

# Death Penalty from The Perspective of Human Rights in Indonesia

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**Abstract-** Pros and Cons regarding death penalty from the perspective of human right in Indonesia are still going on. Some argued the death penalty does not violate human rights because the perpetrators have violated the human rights of victims and human rights of the community, while others convinced that the death penalty violates human rights since it revokes the right to life of a person. This paper aims to review the death penalty from the perspective of Human Rights in Indonesia by applying normative law theory vis a vis current practice. The sources of data were collected from library research, web search and other primary, secondary and tertiary legal materials. The study confirms that death penalty must be seen from the perspective of the Universal Declaration of Human Rights (UDHR), in that there are several articles that do not allow the death penalty. The constitution of the Republic of Indonesia also highlights that every person has the right to live and has the right to defend his life. Thus, capital punishment does not contradict the Indonesian Constitution.

Keywords: death penalty; human rights; the Indonesian Constitution; normative law theory.

## 1. INTRODUCTION

Human Rights locally called Hak Azasi Manusia ((HAM) becomes two sexy words that were claimed to be important in the democratic nations, like Indonesia. However, the understanding of HAM itself often varies from ordinary people to those considered to be very understanding of human rights. This is not surprising as HAM is defined too general as it relates with natural rights and contains moral messages that require every person both individually or in groups even the authorities / government (state) must respect and protect these human rights.

Whilst the discussion and the interpretation of HAM are still varying from one and another, human rights themselves have been included in various international charter and conventions and also have been included in the legislation in force in Indonesia. In other words, the human rights message has been transformed into a legal message because it has been normalized, namely through legislation. Thus, the conception of human rights contained in various laws and regulations will function as a binding norm, so it must be obeyed and implemented.

The legal function governing human rights is to protect individual from arbitrary actions or deeds, imbalances and uncertainties, and so on from other parties. In the preamble of a universal declaration of human rights approved and announced by UN General Assembly Resolution No. 217 A (III) dated December 10, 1948, it was mentioned considerations of human rights as follows.

1. consideration of recognition of inherent dignity and equal rights is not alienated from all members of the human family, justice and peace in the world.
2. consideration of the neglecting and looking down on human rights associated with cruel acts which create a feeling of anger in the conscience of humanity and the formation of a world where humans will taste the enjoyment of freedom from fear and lack has been stated as the highest aspiration of commoners.
3. Consideration of human rights that need to be protected by legal regulations so that people are not forced to choose rebellion as a last resort to oppose despotism and colonialism (Azra, 2003).

In the 1945 Constitution of the Republic of Indonesia, especially in the preamble and in the body of the constitution, it was stated clearly that a nation has right to independence or freedom apart from all forms of colonialism not only apply to the Indonesian people only, but to all nations in the world (opening paragraph I) and what is important for the Indonesian people is that stated in (paragraph IV opening) that the goal of the Indonesian government towards the international world is "participating in carrying out world order based on independence, eternal peace and social justice", and what is unique to the state and nation of Indonesia is that independence and Indonesian nationality in a rule of law based on "Pancasila"

Regarding human rights, the 1945 Constitution seems have no detail affirmation. This is not surprising considering that the problem of the 1945 Constitution was compiled at the end of the Japanese occupation in an atmosphere of urgency which was very limited time to allow human rights to be stated in details. Human rights were formulated further in 1949/1950. As a consequence, the opening of the 1945 Constitution contains the following principles: (1) Indonesian independence is actually a blessing from God's grace; (2) The entire Indonesian people and the state and nation are protected; (3). The state promotes public welfare and enlightens the life of the nation; (4). The state participates in carrying out world order based on independence, eternal peace and social justice; and (5) The Republic of Indonesia is a law based on Pancasila. Whereas the rights and obligations stated in the 1945 Constitution, namely: (a) Article 27, paragraph (1) states that "all citizens are at the same position in law and government. And it is obligatory to see the law and government without exception, Paragraph (2) states that: "every citizen has the right to work and a decent living for humans"; (b). Article 28 states that "freedom of association and assembly shall express thoughts both orally and in writing and others shall be stipulated by law"; and (c). Article 29 paragraph (2) states that "the state guarantees the freedom of the population to embrace their respective religions and to worship and their beliefs".

The brief description above seems to be unclear in explaining public regarding the death capital punishment form the perspective of human rights, this is shown from the facts of the growing opinions whether or not the death penalty does or does not violate human rights. Some argue death penalty does not violate human rights because the perpetrators have violated the human rights of the victims and the human rights of the community. While the rest argue that death penalty is considered to violate human rights because it revokes the right to life of a person. Due to this reason, the objective of this study is to review the death penalty from the perspective of Human Rights in Indonesia by applying normative legal research focusing on an inventory of positive law, principles and doctrine of law, legal discovery, systematic law, synchronization levels, comparative law and legal history. However, before detail of overview is discussed, the following section will highlight relevant literature associated with the scope of criminal law, death penalty and human rights in section 2. Section 3 deals with detail results and discussion addressing death penalty from the perspective of human rights. Finally, concluding notes are drawn in Section 4.

## 2. LITERATURE REVIEW

### 2.1 Criminal Law

The word 'criminal' comes from the Dutch (*Starf*), which basically can be interpreted as suffering (misery) intentionally dropped on someone who has been proven guilty of committing a crime. There are several experts who give opinions regarding the definition of criminal. Vanhamel, for instance, defines criminal is a special suffering that has been inflicted by the authority that has the authority to impose a criminal on behalf of the state as the responsibility of public law order for a violator, which is solely because the person has violated a rule of law which must be upheld by the state. Simons, further stated that criminal is a suffering which by criminal law has been associated with violation of a norm, which by a judge's verdict has been handed down for a guilty person (see, [www.pengertianahli.com](http://www.pengertianahli.com)).

Moeljatno (1993), however, detail the definition of criminal law as the part of the whole applicable law in a country, which establishes the basics and rules for: (a) determining which actions should not be carried out, which are prohibited, accompanied by threats or sanctions in the form of certain penalties for anyone who violates the prohibition; (b) determining when and in what ways those who have violated the restrictions can be imposed or convicted as threatened; and (c) determining by how the imposition of criminal acts can be carried out if there is a person who is suspected of violating the prohibition.

Criminal Law as a law that regulates acts that are prohibited by the Act and results in the imposition of penalties for those who commit them and fulfil the elements of the acts mentioned in the Criminal Law. Such actions are prohibited in the Criminal Code, Corruption Law, Human Rights Law and so on. Criminal law is the law that regulates what acts are prohibited and provides penalties for those who break them. While criminal acts are prohibited acts. Moeljatno (1993) pointed out that a criminal act is an act that is prohibited by a legal regulation which prohibits criminal sanctions in the form of certain penalties, for those who violate the prohibition.

It can also be said that a criminal act is an act that is prohibited and threatened with crime, as long as it is necessary to remember that the prohibition is aimed at the act, while the criminal threat is directed at the person who caused the event. Between prohibitions and criminal threats there is a close relationship between the incident and the person who caused the incident. To express the close relationship, words of action are used, that is, an abstract understanding that refers to the two

concrete conditions. The first is the occurrence of a certain event and the second is the existence of the person who caused the event. Roeslan Saleh (1981) put forward his opinion regarding criminal acts, namely as acts which by criminal law are stated as prohibited acts. Thus, the criminal act only shows the nature of the prohibited act and is threatened with criminal action (Bambang Purnomo, 1976). So criminal acts are separated from criminal liability separated by mistakes. Another case *strafbaarfeit* includes the notion of crime deeds and mistakes.

Whereas according to the provisions of Article 10 of the Criminal Code there are several types of sentences that can be imposed on someone who has committed an act of crime, in which the sentence to be imposed can be in the form of:

**a. Criminal principal.**

1) Criminal death

Many countries have abolished the death penalty. These countries include the Netherlands since the seventeenth century. In Indonesia the death penalty is sometimes still applied for some sentences although there are still many pros and cons to this punishment.

2) Criminal imprisonment

Criminal imprisonment is one form of criminal deprivation of liberty. There are several systems in imprisonment, namely, (1) *Pensylvanian System* that is convicts according to this system are included in separate cells, he must not accept guests from both outside and fellow prisoners, he must not work outside the cell, the only job is to read the sacred books given to him. Because the implementation is carried out in cells, it is also called the *Cellulaire System*. (2) *Auburn System* that is at night he is put in a cell individually, during the day he is required to work with other prisoners, but may not talk to each other, usually called the *Silent System*; and (3) *Progressive System* that is method of carrying out criminal activities according to this system is gradual, usually called the *English / Ire System*.

3) Criminal confinement and substitute confinement

Criminal confinement is also a form of criminal deprivation of liberty, but this confinement is in some ways lighter than imprisonment. This consists of criminal substitute confinement as a substitute for criminal fines that are not paid by the convicted person. A substitute imprisonment can also be imposed if the convict does not pay the estimated price of the booty that was not delivered by the convicted person; and penalty fines which are penalties in the form of a person's obligation to develop a legal balance or atone for his sin by paying a certain amount of money. If the convict is unable to pay the fines imposed on him, it can be replaced with imprisonment. This criminal is called a substitute confinement crime. The maximum of a substitute confinement is 6 months and may be 8 months in the event of repetition, sharing or application of article 52 or article 52 a of the Criminal Code (Teguh Prasetyo, 2014).

**b. Additional Crimes**

Additional crimes consist of revocation of certain rights, expropriation of certain items, and announcement of the judge's decision.

The purpose of punishment can be sought by us on the basis of justification for punishment or conviction. Regarding the basis of justification for criminal prosecution, there are two theories, namely based on absolute theory, relative theory, and combined theory. According to absolute theory, the goal of punishment lies in the criminal law itself. Whoever commits a criminal offense must be sentenced. While according to relative theory, the purpose of punishment is to: (a) prevent crime from happening; (b) to scare so others don't commit crimes; (c) improve the person who commits a crime; and (d) provide protection to the public against crime. According to the combined theory, which is a combination of absolute and relative, the purpose of criminal impose is because the person committed a crime and so that he does not commit another crime (Siti Soetami, 1992).

**2.2. Death Penalty**

The death penalty is a crime that has been formulated in the Indonesian criminal code since January 1, 1918, article 10 of the Criminal Code mentions a basic crime, which in 1870 was abolished in the Netherlands, whereas the death penalty itself means a criminal sentence for a serious crime that requires a convicted person to die, in the form of hanging, shooting, etc. In the Indonesian Penal Code, this have been written and has been promulgated as one of the criminal sentences (Andi Hamzah, 1985).

Capital punishment is part of the types of criminal acts that are based on Indonesia's positive criminal law. This form of crime is a sentence carried out by taking someone's life that violates the provisions of the law. This criminal is also the oldest and most controversial punishment of various other criminal forms. The aim was to carry out and carry out the death penalty so that the public would pay attention that the government did not want any disturbance to the security that was feared by the public.

Actually, capital punishment in Indonesia has been going on since the previous ancestors, namely since the kingdom, although in that period has not been enacted as a whole only partially used it, and during the Dutch colonial period began the capital punishment was strengthened and fully introduced by the Dutch government to the Indonesian people with promulgates and includes capital punishment in the law.

From this, the Indonesian Penal Code has listed the capital punishment which if it has been determined as a basic crime even though it is currently being re-processed by the government for the determination of the death penalty as a basic crime, but in actual review the death penalty may need to be due to being able to deter and suppress and intimidate follow the villain, and relatively cause no pain if carried out appropriately (Andi Hamzah, 1985).

Based on historical, capital punishment is not a relatively new form of punishment in Indonesia. This criminal has been known since the days of the kingdoms. This can be proven by observing the types of criminal according to customary law or the law of the ancient kings, for example: (a) Stealing is sentenced to be chopped off, as practiced in Aceh; (b) Capital punishment is carried out by cutting up the flesh from the body (Sayab), pounding the head (sroh), decapitating and then stabbing his head with a stick (tanjir), and so on.

The purpose of giving the death sentence is actually intended to provide a deterrent effect and to give the right punishment for the perpetrators of serious crimes or even gross human rights crimes, which may affect other individuals so that they think longer in committing serious crimes. From the existence of capital punishment, it is possible to produce more results than other crimes that may be overlooked by many perpetrators of criminal acts.

### **2.3. Human Rights**

Rights are normative elements inherent in every human beings. In their application, there are in the scope of equality rights and freedom rights related to their interactions between individuals or agencies. Rights is also something that must be earned. The issue of human rights is something that is often discussed especially in the current era of freedom. Human rights have been more attention in the reform era than in the era before the reform. Keep in mind that in terms of fulfilling rights, we live not alone and we live socializing with others. We must not violate other people's human rights in our efforts to obtain or fulfil our human rights. In other words, the freedom of our human rights is limited by the human rights of others.

Human rights are the basic rights that humans have had since humans were born. Human rights can be formulated as rights inherent in our nature as humans, which if there were no such rights, it would be impossible for us to live as humans. This right is owned by humans solely because it is human, not because of a gift from society or a gift from the state. So human rights are not dependent on the recognition of other humans, other communities or other countries, but the gift of God to us (Kaelan, 2002).

Human rights are basic rights possessed by humans, in accordance with their nature. In the opinion of Jan Materson (from the UN Human Rights Commission), in Teaching Human Rights, the United Nations as quoted by Baharuddin Lopa stressed that human rights are rights inherent in every human being, without which it is impossible for humans to live as humans. John Locke states that human rights are rights granted directly by God the Creator as natural rights. Article 1 of Law Number 39 Year 1999 concerning Human Rights states that Human Rights are a set of rights inherent in the nature and existence of humans as God's creatures and are His gifts that must be respected, upheld and protected by the state, law, the government and everyone, for the sake of honor and protection of human dignity (Mansyur Effendi, 1994).

Human rights exist and are inherent in every human being. Therefore, it is universal, meaning that it applies everywhere and for anyone and cannot be taken by anyone. This right is needed by humans in addition to protecting themselves and their human dignity is also used as a moral foundation in associating or dealing with fellow human beings. In each right inherent obligation. Therefore, in addition to human rights, there are also human rights obligations, which are obligations that must be carried out to uphold or uphold human rights.

On November 10, 1948, the General Assembly of the United Nations (UN) began to agree on a new agreement. Located in Paris, France, the Universal Declaration of Human Rights was issued. Originating from the first breakthrough, finally in 1950 began to be commemorated annually as Human Rights Day.

After the historic declaration was made, each country tried to declare their respective human rights. They are protected legally for their freedom in a country. In the declaration, there were at least 30 written and agreed human rights (see for details <https://internasional.kompas.com/read/2018/12/10/17055301/ini-30-macam-hak-asasi-manusia-menurut-pbb?page=all> ). These include as follows : (a). born free and treated equally. We are all born free. We all have our own thoughts and ideas. We all need to be treated the same way. (b) Rights without discrimination. Everyone has the right to all rights and freedoms without any distinction, such as race, colour, sex, language, religion, political opinions or otherwise, national or social origin, property, birth, or other status. (c) Right to Life. We all have the right to live, and live in freedom and security. (d) Rights without slavery. No one will be detained in slavery or slavery practices; slavery and the slave trade were prohibited in all forms; (e) Be free from torture and degrading treatment. No one will experience torture or cruel, inhuman or degrading treatment or punishment. (f) Right to

recognition as a person before the law. Everyone has the right to be recognized everywhere as a person before the law. (g) Right to equality before the law. All are equal before the law and are entitled without discrimination to equal legal protection. All have the right to equal protection against any discrimination that violates this declaration and against any incitement to such discrimination.; (h) the freedom protected by law. Every person has the right to an effective remedy by a competent national court for actions that violate the basic rights granted to him by the constitution or by law. (i) Freedom from arbitrary arrest and alienation. No one has the right to put someone in prison without a good reason or send someone away from a country without reason. (j) Right to public hearings. Everyone has the right to full equality when in public. When someone stumbles on legal issues, he is entitled to get protection from the public. (k) Right to be presumed innocent, until proven guilty. There is no one to blame for doing something until proven guilty. When people say someone did something bad, they have the right to show that it is not right (defence). (l) Privacy rights. Every person has the right to legal protection against interference or attacks on him. They will get their privacy protection. (m) Right to freedom of movement. Everyone has the freedom to go to other regions, settle or travel anywhere; (n) The right to find a safe place to live. Everyone has the right to seek and enjoy freedom in other countries to be free from persecution. (o) Nationality rights. Every person has the right to citizenship and no one can lose his citizenship without cause; (p) Right to marry and have a family. Every adult has the right to marry and have a family if they want. Men and women have the same rights when they are married, and when they are separated. (q) Property rights. Everyone has the right to own something or share it. Nobody has to take someone's things without a good reason; (r) Freedom of religion and thought. Everyone has the right to freedom of thought, conscience and choice of religion. This right includes freedom to change his religion or beliefs, and freedom, either alone or in community with others and publicly or privately, to manifest his religion or beliefs in teaching, practicing, worshiping and being pious; (s) Freedom of expression. Everyone has the right to freedom of opinion and expression. This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and without any limitations; (t) Right to general assembly. We all have the right to meet our friends and work together peacefully to defend our rights. There is no freedom for someone to force the rights of others to participate in certain meetings;(u) The right to democracy. We all have the right to take part in the government of our country. (v) Social security rights. Everyone as a member of the community has the right to social security and the right to realization, through national efforts and international cooperation and in accordance with their respective organizations and resources; (w) Right to work and as a worker. Every adult has the right to do work, with a fair salary for their work, and to join a union; (x) Right to rest and relax. Everyone has the right to relax and unwind, including restrictions on reasonable working hours and periodic paid holidays; (y) Food and shelter. Everyone has the right to a good life. Mother and children, parents, unemployed or sick, and everyone has the right to be treated when sick. One also has the freedom to choose food; (z) Right to education, right to participate in the cultural life of the community; right to a just world, and responsibility,

### **3. RESULTS AND DISCUSSION**

#### **3.1 Death Penalty**

The implementation of capital punishment in Indonesia was originally carried out according to the provisions in Article 11 of the Indonesian Criminal Code which states that capital punishment is carried out by the executioner of hanging by tying the neck of the convicted with a snare on a hanging pole and dropping the board from under his feet. Because it was felt to be inappropriate, the article mentioned above was amended with the provisions of Staatsblad 1945 Number 123 and entered into force on August 25, 1945. Article 1 of the regulation states that deviates from what is stipulated in other laws, capital punishment is imposed on civilians (not the military), as long as it is not otherwise determined by the governor general to be carried out by shooting dead. The provisions for its implementation are detailed in Law No. 2 (PNPS) in 1964.

Based on the above information it can be concluded that the execution of the death penalty in Indonesia currently in force is carried out by shooting to death rather than by hanging the convicted person on gallows. Some of the most important provisions in the implementation of capital punishment are as follows: 1) Three days before the execution of the death penalty, the high prosecutor or the prosecutor concerned notifies the convicted person and if there is a wish of the convicted person to express something then the message is received by the prosecutor; 2) If the convict is pregnant must be postponed until delivery; 3) The place of the execution of capital punishment is determined by the Minister of Justice in the jurisdiction of the court of first level court concerned; 4) The Regional Police Chief concerned is responsible for its implementation; 5) The death penalty is carried out by police firing squad under the leadership of a police officer; 6) The Regional Police Chief concerned must attend the implementation; 7) Implementation may not be in public; 8) The funeral is left to the family; 9) After completion of the execution of the death sentence, the Prosecutor must produce an official report on the execution of the death sentence, which then copies of the decision must be included in the court's decision.

Indonesia itself is one of the countries that impose capital punishment. Based on the records of various International Human Rights Institutions, Indonesia is one of the countries that still applies the threat of capital punishment in its criminal law system. However, the largest countries in the world included in the retentionist country is the United States. Although this country

is one of the countries with the most echoes in calling for human rights protection in the world. But in reality, it still enforces the threat of capital punishment, also in military law.

The results of a number of studies on crime do not show a correlation between the death penalty with reduced crime rates. Some studies show that those who have been convicted of murder (also those who are planning) usually do not commit violence in prisons. Likewise, after leaving prison they no longer commit violence or the same crime. On the other hand, some experts criticize that a legal perspective cannot reach the legal complexity of criminal cases where the victim cooperates with the perpetrators of the crime, where the individual is the victim or the perpetrator of the crime, and where the person who appears to be the victim is in reality the perpetrator of the crime.

Capital punishment is a form of punishment that since hundreds of years ago has reaped the pros and cons. The pros and cons do not only occur in Indonesia, but occur in almost all countries that exist today. Every legal expert, human rights activist and others always rely on the pros and cons of opinions on the death penalty institution with logical and rational reasons.

The tendency of experts who agree with capital punishment is still maintained, generally based on conventional reasons, namely the need for capital punishment is needed to eliminate people who are considered endangering public or state interests and are deemed irreparable, while those who are counter to capital punishment usually make the reason for the death penalty is contrary to human rights and is a form of crime that cannot be remedied if after the execution is carried out an error is found in the sentence handed down by the judge. As for some experts and figures who support the existence of capital punishment are:

- a. Jonkers, supported the death penalty with his opinion that criminal reasons cannot be withdrawn, if they have been carried out" is not an acceptable reason to declare "capital punishment unacceptable. Because in court a judge's decision is usually based on the right reasons (Andi Hamzah & A. Sumangelipu, 1985).
- b. Lambroso and Garofalo, argue that capital punishment is an absolute tool that must be present in society to eliminate individuals who cannot be repaired anymore. Individuals are certainly people who commit extraordinarily serious crimes (extra ordinary crime).
- c. Hazewinkel Suringa, argues that capital punishment is a form of punishment that is needed in a certain period, especially in the case of a transition of power that switches in a short time. The author of such a document is based on Suringa's opinion which states that capital punishment is a radical cleansing tool that at every revolutionary time we can quickly use it (Andi Hamzah & A. Sumangelipu, 1985).
- d. Barda Nawawi Arief, explicitly in a book stated that capital punishment still needs to be maintained in the context of the renewal of the National Criminal Code. His opinion stated: "that although the death penalty is maintained, it is mainly based as an effort to protect the community (so it emphasizes more or is oriented to the interests of the community), but in its application it is expected to be selective, cautious and also oriented towards the protection / interests of individuals (criminal acts ). See Barda Nawawi Arief ( 2005).

Furthermore, whether or not the capital punishment is unconstitutional has actually been answered in the Constitutional Court's ruling on the Material Testing Application for Law Number 22 of 1997 Concerning Narcotics against the 1945 Constitution which was filed by four death row convicted narcotics cases through their legal counsel regarding the unconstitutionality of the death penalty stipulated in Act Number 22 of 1997 concerning Narcotics. Based on the decision of the Constitutional Court, it is expressly stated that the threat of capital punishment in Law Number 22 of 1997 concerning Narcotics is not contrary to the Constitution. By analogy, a conclusion can be drawn that capital punishment is not an unconstitutional act. Sounds of the Conclusions of the Constitutional Court Decision on the petition, which states: Provisions of Article 80 Paragraph (1) letter a, Paragraph (2) letter (a), Paragraph (3) letter a; Article 81 Paragraph (3) letter (a); Article 82 Paragraph (1) letter a, Paragraph 2 (letter) a and Paragraph (3) letter a in the Narcotics Law, as long as those concerning the threat of capital punishment, do not conflict with Article 28A and Article 28I paragraph (1) of the 1945 Constitution.

Based on this information, it can actually be clearly stated that capital punishment does not contradict the Constitution of our Country and still deserves to be maintained in positive criminal law. However, based on this decision, the renewal of criminal law related to capital punishment should be taken seriously in the future, as follows:

- a. Capital punishment is no longer a basic crime, but as a specific and alternative criminal offense;
- b. Death sentences can be sentenced to probation for ten years which if the convicted convict behaves can be changed to life imprisonment or for 20 years;
- c. Death penalty cannot be imposed on minors;
- d. Execution of capital punishment on pregnant women and mentally ill people is suspended until the pregnant woman gives birth and the death row inmate who is mentally recovered

So, based on the description of the opinion above, it can be emphasized that the supporters of capital punishment in modern times merely make capital punishment as an instrument to protect society and the State in both preventive and repressive forms. Repressive here is not making those who are governed vulnerable and weak like authoritarian rule which makes capital punishment as a tool to get rid of people who are in conflict with the authorities. In addition, in the formulation of the new National Penal Code, in the case of capital punishment, it must pay attention to the sound of the decision above.

Likewise, the opinions of experts and figures who contravene capital punishment are not insignificant, and they also rely on an argument on the basis of scientific thinking. A classic figure who is very well known for his vocabulary against capital punishment is an Italian national named Beccaria. Beccaria's reason for opposing capital punishment is a process that is carried out in a very bad way against someone who is accused of killing his own child (some time after the execution can be proven that the verdict is wrong). Likewise, stated by Ferri who is also an Italian national in matters against capital punishment, argues that in order to protect those who have the predisposition to a crime, it is enough to have a life sentence, there is no need for capital punishment.

Some reasons for those who oppose the death penalty include the following:

- Once the death sentence is imposed and implemented, there is no way to improve it if it turns out that in its decision the law contains a mistake.
- Death penalty is contrary to humanity.
- By imposing capital punishment, efforts will be made to improve the convicted person.
- If capital punishment is seen as an attempt to frighten potential criminals, then that view is wrong since capital punishment is usually carried out not in public.
- A sentence of death usually involves the compassion of the community, thereby inviting protest actions.
- In general, heads of state are more inclined to change capital punishment with limited or life imprisonment.

The reasons for those who tend to maintain the existence of the sentence or death sentence they express their opinions as follows:

- From a juridical point of view with the abolition of the death penalty, an important tool for the better application of criminal penalties is lost.
- Regarding the mistake of the judge, it can indeed happen however well the law was formulated. This mistake can be overcome by a stage of legal efforts and implementation.
- Regarding the reparation of the convicted person, of course it is intended that the person concerned is returned to the community well, if sentenced to life imprisoned it returns again to the life of the community.

The execution of death in Indonesia is not only based on the above information. For example, in Aceh executions can be carried out with a javelin, in Bali can be carried out by drowning into the sea, whereas in Batak tribes carried out with an alternative system where if the killer does not pay the wrong money then the execution can be carried out, and various other types of executions. By paying attention to the customs (adat) and customary law from Aceh to Irian showing us the death penalty is known by all tribes in Indonesia.

The application of criminal law by the Dutch government in the territory of Indonesia is enforced based on the enactment of "Wet Boekvan Strafrecht" which came into force on January 1, 1918. In this provision, capital punishment is determined as one of the main criminal types as stipulated in article 10. The execution of capital punishment is carried out with a sentence hanging as stipulated in article 10 of the Criminal Code. Then with Staatsblad 1945 Number 123 issued by the Dutch government, capital punishment was handed down by being shot dead. This is reinforced by Presidential Decree Number 2 of 1964 of 1964, State Gazette of 1964 Number 38 was then stipulated into Law number 5 of 1969 which stipulates that capital punishment is carried out by shooting dead convicts. In this case the execution must be attended by the Prosecutor (Head of the Public Prosecutor's Office) as the executor and technically the execution is carried out by the police firing squad.

In Indonesia, up to now there are still approximately 6 laws and regulations that still have threats, the death penalty includes:

- Criminal Code.
- Emergency Law No. 12 of 1951 concerning Firearms.
- Law No.15 of 2003 concerning Eradication of Terrorism Criminal Acts.

- Law No. 26 of 2000 concerning Human Rights Courts.
- Law No.35 of 2009 concerning Narcotics.
- Law No.5 of 1997 concerning Psychotropics.

It is worth noting that the execution of executions of death row inmates must be carried out after the court decision handed down is legally binding and the convicted person has been given the opportunity to submit a pardon to the President. The execution can be carried out first through fiat executives (President's approval). So it is clear here that capital punishment is basically and should be used as the ultimate means of punishment and can only be used against people who cannot be trained anymore and are felt to endanger the lives of the wider community and even the state.

Apart from the pros and cons above, there are also many debates among legal observers in Indonesia about capital punishment cases, many of them think that capital punishment needs to be carried out because of the existence of capital punishment is an attempt to negate people who can no longer be repaired and with the death penalty, the obligation to maintain them with imprisonment is also lost, so it can be concluded that the death penalty can reduce individuals who are not responsible for their actions. But many also consider capital punishment to be incompatible with the culture of Indonesian society because it is deemed to deviate from humanitarianism and deviate from human rights principles, because individuals who are counter to the death penalty assume capital punishment does not because individuals who contravene capital punishment assume capital punishment is not in line with the meaning of the crime itself which considers the crime is a rehabilitation of individuals who have committed a crime so that they can become better individuals without any forced loss of life, so the interpretation of the definition of criminal it is evident that the existence of capital punishment is contrary to the meaning of the crime itself. But, actually the death penalty is a good rule and is the result of thought of the punishment of the ancestors who have used the death penalty to resolve severe criminal cases and individual cases which have not been able to be corrected morally.

In the criminal law, it may include the death penalty but it is still in discussion whether the death penalty will be included as the main criminal or vice versa, as said by Prof. Sudarto that if criminal law is to be involved in efforts to overcome the negative aspects of community development / modernization and crime prevention, it should be seen in the overall relationship of criminal politics or social environment and must be guided by the integral of national development.

In other policies of Indonesian criminal law, a criminal act must be interpreted according to the actions and environment of the community and the suitability of the sentence imposed on the perpetrators of the crime, in fact the prison sentence is also a severe crime because it has robbed and narrowed the individual independence of the criminal will but deprivation of independence sometimes does not produce a deterrent effect must be followed up with other crimes. That is the reason why capital punishment is still enforced in Indonesia because of crimes that may not be worth the sentence if measured by imprisonment alone.

According to Joko Sriwidodo (2019), there are several reasons why capital punishment is abolished. First, capital punishment is considered contrary to human rights. Second, people who are sentenced to death in fact carry out two types of crimes at once namely imprisonment and capital punishment. This is because in the period of waiting for the implementation of the death penalty, the convict is languishing in prison. Third, if there is an error in the death sentence and the convicted person has been executed, then it is no longer possible to correct the mistake. There are several countries which until now have not abolished capital punishment - including Indonesia - having an argument: First, there is not a single religious teaching that forbids the imposition of capital punishment. Second, in criminal doctrine, if the crime committed has an extraordinary impact and there is no opportunity to correct the perpetrators then the death penalty can be imposed to eliminate the perpetrators. Third, capital punishment serves as a general preventive or general prevention of crime.

### **3.2 Death Penalty from the perspective of Human Rights**

There are several articles in the UDHR that do not allow the death penalty, including as follows.

a. Article 3 "Everyone has the right to life, liberty and personal security". The most extreme form of violation of the right to life is killing or injuring one's physical or spiritually from a person or group. The death penalty clearly violates this article, where the person sentenced to death has been deprived of his life, his independence, his personal security. However, the death penalty is a punishment that violates the right to live for humans as God's creatures. Can be seen many people who have been sentenced to death, including corruptors in China, Saddam Hussein, or others. But as in the case of Rwanda and Yugoslavia, perpetrators of human rights violations were only rewarded with a maximum sentence of life imprisonment, because the death sentence in modern times has begun to be abandoned by countries in the world, although there are still some countries that still carry it out in various ways, such as hanging, shot, and injected. However, the way of the death penalty still injures oneself and takes the right of life from someone.

b. If capital punishment is reviewed according to the International Covenant on Political Civil Rights, namely Article 6 paragraph (1), every human being has the right to life. This right must be protected by law. No human being may be hastily

deprived of his life. As it is explained in Article 3 of the UDHR that the execution of death has violated Article 6 paragraph (1), executions basically cause physical pain and deprivation of the right to life of a person, and this is contrary to Article 6 paragraph (1) of the ICCPR and Article 3 of the UDHR. Although many countries have not abolished the death penalty including Indonesia, China and the Iraqi state have not abolished the death penalty, the problem is the lack of fulfilment and clear regulation of the implementation of the criminal penalties both in the process of arrest and in carrying out hearings in trials, so that matters This is contrary to the concept of the rule of law where there is a clear regulation both equality before the law and also the existence of a free and impartial trial which implies an independent judicial power.

c. Article 6 paragraph (2) of the International Covenant on Political Civil Rights states that in countries which have not abolished the death penalty, decisions can be given only for the most serious crimes, in accordance with the law in force at the time the crime was committed, and without violating a provision of this Covenant and the Convention on the Prevention and Punishment of the Extermination (tribal) Crime of the Nation. This sentence may only be carried out with the final decision of the competent court. Furthermore Article 6 paragraph (4) of the International Covenant on Political Civil Rights stipulates that a person who has been sentenced to death must have the right to request forgiveness or leniency. Amnesty, forgiveness, or relief of the death penalty can be given in all chapters. In this case, according to the description above, the author tries to argue that in implementing the death penalty it needs to pay attention to several aspects, namely, philosophical, sociological, and juridical aspects.

In addition to the regulation of basic rights, namely the right to life regulated in the DUHAM which in this case is linked to the death penalty, there are exceptions to the exercise of that right, namely by having an in-depth understanding of the existence of denotable rights, namely in the first case "a public emergency which threatens the life of nation "can be used as a basis to limit the implementation of basic freedom rights, with the condition that the state of the emergency (public emergency) must be officially announced (be officially proclaimed), is limited and should not be discriminatory. This is stipulated in a limitative manner in the International Covenant on Civil and Political Rights, in Article 4 paragraph (1) of the ICCPR, states that in a state of emergency that threatens the life of the nation and the existence of such an emergency has been officially announced, States parties to this Covenant can take efforts that deviate from their obligations under this Covenant, insofar as this is demanded by the emergency situation, provided that these efforts do not conflict with the obligations of the states' parties under international law, and do not violate.

Legal debate over the validity of capital punishment departs from the regulations above, which on the one hand still recognize capital punishment and the other side recognize the right to life. For those who reject capital punishment, the opinion that capital punishment is legally unconstitutional, because it is contrary to the constitution. In the order of the laws and regulations in Indonesia, every regulation that is below must not conflict with the one above it. The law that contains the death penalty is contrary to the constitution which recognizes the right to life. Because the constitution in the Indonesian legal system is higher than the law, the death penalty in the law must be amended. Pros and cons of the application of the Death Penalty in Indonesia broadly conical into two major sections as we have mentioned in the background above.

Parties who do not approve of the application of the death penalty, then recommend what is called conditional capital punishment be an alternative if the state still applies the death penalty. Therefore, the death penalty can be carried out under certain conditions. So the death penalty is applied as a last resort to protect the public. In addition, recommendations are also directed that the government be firm. The legal process is slow and tends to drag on to create feelings of pity and compassion among the people towards those who are sentenced to death. Although on one hand there is an assumption that the long legal process is an attempt to provide an opportunity for death row inmates, but this condition unwittingly actually has a side of legal uncertainty for death row inmates.

Although capital punishment still adheres to several national legal products, it seems to be believed if the application of the death penalty is clearly in violation of the 1945 Constitution of the Republic of Indonesia as the highest positive legal product in the country. Article 28A of the 1945 Constitution (Second Amendment) has stated that everyone has the right to live and has the right to defend his life and life. Meanwhile Article 28I paragraph (1) of the 1945 Constitution (Second Amendment) states that the right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the public, and the right not to be prosecuted based on retroactive laws is a human right that cannot be reduced under any circumstances.

From human rights studies, it may be considered that capital punishment is a crime that would deviate from human rights because it takes an individual's right to independence and takes an individual's right to have a life, but actually all of that if measured by a crime, the crime is sometimes appropriate, but also does not rule out the possibility all of these have the opposite impact on the determination of the death penalty, which means that Ham itself is the right of every individual who is inherent from within the individual from birth to stand and live independently which causes capital punishment not in accordance with human rights.

The requirements of the rule of law are that there is a separation of powers and can be controlled by the authorities of the government, and have an independent or independent judge for citizens, who should be able to resolve problems between citizens by the norms of society and decide on a criminal offense and gross human rights with humane, because judges are functionally the most important element in law enforcement in Indonesia and decide cases fairly and appropriately, while capital punishment is a decision that is not in line with the norms in Indonesia.

At the international level this type of criminal offense is prohibited to be imposed on the convicted person. The United Nations (UN) encourages the elimination of the application of this type of crime based on the Universal Declaration of Human Rights adopted on December 10, 1948, by guaranteeing the right to life and protection against torture. Likewise, the guarantee of the right to life is contained in Article 6 of the International covenants on Civil and Political Rights (ICCPR) adopted in 1966 and ratified by Law Number 12 of 2005 concerning Ratification of the ICCPR. The Indonesian criminal law system seeks to release capital punishment outside the main criminal offense, by regulating it as an alternative criminal. Capital punishment is no longer the first basic criminal offense, but instead becomes a special criminal offense.

Respect about capital punishment (capital punishment) in Indonesia as a country that has the philosophy of the Pancasila until now is a discussion that can cause problems (between the pros and cons), because there are still many among the legal experts who question this because partly because of differences and reviews. For those who reject the death penalty, capital punishment is considered contrary to Human Rights (HAM). Their struggle, for example, can be seen in the change in the status of the death penalty listed in the draft new Penal Code, which will be submitted for adoption by the House of Representatives. Article 66 of the Draft Penal Code states that capital punishment becomes a specific primary crime and is threatened by alternatives to other basic crimes (<http://dickyputraarumawan.blogspot.com/2015/02/v-behaviorurldefaultvmlo.html?m=1>).

The criminal offense is carried out by shooting the convicted person to death and not carried out in public. Imprisonment is considered to take someone's life rights. Whereas everyone has the right to live and has the right to defend his life and lives (Article 28A of the 1945 Constitution). Among those who reject the death penalty, it considers that capital punishment is not in harmony with the development of human rights. All countries have the concept of upholding human rights, and Indonesia as part of the countries in the world must participate in realizing human rights. According to them the formal legal regulation of human rights in the Republic of Indonesia should Indonesia have left the death penalty. Human rights, especially the right to life, are stated as non-denotable rights. This is stated in Article 28 I paragraph (1) and Article 28J paragraph (2) of the 1945 Constitution, Article 4 of Law Number 39 of 1999 concerning Human Rights.

We also need to know that until June 2006 only 68 countries were still implementing the practice of the death penalty, including Indonesia, and more than half the countries in the world had abolished the practice of the death penalty. There are 88 countries that have abolished the death penalty for all categories of crime, 11 countries abolished the death penalty for the category of ordinary criminal crimes, 30 countries carried out a moratorium (de facto not applying) the death penalty, and a total of 129 countries carried out abolition (abolition) of the punishment die.

But positively, the application of capital punishment in Indonesia is still widely decided by judges. As an example of the case of the murder of Sisca Yofie, the culprit was Wawan, who was convicted by the Supreme Court through his verdict on 11 November 2014 from life imprisonment to capital punishment ([http://id.wikipedia.org/wiki/hukuman\\_mati](http://id.wikipedia.org/wiki/hukuman_mati)). The consideration is the actions of the accused against the victim in a sadistic way and to provide a deterrent effect and so that the community respects the right to life of others ( [www.hukumonline.com](http://www.hukumonline.com)). The Attorney General will carry out the executions of 5 people sentenced to death in 2014, and 20 people in 2015. President Jokowi rejected the petition for clemency submitted by 64 convicted to die in drug cases. Finally, the death penalty was carried out against the drug kingpin Fredy Budiman (Kompas, Rabu, 10 Desember 2014).

Currently there are 274 death row inmates who have not been executed. The delay in execution of 274 death row inmates may have been caused by the desire of the Indonesian government to abolish capital punishment in the main criminal code in the Criminal Code, as stated in the draft of the new Criminal Code. However, the death penalty for drug convicts is reasonable, considering that they take many other people's rights and even take many others' lives. For this reason too, President Joko Widodo answered protests over the death penalty, he said that every day 50 of our young generation die from drugs. If it is calculated a year 18,000 people (who die from drugs). See, <http://m.harnas.co/2015/04/29/eksekusi-mati-bukan-eksekusi-ham>

#### 4. CONCLUDING NOTES

The implementation of capital punishment in Indonesia was initially carried out according to the provisions in article 11 of the Criminal Code, which was later amended by the provisions in S. 1945: 123 which entered into force on 25 August 1945 and for the provisions of its implementation in detail are explained in Law No. 2 (PNPS) 1964. Whereas in the conclusion of the Constitutional Court in the material review of Law No. 22 of 1997 concerning Narcotics to the 1945 Constitution states: "Provisions of Article 80 Paragraph (1) letter a, Paragraph (2) letter (a), Paragraph (3) letter a; Article 81 Paragraph (3) letter (a); Article 82 Paragraph (1) letter a, Paragraph 2 (letter) a and Paragraph (3) letter a in the Narcotics Law, as long as those

concerning the threat of capital punishment, do not conflict with Article 28A and Article 28I paragraph (1) of the 1945 Constitution ", meaning that capital punishment does not contradict the Indonesian Constitution.

Capital punishment according to human rights must be seen in the provisions of the Universal Declaration of Human Rights (UDHR), which in the UDHR there are several articles that do not allow the death penalty, namely; Article 3 of the UDHR, Article 6 paragraph (1), (2) and (4) ICCPR. Whereas in Article 3 of the DUHAM it is said that "every person has the right to life, independence and personal security", as well as regulated in ICCRP article 6 paragraph (1) reads "in every human being inherent the right to life, that right must be protected by law . No human being may be hastily deprived of his life ". Whereas in the constitution of the Republic of Indonesia it is stipulated in article 28A which states that "every person has the right to live and has the right to defend his life and life" and article 28I paragraph (1) which states that "the right to life, the right not to be tortured, the right to freedom of thought and conscience, religious rights, the right not to be enslaved, the right to be recognized as a person in public, and the right not to be prosecuted on a retroactive basis are human rights that cannot be reduced under any circumstances ".

In the implementation of capital punishment, there are many parties who are pros and cons, those who are pro argued that the death penalty does not violate human rights because the perpetrators have violated the human rights of victims and human rights of the community. The severity of the allegations regarding capital punishment violating human rights is considered as a one-sided statement that does not see how the human rights of victims of the crime are violated. While those who contra emphasis their view that the death penalty is considered to violate human rights because the revocation of the right to life of a person who is actually a right is highly respected and no one can revoke it. Therefore, the death penalty must be abolished in existing legislation. It is because of the pros and cons that this is likely to delay the execution of 274 death row inmates today. In the sense that the death penalty controversy lies in violating or not violating its human rights, while the death row inmates are people who have violated the human rights of others.

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