

Regulation Capital Punishment Criminal Acts of Terrorism Based on Law Number 15 of 2003 and Islamic Law

Kailani Fatriansyah Purwantoro

Doktoral Student of Law at Law Faculty of The Jambi University, Telanaipura Jambi 36122 Indonesia

Abstract

Terrorism is a criminal offense that is very frightening for the citizens of the world community and the people of Indonesia. The Republic of Indonesia as mandated by the Act of 1945 shall protect the whole Indonesian nation and the entire country of Indonesia. Therefore the state is obliged to protect all citizens from any threat of terrorism both nationally and internationally.

Keywords: Terrorism

1. Introduction.

One of the interference and the threat is a crime of terrorism. Terrorism is an international crime that endanger world peace and security and constitutes a serious violation of human rights, especially the right to life. The series of terrorist acts that occurred in the territory of the Republic of Indonesia has resulted in loss of life regardless of casualties, widespread public fear, and loss of property so that a broad impact on social, economic, political and international relations.

Terror has been a terrible part of our life as a nation. The series of bombing that occurred within the past five years, raising our awareness of the seriousness of the impact and the complexity of efforts to eradicate terrorism. Typologically, terrorism has ravaged the certainty of life of citizens, producing fear, fomenting anxiety, turn off the creativity and values that humanize humans. Acts of terror clearly harassing human values, dignity of the nation and religious norms because of what was done by terrorists is not only unlawful, but also depriving, damaging and destroying the peace of life and creates tremendous fear.¹

The phenomenon is more horrible when we know that the terrorists are no longer a small group that moves with the conventional mode but have become part of organized international terrorism network steadily, supported by finance, technology and sophisticated infrastructure. The quality of the crime of terrorism has become a very serious threat and terrible for human life.²

The terrorist group is also supported by the quality of trained human resources, fanaticism, militancy and team spirit high. With such a profile, it is not surprising that these terrorist groups are often successfully operate with the modus operandi of unpredictable, intricate, neat and discreet, even in a state of security alert status.

Based on the description above, it becomes clear that the crime of terrorism can no longer be classified as an ordinary crime, which can be eradicated by conventional means. Judging from its characteristics, terrorism has become a specific crime that is extra ordinary crime, thus requiring extra ordinary measure.

In the perspective of Indonesian law, a criminal of terrorism regulated in Law Number 15 Year 2003 concerning Stipulation of Government Regulation in Lieu of Law No. 1 of 2002 on Combating Criminal Acts of Terrorism, Being Act (Law Act Eradication Criminal Acts of Terrorism).

Considering such serious consequences occur from an act of terrorism, especially when seen from the perspective of victimology or knowledge about a victim of crime, then it becomes understandable if the perpetrators of criminal acts of terrorism, the Indonesian criminal law implementing the toughest criminal stelsel, which is a form of capital punishment.

In addition to the positive law, Indonesia as a country with a majority of Muslims the greatest in the world, recognize that the capital punishment be warranted in the national legal system for a number of specific crimes. That is because disturbing public order, threatening human life and stability of the country. "Muslims consider it necessary to apply the capital punishment because Islam also recognize the existence of the death penalty, such as *qishas* and *stoning*".³

Islam is in line with the Act because in Islam that the acts of violence so as to cause the loss of the lives of others, then the most appropriate punishment is the capital punishment. Objectives of Islamic Shari'ah, for the benefit of the people.⁴

Based on the description above, the capital punishment is applied to all appropriate actors, is recognized as a criminal stelsel not only by the positive law of Indonesia, but also accepted as a punishment in Islamic law.

¹Djoko Prakoso, *The Capital Punishment In Indonesia*, Ghalia Indonesia, Jakarta. 1984, Pg. 10.

²*Ibid*, Pg. 3.

³M. Hasbi Ash-Shieddiqy, *Philosophy of Islamic Law*, Bulan Bintang, Jakarta, 1996, Pg. 188.

⁴Abdul Wahab Khalaf, *Science Ushul Fiqh*, Daral al-Qalam, Kuwait, 1990, Pg.198.

The formulation of capital punishment as an alternative punishment, in addition to life imprisonment and imprisonment for a certain time, on the one hand can be seen as a gesture for the judge to actually apply the capital punishment are carefully and selectively. That is, the capital punishment is a criminal who has properties ultimum remedium or a last option, after the perpetrators of terrorism, the judge did not feel right to apply temporary imprisonment, or life imprisonment.

But on the other side, the formulation of the alternative punishment, is potentially causing legal uncertainty and injustice. That's because the capital punishment provisions in the Law on Combating Criminal Acts of Terrorism, does not contain a provision for a clear and unequivocal about the criteria or restrictions are clear and explicit, when a perpetrator of terrorism, should be sentenced to death.

2. Results And Discussion.

a. Regulation Capital Punishment Criminal Acts of Terrorism Based On Law Number 15 Of 2003 and Islamic Law.

Previously described just how seriously the terrible impact caused by the criminal act of terrorism. Terrorism has shown movement in fact a tragedy on civilization and humanity. The escalation of the destructive impact caused by these crimes have touched multidimensional human life, identity and dignity as a civilized nation and ideals in order to live in peace with other nations.

Terrorism has devastated the certainty of life of citizens, to make people fear, create anxiety, turn off the creativity and values that humanize humans. Acts of terror clearly harassing human values, dignity of the nation and religious norms because of what was done by terrorists is not only unlawful, but also depriving, damaging and destroying the peace of life and creates tremendous fear.¹

Because the impact of the crime of terrorism is so seriously and horrible It is appropriate for perpetrators of criminal acts of terrorism shall be punished with the most severe, ie, was sentenced to death. Such criminal punishment, believed to effect deterrence, to prevent others from doing the same thing, so that capital punishment can be used as an effective means of law in combating terrorism.

To obtain the results of the analysis is comprehensive, the assessment carried out on each source, is a source of positive law in Indonesia and the sources of Islamic law. The analysis is intended to determine how clear and explicit arrangements regarding the norms of criminal offense in Indonesia criminal law, and how the views of Islamic law against pengenaan death penalty for criminal acts in general, and the criminal acts of terrorism in particular.

1). Norms of Capital Punishment Against Perpetrators of Terrorism According Positive Law Indonesia.

According of Article 10 of the Criminal Code, the capital punishment is a criminal stelsel recognized as the highest in the Indonesian criminal law. As for the threat of capital punishment can be applied to the 10 (ten) common criminal acts in the Criminal Code and a number of specific criminal acts as stipulated in the 9 (nine) criminal law beyond the Criminal Code. One of the criminal act punishable by capital punishment outside the Criminal Code is a criminal act of terrorism, as referred to in Article 6, 8, 9, 10, 14 and Article 16 of the Law on Combating Criminal Acts of Terrorism.

Inside those chapters, stipulate that the capital punishment can be imposed on the perpetrators of criminal acts of terrorism, which did 6 (six) form a criminal act of terrorism, which includes the act using force or threat of violence create an atmosphere of terror or fear of the widespread or cause the victim is massive, by robbing the independence or the loss of life and property of others, or cause damage or destruction to vital objects are located or to the environment or public facilities or international facilities, committed a criminal act of terrorism against aircraft and infrastructure of air transport, insert / remove to / from Indonesia firearms, explosives, and hazardous materials another with intent to commit criminal acts of terrorism, use of chemical weapons, biological weapons, radiological, microorganisms, radioactive or components in committing a crime terrorism, lanning and / or mobilizing others to commit terrorist acts, or provide assistance, convenience, facilities, or information leading to criminal acts of terrorism. Against such actions, the death penalty is the highest criminal alternatives that may be imposed, in addition to imprisonment for life or for a certain time, a maximum of 20 (twenty) years.

The results obtained from the above definition, obtained two (2) conclusions. First, the positive law of Indonesia recognizes the existence of capital punishment as part of a system stelsel or criminal sanctions which can be imposed on the perpetrators of criminal acts of terrorism. Second, stelsel capital punishment in the penal provisions of terrorism in Indonesian positive law, is an alternative to criminal sanctions. Due to the existence of capital punishment stelsel so, then the assessment of urgency or how important the application of capital punishment against perpetrators of criminal acts terrorism, it has been the domain of this study. The main focus of this research is how the application of the capital punishment to the crime of terrorism that recognized the Indonesian positive law, is able to be a means of effective law enforcement strict laws and harsh against the

¹Akhiar Salmi, *Existence of Death Penalty*. Aksara Persada, Jakarta, 1985, Pg. 20.

criminal acts of terrorism, so that the criminal offense in question can be eradicated or at least minimized. However, law enforcement must remain within the framework of respect for human rights, which upholds the principles of justice, legal certainty and legal expediency.

Associated with the conclusion of the second, that stelsel capital punishment in the penal provisions of terrorism in Indonesian positive law, criminal sanctions alternatively, it can be said that stelsel capital punishment is not a penalty of a single, or a criminal penalty the only one that can be imposed on the perpetrators of criminal acts of terrorism who commit a criminal act as referred to in Article 6, 8, 9, 10, 14 and Article 16 of the Law on Combating criminal acts of Terrorism. In other words, in deciding the case of criminal terrorism, the judge can still choose another crime, namely imprisonment for life or for a certain time, a maximum of 20 (twenty) years.

The formulation of capital punishment as an alternative punishment, in addition to life imprisonment and imprisonment for a certain time, on the one hand can be seen as a gesture of clear and unequivocal Judge to actually apply the capital punishment are carefully and selectively. That is, the capital punishment is a criminal nature ultimum remedium or final or ultimate weapon selection, after the perpetrators of murder, the judge was not appropriate to apply temporary imprisonment, or life imprisonment.

In other cases, it could be a Judge carefully convict based on the role of each actor murder case involving a number of actors were more than 1 (one) person. But perhaps also due to factors that are beyond the fact of the trial judge and outside of itself, such as the pressure of society and the mass media are not proportional. The judge in question then generalize the imposition capital punishment to all perpetrators of a criminal case of terrorism.

It is recognized that the disparity Judge's decision is a necessity. Criminal procedure law expressly provides that the judge in deciding the case, based on the belief of the facts obtained in court. Therefore, the Judge has the full authority or discretionary powers to choose alternative punishment will be imposed on an accused. However, surrender completely to the belief the judge to decide on capital punishment, without termination or criteria are clear and unequivocal, concerning restrictions or criteria for the imposition of capital punishment, perceived as something that is not very precise. "Freedom" Judge in deciding the case a criminal act of terrorism, without setting clear and unequivocal, can cause terhadap doubt the objectivity of a capital punishment verdict.

In addition, it would be a collective understanding that the imposition of capital punishment is a decision that concerns the life and death of a person. Judge's decision is not appropriate because of the absence of norms imposition of capital punishment in positive criminal law, will not be able to be repaired again. In turn, the capital punishment verdict would clearly harm the principles of justice, rule of law and benefit law, which precisely be the fundamental purpose of law enforcement itself.

At this point the formulation of a clear and unequivocal provisions on the criteria for the imposition of the death penalty to the crime of terrorism, it is important and determines the success of law enforcement. These conditions should be able to answer clearly and firmly, when a criminal offender should be sentenced to death or terrorism on how the criminal act of terrorism, the perpetrator shall be punishable by capital punishment.

Conditions were clear and firm, will serve as guidelines for law enforcement at all levels of the criminal justice process, especially for the Judges, the judges at first instance, Judge of Appeal, Supreme Court Judges, and Judges Reconsideration, to decide a criminal case of terrorism with seadil- fairness. That is, the clear and unequivocal criteria for the imposition of capital punishment, it will be more fair and definitely also to law implementation. Law with justice and absolute, it would bring the benefits of the law. With a clear and unequivocal criteria, the less likely misapplication of the law by law enforcement in the field. Thus, although it is still applying the death penalty to the crime of terrorism, the application of the capital punishment would be applied very selectively only to the perpetrators of criminal acts of criminal terrorism that actually meets the criteria established only.

1). Norm of Capital Punishment Against Perpetrators of Criminal Acts of Terrorism According to Islamic Law.

In granting the punishment it must be contained a benefit. Because punishment is a deterrent sinful deeds, antidote disobedience and avoid someone from committing a prohibited act. The penalty was also the guarantor of security, is to ensure the safety of lives, property, reputation, independence and honor.

Islamic law laid primarily on the basis of *maqasyid ash-Shari'ah*, namely related to nourish the soul, religion, intellect, lineage and property. With this goal would create the fifth public safety. A reward of earthly with the aim of maintaining the stability of the social order to achieve these objectives, the punishment must have some principles of which the determination of the criminal should be able to prevent people from committing crimes, if a crime has occurred, then the punishment will be expected to give lessons to the perpetrator and will be able to prevent others from doing the same act; and criminal provisions is a requirement

for the creation of social stability, light weight criminal depending on demands.¹ The Muslim jurists classify broad objectives of the Islamic penal code as follows:

- a). Guarantee the security of the necessities of life is the first and main goal of the shari'ah. In human life, this is an important thing, so it can not be separated. If these needs are not guaranteed, there will be riots and disorder everywhere;
- b). Guarantee the necessities of life (secondary purposes) or called hajjiat. With this guarantee will be spared the trouble of society and make life easy for them.
- c). Islam purpose of the legislation is to make various improvements. In this case, improvements include the meaning of the virtues, good manners, and every thing that complement living increase. The absence of improvement will lead to chaos as the absence of the necessities of life.
- d). The purpose of punishment in Islam is to creating peace of individuals and communities and preventing acts that could cause harm to society, both in terms of lives, property and honor.²

In Islam, terrorism called *Al-Irhab*, which is a phrase that has many meanings and images of different forms, but they all revolve around a phrase that means to frighten or intentionally disturb the stability of security threats.

Therefore, any form of crimes of acts of terrorism if it is associated with Islam, it is conflict with Islamic law would not be separated from its main source of the Al-Qur'an, Hadist, dan *Qiyas*. *Qiyas* is seeking law is a punishable in both the Al-Qur'an and the Hadist by comparing a specified law by *nas*. According to another definition is "to equate something that no existing physical defect nas legal because the law of *ilat*".³

Based on the above, it was concluded that, considering the serious consequences of the crime of terrorism against the benefit of the people, the Islamic law recognizes the existence of capital punishment as an option offense can be imposed against perpetrators of criminal acts of terrorism. Referring to the above analysis, it can be concluded end of this section that the positive law of Indonesia and Islamic law recognizes the existence of the death penalty as part of stelsel criminal can be imposed on the perpetrators of criminal acts of terrorism, as stipulated in Article 6, 8, 9, 10, 14 and Article 16 of the Law on Combating Criminal Acts of Terrorism.

Positive law or Islamic law, have the same view that the death penalty should be able to be an effective means of law enforcement nature firm and hard against the perpetrators of criminal acts of terrorism, while upholding human rights and the principles of justice. Law enforcement purposes such, considered to be difficult to achieve because of the vagueness of the norm in the formulation of the provisions on the positions of capital punishment as a punishment alternative, in addition to life imprisonment or criminal temporarily, without a guide convictions clear and unequivocal about the criteria or restrictions when terrorism a criminal offender should be sentenced to death. The weakness is very likely disparity raises the Judge's decision, which may lead to injustice and legal uncertainty, which in turn would weaken law enforcement against criminal acts of terrorism.

Based on data from 2005, 2006 and 2012 were obtained from the Prosecutor of the Republic of Indonesia, it still looks the imposition of the capital punishment to the crime of terrorism. In 2005, there were three people sentenced to death. In the period of 2006, there were three others were sentenced to death. While in the period of 2012 there were two people sentenced to death.⁴

In Bali bombing terrorist acts that occurred on October 12, 2002, a total of three (3) offender sentenced to death. The imposition of capital punishment is carried out because it proved to have planned and mobilize others to action they did. The provisions of this article is intended to *Actor Intellectual*. Purpose planned in this provision is an action that includes preparing physical, financial, and human resources that support terrorist acts they want. Meaning of mobilizing others are doing incitement and provocation to the achievement of a goal by giving gifts or money or promises.

In a group of terrorists, there are several levels of actors, namely on the first level are the terrorists in control of operations including planning and setting goals, superintendent of a terrorist group. This section is a relatively small part of its members, but it has enormous influence in the group. Associated with the Bali bombing terrorism, this part is done by Imam Samudera called the determinant planners target and controller operation. Meanwhile, Amrozi and Ali Gufron referred to as the planner of the bombing. Finally the Denpasar District Court decided to impose the death penalty for the three perpetrators of the Bali bombing terrorism.

The second level is the perpetrators field executive acts of terrorism. On the third level are active supporters who constitute substantial part in a terrorist group. Their task is to maintain the continuity of the activities of other parts of the field such as, provide and maintain communications networks, prepare and provide

¹Pipin Syarifin, *Criminal Law in Indonesia*, Pustaka Setia, Bandung, 2000, Pg. 18.

²Topo Santoso, *Grounding of Islamic Criminal Law: Enforcement of Shari'a in Discourse and Agenda*, Gema Insani Press, Jakarta, 2003, Pg. 19.

³Muhammad Abu Zahrah, *Ushul Fiqh*, trans. Saifullah Ma'sum, Pustaka Firdaus, Jakarta, 2000, Pg. 336.

⁴http://www.kejaksaan.go.id/laporan_tahunan.php?idc=7&idsc=5, accessed on July 10, 2016.

hiding places and places of planning, carrying out reconnaissance activities and providing funding and logistical support.

The imposition of the capital punishment for three (3) perpetrators of criminal acts of terrorism of the Bali bombing Judges have reasons and considerations alone. In the case of the Bali terrorist bombing, not all offenders sentenced to death.

Application of the severity of the sentence imposed for a judge necessarily conform to what is the motivation and the perpetrator inflicted. The judges may conclude and to consider its verdict on the evidence, facts or circumstances known during examination of the perpetrators before trial court. For evidence at present in the hearing must be inter-related with the evidence of the other evidence. This is done so that a judge can prove and provide the underlying belief of judges and judges on the conscience, without any interest whatsoever.

b. Concept of Criminal Policy The Capital Punishment Threats Against Perpetrators of Criminal Acts of Terrorism.

Associated with the implementation of the policy conception of capital punishment in terrorism who wish to put forward, this study departs from the assumption that the capital punishment will be effective and have a deterrent effect when applied selectively and carefully. To achieve the application of capital punishment is so, then the weaknesses in the Indonesian legislation, as has been discussed in the previous section, should be enhanced so that the legal norms are vague, can be clarified and emphasized.

Therefore, the weakness of the formulation of the provisions of Article 6, 8, 9, 10, 14 and Article 16 of the Law on Combating Criminal Acts of Terrorism, to be repaired, so that any provision which clearly and unambiguously about the criteria for when a person who has been proven legally and *teorisme* convince committing a crime, should be sentenced to death. The death penalty is needed, especially in Indonesia, but should apply *specifically* and *selectively*. Specific means that the death penalty is applied for serious crimes (heinous) include corruption, drug dealers, terrorists, serious human rights violators and murder. And what is meant by selective is that the sentence of death to be truly have proven quite convincingly in court (*beyond reasonable doubt*) that he is the culprit. For example defendant itself explicitly admitted his actions, all the evidence is "declared" the defendant as the perpetrator.¹

It is recognized that the above criteria can not yet represent the full limits can explain about when a criminal act *teorisme* should be rewarded with capital punishment. More in-depth studies are necessary to obtain the termination of the imposition of capital punishment is more precise and comprehensive than the conception proposed in this study. However, the main purpose of which would be submitted when there is a clear termination criteria for the imposition of the death penalty to the crime of terrorism, then the application of capital punishment will be closer to justice and legal certainty. Referring to the above analysis, it is concluded that capital punishment norms that should be applied is the criminal norm which is not an alternative punishment, but a single criminal firm and clear, and not be multiple interpretations. With such a norm capital punishment, law enforcement on the ground, especially judges have guidelines in dropping capital punishment against the perpetrators of criminal acts of terrorism. With the sentencing guidelines, expected disparity verdict against capital punishment to be low, so that the capital punishment will *penerapana* closer to justice and legal certainty.

3. Conclusion.

The arrangement of capital punishment against the perpetrators of criminal acts of terrorism in terms of Act No. 15 of 2003 and the Islamic law recognizes the existence of capital punishment as part of *stelsel* criminal can be imposed on the perpetrators of criminal acts of terrorism, as stipulated in Article 6, 8, 9, 10, 14 and Article 16 of the Law on Combating Criminal Acts of Terrorism. Positive law or Islamic law, have the same view that the death penalty should be able to be an effective legal means in strict law enforcement and hard against perpetrators of criminal acts of terrorism, while upholding human rights and the principles of justice. The purpose of the enforcement of such a law, considered to be difficult to achieve because of the vagueness of the norm in the formulation of the provisions on the positions of capital punishment as an alternative punishment, without sentencing guidelines are clear and unequivocal about the criteria when a criminal perpetrators of terrorism should be sentenced to death. The weakness is likely to lead to disparity Judge's decision, which may lead to injustice and legal uncertainty, which in turn would weaken law enforcement against criminal acts of terrorism.

Policy concept of the norm capital punishment should be applied in the Law on Combating Criminal Acts of Terrorism, is the norm sanction capital punishment is not an alternative punishment, but a single criminal firm and clear, and not be multiple interpretations. With such a norm capital punishment, law enforcement on the ground, especially judges have guidelines or guidelines in impose the death penalty against the perpetrators of criminal acts of terrorism. With the sentencing guidelines, expected disparity verdict against capital punishment

¹Supardi, "Pros Cons A Critical Assessment Implementation Death Penalty In Indonesia Especially Against Drug Crime" National Narcotics Agency,, Jakarta, 2007, Pg.23.

to be low, so that the application of the capital punishment will be closer to justice and legal certainty.

References

- Akhiar Salmi, 1985, *Existence of Death Penalty*. Aksara Persada, Jakarta.
- Abdul Wahab Khalaf, 1990, *Ilmu Ushul Fiqh*, Daral al-Qalam, Kuwait.
- Djoko Prakoso, 1984, *The Capital Punishment In Indonesia*, Ghalia Indonesia, Jakarta.
- Pipin Syarifin, 2000, *Criminal Law in Indonesia*, Pustaka Setia, Bandung.
- M. Hasbi Ash-Shieddiqy, 1996, *Philosophy of Islamic Law*, Bulan Bintang, Jakarta.
- Muhammad Abu Zahrah, 2000, *Science Ushul Fiqh*, trans. Saifullah Ma'sum, Pustaka Firdaus, Jakarta.
- Topo Santoso, 2003, *Grounding of Islamic Criminal Law: Enforcement of Shari'a in Discourse and Agenda*, Gema Insani Press, Jakarta.
- http://www.kejaksaan.go.id/laporan_tahunan.php?idc=7&idsc=5, accessed on July 10, 2016.
- Supardi, 2007, "Pros Cons A Critical Assessment Implementation Death Penalty In Indonesia Especially Against Drug Crime" National Narcotics Agency, Jakarta.