
Research Article

Law Policy Reformulation of Death Sentence in Positive Penal Law Based on Pancasila Values

Ira Alia Maerani¹, Eko Soponyono², Gunarto³, Sri Endah Wahyuningsih⁴

Faculty of Law, Universitas Sultan Agung Semarang, Indonesia

Abstract:

The idea from abolitionist to abandon penal law has arose the past few years in line with the strengthening of the idea of human rights. Including the idea to abandon death sentence. At present, there are at least 75 countries already removing death sentence for ordinary crime categories. However, here is still 68 countries that applies death sentence, and Indonesia is one of them. This normative juridical research aims to examine the legal policies of the execution of death sentence in Indonesia, to analyze the weaknesses of the law of execution of death sentence, and to reformulate the law of execution of death sentence based on the values of Pancasila. The results of the implementation of death sentence in Indonesia are regulated in Law no. 5 of 1969 jo Law no. 2 / Pnps / 1964, Weaknesses lies in the accuracy of the death sentence, the fears of executing innocent people, and the effectiveness of death sentence in providing deterrence as one of the purposes of punishment, death sentence is considered inhumane and ineffective. Reformulation of death sentence in Article 7 of Law no. 2 / Pnps / 1964 should be amended and amended so that the article, "Implementation of death sentence on pregnant women is done until the woman gives birth and breastfeeds her child for 2 (two) years.

Keywords: Reformulation, Implementation, Death sentence, Pancasila Values

INTRODUCTION

Along with the strengthening of the idea of human rights enforcement, came the idea of abolishing the implementation of death sentence in penal law implementation in several countries. As of this writing, almost all countries on the Continent of Europe have abolished death sentence except Bellarusia. As the heaviest penalty, of course, this death sentence becomes a frightening things. Therefore, abolitionist that are against the application of death sentence states that death sentence is incompatible with human rights. Given the right to life is a right that can not be reduced in any condition (non derogable rights).

Although 75 countries have abolished death sentence, but the State of Indonesia still maintains the application of death sentence along with 68 other countries. With regard to the policy of maintaining death sentence in the execution of death sentence, the state of Indonesia must have a philosophical, juridical and sociological basis behind this policy. Although many people judge that death sentence is not in accordance with the right of human life. Where the right to life is a right that can not be reduced in any condition (non derogable rights).

For that we need a hard effort to defend the right to life. Especially when the international world is experiencing tremendous miserable human suffering. Torture and murder of some people in Myanmar (Burma) and in some Middle Eastern countries. This condition is very apprehensive, hurts the sense of humanity and disrupt the peace and stability of the

international world.

Behind the current story of humanitarian turmoil is of course interesting to examine how the importance of the application of death sentence for human survival? Still important is death sentence applied in the current era?

The facts on the ground say that still the urgency of the implementation of death sentence is applied. So there is no killing of other human beings due to differences in religion, race, ethnicity, or political interests, economic and social status. This must be underlined explicitly that the right that can not be reduced under any circumstances should not be contrary to the rights of others. For that we need to set the most severe sanctions in order to defend this right to life. Crime sanctions in question are the sanctions of death sentence and the execution of death sentence in order to respect the human rights of others.

The penal acts of Narcotics, Psychotropics and Terrorism also include a crime offense in Indonesia which in it is regulated on the imposition of death sentence for those who are proven to commit a crime. This penal act allegedly destroys human values.

Therefore, the Unitary State of the Republic of Indonesia (NKRI) in the highest constitution namely the 1945 Constitution of the Republic of Indonesia (UUD NRI) regulates the right to life in Articles 28A, 28H and 28J. Article 28J Paragraph (1) of the 1945 Constitution of the Republic of

Indonesia states that everyone is obliged to respect the human rights of others in the order of social life, nation, and state.

In order to order the life, nation and state, then the occurrence of crime in society should be avoided. Legal instruments take on the role of protectors and protectors of society in order to maintain order, security and prosperity. Therefore, the State of Indonesia until now still impose death sentence as one of the penal types because it is considered still there is a moral basis of the enactment of this death sentence. For proving it becomes the jurisdiction of penal procedure.

However, the criticism of the abolitionist school is worth noting too. Given the existence of weaknesses to the implementation of death sentence. Such concerns impose death sentence on wrong people, accuracy of sentence of death, and considered inhumane. For that there is an input to the implementation of death sentence is adjusted with the values in Pancasila, namely the value of divinity, humanity, unity of Indonesia (nationalism), populist and social justice. Therefore, it is expected that death sentence will be penalized in an alternative manner even though it is not abolished in the legislation product but limited to its application.

Basing on the above background needs to be studied in depth regarding the legal policy of the execution of death sentence in Indonesia's current positive penal law, its weaknesses and the reformulation of the legal policy of the implementation of death sentence based on Pancasila values in Indonesia in the future.

METHOD OF RESEARCH

a. Method of Approach

The problems in this study includes the central problem of penal policies, as part of the crime policy. Therefore, the method of approach can not be separated from a policy-oriented approach method¹. The essence of this research is to analyze the legislative / formulative policy in establishing and formulating the crime law system / penal system which includes crime law. Therefore the approach in this research is normative law research. In normative law research, several approaches are used, namely statute approach, conceptual approach and comparative approach.²

b. Specification of Research

The specifications of the research used in this research are normative legal research or literature legal research. Normative legal research or literature proposed by Soerjono Soekanto includes research on the horizontal synchronization level and comparative law.³

RESEARCH RESULT AND DISCUSSION

1. Implementation of death sentence in Indonesian's Positive penal Law

In terms of penal law enforcement policy as a series of processes, are implemented through three stages of policy as follows: (1) legislative or formulative policy stages, (2) applicative or judicial policy stages and (3) executive or administrative policy stages.⁴

Penal Law Implementation in the form of death sentence in Indonesia is currently regulated in Law no. 5 of 1969 on the Statement of Various Stipulation of President and Presidential Regulation as Law. Determination of the President in question is Presidential Decree no. 2 of 1964 on the Procedures of the Penal Implementation Done by the Courts in the General and Military Courts.

The above provisions regulate the implementation of death sentence carried out by being shot to death. Performed by a firing squad team from Mobile Brigade (Brimob) consisting of 12 enlisted men, 1 NCO, and 1 officer. This firing squad is under the orders of the Prosecutor.

The death sentence is a punishment or verdict handed down by the court (or without trial) as the most severe punishment on a person for his actions.⁵

The provisions of the execution of death sentence shall be done by shot to death. This changes the provisions of Article 11 of the Penal Code (KUHP) which reads, "The death sentence is executed by the executioner at the hanging point by tying the rope attached to the gallows on the convict's neck and then dropping the board where the convict stood. "The execution of death sentence by the executioner on the gallows is considered incompatible with the progress of civilization. Therefore it is necessary to make adjustments as regulated in Presidential Decree no. 2 Year 1964.

While awaiting the execution of death sentence, the convicted person is detained in prison or other place specially appointed by the Prosecutor / Prosecutor. Three times twenty-four hours (3x24 hours) prior to the execution of death sentence, the High Prosecutor / Attorney shall inform the convicted person of his or her death sentence. If the convicted person wishes to bring something up, then it is notified to the attorney general / prosecutor. If the convicted prisoner is pregnant, then the crime shall be executed forty (40) days after the child is born. The convicted person may be sentenced to stand, sit, or kneel. If it is deemed necessary, the High Prosecutor / Attorney may order the convict to be tied up by his hands and feet or tied to a special backrest made for it.

Based on Perkap (Regulation of the Chief of Police of the Republic of Indonesia) no. 12 Year 2010 on the Procedures of the Implementation of Penal and Presidential Decree No. 2 /

¹ Barda Nawawi Arief, 1996, *Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara*, Badan Penerbit Universitas Diponegoro, Semarang, p. 8

² Johnny Ibrahim, 2005, *Teori dan Metodologi Penelitian Hukum Normatif*, Bayumedia Publishing, Surabaya, p. 444.

³ Soerjono Soekanto, 1985, *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*, PT Raja Grafindo Persada, Jakarta, p. 14.

⁴ Barda Nawawi Arief, 1998, *Beberapa Aspek Kebijakan dan Pengembangan Hukum Pidana*, PT Citra Aditya Bakti, Bandung, p. 30.

⁵ http://id.wikipedia.org/wiki/Berkas:Dead_Penalty_World_Map_According_Amnesty_International.svg diunduh tanggal 24 Nopember 2016 jam 16:33 WIB.

PNPS / 1964 on the Procedures of Death sentence verdict by the Courts in the General Courts and Military Courts, not all weapons filled with live ammunition. Only three long-barreled rifles filled with live ammunition, while nine other rifles are filled with empty bullets. The series of preparations and execution of the death sentence according to the regulation are as follows :

1. A maximum of three days before the execution, the convict must have been notified.
2. The convict shall be entitled to deliver their final message.
3. The convict came to the location with sufficient escort accompanied by clergy.
4. The convict has the right to choose whether to close his or her eyes or not.
5. The shooter team occupies the position with a long rifle, containing three sharp bullets and nine hollow bullets.
6. The range of fire ranged from five to ten meters.
7. The doctor gives a black mark on the convict's shirt just in the position of the heart as a target shot.
8. The executive commander uses sword to hint the firing squad to shoot simultaneously.
9. The executing commander, also the executor, and the doctor checks the convicted person.
10. If there is still a sign of life, the executor orders the executing commander to end the firing.
11. The execution is completed if the doctor declares that there is no sign of life to the convicted person.

In the Implementation of death sentence there is a debate between the agreed and the counter to death sentence. However, opinions that do not agree with the death sentence, but the fact of formal jurisdiction of death sentence is justified. Several articles in the Penal Code that regulate penal offenses that are subject to death sentence, for example :

1. An act of Coup to kill the head of the state (Article 104 of the Penal Code)
2. Inviting foreign countries to attack Indonesia (Article 111 Paragraph (2) of the Penal Code)
3. Giving help to the enemy of Indonesia in time of war (Article 124 Paragraph (3) of the Penal Code)
4. Killing the head of a friendly country (Article 140 Paragraph (1) of the Penal Code)
5. Preliminary murder (Article 140 Paragraph (3) and Article 340 of the Penal Code)
6. Theft by two persons or more friends, at night or by the way of dismantling and so forth, which carries resulted in a severe injury or died victim (Article 365 Paragraph (4) of the Penal Code)
7. Piracy at sea, on the coast, on shore, and resulted in a dead victim (Article 444 of the Penal Code)
8. In war time advocated for riots, insurrections, etc. among workers in state defense companies (Article 124 bis of the Penal Code)
9. In times of war deceiving when conveying the need of the armed forces (Articles 127 and 129 of the Penal Code)

10. Extortion by appeals (Article 368 Paragraph (2) of the Penal Code).⁶

2. The Weaknesses of the current Indonesia's death sentence execution

Attempts to overcome the problem of crimes have been done in many ways, but the results have not been satisfactory. It is interesting what Habib-Ur-Rahman Khan has to say in his article entitled "Prevention of Crime - It is The Society That Needs" The Treatment "and Not The Penal" as follows :

*"The modern world is fully aware of this acute problem. People are busy day and night doing research work, holding seminars, international conferences and writing books trying to understand crime and its causes in order to control it. But the net result of all these efforts is to the contrary. Crime marches in."*⁷

One crime prevention effort is to use penal law with penalty sanction. However, this effort is still often questioned. The debate over the penal role in dealing with this penal problem, according to Inkeri Anttila, has been going on for hundreds of years.⁸ According to Herbert L. Packer, attempting to control anti-social behavior by imposing a penal on a person guilty of a penal offense is "a social problem that has an important legal dimension."⁹

The use of legal remedies, including penal law, as an attempt to address social issues is included in the field of law enforcement policy. In addition, because of its purpose to achieve the welfare of society in general, then the policy of law enforcement is included in the field of social policy, namely all rational efforts to achieve the welfare of society. As an issue that includes a matter of wisdom, the use of penal law is not necessarily a requirement. There is no absolute discretion in the field of wisdom, because in essence in the matter of wisdom people are faced with the problem of judgment and selection of various alternatives.¹⁰

⁶ Bambang Waluyo, 2014, *Pidana dan Pemidanaan*, Cetakan Keempat, Sinar Grafika, Jakarta, p. 13.

⁷ Barda Nawawi Arief, 1986, *Penetapan Pidana Penjara dalam Perundang-undangan dalam Rangka Usaha Penanggulangan Kejahatan*, Disertasi, Universitas Pajajaran, Bandung, p. 27, dikutip dari Habib-Ur-Rahman Khan, *Prevention of Crime – It is Society Which Needs "The Treatment" and Not The Criminal*, p. 127.

⁸ *Ibid*, p. 28, dikutip dari Inkeri Annttila, 1976, *A New Trend in Criminal Law in Finland*, dalam *Criminology Between the Rule of Law and The Outlaws*, Edited by Jasperse, van Leeuwen Burow and Toornvliet, Kluwer, Deventer, p. 145.

⁹ *Ibid*, dikutip dari Herbert L. Packer, 1968, *The Limits of Criminal Sanction*, Standford University Press, California, p. 3.

¹⁰ Sudarto, 1977, *Hukum dan Hukum Pidana*, Alumni, Bandung, p. 161. Untuk selanjutnya kebijaksanaan yang dimaksud oleh Penulis adalah kebijakan yang merupakan sinonim dari kata *policy* dalam Bahasa Inggris. *Policy* dapat dirumuskan sebagai suatu keputusan yang menggariskan cara yang paling efektif dan paling efisien untuk mencapai suatu tujuan yang ditetapkan secara kolektif. Lihat, Sutan Zanti Arbi dan Wayan Ardhana, 1984, *Rancangan Penelitian Kebijakan Sosial*, Pustekkom Dikbud dan CV

Thus the problem of controlling or preventing crime by using penal law is not only a social problem, but also a matter of policy.

Controversy about the death sentence in the international world continues to roll. Controversy surrounding the opinion of the pros and cons of death sentence. Especially from the flow of abolitionist anti to death sentence and retentionist who agree to the implementation of death sentence. Countries in the European continent have largely abolished death sentence as one of the penal punishment types in their country, except for Bellarusia. Including the Netherlands that once colonized Indonesia also has eliminated death sentence in the legal system of the implementation of the principal penalty in the country since 1870 AD. Ironically, the current Penal Code (W.v.S) of Dutch heritage is still valid in Indonesia. It is time for the independent and sovereign Indonesian State to have the Penal Code (KUHP), the Penal Procedure Code (KUHP) and the Penal Code of Penal Justice (KUHP) itself in accordance with the philosophical values Indonesian nation.

The values of the Indonesian philosophy as stated in the principles of Pancasila, namely; (1) Belief in the One and Only God, (2) Just and Civilized Humanity, (3) Indonesian Unity, (4) Democracy Led by Wisdom of Wisdom and in representation, (5) Social Justice for All Indonesians.

Indonesia is one of the eight countries in ASEAN that still hold the death sentence. Others are : Brunei Darussalam, Indonesia, Malaysia, Singapore, Vietnam, Laos, Myanmar, and Thailand. Three ASEAN countries have eliminated death sentence namely the Philippines, East Timor and Cambodia.¹¹

Currently there are 68 countries that still apply the practice of death sentence, including Indonesia. While the state that abolished all the death sentence for all types of crime is as much as 75 countries. In addition, there are 14 countries that abolished death sentence for ordinary penal category, 34 countries that de facto did not enforce death sentence despite the imposition of death sentence.¹²

The death sentence is considered inhumane and ineffective. Jeffrey Pagan, a professor of law and public health at Columbia University, believes there is no sufficiently strong scientific evidence of the effectiveness of death sentence related to deterrence as one of the goals of punishment.

“There is no reliable scientifically sound evidence that pits execution against a robust set of competing explanations to identify whether it exerts a deterrent effect that is uniquely and sufficiently powerful to overwhelm the recurring epidemic cycles of murder. This and other rebukes remind us to invoke tough, neutral social science standards and commonsense causal reasoning before expanding the use of execution with its attendant risks and costs.”¹³

Therefore, public policy options on death sentence may depend on the accuracy, reliability and certainty of new social science evidence of this insurrection. These matters relate to questions about the justice and accuracy of imprisonment-death sentence imposed. If the death sentence imposed is inaccurate, then the decisions will not result in a deterrent effect, and more importantly, will undermine the perception of the legitimacy of the court that imposed it and the legal moral grounds that became the soul of the court. Because the fear of mistakes and the execution of the wrong person will make the use of the death sentence suspended, there will be no threat of a convincing deterrent effect if execution is rare. However, using the aggressive death sentence to achieve an amount that could theoretically create an effective deterrent effect would increase the risk: the terrible threat of an innocent execution. And it will result in irreparable damage to the legitimacy of the penal law, the courts that have rendered those decisions, and the moral grounds of both.¹⁴

The debate on death sentence is also related to the right to life in international legal instruments as well as in the 1945 Constitution. The right to life is categorized as non derogable rights. However, international legal instruments, in particular the ICCPR (International Covenant on Civil and Political Rights), doesn't prohibit death sentence but rather restrict its application. This right to life provision is as stipulated in Article 6 of the ICCPR as follows :

1. *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*
2. *In countries which have not abolished the death sentence, 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*

Rajawali, Jakarta, p. 65, yang merupakan terjemahan dari *The Design of Social Policy* tulisan Robert Y. Mayer dan Ernest Greenwood, dalam Barda Nawawi Arief, 1986, *Penetapan Pidana Penjara...*, Disertasi, Unpad, Bandung, p. 29 dan 104.

¹¹ <http://global.liputan6.com/read/2179609/8-negara-asean-yang-terapkan-hukuman-mati> diunduh tanggal 29 Mei 2017 jam 11:29 WIB.

¹² Jimly Asshiddiqie, 2009, *Kontroversi Hukuman Mati, Perbedaan Pendapat Hakim Konstitusi*, (dalam Kata Pengantar), PT. Kompas Media Nusantara, Jakarta, p. xi dikutip dari Roger Hood, 2002, *The Death Penalty: A Worldwide Perspective*, Third Edition, Oxford University Press, New York.

¹³ Jeffrey Pagan, 2006, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, Ohio State Journal of Criminal Law, Vol. 4, p. 255, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=935102 diunduh 29 Mei 2017 jam 12:13 WIB.

¹⁴ Jeffrey Pagan, 2009, *Kontroversi Hukuman Mati, Perbedaan Pendapat Hakim Konstitusi*, (dalam Kata Pengantar), PT. Kompas Media Nusantara, Jakarta, p. 144.

3. *When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide*
4. *Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases*
5. *Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women*
6. *Nothing in this article shall be invoked to delay or to prevent the abolition of death sentence by any State Party to the present Covenant*¹⁵.

3. Reformulation of Death Sentences Execution Based on Pancasila Values in Indonesia

In the context of Indonesia, related to limiting the application of capital punishment is confirmed in the Constitutional Court Decision (MK) no. 2-3 / PUU-V / 2007 stating that in the future, the formulation, implementation, or execution of capital punishment should pay attention to four important matters :

1. Capital punishment is not a principal punishment, but as a special and alternative criminal act.
2. The death penalty may be imposed with a probationary period of 10 (ten) years which if the prisoner is admitted to be commendable to be changed with life imprisonment or for 20 years.
3. The death penalty can not be imposed on immature children.
4. The execution of capital punishment on pregnant women and a person who is mentally ill is suspended until the pregnant woman gives birth and the mentally ill prisoner is healed..¹⁶

The controversy surrounding capital punishment arises between the flow of abolitionist cons and the death penalty with adherents stating the need for capital punishment as one of the criminal types (retentionist).

There are two different view about capital punishment :

1.Group that does not agree, the reason:

- a. Absolute, irrevocable
- b. Misguidance of the judge
- c. Contrary to humanity, morals and ethics

d. Related to the purpose of crime:

- The goal of improvement is not achieved
- Implementation is not in public, so the fear (generale preventie) is not achieved.

e. There is a sense of mercy to the convicted person

2.Group agrees, the reason:

- a. The perpetrator has committed acts that violate human rights and the principles of Pancasila
- b. Less security tool
- c. Heterogeneity of Indonesian population, resulted in a clash-prone situation
- d. The Need for certain criminal acts, for example for premeditated murder, corruption crimes, human rights crimes, criminal offenses for narcotics dealers.¹⁷

Regardless of the controversy of the opinion of the pros and cons against the death penalty, but the formal juridical capital punishment still applied in Indonesia.

Therefore, the non-acceptance of the abolition of capital punishment in Indonesia must be understood that the historical consciousness of Indonesian society has not been able to accept the abolition of capital punishment. The death penalty is still understood as legally and morally legitimate. Even if capital punishment violates the right to life, the violation can be justified as a punishment for certain criminal acts. However, historical awareness will certainly undergo changes along with the change of Indonesian society and the emergence of new ideas that underlie efforts to abolish capital punishment. In the event of a change in the historical consciousness of society, capital punishment can be abolished, which can occur through lawmakers as well as judges because both are influenced even a reflection of the historical awareness of their society.¹⁸

The Unitary State of the Republic of Indonesia as a country based on law also has the basic state and basic philosophy of the nation that is Pancasila. Where Pancasila colored the whole life of nation and state. Included in the development of national criminal law. The values of Pancasila form the basis for national policy and law enforcement.¹⁹ The

¹⁷ Didik Endro Purwoleksono, 2009, *Kontroversi Hukuman Mati, Perbedaan Pendapat Hakim Konstitusi*, PT. Kompas Media Nusantara, Jakarta, p. 254.

¹⁸ Jimly Asshiddiqie, *Op.Cit.*, p. xiii.

¹⁹ Ira Alia Maerani, 2015, *Reaktualisasi Proses Penyidikan oleh Kepolisian Berbasis Nilai-Nilai Pancasila dan Optimalisasi Pemanfaatan Teknologi*, Jurnal Hukum, Volume XXXII, No. 2, Desember 2015, ISSN 1412-2723, diterbitkan oleh Fakultas Hukum Universitas Islam Sultan Agung (Unissula) Semarang,

¹⁵ Article 6 ICCPR <https://www.penalreform.org/wp-content/uploads/2015/06/HRC-Article-6-submission.pdf> diunduh tanggal 29 Mei 2017 jam 13.15 WIB.

¹⁶ Jimly Asshiddiqie, 2009, *Kontroversi Hukuman Mati, Perbedaan Pendapat Hakim Konstitusi*, (dalam Kata Pengantar), PT. Kompas Media Nusantara, Jakarta, p. xi.

values contained in Pancasila are the values of divinity (religious), humanity, unity of Indonesia (nationalism), democracy, and social justice.²⁰

However, what must be considered is the application of capital punishment to conform with human rights. Several points related to human rights to be considered in the execution of capital punishment in Indonesia such as the sound of Article 7 of Law no. 2 / Pnps / 1964 reads,

"If the convict is pregnant, then the execution of capital punishment can only be done forty days after the child is born."

According to the authors the sound of the article has not been in accordance with human rights, especially in order to provide complete protection for children from death row convicts. The right in question is the right to obtain first and foremost food for the baby that is Breast Milk Mother (ASI) for at least 2 years.

The suggestion to give breast milk for 2 (two) years is contained in the holy book of Muslims ie Al Qur'an letter Al Baqarah Verses 233 which reads:

وَالْأُولَٰئِذْ يُرْضِعْنَ أَوْلَدَهُنَّ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ أَرَادَ أَنْ يُنْمِ الْرَضَاعَةَ وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا لَا تُضَارَّ وَالِدَةٌ وَبَوْلُهَا وَلَا مَوْلُودٌ لَهُ بِبَوْلِهَا وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ فَإِنْ أَرَادَا فِصَالًا عَنْ تَرَاضٍ مِّنْهُمَا وَتَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا وَإِنْ أَرَدْتُمْ أَنْ تَسِدَّرَ صَبُغًا أَوْلَدَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا آتَيْتُمْ بِالْمَعْرُوفِ وَاتَّقُوا اللَّهَ وَاعْلَمُوا أَنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ ٢٣٣

Meaning : "Mothers should nurse their children for two full years, that is for those who want to perfect breastfeeding. And the duty of the father is to feed and dress to the mothers by ma'ruf. Someone not burdened but according to ability levels. Let not a mother suffer misery because of her child and a father for her child, and an obligate inheritance. If both want to wean (before two years) with their second willingness and deliberation, then there is no sin on either. And if you want your child to be nagged by someone else, then there is no sin for you if you give the payment accordingly. Serve ye to Allah and know that Allah is Seer of what ye do." (Sura' al-Baqarah: 23)²¹

The rule of law is expected to provide justice and humanity to innocent babies and still need breast milk (mother's milk) and mother's love and care. Breast milk is the main and first food for infants. As with QS. Al Baqarah Clause 233 reads: Breast

feeding should be given up to 2 years old baby. This provision is not only regulated by Islam as contained in Al-Qur'an Surah Al-Baqarah Verses 233, but also suggested by WHO (World Health Organization) that mothers breastfeed their children for at least 2 years.²²

Therefore, it is necessary to amend the rules governing the implementation of capital punishment. The amendment to Law no. 5 of 1969 jo Article 7 of Law no. 2 / Pnps / 1964 on the Procedures for the Criminal Implementation Done by Courts in the General and Military Courts, so that the chapter's sound after the amendment is:

"Implementation of capital punishment on pregnant women is done until the woman give birth and breastfeed her child for 2 (two) years."

The provisions of the article also need to be supplemented by rules that protect people who are mentally ill and ill. So it needs to be added with the article that reads:

"The imposition of capital punishment for the convicted person who is mentally ill and sick until the convict is healed from his illness. Assessment of the condition of the convicted person is done by medical team (doctor)."

The provisions that need to be amended next is in the framework of the guidance on the society, then the provision of capital punishment sanction needs to be regulated alternatively. This means that there is an effort to prioritize other types of criminal sanctions, such as imprisonment, penalty, and other crimes before executing capital punishment with due observance of Pancasila values to realize the legal protection for the convicted perpetrators and victims equally..

CONCLUSION

1. The legal policy on the execution of capital punishment in Indonesia's positive criminal law is regulated in Law no. 5 of 1969 on the Statement of Various Stipulation of President and Presidential Regulation as Law. Determination of the President in question is Presidential Decree no. 2 of 1964 on the Procedures of the Criminal Implementation Done by the Courts in the General and Military Courts. Implementation of capital punishment is done by shot to death. The death penalty was carried out by a firing squad team from the Mobile Brigade (Brimob) consisting of 12 enlisted men, 1 NCO, and 1 officer. This firing squad is under the orders of the Prosecutor. But only three long-barreled rifles filled with live ammunition, while the other nine rifles filled with empty bullets (Perkap No. 12 of 2010). Several articles of the Penal Code (KUHP) which regulate the death penalty are regulated in Article 104, 111 Paragraph (2), 124 (3), 140 Paragraph (1), 140 Paragraph (3), 340, 365 Paragraph 4), 444, 124 bis, 127, 129, and 368 Paragraph (2)).
2. The legal weaknesses of the execution of capital punishment in Indonesia's current positive criminal law

<http://jurnal.unissula.ac.id/index.php/jurnalhukum/article/view/659>

²⁰ Ira Alia Maerani, 2015, *Implementasi Ide Keseimbangan Dalam Pembangunan Hukum Pidana Indonesia Berbasis Nilai-Nilai Pancasila*, Jurnal Pembaharuan Hukum, Vol. 2, No.2, Mei-Agustus 2015, ISSN 2355-0481, diterbitkan oleh Program Doktor Ilmu Hukum (PDIH) Fakultas Hukum Universitas Islam Sultan Agung (Unissula), Semarang.

²¹ Q.S. Al Baqoroh Ayat 233, Al Qur'an dan Terjemahnya, 2002, Departemen Agama, PT. Karya Toha Putra, Semarang.

²² Ira Alia Maerani, *Selter ASI untuk Ibu dan Bayi*, Harian Umum Suara Merdeka, 21 Desember 2013, p. 6.

lies in the accuracy of the death sentence, the fears of executing innocent people, and the effectiveness of capital punishment in giving deterrence as one of the purposes of punishment, capital punishment is considered inhumane and ineffective.

3. Regardless of the controversy of the opinion of the pros and cons against the death penalty, but the formal juridical capital punishment still applied in Indonesia. Therefore, the non-acceptance of the abolition of capital punishment in Indonesia must be understood that historical awareness of Indonesian society has not been able to accept the abolition of capital punishment. The death penalty is still understood as legally and morally legitimate. Even if the execution of capital punishment violates the right to life, the violation may be justified as a punishment for certain criminal acts committed by the convicted person. However, what must be considered is the application of capital punishment to conform with human rights. Several points related to human rights to be considered in the execution of capital punishment in Indonesia such as Article 7 of Law no. 2 / Pnps / 1964 which reads, "If the convicted pregnant, then the execution of capital punishment can only be done forty days after the child is born. "The article is not in accordance with human rights, especially in order to give full protection to the children of death row inmates. The right in question is the right to obtain first and foremost food for the baby that is Breast Milk Mother (ASI) for at least 2 years. Therefore, the sound of Article 7 of Law no. 2 / Pnps / 1964 should be amended and amended so that the clause of the article, "Implementation of capital punishment on pregnant women is done until the woman gives birth and breastfeeds her child for 2 (two) years." The provisions of the article also need to be added with rules that protect the mentally incapable. So it needs to be added with the article which reads, "The imposition of capital punishment for the convicted person who is mentally ill and serious ill until the convict is healed from the illness. Assessment of the condition of the convicted person is performed by the medical team (doctor). "Death penalty also needs to be regulated as the last alternative criminal punishment for the community.

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