



# The phenomenon of the death penalty in Indonesia: a review from the aspects of norms, morals, and legality

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## ABSTRACT

**Background:** This research explores the phenomenon of the death penalty in premeditated murder cases in Indonesia through the lens of H.L.A. Hart's perspective. The moral and justice analysis in such cases differs significantly from general discussions on capital punishment. This study aims to examine the legal, normative, and moral dimensions of the death penalty in premeditated murder cases. **Methods:** The research employs a qualitative approach, using a literature review of actual issues, with a descriptive-analytical methodology. Data analysis is conducted through descriptive, inductive, and deductive methods, focusing on holistic understanding, internal coherence, and reflection. **Findings:** The study found that, from a legal standpoint, the death penalty in premeditated murder cases in Indonesia does not conflict with the nation's positive laws. However, from a normative perspective, the death penalty appears to clash with societal norms that highly value human life. The research emphasizes the need for a fair judicial process to prevent issues such as extended waiting times for execution and unjust trials. Morally, based on Hart's view, the death penalty is fundamentally considered immoral. **Conclusion:** While the death penalty is legally justified in Indonesia for premeditated murder, it remains controversial in terms of societal norms and moral values. The study highlights the necessity of improving judicial practices to align better with both legal and moral standards. **Novelty/Originality of This Study:** This study uniquely integrates H.L.A. Hart's moral philosophy with the analysis of the death penalty in Indonesia, offering a distinctive perspective on the alignment between legal practices, societal norms, and moral principles in premeditated murder cases.

**KEYWORDS:** death penalty; legality; morality; norms.

## 1. Introduction

In Indonesia, the death penalty is regulated in the Criminal Code (KUHP) Article 10 and places the death penalty as the top penalty, implicitly indicating that the death penalty is the most severe punishment (Asmarawati, 2013). The purpose of holding and implementing the death penalty is, in essence, so that the community notices that the government does not want any disturbance to the peace of the community which is highly feared by the community (Hutapea 2016).

The debate on the death penalty is an endless discussion, especially in terms of law and human rights. Generally, there are three major groups, namely those who reject the death penalty for any reason; support the death penalty for some / some reasons such as genocide or murder crimes etc.; and those who support the death penalty in full. This is where the

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issue of the death penalty for convicted premeditated murderers arises. The right to life is the most basic right that all people have even before being born into the world.

However, if his actions for any reason take the lives of others, in other words taking the human rights of others, is the revocation of the right to life of convicted persons something that can be justified in terms of morality and law? In 2020 itself, the upward trend in both the number of cases and the number of death penalty defendants has increased significantly. During October 2019 to October 2020 there were 173 cases with a total of 210 defendants, which can be seen as an increase from the previous year with 126 cases and a total of 135 defendants (ICJR, 2020).

In addition to questions regarding the justification and morality in the phenomenon of the death penalty itself, problems also arise regarding the humanitarian and justice side that is present in many cases in Indonesia. In the process, prisoners who have been sentenced to death will not be sentenced immediately in a short period of time. From the time the sentence is imposed until the execution is carried out, it can take anywhere from 3-20 years, the death row phenomenon in Indonesia for murder cases as of October 9, 2019 is 61 male convicts and 3 female convicts.

Based on human rights principles, double suffering has actually occurred if the execution is only carried out after a prison term of more than 10 years (Arba'I, 2012). The controversy that follows the death penalty is not only present from debates about human rights, justice, history, and religion. In its implementation, there are also many cases that impose the death penalty that are not in accordance with the procedures and steps described in Indonesian positive law to errors in sentencing innocent defendants. The implementation of the death penalty in Indonesia has a strong juridical basis, with the Criminal Code as the starting point for all criminal acts in Indonesia, which is regulated in Article 10 and Article 11. Outside the Criminal Code, the death penalty in Indonesia is also imposed on other serious crimes such as narcotics, corruption, and terrorism.

Regarding morality and law itself, it is a question that continues to be debated. H.L.A Hart has a view that morality and law are not interrelated but on the other hand are not completely separate. His view on punishment can be linked to the case of premeditated murder. For Hart, a human activity in general (this includes offenses) is a series of systems coordinated by various backgrounds.

Researchers here are interested in reviewing the phenomenon of the death penalty in Indonesia, especially in cases of premeditated murder through the thinking of H.L.A Hart. The determination of H.L.A Hart's legal morality perspective is considered to be able to answer the debates that often arise in issues regarding the death penalty in Indonesia. More specifically, this research aims to question how the phenomenon of the death penalty in Indonesia when viewed in terms of norms, morals, and legality. This death penalty case is placed in the context of a premeditated murder case. Given the debates that often occur in discussions regarding the death penalty, a review based on these three aspects is important to be carried out in this research so that it can provide alternative answers to the existing problems.

Research on the phenomenon of the death penalty in Indonesia has basically been carried out by several scholars. Among them are Nurshadira (2017), Setioreni (2016), and R.Arroy Mth (2004). Nurshadira (2017) wrote a thesis entitled "State, Identity, and Discourse: Analysis of Indonesia's Identity on Death Penalty in Jokowi's Era". This thesis discusses Indonesia's decision to implement the death penalty and its relationship with efforts to affirm Indonesia's identity as a country. Setioreni (2016) examined "Analysis of the Death Penalty for a Person Suffering from Mental Disorder According to International Law Case Study of Rodrigo Gularte, a Foreigner from Brasilia". This research discusses the death penalty against people with mental disorders who are sentenced to death in Indonesia, the formal object is carried out through an international legal approach. Finally, R.Arroy Mth (2004) wrote "Orientation of Legal Philosophy: Its Function and Relevance for the Sense of Justice According to Positive Law". This research discusses aspects of positive law and finds the meaning/meaning of justice that applies in positive law in society and

seeks relevant solutions to legal practices that are no longer appropriate and the function of law in society.

Based on the literature review above, there has been no research on the death penalty in premeditated murder cases in Indonesia with the views of H.L.A Hart. By examining the phenomenon from Hart's view, it is hoped that this research can contribute to the development of philosophy, especially in the field of legal philosophy and be able to serve as further literature. In addition, this research is expected to be able to be used as reflection and reference material for the government, activists, and the general public regarding the death penalty.

Furthermore, the following is a brief description of Hart's theoretical views. Hart also believes that positive law and positive morality need to be separated, the norms that grow in society are conventional morality and cannot be equated with positive law, although it does not rule out the possibility of some dependence between the two. The most important difference between positive law and positive morality lies in the form of "pressure" used to enforce the system. Moral pressure is exerted not through the threat of punishment but through the pressure of community values (DCL and George, 2013).

Regarding morals, Hart distinguishes between law and morals, customs, etiquette, and various other social rules. There are 4 elements that distinguish morals from the concept of law according to Hart, namely: Importance, immunity from deliberate change, voluntary character of moral offenses, and forms of moral pressure. Hart views that what is allowed or required by law may be prohibited by morality, in other words, something legal may be an immoral act. Vice versa, something that is prohibited by law may be morally permissible or even necessary. The essence of the difference is that the separation thesis states that morality and law can be separated, not absolutely separated (Cane, 2012).

It also relates to how Hart in strengthening his argument regarding the difference between morality and law uses what he calls a more "broad" view of morality, consisting of "personal" morality and "critical" morality. Personal morality as a person's idealistic understanding of goodness, truth, virtue that only belongs to him personally. On the other hand, critical morality is used as a basis for criticizing morality in a society itself (Hart, 2012).

## 2. Methods

Researchers will use a qualitative descriptive research model with a research model on actual problems strengthened by literature studies. The material object in this research is the death penalty in cases of premeditated murder in Indonesia and the formal object is H.L.A Hart's view, especially on morality and law. Then the problem will be reflected and analyzed using the formal object that has been determined (Kaelan, 2005). Meanwhile, data analysis is carried out based on the views of Bakker and Zubair (1990), namely description, induction and deduction, holistics, internal coherence, and reflection.

## 3. Results and Discussion

### 3.1 *Morality and law according to H.L.A. Hart*

Hart in his book *Law, Liberty and Morality* discusses a lot about the relationship between morality and law. A discussion of morality in law is needed in this paper, considering that there are many opinions regarding morality when talking about the death penalty and premeditated murder. To open the discussion on the relationship between law and morality, Hart (1963) provides four basic questions that can accommodate various other questions.

The first is about whether the development of law has been influenced by morality, for this Hart explicitly states that the answer is that morality has influenced the development of law. However, at the time this essay was written Hart emphasized the existence of new discoveries especially in the legal scene of the United States and England, thus emphasizing the possibility of an affirmative answer to this question in the future (Hart, 1963).

Furthermore, regarding the necessity of including references to morality in a legal system and definition. Hart's opinion is that neither the discussion nor the outcome of this question is important. However, this is simply because there are two things that are always questioned and ultimately make the discussion of this question endless. The first is that the subject matter has been made ambiguous by the presence of the words "Positivism" and "Natural Law". The second is that among the many discussions on this second question, very few result in a discussion of the adequacy of the definition of law itself (Hart, 1963).

The third question concerns the possibility of a moral criticism of law, Hart says this question spawned many other discussions, and yielded a wider range of results. One of them is the existence of moral criticism of law (Hart, 1963). Another follow-up question is whether there really is a moral criticism that only discusses law. There is also further discussion about whether good law is different from law in general?

Finally, the question of if a charge is deemed immoral, would it be sufficient to justify the charge being punishable by law? Here Hart borrows Mill's thoughts in *On Liberty*, regarding the only reason when a power can be exercised over members of society by force is when it is harmful to other members of society. Hart tries to address this opinion into the topic of sexual morality when an act that is considered immoral is actually not harmful to others (Hart, 1963).

Furthermore, Hart in *The Concept of Law* (Chapter IX) explains some fundamental questions about how laws can and should be made. The three questions are (a) how far the law is influenced by moral beliefs and behavior in a society; (b) how dangerous an activity is until we can have justification to regulate it into law; (c) whether most people believe that the law is morally binding; and (d) how far we have an obligation to the law in terms of moral obligations both to respect and obey.

Hart briefly discusses the influence of morality on law (Hart, 2011). It can already be concluded that in the modern world the existence of morality and its influence is undeniable. Hart also emphasizes the stability of the legal system which is highly dependent on its compatibility with these morals. However, Hart also recognizes that the close relationship between morality and law with the principles of legality tends to be incompatible with injustice (Hart, 2011).

### *3.2 Death penalty in cases of premeditated murder*

The threat of the death penalty in the Criminal Code itself there are 9 kinds of offenses including, Article 104 regarding treason, Article 111 paragraph (2) regarding the inducement of a foreign country to fight, Article 124 paragraph (1) regarding assistance to the enemy in time of war, Article 140 paragraph (3) regarding treason against a friendly country which is planned or results in death, Article 365 paragraph (4) regarding theft or violence resulting in serious injury or death, Article 444 of the Criminal Code regarding piracy resulting in death, Article 479 k paragraph (2) and Article 479 o paragraph (2) regarding aviation crimes, and Article 340 regarding premeditated murder. From the nine offenses, it can be seen that 4 of them resulted in the loss of life of others, including the discussion in this research, namely Article 340 of the Criminal Code on premeditated murder.

It should be remembered that the Criminal Code, which is the basis for the recognition of the death penalty as the most severe form of punishment in Article 10 of the Criminal Code, is a legal product from the Netherlands. A little history, the Criminal Code originated from the *Wetboek van Strafrecht voor Nederlandsch-Indie*. In Law No. 1/1946 on Criminal Law Regulation in the general explanation section, it is explained that the reason for recognizing legal products from the Dutch East Indies and not from the Japanese, is because

the contents are quite complete and generally do not contain defects. The official use of the Criminal Code was initially only intended for the Java and Madura regions, only in 1958 with the enactment of Law No. 73/1958 authorized the enforcement of the Criminal Code throughout Indonesia.

In full, the Criminal Code CHAPTER XIX on Crimes Against Life in Article 340 is written as follows:

"Any person who with deliberate intent and with premeditation takes the life of another person, shall, being guilty of murder with premeditation, be punished by death or life imprisonment or a maximum imprisonment of twenty years."

Therefore, as stipulated in the relevant Article, there are 3 elements that should be present in an alleged event including (1) Whoever; (2) Intentionally; and (3) With Prior Planning. In CHAPTER XIX, the penalty for Article 340 has the highest penalty, namely the death penalty. There is Article 338 which is almost similar, namely regarding the offense of Murder, the only elemental difference with Article 340 is the absence of the element "With Advance Planning" while the maximum threat in Article 338 is only 15 (fifteen) years imprisonment. It should be emphasized that indeed the existence of the death penalty in Article 340 is the maximum penalty, in other words there are other lighter penalty options.

Related to criminal acts against life, especially murder offenses, in Indonesia there are various forms of cases ranging from brawls between students, robberies, problems in a relationship, to domestic violence. Asmarawati (2016) revealed in her data obtained from the Tangerang Correctional Institution, that different criminal sentences (Criminal Disparity) for the article of premeditated murder can be seen from the death penalty imposed for 11 people while there are other convicts who only get 5 years of imprisonment. Of course, the problem regarding this criminal disparity can be motivated by various factors such as the role of the convict whether the main perpetrator, the brain of planning, or assisting; the background of the convict is a recidivist or from a vulnerable group; to the motive for committing premeditated murder. Factors outside the convict also influence such as the integrity of law enforcement officials, assessment of the attitude of the convict during the examination, incriminating or mitigating witness testimony, and the possibility of money games in case examinations.

Based on data from the Central Statistics Agency (BPS), it was found that in 2020 there were 898 cases of crimes against life that occurred in Indonesia. This data is based on violations of all articles in Chapter XIX of the Criminal Code, not just articles related to murder. However, this figure has decreased from previous years. Judging from the data at BPS, only 2020 and 2019 had less than 1000 cases of crimes against life. Especially for the prosecution of Article 340 of the Criminal Code, basically it can be used against various forms of cases and backgrounds of convicts. Starting from underage convicts with juvenile delinquency motives to adult convicts with revenge motives.

### *3.3 H.L.A. Hart's legal morality regarding the death penalty verdict for premeditated murder*

In the conclusion made by Hart, it will be understood that the existence of morality and law is certainly mutually influential. However, in the course of the adjustment between the two and the results of both are still being debated. In the same conclusion, Hart also recognizes that the close relationship between morality and law with the principles of legality tends to be incompatible with injustice (Hart, 2011: 319-320). This principle of legality itself characterizes control through regulation in society. In accordance with Hart's opinion, although in the indictment the act of premeditated murder is not in line with morality which upholds the right to life of the victim, but in the punishment the death penalty verdict itself is not in line with the principle of injustice, at least injustice according to Hart. as explained in Chapter II, it can be understood that Hart sees fairness or unfairness as very complicated and cannot be seen in a nutshell.

Hart in *Punishment and Responsibility* (2008) has specifically discussed the death penalty in premeditated murder cases. Hart compares this phenomenon in the United Kingdom and the United States and looks at how both countries classify murder articles and

the penalties for each article. This time Hart provides an analysis of the question "how much and what characteristics of evidence are required for a death sentence to be necessary to protect other members of society?". It is emphasized that there is no evidence to suggest that the abolition of the death penalty would correspond to an increase in the murder crime rate. On this basis, Hart argues that the relationship between the imposition of the death penalty for murder will not have much effect on public safety.

Following up on his opinion, Hart added that the discovery is actually evidence of how little we know about the death penalty and the effects of the death penalty itself in social life. Furthermore, to eliminate this misinformation Hart also provides three important points that need to be seen, especially regarding various data on the death penalty. The first point is that comparisons between countries that still use the death penalty and those that have abolished it are basically useless. Because in the death penalty there are many things that affect it such as population, social differences, economic differences, and others so using numbers to compare them is futile.

The second point is that to change the first point, instead of comparing with other countries, it is necessary to compare with each country. For example, Indonesia compared death penalty cases in 2017 with death penalty cases in 1997. The last point is the most important data that can be trusted when there are several neighboring states and similar social life and population with the condition that one of these states has abolished the death penalty and the other has not. From this data, it will be clear about the relationship between the death penalty and the crime of murder that occurs in society.

#### **4. Conclusions**

Regarding the phenomenon of the death penalty in cases of premeditated murder in Indonesia in terms of legality, it actually does not violate or contradict Indonesian positive law. As for having several inconsistencies with human rights which are also upheld by Indonesian positive law and international law, but its existence legally does not violate any regulations. In terms of norms, researchers see that the existence of the death penalty itself is still not in line with the norms prevailing in Indonesian society which respects human life. However, the same norms also do not underestimate crimes such as premeditated murder. Therefore, it is necessary to uphold the judicial process undertaken by the convicts so that at least various cases such as the death row phenomenon and unfair trial do not occur again. With these two phenomena not occurring, at least the norms of society will not be violated twice. Finally regarding the moral side, related to morals according to Hart's view, basically the phenomenon of the death penalty is considered an immoral thing, with immoral of course being inappropriate as a legal sanction considering Hart's view of the relationship between Morals and Law.

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