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Pengantar Redaksi

Kata syukur merupakan kata "pamungkas" yang patut disampaikan dengan terbitnya Jurnal edisi pertama tahun 2010 ini. Kerjasama antara Pusat Studi Konstitusi (PUSAKO) Fakultas Hukum Universitas Andalas dengan Mahkamah Konstitusi dalam penerbitan Jurnal Konstitusi telah memasuki tahun kedua. Hal itu tentu harus di apresiasi, terutama kebijaksanaan yang telah ditempuh oleh Kesekretariatan Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia yang mendukung tidak hanya secara moril tetapi materiil untuk penerbitan Jurnal Konstitusi ini.

Jurnal kali ini menampilkan artikel-artikel penting. Dibuka pertama kali oleh Zainul Daulay dengan judul artikel, *Reviewing Capital Punishment for Apostasy*. Zainul menuturkan alasan kenapa dalam hukuman mati sangat penting dalam agama Islam. Pendekatan kesejarahan yang digunakannya memberikan sumbangsih menarik dalam kajian-kajian terkait hak asasi manusia.

Ulasan kedua oleh Suharizal dengan judul, Problem Rekrutmen dan Koalisi di Tingkat Partai Politik Pada Pemilihan Umum Kepala Daerah; (*Evaluasi Pilkada 2005-2008*), merupakan kajian ketatanegaraan yang sangat menarik. Menceritakan permasalahan koalisi yang berkembang dalam pemilihan umum kepala daerah.

Dilanjutkan kemudian dari pemikiran Charles Simabura dengan judul artikel, Mekanisme Konsultasi Publik Sebagai Wujud Partisipasi Masyarakat Dalam Penyusunan Peraturan Daerah. Charles menuturkan betapa pentingnya keterlibatan

partisipasi publik dalam pembentukan peraturan perundang-undangan terutama penyusunan Perda.

Keempat, terdapat kajian klasik politik ketatanegaraan mengenai konsep kedaulatan rakyat. Artikel itu disusun dari hasil penelitian Yordan Gunawan dan Alex Adi Iskandar dengan judul artikel, Implementasi Konsep Kedaulatan Rakyat Dalam Sistem Ketatanegaraan Pasca Amandemen UUD 1945.

Veri Junaidi dalam artikel kelima yang berjudul, Kebijakan Hukum Pemilukada 2010 dan Permasalahan Hukumnya, mengurai bagaimana maraknya Pemilukada di tahun 2010 bisa menjadi permasalahan serius. Uraian Veri menarik sebagai referensi Pemilukada di Indonesia.

Artikel keenam ditulis oleh Yance Arizona berjudul, Konstitusionalitas Noken: Pengakuan model pemilihan masyarakat adat dalam sistem pemilihan umum di Indonesia, merupakan tuturan yang menarik pasca putusan MK dalam kasus Pemilu di Yahukimo, Provinsi Papua. Menurutnya pengakuan akan Pemilu “gaya” Yahukimo tersebut memperlihatkan penghargaan yang tinggi terhadap hukum adat yang hidup di masyarakat.

Bagian akhir dari jurnal ditutup dengan tulisan Zhauri Ismadhani dengan judul, IMPLEMENTASI PENGAJUAN CALON PERSEORANGAN PADA PILKADA KOTA PADANG, yang merupakan hasil penelitian lapangan. Tulisan ini menarik untuk melihat realitas calon perseorangan dalam gejolak demokrasi tingkat local.

Tulisan-tulisan di atas diharapkan dapat bermanfaat bagi para penggali kajian ketatanegaraan di Indonesia. Semoga dengan terbitnya jurnal kali ini, produktivitas penulisan terkait hukum tata Negara terus berkembang di Indonesia.

Demikian, semoga puas, kami berharap kritik dan saran yang membangun. Terima kasih.

Hormat,

Redaksi Jurnal Konstitusi

Pusat Studi Konstitusi (PUSaKO) Fakultas Hukum Universitas Andalas

REVIEWING CAPITAL PUNISHMENT FOR APOSTASY

Zainul Daulay

Abstract

Hukuman mati bagi orang murtad (keluar dari agama) selalu menjadi isu kontroversi, terutama ketika hal itu bersentuhan dengan isu-isu terkait perlindungan hak asasi manusia. Artikel ini bertujuan untuk mendiskusikan sebuah kritik terhadap hukuman mati bagi orang yang murtad sebagai sebuah "ijtihad" terutama terkait pada sebuah bentuk penghukuman dalam kategori "hudud". Beberapa isu yang akan dituturkan dalam artikel ini adalah: (i) analisa hukum dalam alasan mendasar dari hukuman mati bagi seseorang yang murtad; (ii) hukuman mati dan desakan untuk penegakan hak asasi manusia. Agar diskusi terkait lebih nyata, artikel ini akan melakukan studi perbandingan yang didasari pada pendekatan menurut sejarah (diachronic). Metode tersebut akan lebih fokus kepada latar belakang sejarah dari hukuman mati dari masa ke masa, semenjak zaman Rasullullah S.A.W. Akhirnya, hal itu akan memberikan pandangan bahwa hukuman mati bagi orang yang murtad dapat dihargai dan dipahami dengan didasari alasan yang dalam, situasi dan kondisi tertentu. Penghargaan yang didasari dari pendekatan tersebut akan memberikan sebuah solusi alternatif yang baru untuk membawa Islam sebagai sebuah agama penuh damai dalam menghadapi isu-isu kontemporer dalam era modern saat ini.

Kata Kunci: Hukuman mati, Murtad, Hak Asasi Manusia.

1. Introduction

Classical Moslem scholars¹ generally classified apostasy² as a part of *hudud* (sing. "hadd"—the punishment). Till now, those scholar's ideas and thoughts have strong influence in Moslem countries which applied Shari'ah as main legal system. Under Shari'ah, a man who apostates can be punished by capital punishment. A Moslem is not allowed to change or revert from being a Moslem whether he is born as a Moslem or he converted to Islam from another religion. The '*hadd*' prescribed for apostasy shall be inflicted on someone who apostates from Islam. This is based on the *hadith* as the Prophet is reported to have said: 'whosoever changes his religion (revert from Islam) kill him'.³ However, there is no specific order in the Koran to punish an apostate. Most classical ulema have referred to some indirect verses of the Koran to support their thoughts that apostasy is punishable by capital punishment as a part of *hudud*.⁴

The implementation of the capital punishment for apostasy is always becoming controversial issue.⁵ From human

1 In this paper, the classical moslem scholar refers to the four leading Islamic legal scholars (fuqaha) such as: Imam Hanafi, Imam Malik, Imam Syafi'i and Imam Hambali.

2 The apostasy, in Arabic laguage, is *riddah* or *irtidad* from the root *radd*, which literally has meaning to 'retreat', to 'retire', to 'withdraw from' or 'fall back from'. *Murtad*, the active participle of *irtadda*, means 'one who falls back from'. Apostasy, in Islamic jurisprudence is "renunciation or abandonment of Islam by one who professes the Islamic faith". It may be committed whether by intention, by an action, or by a statement. Thus, a Moslem who refuses the Islamic faith and/or converts to another religion is qualified as an apostate. The apostasy constitutes one of the subjects that classified as a crime in Islamic law. See: S.A. Rahman, *Punishment of Apostasy in Islam*, Kitabbahavan, New delhi, 1996, p.9.

3 Hadith Al Bukhari.

4 M. Abu'l-A'la Maundudi has referred to Taubah, verses 11-12 and Muhammad Hamidullah, has quoted al Midah, verse 54 and al-Ahzab verse 57.

5 Some groups of ulama maintain that the apostasy is a crime which is classified in *hudud* that should be punished. However, they pointed out that the type of its punishment should be grouped in *ta'zir*. This is because the punishment to apostasy is not certainly determined in the Koran and the Sunnah of the Prophet. In addition, the hadith does not order to apply the capital punishment to an apostate because

right perspective, it is divergence with religious freedom and it is likely to be contra-productive against the holy mission of Islam as, "*rahmatan lil alamin*". Moreover, there is no consensus among ulama on the death punishment for apostasy. For that reason, it is important to note and scrutinize the Koran as the main resource of Islamic jurisprudence to appreciate and review the capital punishment of apostasy.

2. Is Capital Punishment for Apostasy based on the Koran as the main resource of Islamic Jurisprudence?

As having mentioned above that there is no specific statement or order in the Koran to punish an apostate by the capital punishment. From time to time, since the classical Islamic scholar era, the capital punishment is maintained and defended by judgment of ulemas. The Ulema's judgment is based on indirect verses of the Koran and hadeeth which mention about the capital punishment for apostate. However, in order to appropriately appreciate the position of the capital punishment in Fiqh, it would be wise if we apprehend the background, situation and condition when the hadeeth stated by the Prophet S.A.W. It is necessary to be understood that the instruction to take life of any apostate is not caused by his will to revert from Islam, but it is because of the danger of the trait (*baghy*) of the apostate for the Moslem community. This point of view is relevant to Ibn Taimiyah's view on the hadeeth concerning the apostate. Taimiyah refers to the hadeeth which stated that "the life of a Moslem can be taken if he commits adultery, murder or leaves his religion". He further explains that this hadeeth is especially towards a traitor or *baghy* and not against apostate.⁶ It means that if an apostate does not trait

but he leave his religion (Moslem), but the order is aimed at blocking the apostate to threat Moslem community or to committ the offence of treason (*hirabah*). Under Fiqh, principally, the death penalty can be applied only in the following crimes, (i) murder (*qisas*), (ii) *alhirabah*, and (iii) highway robbery (*qoetta' tariq*).

⁶ Pawancheek Marican and Mohamed Azam Mohamed Adil, "Aposty and

or threats Moslem community, the capital punishment cannot be applied.

The above argument shows that the capital punishment for apostasy is not directly based on the Koran, but it is merely depend on ijtihad of Islamic legal scholars. This can be seen from various different decisions concerning the apostasy. Therefore, the degree of the apostasy case is not categorized into hudud, but it is classified into ta'zir in which a judge plays a significant role in determining the quality of the punishment on the apostasy.

3. Basic Reason of Punishment for Apostasy

In Fiqh, Moslem legal scholars classify the substance of Fiqh into four chapters: (i) devotion; (ii) transaction; (iii) munakahat; (iv) punishment. Punishment is divided into three classes: (i) Hadd, (ii) Qisas, and (iii) Ta'zir. Firstly, "hadd" means an unalterable punishment provided by the Koran or a Sunnah of the Rasulullah for a crime.⁷ Hadd is fixed by Allah because it is His right (Haqullah). It cannot be increased, decreased, altered or emitted by anyone ---including the head state of an Islamic Country. Traditionally, according to Moslem legal scholar, hudud consists of seven kinds of crimes:⁸

- 1) Adultery, for which the adulterer must be stoned;
- 2) Fornication, for which the guilty persons must receive

Freedom of Religion in Malaysia: Constitutional Implications", in Eugene Cotran and Martin Lau, (Eds.), *Yearbook of Islamic and Middle Eastern Law*, Vol. 11, 2004-2005, p. 190. See also: S.A. Rahman, *Punishment of Apostasy in Islam*, Kitabbahavan, New delhi, 1996, p.54.

7 Pawancheek Marican and Mohamed Azam Mohamed Adil, "Aposty and Freedom of Religion in Malaysia: Constitutional Implications", in Eugene Cotran and Martin Lau, (Eds.), *Yearbook of Islamic and Middle Eastern Law*, Vol. 11, 2004-2005, p. 189.

8 Ahmad A Galwas, *The Religion of Islam, A Standard Book, Companion and Introductory to the Koran* Vol. II, 4th Edition, 1969, p. 103.

one hundred strips;

- 3) The false accusation of a married person with adultery, for which the offender must receive eighty strips;
- 4) Apostasy which is punishable with death;
- 5) Drinking intoxicating liquor; for which the offender must receive eighty lashes
- 6) Theft, which is punished by cutting off the hand;
- 7) Highway robbery, for robbery only the loss hands and feed, and for robbery with murder death, either by sword or crucifixion.

Secondly, "*qisas*" literally means retaliation. It is punishment, which although fixed by the law, can be remitted by the person offended against, or in the case of a murdered person, by his heirs. It is applicable to cases of murder and wounding.

Thirdly, *ta'zir* is the law that governs offences which punishment is left to the discretion of the judge. The traditional ulama have qualified the apostasy in the hadd classification. Because the hadd is a right of Allah, they must refer the punishment for apostasy to Koran or Sunnah. Based on the hadeeth they have applied the death punishment for an apostate who refuses to repent should be killed. It is a logic consequence of the qualification that the apostasy is part of hadd. They argue that act of leaving Islam is a crime.

By scrutinizing the above description, principally there is no strong and accurate legal reason to posit the punishment to apostasy into hudud. This is because the punishment of the apostasy can be changed based on several indicators, such as: (i) background, (ii) situation, (iii) condition and (iv) impact of the apostasy to Moslem community. This argument strengthens my position statement that the punishment to apostasy is in the *ta'zir* domain, not *hudud*. If there is capital

punishment applied to the apostasy case, it is merely a judge's decision considering dangerous impact of the apostasy to Moslem community.

4. The Apostasy in Koran and Practice: State of the Art

There is no specific reference to the death punishment in the Koran. As far as the Koran concern, there are only three kinds of punishment for apostasy, as follow:

- 1) The curse of Allah and the angels (*laknatullah wal malaikah*);
"But those who reject faith (demonstrate in their persisting in the concealing the truths) and die unbelievers, on them is curse of God and the angels, and all humankind." (Albaqarah;161)
- 2) Wroth of Allah (*gradaballah*);
"For those –their compense is that on them rests the curse of God, and of angles and of humankind, all together." (Ali Imran; 87)
- 3) He/She lost his/her deeds in the life and in the hereafter;
 - a. *"...Whoever of you turns away from his Religion and dies an believer- those are they whose works have been waste in both the world and the Hereafter, and those are the companions of the Fire; therein they will abide."* (Al Baqarah; 217);
 - b. *"Those are the ones whose works have been wasted in both this world and the Hereafter, and they have no helper (to restore their works to their benefit and save tem from punishment)." (Ali Imran ; 22)*

Having mentioned all punishment of the apostasy in the Koran, there is no single verse provides neither indicate direct or indirect death penalty for apostasy. In fact, the apostasy is treated as a sin. It is because the act of apostasy is a matter of

freedom of religion or faith. As far as, apostates do not insult, revile or ridicule Islam, they will not be punished in this world because Allah will punish them in the hereafter.

In practice, the application of the capital punishment to apostasy is different from country to country. It is caused by different consideration of the respected country to categorize punishment to apostasy into hudud or ta'zir. By referring the practical domain in several Moslem countries, for example Malaysia, the punishment to apostasy can be categorise into ta'zir. This can be seen from the effective state laws. Another different perspective, can be seen from Indonesia which introduce Pancasila and the 1945 Constitution as the grand norm of the Indonesian positive laws, where the apostasy is not regulated under the Indonesian positive laws. Thus, clearly the punishment of apostasy, either at the dogmatic level or practical level, is in ta'zir domain.

5. Conclusion

Substantially, the capital punishment to apostasy is not specifically regulated in the Koran. It is recognized that the capital punishment is regulated in the hadeeth. However, it must be interpreted based on situation, condition, and the impact of the apostasy to Moslem community. Therefore, procedurally, the punishment to apostasy is categorized into ta'zir. Thus, it was judge who determines the punishment of the apostate. The most importantly, the punishment for apostasy must be appreciated and understood based on basic reason, situation and condition and its impact on the Moslem community. The appreciation based on this approach will open up an alternative way to lead Islam as a compatible religion to solve any contemporary issue.

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Hadith Al Bukhari.

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Ahmad A Galwas, *The Religion of Islam, A Standard Book, Companion and Introductory to the Koran* Vol. II, 4th Edition, 1969.

"The three - the composed of man and woman, of God, and of angels and of mankind, all together." (Al Isra' 87)

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