places article 29 as a limitation on human rights (Sefriani, 2016).

The two court decisions concluded that the narcotics crime, the crime of robbery which caused serious injury or death of the victim and gross human rights violations, was the most serious crime. The court places those three crimes in equal because of the effect. It caused fear or extraordinary psychological effect on the community as well as causing “adversarial affect the economic, cultural and political foundation of society” and caused the same “a danger of incalculable gravity” (Hearing Minutes of the Constitutional Court's Decision No. 2-3/PUU-V/2007).

The threat of the death penalty is expected to have a deterrent effect for committing crimes both for the defendant and for the community (Sefriani, 2013). The respondent who is representative of the government in the court hearing has asserted its opinion that the death penalty is needed for narcotics crime because this crime is considered as a crime against humanity which aims to destroy humanity, slowly but surely. Illegal drug criminals deserve the death sentence because what they have done causes damage to the minds and morale of the victims. The crime they committed eliminates the potential of humans to develop their culture and civilisation. (Constitutional Court Decision No. 2/PUU-V/2007).

4. The death penalty does not violate international law

The Indonesian Constitutional Court claims that no international law has been violated by Indonesia. Article 6 paragraph 2 of the ICCPR stipulates that:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

This provision allowed contracting parties to impose the death penalty for the most serious crimes. Narcotics crime is the most serious crime for Indonesian people. In addition, Indonesia also has an obligation to comply with international conventions on narcotics. Specifically, the Single Convention on Narcotic Drugs (1961) as amended by the Protocol amending the Single Convention on Narcotic Drugs (1972) actually mandates the contracting parties to maximise law enforcement against drug traffickers. The convention also mandates the contracting parties to prevent and eradicate narcotic trafficking, which is considered as a very serious crime, especially if it involves international networks. It is not excessive for Indonesia to categorise drug trafficking as the most serious crime, since the narcotic convention considered it as a very serious crime.

The Constitutional Court mentioned that the phrase "the most serious crimes" in Article 6 paragraph 2 of the ICCPR above may not be read separately from the next phrase, that is "in accordance with the law in force at the time the crime was committed". It means that the most serious crime is in accordance with the law in force at the time of the commission of the crime, both in national and international law.

The sources of international law applicable in the field of narcotics are the 1961 United Nations Single Convention on Narcotics Drugs which was revised by the 1972 Protocol. This convention marks the birth of the "prohibition" regime by giving obligations to contracting parties to address narcotics problems including abuse of narcotics illegally using a criminal approach. The goal to be achieved is to make the world free of narcotics, except for medical and scientific purposes.

Another international law legal source is the United Nations Convention Against Illicit In Narcotic Drugs and Psychotropic Substances (1988) which Indonesia has ratified this legal instrument by Law Number 7 Year 1997. The first and the second paragraph of this convention recognise that narcotics crimes are categorised as particularly serious crimes. Furthermore, article 24 of this convention stipulated that "a Party may adopt more strict or severe measures

than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic.”

In general, this convention stipulated that state parties can impose criminal sanctions in accordance with their respective national laws (particular or relative cultural values). There is not a single provision in this convention that prohibits the death penalty. The convention emphasises inter-state cooperation in combating narcotics and psychotropic illicit trafficking (Mardenis and Maryanti, 2019). Thus, it can be interpreted that the implementation of the death penalty against narcotics trafficking is permissible if according to the state concerned it is necessary to maximise the prevention and eradication of narcotics trafficking as effectively as possible. Current international law still allows the application of the death penalty.

Although some existing international legal instruments have abolished the death penalty, the obligation to abolish the death penalty without exception is not yet recognised as customary international law. Customary international law is currently still in the stage of recommending countries to limit and be selective in applying the death penalty. This restriction relates to the type of crime, time of implementation, and the person who can be sentenced to death.

Countering the Indonesian Arguments to Impose Death Penalty

To provide a balancing analysis, this research finds three counter arguments and concluded that imposing death penalty is not necessarily being regulated and conducted in Indonesia. The three arguments include the rise of penal populism, the unrealistic *rationale* of deterrent effect, and the unconformity with the constitution as well as international law.

1. The rise of penal populism in Indonesia

The previous study stated that more than 84% of Indonesian people supported the application of the death penalty for drug trafficking. This strong support is the basis for implementing the death penalty. However, this figure is actually an impact of resurrection of penal populism. Penal populism means a form of hard conviction policy which is taken based on trends in people's attitudes for political purposes only. This phenomenon has a devastating effect on the criminal policy reform process (Anggara, et.al., 2019).

John Pratt (2007) defines penal populism as a phenomenon where harsh punitive policies are taken by following the popular trends of community attitudes for political purposes. Thus, populist criminal justice policy making is not intended to improve the existing system because without rational considerations, involvement of experts, or valid research, but is done only to gain sympathy from the community. Moreover, in the experience of some countries, including Indonesia, penal populism is important to get people's vote during the general election process. The death penalty issue is a potential opportunity for vote-seeking politicians. In the event that

the public mindset turns out to be pretty much correctional in direct reaction to changes in crime percentages, it may be normal practice that vote-arranged legislators would, thus, look to adjust criminal justice policies to offer reassurance to citizens wanting them to get tough on crime, such as by imposing the death penalty (Jennings, 2016).

Indonesian President, Joko Widodo, relied on a populist rhetoric when he claimed Indonesia was in a state of emergency because of drug use and trafficking, and that it could only be confronted with the death penalty. The President, by way of a justification, responded: “there are between 30 and 50 people in Indonesia dying per day because of drugs” (Hutt, 2016). The President also raised alarm bells when earlier in his presidency he restored the moratorium policy of the death penalty against suspected drug traffickers, a move that garnered widespread popular support (Neuman, 2020).

A similar condition occurred in Philippines, when President Rodrigo Duterte instructed extra judicial killing for a drug offender. The police say that since July 2016, they have killed more than 2000 people suspected of drug-related crimes. In addition, more than 3500 homicides remain unsolved, many at the hands of unknown vigilantes. (Johnson and Fernquest, 2018).

2. The unrealistic *rationale* of deterrent effect for drug trafficker

Supporters of the death penalty argue that the death penalty is implemented to provide a deterrent effect. However, a BNN report shows that the amount of drug abuse in Indonesia has been still increasing in recent years, even when the government has taken strong steps by executing narcotic death prisoners (Heriyanto and Gui, 2016).

In 2015, Indonesia executed 14 narcotic death prisoners (Amnesty International, 2016). However, the number of drug cases continues to increase in the same year which reached 644 cases (BNN, 2017). Then in July 2016, the Attorney General's Office executed 4 other persons, all of them drug traffickers (Nugraha, 2016). Furthermore, BNN reported that in 2016 there were 881 cases of drug trafficking (BNN, 2017). Although BNN and the National Police applied shoot on sight approach to suspected drug cases, drug cases reached 990 cases in 2017 and 1,355 in 2018 (BNN, 2018).

Data from the Prevention and Eradication of Abusing of Drug and Illicit Drug Trafficking (P4GN) showed that at the end of 2017 79 people were shot dead in relation to drug cases (BNN, 2017). Nevertheless, cases of drug abuse is still increasing, showing the ineffectiveness of the death penalty and extra judicial killing to eliminate illicit drug trafficking.

A similar situation occurred in Thailand and China where the death penalty is imposed for illicit drug trafficking. In both countries, the amount of drug abuse is still increasing. In China, the official number of drug users increased from 150,000 in 1991 to 2.5 million in 2017. Now, the

death penalty for drug traffickers in Thailand has been replaced with life imprisonment *and* a fine (Girelli, 2019).

It is not much different in Singapore where the death penalty was applied by and there were high execution rates. However, the amount of illicit drug trafficking in this country was still increasing. In 2013, Singapore abolished the death penalty as a mandatory punishment for illicit drug trafficking along with the importing and exporting of drugs (Girelli, 2019). Moreover, Lynch (2009) mentioned that:

“... the apparent deterrent effect of capital punishment in Southeast Asia by comparing the experiences of Indonesia and Singapore. Despite Indonesia’s much larger population, Singapore executed almost fifteen times as many convicts as did Indonesia between 1999 and 2005. If capital punishment had a deterrent effect on drug trafficking, this would lead to less drug trafficking, and therefore higher wholesale drug prices, in Singapore. However, wholesale drug prices for both cocaine and heroin were significantly higher in Indonesia than in Singapore from 2003 to 2006, and drugs generally were more prevalent in Singapore than Indonesia in that period, indicating that drug trafficking was not deterred as a result of Singapore’s high levels of capital punishment.”

3. Unconformity with 1945’s Constitution and international law

The death penalty is basically not in accordance with the provisions stipulated in international law, especially international law and human rights. The death penalty violates the human rights of the perpetrators both before and after the execution.

Different methods for execution have likewise been distinguished as unacceptable under international human rights law. Execution is a torture, as it establishes an extraordinary mental and physical effect on an individual effectively heavily influenced by the punishment (Prokosch, 2004). At the same time, this has also clearly been inconsistent with the 1945s Constitution, especially as stipulated in Articles 28G, 28H, and 28I.

The tendency of the international society to abolish the death penalty without exception is because it is considered to violate the right to life of, not just a limitation or exclusion of the right to life. The right to life is a non-derogable right. If countries are still imposing the death penalty, it is permitted under article 6 of the International Covenant on Civil and Political Right (1966) to the most serious crime only. However, narcotics crime is not included in the most serious crime category according to international law. Exception of the application of the death penalty as regulated under article 2 (1) of the Second Optional Protocol of ICCPR (1989) is only applied to the most serious crimes in war situation.

The most serious crimes under international law are characterised as follow:

- a. The crime committed is very cruel, shaking the conscience of humanity and may be a threat to international peace and security.
- b. There is an intentional, organised, systematic and widespread element to cause death or other very serious consequences (extremely grave consequences). (Muladi, 2005)
- c. The most serious crime, under Rome Statute concerning the establishment of International Criminal Court (1998), consists of four crimes: war crime, genocide, crimes against humanity, and crimes of aggression.

Conclusion

Indonesia claims a drug emergency situation and that it needs to apply the death penalty as part of the war on drugs. This research shows that there are several arguments why Indonesia still supports and retains the death penalty policy for drug traffickers. Those arguments include that most of the Indonesian people desire to apply the death penalty as a deterrent effect, that the death penalty is needed to save the wider community, and that the death penalty does not violate the Indonesian constitution nor international law. However, this research found that those arguments were not appropriate if we consider to the development of international human rights law. This research proposed three counter arguments to support the abolishment of death penalty: the rise of penal populism, the death penalty for drug trafficking does not have a deterrent effect, and that the death penalty for illicit narcotics traffickers is not in accordance with international laws because drug trafficking could not be categorised as a most serious crime.

Finally, this research also proposed that to reform the Indonesian narcotics law, it is important to highlight some legal policy models to address the issue of illegal drug trafficking, such as: promoting the prevention and community empowerment to reduce illicit drug trafficking; applying decriminalisation and prioritising rehabilitation of narcotics addicts rather than criminal conviction; and replacing the death penalty with life imprisonment.

International human rights standards encourage states to move towards complete abolition of the death penalty. Abolition of the death penalty will contribute to the enhancement of human dignity and the progressive development of human rights. For states that still maintain the death penalty, it should only be imposed for the most serious of crimes.

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