

DEATH PENALTY POLICY IN INDONESIA



INSTITUTE FOR
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REFORM

Death Penalty Policy in Indonesia

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FOREWORD

As a part of many types of punishment, death penalty in Indonesia was not introduced by the colonial government—the Netherland Indies government. Prior to the European colonialism, Kings and Sultans in Nusantara region have implemented death penalty to their slaves/subordinates. In the context of Indonesia, a consolidation of death penalty policy happened in 1808 under the order of Governor General Herman Willem Daendels, who regulated the imposition of death penalty as the authority of Netherland Indies Governor General. During this period, death penalty was used as a strategy to silence the colonies and to defend Java from the British attack. Without this effort, the mission of French Government that controlled the Netherland to defend Java from the British was too difficult.

The second policy consolidation and arguably the most important was the enactment of *Wetboek van Strafrecht voor Inlanders (Indonesiers)* on 1 January 1873. Afterwards, in 1915, the *Wetboek van Strafrecht voor Indonesie (WvSI)* was passed into a law and entered into force on 1 January 1918. The motive of racial prejudice and maintaining the public order was still the main objective to impose death penalty in Indonesia.

After Indonesia declared its independence in 1945, death penalty was still imposed in many prevailing laws and regulation. It was indeed imposed with different rationale and objective, adjusted with the political system and social-politics situation when the legislation was enacted. Ever since the independence in 1945, the politics of law in Indonesia is still directed to use death penalty as one of the most important punishment under its legal framework.

Even after the Reformasi in 1998, in less than 18 years, at least five laws (*undang-undang*) incorporated death penalty as one of many punishment, regardless the fact that the 1945 Consitution (Amendment) explicitly ensures the right to life. While only five laws that incorporated death penalty after the Reformasi, the number of articles that incorporate death penalty as punishment increased two folds compared to the figures of death penalty articles during 1945-1998.

This anomaly becomes a serious attention by many human rights activists and other countries that already abandoned the practice that against humanity. It is also evident from the United Nations Resolution No. 29 dated 18 December 2007, which asked all countries to conduct a moratorium of death penalty in their legal system as a part to fully eliminate the practice of death penalty. As a member of the United Nations, Indonesia cannot disregard the UN Resolution as the instrument of the international law.

Due to the abovementioned explanation, it is important to conduct a study that maps the main argumentation on why death penalty is still incorporated under Indonesian laws and regualtions. This effort is important to discover the rationale and background of public policy that use death penalty under the Indonesian legal system. Without understanding the roots and background as well as the argumentation on why death penalty is used under several laws, the practice in incorporating death penalty as part of punishment will still be maintained and utilized.

Institute for Criminal Justice Reform

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Executive Director

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CHAPTER I

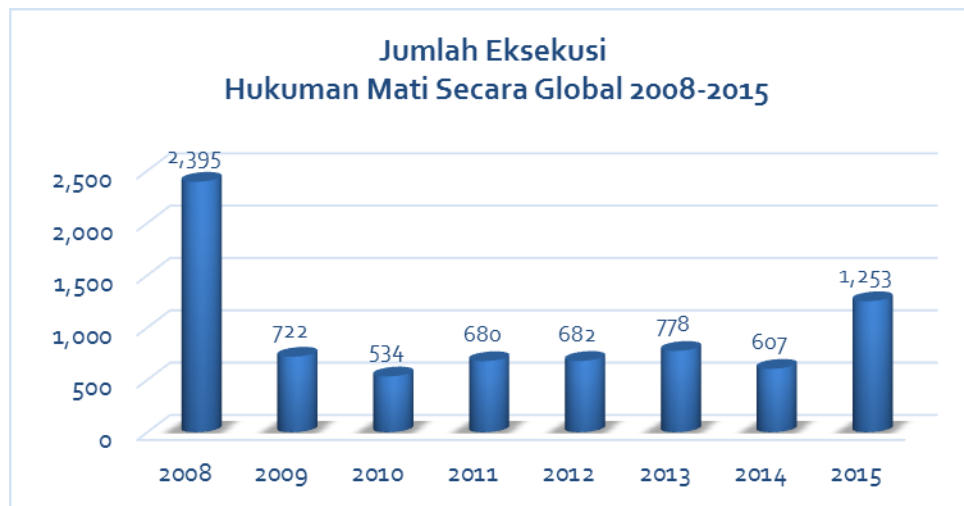
Introduction

1.1 Background

The global current trend shows that many countries are starting to abandon death penalty in their legal system, as evident from the United Nations (“UN”) Resolution in December 2007 that prohibits death penalty.¹ Nevertheless, the real situation shows the other way around. Death penalty is still used as one of punishment. During 2015, the death execution in global level increased significantly compared to 2014. At least 1.634 persons have been executed in 2015, an increase of 573 execution or 54 percent compared to 2014.²

When looking into the global trend of death penalty imposition, compiled by Amnesty International from 2008 to 2015, there is a fluctuative trend. For instance, in 2010 and 2014, a decrease of death execution can be seen compared to previous years. However, the trend in the last five years (2010-2015) shows an inevitable increase of death execution globally (Table 1.1).³

Tabel 1.1 Global Figures of Death Execution 2008-2015



Similar to global trend, the practice of death penalty execution in Indonesia also shows a significant increase during President Joko Widodo administration. This situation is closely related to President Jokowi’s policy, which states that Indonesia is currently under a national emergency regarding narcotic,

¹ Roger Hood, *Introduction*, dalam Jon Yorke (ed), *Against the Death Penalty: International Initiatives and Implications*, (Farnham: Ashgate Publishing Limited, 2008), pg. 1.

² Amnesty International, *Amnesty International Global Report: Death Sentences and Executions 2015*, (London: Amnesty International Ltd, 2016), pg. 5.

³ *Ibid.*

and therefore requires a firm punishment.⁴ Early in his administration period, President Jokowi executed 18 death convicts (see Table 1.2).

Tabel 1.2 Death Execution in Indonesia 2007-2016



Reviewing a number of laws and regulations that stipulate applicable death penalty, as well as the sentencing policy trend in Indonesia, it is likely to see that death penalty will still be maintained in the near future. It is also affirmed from Indonesia's status as one of 58 countries that still preserving and standardizing death penalty as a punishment to be imposed towards certain criminal offender. In contrast, as per 31 December 2016, more than two-thirds of countries around the world have abandoned death penalty, both in their legal instrument and practice.

Global trends of countries in responding to death penalty under their sentencing policy can be seen from the following figures: (i) eliminating death penalty for all crimes, 102 countries; (ii) eliminating death penalty for ordinary crimes, 6 countries; (iii) eliminating death penalty in practice, 32 countries; (iv) preserving death penalty, 58 countries.⁵

Under the Indonesian legal system, there are at least 13 laws and regulations that still stipulate death penalty as a punishment outside provisions under the Criminal Code (*Kitab Undang-Undang Hukum Pidana* – "KUHP"). This type of sanction is imposed towards crimes that are stipulated under KUHP, or those that are incorporated under several special/specific laws.⁶

The basic idea of death penalty implementation under the Indonesian legal system can be found under Article 10 of KUHP, consisting two types of punishment: main punishment and additional punishment. Main punishment consists of: (1) death penalty; (2) imprisonment; (3) confinement; and (4) fines. Meanwhile, additional punishment consists of: (1) revocation of certain rights; (2) forfeiture of certain

⁴ Indra Akuntoto, *Presiden Jokowi: Indonesia Gawat Darurat Narkoba*, Kompas.com, 4 February 2015 <<http://nasional.kompas.com/read/2015/02/04/10331931/Presiden.Jokowi.Indonesia.Gawat.Darurat.Narkoba>>, accessed on 12 February 2017.

⁵ Amnesty International, *Global Report...*, *op.cit.*, pg. 65.

⁶ Syahrudin Husein, *Pidana Mati Menurut Hukum Pidana Indonesia*, (Medan: USU Digital Library, 2003), pg. 6.

assets; and (3) announcement of judge decision. From the said main punishment, the idea of death penalty was originated. On the other hand, in practical level, the execution of death penalty is stipulated under Law No. 2/PNPS/1964 on Procedures on the Death Penalty Execution Imposed by Court under General and Military Court System, which is still applicable to this date.

There are eight crime that are charged with death penalty under KUHP, namely:

1. Article 104 on crime against state security (treason or *makar*);
2. Article 340 on premeditated murder;
3. Article 111 (2) on colluding with foreign power or countries, with the intent to wage a war;
4. Article 124 (3) on betrayal to the enemy during wartime;
5. Article 124 (bis) on causing or facilitating revolt; Article 140 (3) on premeditated murder towards a head of friendly state;
6. Article 479 k (2) and Article 148 (2) on crimes relating to aviation and aviation facilities;
7. Article 444 on piracy resulting in death; and
8. Article 365 (4) theft accompanied by force, committed by two or more persons resulting in severe injury or death.

Tabel 1.3 Death Penalty Regulation in Indonesia

No	Laws and Regulations	Articles
1.	KUHP	Article 104, Article 111 (2), Article 124 (3), Article 140, Article 340, Article 365 (4), Article 444, Article 368 (2)
2.	Military Criminal Code (<i>Kitab Undang-undang Hukum Pidana Militer – “KUHPM”</i>)	Article 64, Article 65, Article 67, Article 68, Article 73 1st, 2nd, 3rd and 4th, Article 74 1st and 2nd, Article 76 (1), Article 82, Article 89 1st and 2nd, Article 109 1st and 2nd, Article 114 (1), Article 133 (1) and (2), Article 135 (1) 1st and 2nd, (2), Article 137 (1) and (2), Article 138 (1) and (2), and Article 142 (2)
3.	Law No. 12/Drt/1951 on Firearms	Article 1 (1)
4.	Presidential Determination No. 5 Tahun 1959 tentang Authority of Attorney General / Military Attorney General in regards to Aggravate Punishment towards Crimes that Causing Danger to Food Stocks	Article 2
5.	Government Regulation in Lieu of Law No. 21 of 1959 on Aggravate Punishment Towards Economic Crimes	Article 1 (1) and (2)
6.	Law No. 31/PNPS/1964 on Basic Provisions on Nuclear Power	Article 23
7.	Law No. 4 of 1976 on Amendment and Addition of Several Articles under KUHP in relation to the	Article 479k (2) Article 479o (2)

	Extension of the Applicability of Provisions regarding Crimes related to Aviation and Aviation Facilities	
8.	Law No. 5 of 1997 on Psychotropic	Article 59 (2)
9.	Law No. 31 of 1999 on Corruption	Article 2 (2)
10.	Law No. 26 of 2000 on Human Rights Court	Article 36, Article 37, Article 41, Article 42 (3)
11.	Law No. 15 of 2003 on Eradication of Terrorism	Article 6, Article 8, Article 9, Article 10, Article 14, Article 15, Article 16
12.	Law No. 35 of 2009 on Narcotic	Article 74, Article 113 ayat (2), Article 114 (2), Article 119 (2), 118 (2), Article 119 (2), 121 (2), Article 132 (3), Article 133 (1), Article 144 (2)
13.	Government Regulation in Lieu of Law No. 1 of 2016 on Second Amendment to Law No. 23 of 2002 on Child Protection (later issued as Law No. 17 of 2016 on Determination of Government Regulation in Lieu of Law No. 1 of 2016 on Second Amendment to Law No. 23 of 2002 as a Law)	Article 81 (5)

Even though KUHP still preserving death penalty as one of its main punishment, the history of the development of criminal law codification process in the Netherlands, which is the role model of Indonesia's punishment system, shows different angle. Since 1870, death penalty as a main punishment has been erased under the Netherlands legal system. Even in their practice, the Government of Netherlands was no longer implementing death execution since 1860. Death execution in public was lastly conducted in 1860 in Maastricht.⁷

Furthermore, imprisonment as a punishment is an alternative so that death penalty and physical punishment are no longer used, as both are considered inhuman and cruel in the Netherlands. The idea was firstly identified under the amendment proposal towards French Code Penal in 1827.⁸ As noted by Lydia Bertram, during the deliberation of the Netherlands Code Penal, the idea of life imprisonment under the Netherlands legal system was clearly a replacement for death penalty.⁹

According to Sahetapy, the main reason why the Government of Netherlands was still preserving death penalty in its colonial territories, including Indonesia, was caused by racial motive to support the law and order during that time. Discriminative racial prejudice, in essence, assuming that indigenous and local population cannot be trusted.¹⁰ There was even an assumption that local people were lying by giving perjury before the court.¹¹ Local population were easy to believe in something and accepting lie

⁷ Chrisje Brants, *The Abolition of Death Penalty in the Netherland*, dalam Hans Nelen and Jacquess Claessen (eds), *Beyond the Death Penalty: Reflection on Punishment*, (United Kingdom: Intersentia Publishing, 2012), pg. 25.

⁸ Lydia Bertram, *Imprisonment as An Alternative to the Death Penalty: Historical Observations Complementary to an Emerging Discussion*, dalam Hans Nelen and Jacquess Claessen (eds), *op.cit.*, pg. 65.

⁹ *Ibid.*, pg. 72.

¹⁰ J.E. Sahetapy, *Ancaman Pidana mati terhadap pembunuhan Berencana*, (Bandung: Alumni, 1979), pg. 31-36

¹¹ *Ibid.*

as a truth, and many have vices.¹² This discriminative perspective was in the main analysis, as Netherland's jurists already had superior sentiment as the colonizer.¹³

The independence declaration of Indonesia in 1945 did not affect anything related to colonial policy on death penalty. It is evident that death penalty (in addition to provisions under KUHP) is still well-maintained and multiplied in many Indonesian laws and regulation. Starting from the independence in 1945 to 1998, at least six laws and regulations that used death penalty as a punishment (see Table 1.3). Even the use of death penalty as a punishment in many laws and regulations are increasing after the Reformasi era (1998 – today).

In a period of less than 18 years, at least five laws (*undang-undang*) incorporated death penalty as a punishment, even though the 1945 Consitution after the Amendment (1999-2002) has explicitly ensured the right to life.¹⁴ While only five laws that incorporated death penalty after Reformasi, if we compared the number of articles that regulate the death penalty as a punishment, the figures increased two-folds from the overall articles on death penalty in the period of 1945-1998.

This anomaly, of course, has attracted serious attention from human rights activists and other countries that already abandoned this practice that is not in line with humanity. Referring to the UN Resolution No. 29 dated 18 December, the international community has demanded all member states to conduct a moratorium of death penalty in their legal system, before fully eliminating death penalty.¹⁵ As a member of this international community, Indonesia cannot disregard the direction from the UN Resolution as the international legal instrument.

At this point, it is important to study and map the main argumentation on why death penalty is still incorporated as a punishment under several laws and regulations in Indonesia. Such identification is crucial to discover the rationale and background of each public policy that uses death penalty, and therefore included under the Indonesian legal system. Without having a thorough understanding towards the roots, background, and argumentation on why such situation is still happening in Indonesia, it becomes a possibility that death penalty as a punishment will still be preserved and used.

1.2 Problem Statement

The lack of reference and studies related to the rationale, arguments, and consideration in using death penalty under the Indonesian legal system, leads this study to focus on the following questions:

1. What are the background and social-politics dynamics of death penalty sentencing policy as punishment under the laws and regulations in Indonesia?
2. How is the conformity of death penalty policy in Indonesia with the universal human rights principles and norms?

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Indonesia, *1945 Constitution*, Article 28A.

¹⁵ William A Schabas, *The United Nations and Abolition of the Death Penalty*, in Jon Yorke (Ed), *op.cit.*, pg. 37. The Resolution was triggered by the deatch execution towards Saddam Hussein in early 2007. UN Secretary General Ban Ki-moon condemned the execution towards Saddam, which according to him was a barbaric action and inhuman. Resolution that was dated on 18 December 2007 was passed after a vote between UN member states. There were 104 member states in favor of the Resolution, 54 member states were against, and 29 member were abstained.

1.3 Objectives

Based on the abovementioned research questions, the objectives of this study are as follows:

1. To identify the background and social-politics dynamics of death penalty sentencing policy as criminal sanction under the laws and regulations in Indonesia;
2. To compare Indonesia's conformity on death penalty policy with universal human rights principles and norms.

1.4 Focus of Study

This study is focusing on the mapping of Indonesian legislation that incorporate death penalty as one of criminal punishment. This study further highlights that the process of lawmaking is closely related to the dialectic of society's social-political context during the policymaking process. Therefore, writing down the dynamics of legislation development is required without question. Due to this consideration, it is important to review the process in developing death penalty legislation and documenting the overall process.

From another angle, the demand to review conformity of Indonesian legal structure conformity with international human rights legal structure in formulating death penalty legislation, becomes an important aspect to have an objective point of view on how far the national law responds to the development of international community norms and standards.

From the urge to have a thorough understanding on the process of death penalty legislation development, this study is expected to be a reference in examining and reviewing the conformity of death penalty-related policies with international human rights standards, including the recommendation of review, amendment, or even revocation of policies that use death penalty as one of sentencing policy in Indonesia.

1.5 Literature Review

Even though the topic regarding death penalty is not a new issue, the method and focus of study for this specific issue, on the other hand, can be considered as a novelty in Indonesia. From the literature research that has been conducted, there is no single research with comprehensive study that seeks for the root problem of the rationale behind why death penalty is still incorporated in many Indonesian laws and regulations, and at the same time comparing it with international standards on death penalty. Furthermore, there is still a lack of studies conducted by Indonesian researchers in regards death penalty issue.

Several studies that focusing on death penalty that conducted by researchers are as follows: *Ancaman Pidana Mati Terhadap Pembunuhan Berencana* by J.E Sahetapy,¹⁶ *Pidana Mati dalam Negara Pancasila* by J.E Sahetapy,¹⁷ *Kontroversi Hukuman Mati: Perbedaan Pendapat Hakim Konstitusi* by Todung Mulya Lubis and Alexander Lay,¹⁸ *Politik Hukuman Mati di Indonesia* by Robertus Robert and Todung Mulya

¹⁶ Sahetapy, *Ancaman...*, *loc.cit.*

¹⁷ J.E. Sahetapy, *Pidana Mati dalam Negara Pancasila*, (Bandung: Citra Aditya Bakti, 2007).

¹⁸ Todung Mulya Lubis and Alexander Lay, *Kontroversi Hukuman Mati: Perbedaan Pendapat Hakim Konstitusi*, (Jakarta: Kompas, 2009).

Lubis (ed.),¹⁹ *Pengaturan Hukuman Mati Sebagai Pidana Pokok dalam Rancangan Kitab Undang-Undang Pidana* by Edita Elda,²⁰ *Perdebatan Mengenai Hukuman Mati dalam Pembaharuan Hukum di Indonesia* by Shidarta Praditya Reviendra Putra,²¹ *Hukuman Mati dalam R KUHP: Jalan Tengah Yang Meragukan* by Supriyadi Widodo Eddyono et.al,²² *Menolak Hukuman Mati: Perspektif Intelektual Muda* by Antonius Cahyadi et.al,²³ *Unfair Trial: Analisis Kasus Terpidana Mati di Indonesia* by Koalisi Hapus Hukuman Mati (Koalisi Hati),²⁴ *Aku Menolak Hukuman Mati: Telaah Atas Penerapan Pidana Mati* by Yon Artiono Arba'i.²⁵ and, *Hakikat Pelaksanaan Hukuman Mati di tinjau dari Perpektif Hak Asasi Manusia* by Bambang Sugeng Rukomono²⁶.

From on the nine research mentioned above, and based on the scope of the focus of study that was determined, there are two main categories, namely studies towards all laws and regulations pertaining to death penalty and studies focusing on certain regulation or crime that stipulate death penalty. Using this categorization, only the study conducted by Supriyadi Widodo Eddyono et.al and Edita Elda that map the whole laws and regulations regarding death penalty in Indonesia. However, the study titled *Hukuman Mati dalam R KUHP: Jalan Tengah Yang Meragukan*²⁷ by Supriyadi Widodo Eddyono et.al and *Pengaturan Hukuman Mati Sebagai Pidana Pokok dalam Rancangan Kitab Undang-Undang Pidana*²⁸ by Edita Elda only compiled the regulations regarding death penalty in Indonesia.

This is where this study differs from the studies conducted by Supriyadi Widodo Eddyono et.al and Edita Elda. This research is not only compiling laws and regulations that stipulate death penalty in Indonesia, but also taking a deeper understanding by discovering the root of the problems, debate, or argumentation that underlies why death penalty is still used under several laws and regulations in Indonesia.

Additionally, other studies concerning death penalty, only focusing on several specific issues related to death penalty. For instance, study by Sahetapy under the title *Ancaman Pidana Mati Terhadap Pembunuhan Berencana*, only focusing on Article 340 KUHP regarding premeditated murder. Similar approach also used under the study titled *Kontroversi Hukuman Mati: Perbedaan Pendapat Hakim Konstitusi* by Todung Mulya Lubis and Alexander Lay, which only focusing on the study towards death

¹⁹ Robertus Robert and Todung Mulya Lubis, *Politik Hukuman Mati di Indonesia*, (Tangerang Selatan: Marjin Kiri, 2016).

²⁰ Edita Elda, *Pengaturan Hukuman Mati Sebagai Pidana Pokok dalam Rancangan Kitab Undang-Undang Pidana*, Master Thesis at Universitas Indonesia, (Depok: Perpustakaan Universitas Indonesia, 2009).

²¹ Shidarta Praditya Reviendra Putra, *Perdebatan Mengenai Hukuman Mati dalam Pembaharuan Hukum di Indonesia*, Master Thesis at Universitas Indonesia, (Depok: Perpustakaan Universitas Indonesia, 2009).

²² Supriyadi Widodo Eddyono et.al, *Hukuman Mati dalam R KUHP: Jalan Tengah Yang Meragukan*, (Jakarta: Institute for Criminal Justice Reform (ICJR), 2015).

²³ Lucia Ratih Kusumadewi and Gracia Asriningsih (ed.), *Menolak Hukuman Mati: Perspektif Intelektual Muda*, (Yogyakarta: Kanisius, 2015).

²⁴ Koalisi Hapus Hukuman Mati (Koalisi Hati), *Unfair Trial: Analisis Kasus Terpidana Mati di Indonesia*, (Jakarta: Imparsial, 2016).

²⁵ Yon Artiono Arba'i, *Aku Menolak Hukuman Mati: Telaah Atas Penerapan Pidana Mati*, (Jakarta: KPG, 2015).

²⁶ Bambang Sugeng Purnomo, *Hakikat Pelaksanaan Hukuman Mati di tinjau dari Perpektif Hak Asasi Manusia* (Jakarta: PT Raja Grafindo Persada, 2016).

²⁷ Eddyono, *Hukuman...*, *op.cit.*, pg. 10-11.

²⁸ Elda, *op.cit.*, pg. 42-45. Compare with paper written by Husein, *Pidana Mati...*, *op.cit.*, pg. 1-8.

penalty debate from the judicial review of Narcotic Law at the Constitutional Court (*Mahkamah Konstitusi* – “MK”).²⁹

Other studies, as comparison, are not focusing their studies on the roots of the problem and background on why several laws and regulations in Indonesia are still incorporating death penalty. For example, a study by Shidarta Praditya Reviendra Putra highlighted the debate of death penalty sentencing theory under the Draft Bill on Criminal Code (“RKUHP”). Additionally, Sahetapy’s study is only focusing on death penalty variable from philosophical perspective of Pancasila state.

Futhermore, other reports and studies only see on why the death penalty from the subjective point of view or empirical experience of each writers. For instance, a writing anthology titled *Menolak Hukuman Mati: Perspektif Intelektual Muda* by Antonius Cahyadi et.al criticized the use of death penalty as a sentencing form that is no longer relevant with the academic pursuit and humanity values based on each writer’s background. Other publication, such as a book titled *Aku Menolak Hukuman Mati: Telaah Atas Penerapan Pidana Mati* by Yon Artiono Arba’i, was written based on the writer’s subjective experience who was working as a prosecutor; while a book titled *Unfair Trial: Analisis Kasus Terpidana Mati di Indonesia* described the experience of each legal counsel or lawyer in advocating several defendants that have been sentenced to death.

In addition to all literature mentioned above, the one that has similar approach was an article written by Wilson titled *Warisan Sejarah Bernama Hukuman Mati* in a book called *Politik Hukuman Mati di Indonesia*. This article is focusing its study on the practice of death penalty from historical point of view, including the colonial period, revolution period, and Guided Democracy period (Soekarno era). While this study is a descriptive approach in regards to the policy towards persons that were sentenced to death during the Netherland Indies and Indonesia, the data from the article becomes a very valuable information for this study.

Based on the abovementioned description, it can be concluded that this study contains novelty in terms of research regarding death penalty in Indonesia. As per of this writing is published, there are no similar studies that focusing their research to the questions and perspective that are to be identified under this study.

1.6 Methodology

Legal research can be conducted for many viable reasons. Some are utilized to identify legal sources to be implemented and solved in a legal problem, and afterwards finding a solution to the problem that has been identified.³⁰ Nevertheless, in the history of legal academic tradition, there are two research typologies: (1) expository research, or also known as black letter law research, or doctrinal legal research, which focusing more on the law itself as an independent principle that can only be accessed from several court decisions or law (statutes), with little to none reference to variables outside the written law; and (2) fundamental research, or law in context research, or socio legal studies. The second

²⁹ Lubis dan Lay, *Kontroversi...*, *op.cit.*, pg. IX.

³⁰ Mike Mc Conville and Wing Hong Chui, *Research Methods for Law*, (Britain: Edinburg University Press, 2007), pg. VII.

approach is not started from the written law (statutes) but from the problems and issues within the society that are tend to shifted into public attention or get public attention.³¹

From the two main tradition of legal research, if it is tied further into problem statement mentioned earlier, it is clear that this study is categorized under the fundamental research, or law in context research, or socio legal studies. In a more technical level, socio legal studies also use social research, such as qualitative and quantitative research. One of many traits of socio legal studies is data collection in the field from interview and literature research. Both of these can be conducted in parallel without the tendency to be treated as separate part.

Table 1.4 Research Methodology

Problem Statement	Sub	Methodology	Sources
What are the background and social-politics dynamics of death penalty sentencing policy as punishment under the laws and regulations in Indonesia?	A. Colonial Period; B. Revolution Period C. Liberal Democracy Period D. Guided Democracy Period E. New Order Period F. Post-Reformasi Period	Literature Research	Primary Legal Sources 1. Laws 2. Relevant laws and regulations Secondary Legal Sources Related and authoritative legal research/studies concerning the topic
		Interview	Academics, legal experts, human rights activists, government, and lawmakers who are directly involved in the lawmaking process
How is the conformity of death penalty policy in Indonesia with the universal human rights principles and norms?		Literature Research	Primary Legal Sources 1. Laws 2. Relevant laws and regulations Secondary Legal Sources Related and authoritative legal research/studies concerning the topic
		Interview	Academics, legal expert, and human rights activists

Data collection is obtained through in-depth interview and focus group discussion with academics, legal and human rights experts, government and members of the parliament who are directly or indirectly involved in the formulation and implementation of policy that stipulate death penalty. Additionally, also primary and secondary legal sources. Primary legal sources are laws and regulations that are related to death penalty and human rights; while secondary legal sources are literature research. Literature data are obtained from literature research related to death penalty and human rights that are being the research object.

Analysis and interpretation are conducted in parallel with the data collection process in the field. This approach is taken as an effort to keep up with the developing issues in hand, as the problem pertaining

³¹ *Ibid.*, pg. 1-2. In addition to the two main legal research types, Mike and Wing also stated the third research method, which is comparative legal research.

to death penalty applicability and human rights are experiencing a very fast development from time to time. Analyzing research result requires data support, from literature data, field data, or other data that are relevant with the study, and therefore the data can be analyzed in parallel with the findings from the field in the development.

Interpretation is conducted after the valid data is obtained from the field, and afterwards to be verified with the documents and literature data. This is conducted so that the interpretation towards the data can generate optimum result. Furthermore, this study follows the following phases:

1. This study is started with data collection using the abovementioned method.
2. Followed by analysis of available data.
3. Next phase is the drafting of study report that will result in the draft as the basis for opinion or review or feedback from many experts
4. The next step is finalization of study report by formulating the conclusion and recommendation policy regarding death penalty in Indonesia.
5. The study then will be published as a comprehensive text discussing death penalty legislation in Indonesia

1.7 Systematics of Writing

In conducting the study, the systematics are consisting of five chapters as follows:

Bab I, is the *Introduction* part. This chapter tries to elaborate the background or problem that becomes the basis on why this study is important and strategic to be conducted in Indonesia. In short, this chapter illustrates the increasing trend of death penalty execution at the global level and the increasing trend of countries that abandoned death penalty, in both regulatory aspect and practical aspect. This chapter also elaborates on why the tendency of Indonesian government in conducting death execution practice and the increase of laws and regulations that stipulate death penalty. Such phenomenon becomes the problem statement of the identification study of the argumentation basis on why death penalty provision is still preserved in Indonesia.

Bab II, titled *Dynamics of Anti Death Penalty at the Global Level*. This chapter illustrates the dynamics and history on the debate between abandoning death penalty and preserving death penalty, both from regulatory and practical perspective at universal level.

Bab III, titled *Dynamics of Death Penalty Policy in Indonesia*. This chapter consists of seven sub-chapters, based on political periods in Indonesia: (1) The Dynamics of Death Penalty Policy in Colonial Period; (2) Death Penalty Policy in Japan's Colonial Period; (3) Death Penalty Policy in Post-Independence Era; (4) Death Penalty Policy in Liberal Democracy Period; (5) Death Penalty Policy in Guided Democracy Period; (6) Death Penalty Policy in New Order Regime; and (7) Death Penalty Policy in Post-Reformasi Period.

Bab IV, titled *Legislation in Indonesia and Its Conformity with Human Rights Principles*. This chapter gives a short review on the regulatory framework of right to life in Indonesia and its conformity with the right to life standards at the universal level.

Bab V, titled Contemporary Issue: The Use of Death Penalty in Narcotic Eradication in Indonesia. This chapter discusses about the use and implementation of death penalty in Indonesia and the debate revolving the issue, including the constitutional debate of the right to life in many relevant laws and regulations.

Bab VI, titled Conclusion. This chapter consists of conclusion based on the study that has been conducted under the previous chapters.

CHAPTER II

The Dynamics of Anti Death Penalty at Global Level

2.1 Introduction

Death penalty or capital punishment has been used for thousands of years as the main punishment for certain crimes. While historians do not have specific measures to know for how long death penalty has been the central theme of discussion, they know for sure that the implementation of this type of punishment has been debated for centuries.³² This situation shows that for some points in the history of mankind, most of the civilization used death penalty as a method of punishment.³³ The campaign to end death execution was initiated in Western Europe, pioneered by Cesare Beccaria, in his writing titled *On Crimes and Punishment*, published in 1764. While the progress in the debate slowed down for more than a century after the writing was published, the second half of 20th century became the most active era in the effort to reform the policy regarding death penalty implementation in many countries and new perspective in regards to death penalty started to establish.³⁴

The first countries that proactive on the idea to abandon death penalty mostly located in Americas continent, particularly Southern America. The very first country that abandon death penalty for all types of crimes was Venezuela in 1863. Meanwhile, in Europe, San Marino was the first country that pioneered the abolitionist movement by abandoning death penalty for all crimes in 1865. Previously, in 1848, San Marino was the first country in the world that abandoned death penalty for ordinary crimes. For many decades that followed, San Marino and Romania were two abolitionist countries in Europe. Outside Latin America and Europe, the abolitionist movement was yet to find its peak.³⁵

On the other side of the globe, the first country in Asia that rejected death penalty for all crimes was Cambodia in 1989. Up to this date, only East Timor, Nepal, and Turkmenistan that followed Cambodia's steps. Further, in the African region, Cape Verde abandoned death penalty in 1981. Nine years later, following Cape Verde were Mozambique, Namibia, as well as São Tomé and Príncipe. While in Oceania, at the same time of its independence in 1978, Solomon Islands and Tuvalu abolished death penalty.³⁶

The development of international law norms to abolish death penalty was a Post-World War II phenomenon. The abolishment of death penalty was the purposed of civilized nations as manifested under the Universal Declaration of Human Rights ("UDHR") in 1948. Even though the expression of the acknowledgement of the norm was only implicitly under the phrase of the right to life.³⁷

³² Peggy J. Parks, *The Death Penalty: Current Issues*, (San Diego: Reference Point Press, Inc., 2012), pg. 11.

³³ Ida Walker. *The Death Penalty*, (Minnesota: ABDO Publishing Company, 2008), pg. 9

³⁴ T. Johnson and Franklin E. Zimring (ed), *The Next Frontier National Development, Political Change, and the Death Penalty in Asia*, (New York: Oxford University Press, Inc., 2009), pg. 4

³⁵ Carsten Ankar, *Determinants of the Death Penalty: A comparative study of the world*, (New York: Routledge, 2004), pg. 17-18

³⁶ *Ibid.*

³⁷ William A. Schabas, *The Abolition of the Death Penalty in International Law*, (New York: Cambridge University Press, 2002), pg. 1.

The idea to abolish death penalty gained another momentum in the following decades by the international lawmakers who pushed the limitation of death penalty, with the issuance of the International Covenant on Civil and Political Rights (“ICCPR”) in 1966 and the second Optional Protocol agreed on 1989. Under Article 6 of the ICCPR, consists of six paragraphs, four out of six paragraphs stipulate the limitation of death penalty, such as the imposition only to serious crimes, right to pardon or change of punishment, cannot be imposed to crimes committed by minors (below 18 years of age) and cannot be executed to a women who is pregnant.³⁸ After the ICCPR, two regional treaties on human rights followed suit, namely the European Convention on Human Rights and the American Convention on Human Rights, consisting of similar provisions.³⁹

The latest international law instruments, stipulating the most serious crimes that highlighted by the international community, including genocide, crimes against humanity, and war crimes, are all against death penalty. This was evident from the statutes that established international criminal tribunal by the United Nations, namely the International Criminal Tribunal for the Former Yugoslavia and Special Court for Sierra Leone. The Rome Statute of the International Criminal Court formulates life imprisonment as the maximum punishment.⁴⁰

2.2 The Development of International Law

International human rights law and international humanitarian law have discussed the death penalty issue for at least 80 years. While international law cannot automatically applied in each countries, due to the prevailing national laws and regulations system in each sovereign nation for further implementation, the international law itself is a very authoritative guideline source regarding interpretation of norms.⁴¹

The discussion in regards to death penalty under international law was initiated in the Geneva Convention relative to the Treatment of Prisoners of War (1929). In this convention, procedures are formulated specifically and must be complied with when a prisoner of war will be executed. This provision was further affirmed with the Third Geneva Convention (1929), that still applicable until this date. The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War also incorporates important provision, which is the prohibition to impose death penalty towards civilians in the occupied territory.⁴²

2.3 Universal Declaration of Human Rights

The starting point of international human rights law was the Universal Declaration of Human Rights (“UDHR”), which was adopted by the UN General Assembly on 10 December 1948. This declaration, up to this date, is still the authoritative benchmark in terms of human rights norms, and it is without hesitation applied to all UN member states. The UDHR is an international human rights law document

³⁸ William A. Schabas, Keterangan Ahli dalam Putusan MK, dalam Lubis dan Lay, *Kontroversi...*, pg. 80

³⁹ *Ibid.*

⁴⁰ Schabas, *Keterangan Ahli...*, *op.cit.*, pg. 78.

⁴¹ *Ibid.*, pg. 80.

⁴² Both conventions were both affirmed with the issuance of additional protocols to the Geneva Convention, adopted in 1977. The international humanitarian law, which is the law concerning armed conflicts, does not apply during peace time. However, such development within the international humanitarian law, was a strong evidence that international law approach was moving towards limitation and eventually the abolishment of death penalty.

that is acception all over the world and it is an achievement from mankind struggle for freedom and dignity. Two types of human rights are stipulated under the UDHR, namely: (i) civil and political rights; and (ii) economic, social, and cultural rights. The UDHR guarantees the right to life and protection from torture and consciously abolish a part on death penalty. This part was initially meant to acknowledge death penalty as an exception to the right to life.⁴³

When it was adopted, the UDHR did not have legally binding power towards all decision on human rights made by UN member states. This declaration was approved as a resolution by the General Assembly and became the general format. When the Declaration was adopted, the basic idea was to create a convention that has a legally binding power, to be realized immediately for the purpose of human rights protection effectiveness.

However, the legal status of the UDHR changes from time to time. It can be seen from the interpretation of the authority over the Charter of the United Nations, in which UN member states committed to improve the appreciation towards human rights. Several rights formulated under the UDHR also incorporated as part of the international customary law, and therefore those rights are now legally binding international law.

The right to life was stipulated under Article 3 of the UDHR, which states that “Everyone has the right to life, liberty and security of person”. However, such short article is not comprehensive and only serves as the basic declaration regarding the right to life. There was no explanation made concerning death penalty under the UDHR and it cannot be said on whether or not the article leans towards the abolishment of death penalty as violation towards the right to life.⁴⁴

William A. Schabas developed an analysis towards Article 3 of the UDHR under his writing titled “The Abolition of the Death Penalty in International Law”.⁴⁵ Schabas said that Article 3 of the UDHR was drafted in 1947 and 1948, when most of countries were implementing death penalty. The UDHR was aimed to determine a common standard of achievement. According to Schabas, while death penalty was mentioned in the early drafts of Article 3, the UN General Assembly decided to erase all discussion regarding death penalty, under the opinion that it did not want to intervent the evolution of state practice towards the abolishment of death penalty..⁴⁶

Article 29 (2) of the UDHR also stipulates the provision regarding the limitation for every person in conducting their rights and obligations. In other words, this provision also said that the interpretation towards UDHR provisions must refer to Article 29 (2), which states that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

⁴³ Schabas, *Keterangan Ahli...*, *loc.cit.*

⁴⁴ Hans Goran Franek, *Hukuman Biadab: Penghapusan Hukuman Mati*, (Jakarta: Pustaka Hak Asasi Manusia, Rauol Wallenberg Institute, 2003), pg. 57.

⁴⁵ Schabas, *Keterangan Ahli...*, *loc.cit.*

⁴⁶ Schabas, *Keterangan Ahli...*, *loc.cit.*

The limitation clause under Article 29 (2) of the UDHR becomes the model for other similar provisions under various treaties or international agreements concerning human rights. The limitation clause under Article 29 (2) of the UDHR is a general provision and applicable as a whole for the implementation of rights and obligation stipulated under the Declaration. This is different from other limitation clauses stipulated under various human rights international treaties. When Article 29 (2) of the UDHR is translated into the language of international treaty, for instance under the ICCPR and regional level human rights convention (such as European Convention on Human Rights and American Convention on Human Rights), the limitation clauses were formulated specific to certain rights, even though the formulation is similar to the language under Article 29 (2) of the UDHR.

Under the ICCPR, for instance, the limitation clause on the right to freedom of religion, right to hold opinion without interference, the right to freedom of association, or the right to privacy, the limitation is specific in nature for the respective rights. This is evident from the limitation clauses under Article 18, Article 19, and Article 21 of the ICCPR. Similar clauses can also be found under many constitution in various countries since 1948, such as South African and Canadian Constitution. In Indonesia, the 1945 Constitution also stipulates limitation clause as formulated under Article 28J (2). Therefore, many clauses on the limitation on the implementation of rights and freedom is rooted or sourced from Article 29 (2) of the UDHR.

However, specific to right to life, another different approach is used. Death penalty is explicitly stated as an exception, in the notion that it is subject to various limitation, and not as logical consequence from the interpretation of principles under Article 29 (2) of the UDHR. The drafter of these treaties need to ensure that death penalty is not prohibited explicitly or implicitly, because it was made on 1957. Therefore, if death penalty was prohibited explicitly or implicitly at that time, many countries would not ratify the ICCPR, while the current situation is different.

2.4 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (“ICCPR”) is an international agreement concerning human rights that was aimed to realize the “common standard of achievement” that has been determined by the UDHR. Initially, the UN planned to draft two documents, which were a “declaration” and a “covenant”. The “declaration” was aimed to be the “common standard of achievement”, while the “covenant” was aimed to be an international agreement that has legally binding power. In a relatively short time, the Declaration was approved and adopted as a General Assembly Resolution and officially called as the UDHR. Meanwhile, the adoption of “covenant” took longer timeframe. The drafting process of the “covenant” was influenced by debates in the Cold War period, which caused the process halted for years.

Due to the debates, the “covenant” drafts were separated into two different documents. This separation reflected the objection from western countries over the incorporation of economic and social rights; while on the other side, socialist countries and Southern Hemisphere countries insisted on the importance of economic and social rights. The result from the debate was clear on 1966, when the UN gives human rights protection with legally binding power under two international treaties on human rights, namely (i) the International Covenant on Civil and Political Rights;⁴⁷ and (ii) the International Covenant on Economic, Social and Cultural Rights.⁴⁸

⁴⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966.

⁴⁸ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966.

The ICCPR stipulates many rights related to civil and political rights, also mandates the establishment of Human Rights Committee.⁴⁹ This committee is a quasi-judicial institution that is responsible to study and comment the reports from countries in regards to their conformity towards the ICCPR. This committee also responsible for studying and commenting the petition/request submitted by individuals regarding violation towards the ICCPR by the country he/she is within. The Human Rights Committee's interpretation over the ICCPR is considered very authoritative.

The debate surrounding death penalty revolves around two ICCPR provisions, as stipulated under Article 6 and Article 7.

Article 6:

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 penalty, 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.*
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.*
6. *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.*
7. *Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.*

Article 7:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation..

Article 6 was formulated by the Third Committee of the UN General Assembly in 1957, which reflected the practice of many countries when death penalty was still widely used everywhere. In 1957, most of European countries were still imposing death penalty, while as of now death penalty has been fully abolished in the European continent.

The formulation of the right to life under the UDHR that was still unclear has been replaced by the ICCPR with a more detailed provisions. Article 6 (1) of the ICCPR stated that the right to life of every person shall be protected by law, in other words a state must provide a law that prosecutes murder. Paragraph (1) also stated that the right to life of a person cannot be arbitrarily deprived, relates to the statement that death penalty can only be used as the last resort of a competent court. Meanwhile, paragraph (2)

⁴⁹ UN General Assembly, *International Covenant on Civil...*, Article 28.

stated that death penalty can only be imposed only for the most serious crimes. Unfortunately, there is definition in regards to the most serious crimes, even though it is clear that states cannot use death penalty as a punishment for all ordinary crimes.⁵⁰

The language under Article 6 of the ICCPR reflects the contradiction between the need to acknowledge death penalty, by considering the implementation on death penalty in many regions, while at the same time trying to send the message that is in line with the human rights mission carried by the covenant. If the International Covenant acknowledges that what have been practiced by states at that time already in accordance with the human rights standards, the Covenant will fail to realize its very objective. Due to this contradiction, the language formulation under Article 6 of the ICCPR was made. This situation was the context to understand the background of Article 6 of the ICCPR, which was made half-century ago and to be used nowadays.⁵¹

Article 6 (1) of the ICCPR is a general principle statement that was formulated by referring to Article 3 of the UDHR, with a more detailed formulation. Article 6 (1) states that no one shall be “arbitrarily” deprived of his life. The word “arbitrarily” is a general limitation towards the right to life, as an effort to codify (harmonize) the concept of limitation towards the right to life. UDHR, as mentioned earlier, also gives similar limitation under Article 29 (2). The term “arbitrarily” is considered to cover exemption over the right to life, such as killing in the act of self-defense, the use of deadly force for the purpose of certain law enforcement, and killings in armed conflicts.⁵²

The drafters of Article 6 of the ICCPR opined that death penalty can be considered as arbitrary deprivation of life. As elaborated earlier, it is important to give an explicit exemption, considering the practice of many countries at that time. Due to this reason, the drafters added paragraph (2) under Article 6, which allows many states that had not abandoned death penalty to impose such punishment with specific/certain limitation.

Therefore, it is clear that Article 6 of the ICCPR has the tendency to abolish death penalty. It can be seen from Article 6 (6) of the ICCPR, which states that: “Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant”. This provision is an unusual clause under an international treaty, because such provision does not create a norm, but stating a programmatic objective. This provision is an analogy to a preamble, that gives nuance to the reading over other paragraphs under Article 6 of the ICCPR.⁵³

2.5 Efforts from the UN for the Total Abolishment of Death Penalty

In 1959, the discussion regarding death penalty rose in the UN agenda when the General Assembly approved a resolution that requested the Economic and Social Council to study death penalty from the legal aspect and the implementation in various countries, and at the same time to measure the impact of the abolishment of death penalty towards the crime rate. The study was finished in 1962, under the report titled “Capital Punishment”, presented by Marc Ancel, a French jurist.⁵⁴

⁵⁰ Franek, *op.cit.*, pg. 60.

⁵¹ Schabas, *Keterangan Ahli...*, *op.cit.*, pg. 90.

⁵² *Ibid.*, pg. 91.

⁵³ *Ibid.*

⁵⁴ Marc Ancel, *Capital Punishment*, ST/SOA/SD/9, Sales No. 62.IV.2.

The report gave an important conclusion, which is the abolishment of death penalty does not cause the increase of crime rate. The UN followed up this study with the publication report (complementing the previous report) in 1967, prepared by Norval Morris.⁵⁵ In 1966, the UN finally can give human rights protection in a legal formula with binding power with the creation of two draft international treaties, originated most from the UDHR, namely the ICCPR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

In 1968, upon the initiative from Sweden and Venezuela, the UN General Assembly approved a resolution that ask a better protection for the death convicts.⁵⁶ To ensure the protection is promoted, the resolution explained that UN member states to adopt legislation that ensures during the waiting period of death execution, there is still a possibility for an appeal or pardon, or firm with the execution.

Furthermore, such legislation must determine that the execution will not be conducted before the pardon/implementation of the punishment is decided by a competent authority and never been imposed within six months prior to the decision from the court of the first instance. The resolution also asserted that the underprivileged society that imposed with death penalty must be assisted with competent legal counsel.⁵⁷

An important step made by the UN to abolish death penalty was by adopting another resolution, approved by the Economic and Social Council in 1971. This effort was aied to encourage the restriction on death penalty. The resolution concluded that the expected objective is the total abolishment of death penalty in all countries, as a form of appreciation towards human rights as stipulated under Article 3 of the UDHR. A draft resolution with similar content was also proposed to the General Assembly and was approved with minor changes.⁵⁸

In 1973, the Economic and Social Council asserted once again the attention towards death penalty and decided scientific research on this issue conducted under the UN's supervision. Four years later, the UN General Assembly adopted a resolution that was aimed to gradually abolish the number of death penalty, with the hope that it will achieve total abolishment of death penalty in the world.⁵⁹

Based on UN research in 1983, there are two million people that became the victims of extrajudicial killing and arbitrary court in 1968 and 1983. In Uganda, Cambodia, Argentina, Guatemala, and Iran, people were tortured and murdered in extrajudicial killings. For the research purpose, the UN appointed Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions.⁶⁰

In 1984, another important step was also taken by the UN Economic and Social Council, along with protection effort signed by the UN General Assembly . UN and seceral other international institutions further implemented serius of standards to regulate and limit the imposition of death penalty, with the objective to abolish this punishment. In particular, the UN Economic and Social Council adopted the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (UN Safeguards),

⁵⁵ Norval Morris, *Capital Punishment: Developments, 1961-1965*, Sales No. E.67.IV.15. *The two reports*, by Ancel and Morris, published under one edition in 1968, ST/SOA/SD/9 dan ST/SOA/SD/10.

⁵⁶ Franek, *op.cit.*, pg. 61.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

which determined the basic guaranteed protection that must be taken into consideration for all death penalty cases. The UN Safeguards was approved by the UN General Assembly in 1984 without voting.⁶¹ The resolution stated that:

- 1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.*
- 2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.*
- 3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.*
- 4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.*
- 5. Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.*
- 6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.*
- 7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.*
- 8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.*
- 9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.*

Various protection mentioned above are related to the foundation that can be found under Article 6 and Article 14 of the ICCPR.

Afterwards, pursuant to the recommendation from the Federal Republic of Germany, the UN General Assembly proposed a protokol to abolish death penalty under ICCPR in 1980. The result was Second

⁶¹ The UN Economic and Social Council Resolution 1984/50 25 May 1984, was agreed upon through the UN General Assembly Resolution, 39/118 dated 14 December 1984. The UN Economic and Social Council recommended to take necessary steps to strengthen the protection of individuals facing the death penalty in the following resolution 1989/64, dated 24 May 1989.

Optional Protocol to the ICCPR, which was signed on 15 December 1989. The Second Optional Protocol prohibits the imposition of death penalty within the jurisdiction of member states that ratified this document. In addition, the member states must take all important steps for the abolishment of death penalty.⁶²

To oversee the action towards the abolishment of death penalty, the UN Human Rights Commission evaluated the report proposed by state parties within a year after the Second Optional Protocol entered into force. Pursuant to the Second Protocol, a state cannot deny the prohibition of the punishment by stating that the said state is under emergency situation, something that is allowed under the ICCPR. The European Parliament approved a resolution, dated 12 March 1992, which asked the European Union member states to ratify the Second Optional Protocol without postponement.⁶³ By June 2002, almost 50 countries, among which are European countries, have ratified the Second Optional Protocol.

The effort to abolish death penalty at the global level is continuing through many other international treaties. The Statute of the International Criminal Tribunal for the Former Yugoslavia⁶⁴ and the Statute of the International Criminal Tribunal for Rwanda,⁶⁵ as an ad hoc international court for crimes such as genocide, crimes against humanity, and war crimes, did not incorporate death penalty as part of the punishment. It was different compared to the International Military Tribunal at Nuremberg, during 1945, and the International Military Tribunal for the Far East, during 1945-1946, both of which were established after the World War II was ended. That development showed fundamental changes conducted by the UN in the last 50 years. Death penalty is no longer used, even for the most serious crimes.

The development is strengthened in 1998 the Rome Statute of the International Criminal Court. This Statute was approved by the Rome Conference in July 1998, which omitted death penalty from the existing punishment alternatives. Whereas, the International Criminal Court has the jurisdiction over the most serious crimes that are the crime of genocide, crimes against humanity, war crimes, and crime of aggression. The Rome Statute has been in force since 1 July 2002.

With the combination of substantive regulation on death penalty related to the ICCPR and the Second Optional Protocol, the UN has provided a relatively satisfactory protection for arbitrary measures and other procedural aspects of death penalty. However, the UN experiencing similar problem suffered by many other institutions, which is the general incapability and the lack of willingness at the national level to prevent the implementation of the international commitment. The lack of punishment system imposed towards states that fail to satisfy the existing requirements under an international treaty, is an evidence that the UN will continue to be a weak organization, especially for countries that want to exploit the UN's weaknesses

International Treaty Ratification

⁶² UN General Assembly, *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, A/RES/44/128, 15 December 1989.

⁶³ Franek, *op.cit.*, pg. 63.

⁶⁴ UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)*, 25 May 1993.

⁶⁵ UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994.

The community of nations has enacted four international treaties for the abolishment of death penalty. One of those treaties agreed upon at the global level, while the other three agreed upon at the regional level. The following paragraphs are brief description of these international treaties and list of signatories, along with the list of state parties that have signed the treaty but have not done ratification, per 31 December 2015.

As a side note, under the international law framework, a state can be a signatory of an international treaty by means of accession or ratification. States that sign the international treaty shows their intention to become a signatory that ideally followed by ratification.⁶⁶ States that execute ratification are conducting international action, in which those states declare to be bound as the state party of a certain international treaty.⁶⁷ Meanwhile, accession is an action from a state to accept or to become a state party in an international treaty that has been signed by other states. Accession has the similar legal consequence with ratification.⁶⁸

Second Optional Protocol to the ICCPR

The Second Optional Protocol to the ICCPR aims to abolish death penalty, adopted by the UN General Assembly in 1989, as a instrument with global/world coverage. This Protocol facilitates the total abolishment, while allowing state parties to preserve death penalty during war time, if they execute reservation for such exemption when ratifying or accessing the Protocol. Every state that is state party to the ICCPR becomes the state party of this Protocol.

State Parties: Albania, Andorra, Argentina, Australia, Austria, Azerbaijan, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Cabo Verde, Canada, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Ecuador, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Honduras, Hungary, Iceland, Ireland, Italy, Kyrgyzstan, Latvia, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Mexico, Moldova, Monaco, Mongolia, Montenegro, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Philippines, Poland, Portugal, Romania, Rwanda, San Marino, Serbia, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Timor-Leste, Turkey, Turkmenistan, Ukraine, United Kingdom of Great Britain and Northern Ireland, Uruguay, Uzbekistan, Venezuela (in total: 81) Signed but not ratified: Angola, Madagascar, Sao Tome and Principe (in total: 3)

Protocol to the American Convention on Human Rights to Abolish the Death Penalty

The Protocol to the American Convention on Human Rights to Abolish the Death Penalty, was adopted by the General Assembly of the Organization of American States in 1990.⁶⁹ This Protocol facilitates the full abolishment of death penalty, while allowing state parties to preserve death penalty during war time, under the condition that they declare reservation of such exemption when ratifying and accessing the protocol. All state parties to the American Convention on Human Rights are allowed to be state party to the protocol. **State Parties:** Argentina, Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay, Venezuela (in total: 13)

⁶⁶ United Nations, *Convention on the Law of Treaties 1969*, Article 10 and 18.

⁶⁷ *Ibid.*, Article 2 (1) (b), 14 (1) and 16.

⁶⁸ *Ibid.*, Article 2 (1) (b) and 15.

⁶⁹ Organization of American States, *Protocol to the American Convention on Human Rights to Abolish the Death Penalty ("Pact of San Jose")*, 8 June 1990.

Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty

The Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty, was adopted by the Council of Europe in 1983.⁷⁰ This Protocol facilitates the abolishment of death penalty during peace time and state parties may preserve death penalty during “war time or real threat of war”. Every state party to the European Convention on Human Rights becomes the state party to the protocol.

State Parties: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greek, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland (in total: 46). Signed but not ratified: Russian Federation (in total: 1)

Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances

The Protocol No. 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances,⁷¹ was adopted by the Council of Europe in 2002. This Protocol facilitates the abolishment of death penalty in all circumstances, including during war time and real threat of war. All state parties to the European Convention on Human Rights may become the state party to the protocol.

State Parties: Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greek, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland (in total: 44) Signed but not ratified: Armenia (in total: 1)

2.6 Report from the UN Secretary-General

Once every five years, the UN Secretary-General will publish a report pertaining to the development that has been done towards the abolishment of death penalty. A report that was drafted based on the reports from 63 other countries, was published on 8 June 1995.⁷²

In that report, there was a large amount of countries that have abolished or put an end to the use of death penalty, compared to the previous five years. Since 1989 until 8 June 1994, 24 countries have abolished death penalty and 22 of them have executed such action during both war and peace time.

⁷⁰ Council of Europe, *Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty*, 28 April 1983.

⁷¹ Council of Europe, *Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances*, 3 May 2002.

⁷² Franek, *op.cit.*, pg. 63.

However, there was a note that since 1989, four countries have re-introduced death penalty and 2 countries (Bahrain and Comoro), also conducted similar step after previously ceasing execution.

The report from the UN Secretary General also highlighted the problem on whether or not the protection from the Economic and Social Council, which was adopted in 1984, has been implemented. In conclusion, death penalty is still used of political crime and violation in military discipline. Other problems including on various treatment that are not in accordance with international standards. In some countries, the violation are implementing deth penalty and preventing the court trials from consideration of certain condition. The report also recommended that the definition of “mental disorders” follows the resolution adopted by the UN Economic and Social Council in 1989, which prohibited death penalty to be imposed towards mentally-ill persons or suffering from significant mental disorders.

The report also discussed the alternative punishment that can be used in the countries that have abandoned death penalty. Different situation can be seen from the document that submitted by various states. From that report, it was uncovered that many countries have given the authority to the court to decide a life sentence or up to certain period of time, especially when the defendant is 15 to 25 years of age. Many countries using probation period, usually after the convicted have been in prison for two-thirds of the sentence.

2.7 UN Resolution and Recommendation on Death Penalty

As it is known by the international community, the ICCPR still allows the practice of death penalty and therefore in 30 years after the ICCPR was adopted, the UN General Assembly adopted and announced the Second Optional Protocol to the ICCPR that stipulates the abolishment of death penalty, in Resolution 33/148, dated 15 December 1989. This resolution incorporated changes of norms on the view towards the imposition of death penalty, with the following consideration: the basic right for mankind to live, risks that cannot be tolerated by executing an innocent person, and the lack of evidence that death penalty will create deterrent effect to criminal offenders.

The UN General Assembly along with the UN Human Rights Council issued several recommendations on death penalty in the form of Resolutions that are the result of consensus of the majority of general assembly session. Each of the resolution depicted perspectives towards global issues, including the principles supported by the consenses, or action supported by the consensus as well. So far, the global consensus has issued several resolution on the protection towards persons facing death penalty, and strictly forbid the use of death penalty by reducing the number of crimes that can be sentenced to death.⁷³

The UN General Assembly resolutions are as follows:

1. United Nations General Assembly, *Moratorium on the Use of Death Penalty* (A/RES/62/149)(18 December 2007)
2. United Nations General Assembly, *Moratorium on the Use of Death Penalty* (A/RES/63/168)(18 December 2008)

⁷³ Adhigama Andre Budiman, *Pidana Mati dan Posisi Indonesia terhadap Resolusi Majelis Umum PBB dan Resolusi Dewan HAM PBB*, (Jakarta: Institute for Criminal Justice Reform (ICJR) and Human Rights Working Group (HRWG), 2017), pg. 8.

3. United Nations General Assembly, *Moratorium on the Use of Death Penalty* (A/RES/65/206)(21 December 2010)
4. United Nations General Assembly, *Moratorium on the Use of Death Penalty* (A/RES/67/176)(20 December 2012)
5. United Nations General Assembly, *Moratorium on the Use of Death Penalty* (A/RES/69/186)(18 December 2014)
6. United Nations General Assembly, *Moratorium on the Use of Death Penalty* (A/RES/71/187) (19 December 2016)

Meanwhile, resolutions from the UN Human Rights Council are as follows:

1. *Panel on the human rights of children of parents sentenced to the death penalty or executed* (Resolution 22/11) (10 April 2013)
2. *The Question of the Death Penalty* (Resolution 26/2) (26 June 2014)
3. *The Question of the Death Penalty* (Resolution 30/5) (1 October 2015)

In April 1997, a resolution on death penalty from the UN was approved the Human Rights Commission. This resolution asked the member states that had not abolished death penalty, to considering a postponement on death execution, under the view to achieve total abolishment of death penalty. This resolution also urged all member states that had not abolished death penalty progressively, to limit the persons that can be imposed with death penalty where death penalty is still possible. Member states that were still imposing death penalty were also asked to provide public information on the implementation of such death penalty. The resolution was supported by Italy and other member states, approved by 27 member states, rejected by 11, and 4 member states were abstain. Since then, the annual meeting of the Human Rights Council progressively urged the member states that still using death penalty to implement moratorium.

Table 1.5 UN Resolutions on Death Penalty

UN Resolutions	Member States Position: (Y) Yes (N) No (A) Abstain
UNGA Vote 2007 Resolution 62/149	(Y) 104 (N) 54 (A) 29
UNGA Vote 2008 Resolution 63/168	(Y) 106 (N) 46 (A) 34
UNGA Vote 2010 Resolution 65/206	(Y) 109 (N) 41 (A) 35
UNGA Vote 2012 Resolution 67/176	(Y) 111 (N) 41 (A) 34
UNGA Vote 2014 Resolution 69/186	(Y) 117 (N) 37 (A) 34
UNGA Vote 2016 Resolution 71/187	(Y) 117 (N) 40 (A) 31

Human Rights Commission Resolutions	Member States Position: (Y) Yes (N) No (A) Abstain
HRC Resolution 22/11	<i>No voting</i>
HRC Resolution 26/2	(Y) 29 (N) 10 (A) 8
HRC Resolution 30/5	(Y) 26 (N) 13 (A) 8

Resolution 62/149 UN General Assembly

Under this Resolution, the UN General Assembly received commitments from several countries that implemented moratorium for death penalty and encouraging other countries that still implemented death penalty to honor international standards that guarantee the protection for people facing death penalty,⁷⁴ by referring to the UN Economic and Social Council Resolution on Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.⁷⁵ A reporting mechanism on the use of death penalty must be executed by countries that are still implementing death penalty, to have a progressive action in restricting the implementation of death penalty and reducing the number of crimes that can be imposed with death penalty and to implement moratorium on death penalty by considering the abolishment of death penalty within their national legal system.⁷⁶

The resolution recommended the countries that already abolished death penalty, not to reintroduce such policy anymore.⁷⁷ However, the fact showed that some countries were trying to reintroduce death penalty after such policy has been abolished in that countries. The Philippines, for instance, after ratified the Second Optional Protocol to the ICCPR on 2007 and supported the UN General Assembly resolutions on the moratorium on the use of death penalty, the Philippines House of Representatives on 1 March 2017 agreed on the draft bill that reintroduced death penalty, after this policy has been abolished for more than a century.⁷⁸ The draft bill regulated crimes such as murder, rape, narcotics-related crimes (imported, sales, producing, courier, and distribution) to be imposed with death penalty.

When the voting for Resolution 62/149, 104 member states were approving, 54 member states were rejecting, and 29 member states were abstaining.⁷⁹

⁷⁴ UN General Assembly, *Moratorium on the Use of Death Penalty*, A/RES/62/149, 18 December 2007, Article 2(a).

⁷⁵ UN Economic and Social Council, *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, 25 May 1984.

⁷⁶ UN General Assembly, *Moratorium...*, A/RES/62/149, Article 2(b), 2(c), and 2(d).

⁷⁷ *Ibid.*, Article 3.

⁷⁸ Felipe Villamor, *Philippines Moves Closer to Reinstating Death Penalty*, New York Times, 1 March 2017, <<https://www.nytimes.com/2017/03/01/world/asia/philippines-death-penalty.html?mcubz=3>>, accessed on 18 August 2017.

⁷⁹ United Nations Bibliographic Information System, *Voting Record*, A/RES/62/149, <<http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares62149>>, accessed on 18 August 2017.

Resolution 63/168 UN General Assembly

The UN General Assembly re-affirmed the previous resolution by adopting Resolution 63/168,⁸⁰ followed by the increasing numbers of UN member states that decided to support the moratorium on the use of death penalty. This resolution requested the UN Secretary-General to issue a report on the development of the implementation of the previous resolution (Resolution 62/149),⁸¹ also to countries that were still implementing death penalty to provide relevant information to the UN Secretary-General. A commitment was also issued to continue the consideration on death penalty moratorium to the 65th session, titled "Promotion and Protection of Human Rights".⁸² In this second resolution, Indonesia still rejected the UN General Assembly Resolution on the death penalty moratorium. During the voting, 106 member states approved of Resolution A/RES/63/168, 46 member states rejected Resolution A/RES/63/168, and 34 member states were abstaining.⁸³

Resolution 65/206 UN General Assembly

Under Resolution 65/205, the UN General Assembly requested the member states to honor international standards that guarantees the protection for people facing death penalty,⁸⁴ referring to the UN Economic and Social Council Resolution on Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. The Resolution also discussed the reporting mechanism to the UN Secretary-General on such issue.

Futhermore, UN member states were encouraged to provide relevant information regarding death penalty practice for the purpose of public awareness and open the possibility for a transparent discussion at the national level on the implementation.⁸⁵ The UN General Assembly requested member states that already abolished death penalty practice to share their experience on death penalty abolishment under their national legal system. There were 41 states rejected this Resolution and 109 states supported Resolution A/RES/65/206. There were 35 states that chose to abstain.⁸⁶

Resolution 67/176 UN General Assembly

Resolution 67/176 was the first resolution adopted by the UN General Assembly that regulated explicitly on the protection towards children and pregnant women in relation to death penalty.⁸⁷ The incorporation of the formulation of protection towards children and pregnant women was considered as a situation, in which the death penalty implementation at the national level as a serious threat towards human rights.

⁸⁰ UN General Assembly, *Moratorium on the use of the death penalty*, A/RES/63/168, 13 February 2009.

⁸¹ *Ibid.*, Article 2.

⁸² *Ibid.*, Article 3.

⁸³ United Nations Bibliographic Information System, *Voting Record*, A/RES/63/168, <<http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares63168>>, accessed on 18 August 2017.

⁸⁴ UN General Assembly, *Moratorium on the Use of Death Penalty*, A/RES/65/206, 18 December 2007, Article 3(a).

⁸⁵ *Ibid.*, Article 3(b).

⁸⁶ United Nations Bibliographic Information System, *Voting Record*, A/RES/65/206, <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/65/206>, accessed on 18 August 2017.

⁸⁷ UN General Assembly, *Moratorium on the Use of Death Penalty*, A/RES/67/176, 20 December 2012, Article 4(c).

The regulation on the protection of children and pregnant women was the adoption of the fundamental protection principle at the international level and it was stated that “The Death Penalty for [such offences] shall not be executed on such women (pregnant women or mothers having dependent infants).”⁸⁸ Before international law on human rights was in place, humanitarian law has explicitly regulated the protection for these two groups during emergency and conflict situation⁸⁹ and under recommendation from the UN Economic and Social Council.⁹⁰ This is why the UN recommended the protection towards children and pregnant women to be adopted to the domestic practice implementation, due to the need or the failure of critical protection from the state when executing their governance.

The incorporation of child protection on death penalty under UN General Assembly Resolution A/RES/67/176 followed by the attention from the UN on the future of the children of death convicts. The UN Human Rights Council invited the representatives from the civil society, member states, and the UN itself to the discussion forum on the children of death convicts.⁹¹ Pursuant to the Children Convention,⁹² this resolution urged and requested member states to provide protection and assistance to the children of death convicts and with the consideration of the best interest of the child, providing information on their parents and other related information. Furthermore, the Resolution asked the Office of the High Commission to organize a panel discussion on this topic.

The discussion was held on 11 September 2013 at *Palais de Nations* in Geneva. Deputy OHCHR, Flavia Pansieri, said that “States which use the death penalty must think about its consequences on society as a whole, particularly the families of those sentenced to death or executed, (...) this Council expressed its profound concern at the negative impact of the imposition or implementation of the death penalty.”⁹³ The practice from the Jordanian Human Rights National Commission/Agency⁹⁴ to give training to the police regarding the steps to handle children in the arrest process and to handle the media, was the example of good practice in supporting the children of death convicts. Thailand Human Rights National Commission⁹⁵ also the successful example in encouraging the visitation for people facing death penalty, as a reference for other states to satisfy the recommendation.

This resolution also encouraged the UN member states to ratify the Second Optional Protocol to the ICCPR that regulates the abolishment of death penalty.⁹⁶ The incorporation of the abovementioned clauses, added the supports of the UN member states from 109 states to 111 states. When the voting for the resolution was held, 41 member states rejected and 34 member states were abstaining.

⁸⁸ See the International Committee of the Red Cross, *Protocol Additional I to the Geneva Conventions*, 1993, Article 76(3).

⁸⁹ See the International Committee of the Red Cross, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1949, Article 38(5), 132.

⁹⁰ See UN General Assembly, *Declaration on the Protection of Women and Children in Emergency and Armed Conflict*, A/RES/3318(XXIX), 14 December 1974.

⁹¹ Léa Macarez, *Children of people sentenced to death attract the UN's attention' World Coalition Against the Death Penalty*, 19 September 2013, <<http://www.worldcoalition.org/Children-of-people-sentenced-to-death-attract-the-UNs-attention.html>>, accessed on 20 August 2017.

⁹² UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, Articles 2, 3, 9, and 20.

⁹³ Macarez, *loc.cit.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ UN General Assembly, *Moratorium...*, A/RES/67/176, Article 6.

Resolution 22/11 UN Human Rights Council

During the 22nd session on 21 March 2013, the UN Human Rights Council adopted Resolution 22/11 on **Panel on the Human Rights of Children of Parents Sentenced to the Death Penalty or Executed.**⁹⁷ This Resolution was adopted without voting process and was sponsored Belgium, supported by approximately 60 member states as co-sponsors.

Resolution 26/2 UN Human Rights Council

During the 26th session on 27 June 2014, the UN Human Rights Council adopted Resolution 26/2 on The Question of the Death Penalty. The draft of this resolution was voted with 29 member states supported, 10 member states disapproved, and 8 member states abstain.⁹⁸

In this Resolution, the UN Human Rights Council reminded the member states on the UN mechanism regarding:⁹⁹

1. Special Procedure related to death penalty, including under Special Rapporteur on torture and other cruel, inhuman, degrading treatment or punishment; as well as Special Rapporteur on extrajudicial, summary or arbitrary executions.
2. *Treaty Bodies*, in discussion human rights issues that related to death penalty.

Previously, under the UN Human Rights Council report on the 26th session, there were amendments from the draft resolution that were proposed by non-sponsor states and non-co-sponsor state. The amendments were as follows:

1. Amendment A/HRC/26/L.34, similar formulation with Draft Resolusi A/HRC/26/L.8/Rev.1, except for paragraph 13, which was eliminated by drafters. Paragraph 13 Draft Resolution A/HRC/26/L.8/Rev.1 stated that: “(The Human Rights Council) Strongly deploring the fact that the use of the death penalty leads to violations of the human rights of those facing the death penalty and of other affected persons”.¹⁰⁰ Amendment A/HRC/26/L.34 was rejected after the voting, in which 17 states were supporting (including Indonesia) – 23 states disapproved, and 6 abstain.¹⁰¹
2. Documen revision A/HRC/26/L.35, with similar formulation, with additional one paragraph that stated, “Reaffirms the sovereign right of all countries to develop their own legal systems, including determining appropriate legal penalties, in accordance with their international law obligations”.¹⁰² Amendment A/HRC/26/L.35 was rejected after the voting, in which 17 states were supportin (including Indonesia), 23 states rejected, and 7 abstain.

Draft Resolution under A/HRC/26/L.8/Rev.1 was then proposed by France, Switzerlan, Mexico, and Belgium, sponsored by Belgium, Benin, Costa Rica, Frace, Mexico, Mongolia, Moldova Republic, and

⁹⁷ UN Human Rights Council, *Report of the Human Rights Council*, Twenty-second session Agenda item 1, 2013, para 39.

⁹⁸ UN Human Rights Council, *Report of the Human Rights Council*, Twenty-second session Agenda item 1, 2014, para 149.

⁹⁹ UN General Assembly, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: The question of the death penalty*, A/HRC/26/L.8/Rev.1, 25 June 2014, Article 9, 10.

¹⁰⁰ *Ibid.*

¹⁰¹ UN Human Rights Council, *Report of...*, *op.cit.*, Article 141.

¹⁰² UN General Assembly, *Promotion...*, *loc.cit.*

Switzerland¹⁰³, which was co-sponsored by other member states.¹⁰⁴ During this session, the voting for Draft Resolution A/HRC/26/L.8/Rev.1 resulted in 29 member states approved and 10 member states rejected. Indonesia was one of many member states that rejected this draft.¹⁰⁵

Resolution 69/186 UN General Assembly

Resolusi 69/186 on the death penalty practice re-affirmed four previous resolutions, while accepted the decision and recommendation from the UN Human Rights Council.¹⁰⁶ The UN General Assembly noted that the discussion encouragement at the national and regional level on death penalty moratorium, and the readiness from several countries to provide information on the implementation of death penalty that can be accessed by the public, as well as UN Human Rights Council Resolution 26/2 dated 26 June 2014 to organize high-level panel discussion every two years, to exchange views on death penalty.¹⁰⁷

The UN General Assembly recommended the UN member states to follow their obligation according to the 1963 Vienna Convention, particularly on the right to receive information on consular relations regarding trial process.¹⁰⁸ The resolution added the protection guarantee for people with mental disabilities.¹⁰⁹ The UN General Assembly recommended the UN member states to consider the approval or ratification of the Second Optional Protocol to the ICCPR on the abolishment of death penalty.¹¹⁰

This resolution was adopted after a voting, in which 117 member states supported, 37 member states rejected, and 34 member states abstain. There was a significant increase on the number of member states that supported the Resolution on moratorium of death penalty, considering the substance of the recommendations. The incorporation of fundamental protection for children, pregnant women, and people with mental disabilities was very influential to the consideration of member states to implement moratorium on death penalty.

¹⁰³ UN Human Rights Council, *Report of...*, *op.cit.*, Article 134. Sponsor is a delegation or state representative who proposes a resolution to be adopted in a conference. Co-sponsor is a delegation or state representatives, who collectively participating in proposing a resolution or other forms of proposal to be adopted in a conference.

¹⁰⁴ List of co-sponsor states: Andorra, Angola, Australia, Austria, Bolivia (Plurinational State of), Bulgaria, Chile, Colombia, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Estonia, Finland, Georgia, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Namibia, the Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Peru, Poland, Portugal, Romania, Rwanda, Serbia, Sierra Leone, Slovakia, Slovenia, Spain, Sweden, the former Yugoslav Republic of Macedonia, Timor-Leste, Turkey, Ukraine, the United Kingdom of Great Britain and Northern Ireland and Uruguay. Subsequently, Algeria, Argentina, Brazil, Cabo Verde, Côte d'Ivoire, Djibouti, Haiti, Italy, San Marino, Togo and Venezuela (Bolivarian Republic of).

¹⁰⁵ UN Human Rights Council, *Report of...*, *op.cit.*, Article 149

¹⁰⁶ UN General Assembly, *Moratorium on the Use of Death Penalty*, A/RES/69/186, 18 December 2014, para 3, 4.

¹⁰⁷ *Ibid.*, para 7.

¹⁰⁸ United Nations, *Vienna Convention on Consular Relations*, 24 April 1963, Article 63. As a note, Indonesia has ratified this Convention under Law No. 1 of 1982 on Ratification of the Vienna Convention on Diplomatic Relations and the Optional Protocol thereto concerning Acquisition of Nationality.

¹⁰⁹ UN General Assembly, *Moratorium...*, A/RES/69/186, Article 5(d).

¹¹⁰ *Ibid.*, Article 7.

Resolution 30/5 UN Human Rights Council

On 1 October 2015, the UN Human Rights Council adopted Resolution A/HRC/RES/30/5 on the Question of the Death Penalty. The Resolution was adopted by considering various instruments such as UDHR, ICCPR, Children Convention, as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The resolution also reminded and encouraged the member states to ratify the Second Optional Protocol to the ICCPR, and pursuant to the conclusion from the UN Secretary-General who said that the implementation of death penalty is not in accordance with the human dignity, right to life, and prohibition of torture and other cruel, inhuman or degrading treatment or punishment.¹¹¹

Moreover, the UN Human Rights Council Resolution highlighted the humane treatment for people facing death penalty, and honoring their dignity by improving the condition at the isolation/detention room according to international standards such as treatment minimum standards for detainees.¹¹² The Human Rights Council appealed to the member states that still implemented death penalty to provide information related to the persons that have been executed or those that are facing death penalty, from the aspect of gender and other criteria, along with amnesty and pardon that have been given.¹¹³

By considering the best interest of the children, the UN member states must ensure that the children of whom the parents or the legal guardians are facing death penalty, to be informed to the family, legal counsel, regarding the information on the execution that will be held, including the date, time, and location. It also included to facilitate the last visit with the death convict.¹¹⁴

Before the adoption, the Resolution A/HRC/RES/30/5 (A/HRC/30/L.11/Rev.1) was proposed to be amended. There were revisions with additional and reduction of paragraphs in the preamble, even though there was no revision on the recommendation for the member states. The revisions were:

Firstly, revision A/HRC/30/L.34, proposed by Bangladesh, Botswana, Brunei Darussalam, China, Egypt, Iran, Kuwait, Malaysia, Pakistan, Oman, Qatar, Saudi Arabia, Singapore, Sudan, United Arab Emirates, with the revision by adding paragraph after the first paragraph “(The Human Rights Council) Reaffirms the sovereign right of all countries to develop their own legal systems, including determining appropriate legal penalties, in accordance with their international law obligations”.¹¹⁵ This A/HRC/30/L.34 amendment was rejected after voting, in which 17 member states supported (including Indonesia), 20 member states rejected, and 8 member states abstained.¹¹⁶

Secondly, amendment A/HRC/30/L.35 proposed by Bangladesh, China, Egypt, Malaysia, Pakistan, Qatar, Saudi Arabia, and Singapore. The additional paragraph was proposed after paragraph II “(The Human Rights Council) Recognizes that the application of a moratorium on the death penalty sentence, abolishing the death penalty sentence, or retaining it, should be a decision emanating from the national level, and that States should not be subjected to external pressures or interference, including through

¹¹¹ UN General Assembly, *The question of the death penalty*, A/HRC/RES/30/5, 12 October 2015.

¹¹² *Ibid.*, Article 1.

¹¹³ *Ibid.*, Article 3.

¹¹⁴ *Ibid.*, Article 4.

¹¹⁵ UN General Assembly, *The question of the death penalty*, A/HRC/30/L.34, 30 September 2015.

¹¹⁶ UN Human Rights Council, *Report of the Human Rights Council*, Thirtieth session Agenda item 1, 2016, Article 161.

economic sanctions and/or application of conditionality on official development assistance, in relation to their domestic debates and decision-making processes relevant to this issue”.¹¹⁷ Amendment A/HRC/30/L.35 was rejected after voting, in which 16 member states were supporting (including Indonesia), 22 member states were rejected, and 7 member states were abstained.¹¹⁸

Ketiga, amendment A/HRC/30/L.36 to erase Paragraph 14 and 17 from the preamble.¹¹⁹ Paragraph 14 stated that, “(The Human Rights Council) Strongly deploring the fact that the use of the death penalty leads to violations of the human rights of the persons facing the death penalty and of other affected persons”¹²⁰ and Paragraph 17 stated that, “(The Human Rights Council) Recalling that all methods of execution can inflict inordinate pain and suffering, and that the circumstances in which executions are carried out, in particular public executions, which imply an undignified exposure of the persons sentenced to death, and secret executions or those with short or no prior warning add to the suffering of the persons sentenced to death, as well as of other affected persons.”¹²¹ This amendment was rejected after the voting, in which 14 member states approved, 22 member states rejected, and 9 member states abstained. Draft Resolution of Resolution 30/5 was later adopted by a vote, with 26 member states supported, 13 member states rejected, and 8 member states abstained.¹²²

Resolution 71/187 UN General Assembly

On 19 December 2016, the UN General Assembly adopted Resolution 71/187 on the sixth moratorium on death penalty. This resolution was drafted with new elements, in which the UN General Assembly referred to Amendmend A/HRC/26/L.35 from the UN Human Rights Council Resolution 26/2, which stated “The United Nations General Assembly Reaffirms the sovereign right of all countries to develop their own legal systems, including determining appropriate legal penalties, in accordance with their international law obligations”.¹²³ Paragraphs from Amendment A/HRC/26/L.35 was later incorporated to Article 1 Resolution 71/187.

Afterwards, this Resolution recommended that the UN member states to ensure that people facing death penalty can submit for amensty or communicating about his death penalty, by assuring that the amnesty procedures to be conducted in transparent and just manner, and information should be given immediately during the process.¹²⁴

This Resolution was later adopted with majority votes, in which 117 member states supported, 40 member states rejected, and 31 member states (Indonesia included) abstained. In substance, this Resolution was of the view that the implementation of many countries on death penalty is human rights issue and requested member states to implement moratorium on death penalty, with the aim to abolish death penalty. Singapore Delegation delivered their opinion during this session, stated that the focus of

¹¹⁷ UN General Assembly, *The question of the death penalty*, A/HRC/30/L.35, 30 September 2015.

¹¹⁸ UN Human Rights Council, *Report...*, 2016, Article 164.

¹¹⁹ UN General Assembly, *The question of the death penalty*, A/HRC/30/L.36, 30 September 2015.

¹²⁰ UN General Assembly, *The question..*, A/HRC/RES/30/5, para 14.

¹²¹ *Ibid.*, para 17.

¹²² UN Human Rights Council, *Report...*, 2016, Article 170.

¹²³ UN General Assembly, *Moratorium on the Use of Death Penalty*, A/RES/71/187, 19 December 2016, Article 1.

¹²⁴ *Ibid.*, Article 7(f).

the UN General Assembly was shifted from death penalty moratorium into death penalty abolishment.¹²⁵

There was a positive change from some African states, such as Malawi and Swaziland—both of which were supportive of the Resolution for the first time.¹²⁶ Zimbabwe that previously rejected, was abstaining, and Sri Lanka that previously abstained, was supporting, by realizing their commitment during the 6th World Congress Against the Death Penalty on June 2016.¹²⁷

2.8 Development of Abolitionist and Retentionist Countries

Several countries that abolished death penalty and the comparison with the total countries keep significantly increasing for many years. Moreover, the development of international law on death penalty, from 1929 to current date, reflects a very clear trend, which is leaning towards limitation, reduction, and ultimately abolishment of death penalty. This development, in terms of normative development, reflected by practice in many countries.¹²⁸

In 1948, when UDHR was adopted, there were only few countries, around six or seven of them that already abolished death penalty. This figure was equal to 10 percent of the total sovereign countries at that time. Forty years later, this figure increased to 70 countries, while other 100 countries were still implementing such policy.¹²⁹ According to the report prepared by Norval Moris to the UN on death penalty status in the world during 1965, there were only 25 abolitionist countries, in which 11 of them were fully abolished death penalty, while 14 of them abolished death penalty for ordinary crimes during the peace time..¹³⁰

In 1989, the Amnesty International surveyed the international situation, which was followed by a statistical elaboration as follows:¹³¹

- Abolishing for all crimes: 35 countries
- Abolishing for extraordinary crimes: 18 countries
- Abolishing in practice: 27 countries
- Preserving: 100 countries

From 1989 to 8 June 1995, 24 countries have abolished death penalty, and 22 of those countries have implemented such action during war time and peace. However, it should be noted that since 1989, four countries have re-introduced death penalty punishment and 2 countries (Bahrain and Comoros) also did the same action after abolished the death execution.¹³²

¹²⁵ Elise Guillot et Aurélie Plaçais, *The UN General Assembly voted overwhelmingly for a 6th resolution calling for a universal moratorium on executions*, World Coalition Against the Death Penalty, 20 December 2016, <<http://www.worldcoalition.org/The-UN-General-Assembly-voted-overwhelmingly-for-a-6th-resolution-calling-for-a-universal-moratorium-on-executions.html>>, accessed on 21 August 2017.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ Schabas, *Keterangan Ahli...*, *op.cit.*, pg. 82.

¹²⁹ *Ibid.*

¹³⁰ Bambang Sugeng Rukmono, *Hakikat pelaksanaan Hukuman Mati dari Perspektif HAM*, (Jakarta: PT Raja Grafindo, 2016), pg. 40. See also Imparsial Team, *Menggugat Hukuman Mati*, (Jakarta: Imparsial, 2010), pg. 77-99.

¹³¹ Franek, *op.cit.*, pg. 83.

¹³² *Ibid.*, pg. 63.

Dramatic changes happened after the 1990s, since the research prepared by the Amnesty International was made. Approximately 44 percent of countries that abolished death penalty, followed by in 2000 when the number increased to 64 percent of the total countries.¹³³

In other words, during four decades the percentage of countries that abolished death penalty reached 35 percent. As of now, more than 130 countries are no longer using death penalty, compared to other 60 countries that are still preserving it. Almost 70 percent of the countries have abandoned death penalty. Even the People's Republic of China is now planning to abolish death penalty, as mentioned by one of its officials, La Yifan, during the fourth session of the UN Human Rights Council in March 2006.¹³⁴

The above calculation covering the countries that already abolished death penalty for a significant time period, as well as the countries that abolished death penalty under their legal system. Experience showed that when a country abolishes death penalty for more than 10 years, it is very rare that death penalty will be re-introduced. There are some rare cases, in which a country re-introduces death penalty. However, those countries re-introduced such policy in a very short time period. Moreover, it is very rare if a country that abolishes death penalty re-introduce it again in their legal system. The Philippines is one example of this rare cases, as it has abolished death penalty from their legal system and from the practice, re-introduced it again, and in 2006 official abolished death penalty. Therefore, the trend shows that it will be the abolishment of death penalty. The average number of death penalty abolishment is three countries per year.

Furthermore, in regards to sentencing legal policy in a country related to death execution, there are four categories as follows:¹³⁵

1. Category 1 countries that are abolitionist for all crimes. This category covers the countries and regions, in which their legal system no longer use death penalty for any crimes;
2. Category 2 countries that are abolitionist for ordinary crimes only. This category covers the countries and regions that use death penalty for extraordinary crimes, such as crime under the martial law or crimes committed during an extraordinary period such as war time;
3. Category 3 countries that are abolitionist de facto. This category covers the countries and regions that preserve death penalty for ordinary crimes, but considered as abolishing death penalty in the practice for 10 years or longer, or such country/region has made an international commitment not to conduct death execution anymore; and
4. Category 4 retentionist countries. This category covers the countries that preserve and use death penalty for ordinary crimes. Countries that fall under this category, have executed in the last 10 years.

Based on a 2013 report prepared by the Amnesty International, from 140 UN member states, 98 countries have fully abolished death penalty, 7 countries have abolished death penalty for ordinary crimes, while 35 other member states implemented moratorium on death penalty. Only 58 countries in the world that are still using death penalty.¹³⁶

¹³³ *Ibid.*, pg. 84.

¹³⁴ *Ibid.*

¹³⁵ Anckar, *op.cit.*, pg. 4-5.

¹³⁶ Amnesty Internasional, *Vonis Hukuman Mati dan Eksekusi 2013*, (London: Amnesty International Publication, 2014), pg. 52.

According to the data from the Amnesty International in 2015, more than two-thirds of countries in the world have abolished death penalty under their legal system or from practice. As of 31 December 2015, the figure is as follows:¹³⁷

- Abolishing for all crimes: 102 states
- Abolishing for ordinary crimes only: 6 states
- Abolishing in practice: 32 states
- Total abolishment in legal system and practice: 140 Negara
- Preserving: 58 states

Tabel 1.6 List of Countries under Four Categories in 2015

Trend	States
Abolishing for all crimes	Countries in which their legal system does not allow the use of death penalty for all crimes: Albania, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Belgium, Bhutan, Germany, Greece, Guinea-Bissau, Haiti, Holy See Vatican, Honduras, Hungary, Iceland, Ireland, Italy, Kiribati, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malta, Marshall Islands, Mauritius, Mexico, Micronesia, Moldova, Monaco, Montenegro, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niue, Norway, Palau, Panama, Paraguay, Philippines, Poland, Portugal, Romania, Rwanda, Samoa, San Marino, Sao Tome and Principe, Senegal, Serbia (incl. Kosovo), Seychelles, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Suriname, Sweden, Switzerland, Timor-Leste, Togo, Turkey, Turkmenistan, Tuvalu, Ukraine, United Kingdom of Great Britain and Northern Ireland, Uruguay, Uzbekistan, Vanuatu, Venezuela.
Abolishing for ordinary crimes only	Countries in which their legal system allow death penalty for extraordinary crimes, such as crimes under martial law or crimes during extraordinary situation: Brazil, Chile, El Salvador, Israel, Kazakhstan, Peru
Abolishing in practice	Countries that preserve death penalty for ordinary crimes, such as murder, but considered as abolishing it from practice, as these countries are not executing in the last 10 years and have established policy or practice not to conduct execution: Aljazair, Benin, Brunei Darussalam, Burkina Faso, Cameroon, Central African Republic, Eritrea, Ghana, Grenada, Kenya, Laos, Liberia, Malawi, Maldives, Mali, Mauritania, Mongolia, Morocco, Myanmar, Nauru, Niger, Papua New Guinea, Russian Federation, Sierra Leone, South Korea, Sri Lanka, Swaziland, Tajikistan, Tanzania, Tonga, Tunisia, Zambia.
Preserving Death Penalty for ordinary crimes	Countries that preserve death penalty for ordinary crimes: Afghanistan, Antigua dan Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Botswana, Chad, China, Comoros, Democratic Republic of Congo, Cuba, Dominica, Egypt, Guinea Equatorial, Ethiopia, Gambia, Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kuwait, Lebanon, Lesotho, Libya, Malaysia, Nigeria, North Korea, Oman, Pakistan,

¹³⁷ *Ibid.*, pg. 34.

	<p>Palestina (Negara), Qatar, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and Grenadines, Saudi Arabia, Singapore, Somalia, South Sudan, Sudan, Suriah, Taipei, Thailand, Trinidad and Tobago, Uganda, United Arab Emirates, United States of America, Vietnam, Yaman, Zimbabwe. The Russian Federation implemented moratorium on death penalty in August 1996. However, executions were held during 1996 to 1999 in Republic of Chechnya</p>
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CHAPTER III

The Dynamics of Death Penalty Policy in Indonesia

3.1 Death Penalty Policy from Colonial to “Reformasi” Era

During the colonial time, the practice of using death penalty as a type of punishment was common.¹³⁸ Before the arrival of the *Vereenigde Oost-Indische Compagnie* (VOC) in Indonesia, there were some small kingdoms in Indonesia. Every kingdom established its own laws, different with other kingdoms. One of the law that was implemented by the kingdoms was death penalty.¹³⁹

The first comprehensive consolidation of the use of death penalty in the Dutch East Indies (Indonesia) was conducted in 1808, ordered by Governor General Daendles, from the regulation concerning law and court (*Raad van Indie*)¹⁴⁰, which stipulated the imposition of death penalty as the authority of the Governor General. In this period of time, death penalty was executed with many methods.¹⁴¹ In 1848, a criminal law provision was issued, known under the title *Interimaire Strafbepalingen*, which stipulated that this legislation will continue the criminal law policy prior to 1848 with the exception to changes regarding punishment system, amongst which was death penalty execution conducted by hanging the convict (*galg*).

The second consolidation of death penalty practice and the most important in the Dutch East Indies was when the criminal law codification under *Wetboek van Strafrecht voor Inlanders (Indonesiers)* or WvSInl entered into force on 1 January 1873. With the new development, marked by the issuance of the first codification of criminal law in the Netherlands, the WvSInl was adjusted with the development by conducting criminal law unification in all Indonesia's regions. In 1915, *Wetboek van Strafrecht voor Indonesie* (WvSI) was issued and entered into force on 1 January 1918.¹⁴²

Unlike the Netherlands' situation, under WvSi that was enforced for the Dutch East Indies, it still incorporated death penalty. In Netherlands, as comparison, in particular in 1870, three years before the issuance of the WvSInl in the Dutch East Indies, death penalty was abolished. The reason why death penalty was still preserved in the Dutch East Indies, due to the view that it was an emergency law.¹⁴³ When the drafting process of the criminal law codification (WvSI) by conducting criminal law

¹³⁸ Utrecht, *Hukum Pidana I*, (Surabaya: Pustaka Tinta Mas, 1950); Tresna, *Peradilan Indonesia dari Abad ke Abad*, 1957. See also Supomo and Djokosutono, *Sejarah politik Hukum Adat*, (Jakarta: Pradnja Paramitha, 1982), quoted from Supriyadi W. Eddyono, et.al, *Jalan Tengah yang Meragukan*, (Jakarta: Institute for Criminal Justice Reform (ICJR) dan Aliansi Nasional Reformasi KUHP, 2015), pg. 3.

¹³⁹ Nelvitia Purba and Sri Sulistyawati, *Pelaksanaan Hukuman Mati: Perspektif Hak Asasi Manusia dan Hukum Pidana di Indonesia*, (Yogyakarta: Graha Ilmu, 2015), pg. 21.

¹⁴⁰ For Europeans, the applicable law was the new Batavia Statute; while of native population, the applicable law was their customary law. However, the Governor General has the authority to change the legal system if the punishment was considered unfit with the crime that has been committed or the customary law cannot solve a case. Eddyono, *Jalan..., op.cit.*, pg. 5.

¹⁴¹ *Ibid.*, pg. 3.

¹⁴² *Ibid.*, pg. 6.

¹⁴³ J.E Jonkers, *Buku Pedoman Hukum Hindia Belanda*, (Jakarta: Bina aksara, 1987), pg. 105.

unification, the Netherland colonial government still preserved death penalty in its colonial territories, including Indonesia. In essence, the stipulation of death penalty had a racial motive in nature, the reason of public order factor, and contextuality of the criminal law and criminology at that time.¹⁴⁴

Discriminative racial prejudice, in essence, viewed that native indigenous people cannot be trusted.¹⁴⁵ There was even assumption that indigenous people tend to lie by giving perjury before the court.¹⁴⁶ Indigenous people easy to trust and to accept lies as truth and many of them had bad attitude.¹⁴⁷ This discriminative view arised as Dutch jurists already had superior sentiment as the colonialist.¹⁴⁸

Meanwhile, the reason in regards to public order covered several aspects, including the assumption that the state had all authority to maintain public order. Therefore, the imposition of death penalty was necessary in order to preserve such public order.¹⁴⁹ In addition, as Dutch East Indies was a vast occupied territories with many ethnic groups, it can be easily interfered and it was susceptible to crises and distress compared the situation in the Netherland. Additionally, there was also an assumption that the structure of the government and the tools to maintain the power in the Dutch East Indies were hard to be operated compared to the condition in the Netherlands.¹⁵⁰

The preservation of death penalty in the Dutch East Indies, if it was attributed to the context of criminal law and criminology issues at that time, were not the most important factores. The most important factor was still the discriminative prejudice and public order. This was probably common, as of that time death penalty was considered as a reasonable element under the criminal law and therefore did not require any question. In addition, death penalty was also considered as part of criminal law. Therefore, it was reasonable to impose death penalty during that time due to the significant political-economy interest of the Netherland as the occupier of the Dutch East Indies.

Some of the thoughts of the Dutch jurists can be seen from several statement quoted by Sahetapy¹⁵¹, in which that death penalty can ensure the convict is no longer able to do anything and the society will be no longer disturbed by the convict. Therefore, death penalty was a strong repression tool for the government of the Dutch East Indies. With this tool, the interest of the society can be guaranteed and

¹⁴⁴ Sahetapy, *Ancaman...*, *op.cit.* pg. 152.

¹⁴⁵ *Ibid.*

¹⁴⁶ According to Sahetapy, the subjective stance and evaluation can be explained because Dutch jurists that were placed in the law enforcement institutions, did not have the knowledge of Melayu language and local language. Therefore, the dependency to the interpreter can enlarge the suspicion over perjury. In addition, they did not understand nor absord the indigenous people's social values at that time. Moreover, the lack of criminal procedural law and native legal defense or legal counsel, it was not surprising that the colonial government had the misleading view and description over native witnesses that give perjury. See Simons. *Ibid.*

¹⁴⁷ Krusemen further compared the attitude of the Dutch with mixed citizen and native people, and he was of the view that Dutch had the calm attitude. Kruseman also admitted that while mixed citizen had more native influence in their bloodline, they were not similar to the native people. Kruseman also said that, native people, in addition able to be bribed and cannot be trusted, they were mostly uneducated and therefore had not standpoint. See Kruseman. *Ibid.*

¹⁴⁸ According to Winckel, Europeans were categorized as a special class and therefore the occupied citizens would not be suprised if death penalty was not imposed to the Europeans. Klientjes also said that native people had different perspective on the Europeans life. He took an example, in which when a native was sentenced to death, he will not appply for a pardon. See the hypotheses put forward by Winckel. *Ibid.*

¹⁴⁹ See the opinion of Modeerman. *Ibid.*

¹⁵⁰ See the opinion of Lemaire. *Ibid.*

¹⁵¹ *Ibid.*

therefore public order can be protected. This strong repression tool was also served as a preventive measure, and it was hoped that potential perpetrator will halt his intention to commit a crime. Furthermore, it was hoped that the crime level can be decreased. With the imposition of death penalty, it was hoped that there could be a natural selection and the society can be free from bad or evil elements and so forth.¹⁵²

The WvSI was still applicable until the occupation of the Japanese. After Indonesia's independence, pursuant to law No. 1 of 1946, WvSI was enforced with several amendment, into KUHP in 1946, which was officially applicable to all Indonesia's regions on 29 September 1958.¹⁵³ KUHP which was originated from the WvSI still incorporated several articles that formulate death penalty that can be found under Book II of KUHP. Death penalty can be imposed for several crimes such as treason, insurgency, defection, murder of the head of state, premeditated murder, piracy at sea, robbery with assault, and extortion.

In its development, as the 1946 version of KUHP was considered outdated to satisfy the situation of the society in the Revolution era, particularly in the context of social economy politics at that time, ever since the independence there were introduced special criminal law that imposing death penalty. For instance, in 1951, during the Liberal Democracy era under the UUDS 1950, Law No. 12 of 1951 was issued, which regulated the temporary special punishment on firearms, ammunition, and explosives. The rationale behind the issuance of the law was there were many armed conflicts in Indonesia, armed militas, and insurgents that owned weaponry after the independence movement. This legislation was issued to strengthen the punishment related to firearms that has been issued by the colonial government.¹⁵⁴

During the Guided Democracy Era in 1956-1966, President Soekarno issued Emergency Law on Investigation, Prosecution, and Court System for Economic Crime (LN 1955 Nr 27). This law was affirmed with President Determination No. 5 of 1959 and Government Regulation in Lieu of Law No. 21 of 1959 on the Maximum sentence in form of death penalty. The whole legislation was addressed to respond the Indonesia's economic situation that was experiencing a drastic slowdown, due to a very high global inflation, the damage in basic necessities supply, and also the significant volume of economic-related crimes committed by public officials or the public such as hoarding, profiteering, and so forth. President Soekarno also issued a regulation that was hoped can reduce the level of corruption, which was Government Regulation in Lieu of Law on Investigation, Prosecution, and Examination of Corruption Crime (LN 1960 Nr 1972).¹⁵⁵

During the President Soeharto administration, death penalty punishment was further included in several legislation, including Law No. 11/PNPS/1963 on Eradication of Subversive Activities; Law No. 4 of 1976 on Crimes towards Aviation and Aviation Facilities; Law No. 9 of 1976 on Narcotic; Law No. 5 of 1997 on Psychotropic; Law No. 22 of 1997 on Narcotic; and law No. 31 of 1997 on Nuclear Energy.

After the fall of President Soeharto in 1998, law on antiradicalism was later revoked. However, several years later, Indonesia issued more laws that formulated death penalty, such as Law No. 31 of 1999 on

¹⁵² *Ibid.*

¹⁵³ Utrecht, in Eddyono, *Jalan..., op.cit.*, pg. 3.

¹⁵⁴ Eddyono, *Jalan..., op.cit.*, pg. 4.

¹⁵⁵ *Ibid.*, pg. 5.

Corruption Eradication; Law No. 26 of 2000 on Human Rights Court; and Law No. 15 of 2003 on Eradication of Terrorism Crime.¹⁵⁶

There were several popular motives used in order to use death penalty in Indonesia, for instance, death penalty has the higher effectiveness rate compared to other punishment. In addition to having shock therapy effect, death penalty is also more economical.¹⁵⁷ Death penalty is also used to prevent vigilante action (*eigenrichting*) within the society.¹⁵⁸

Along with this motive, the dominant theoretical claim in the current situation is that death penalty will also create a high deterrent effect and therefore will prevent the intention of anyone to commit any crime. Thus, death penalty can be used as a proper tool for general or specific prevention.¹⁵⁹ In addition, the significant function of sentencing that takes into consideration retributive measures, mainly is preserving several approaches from absolutism theory of retributive measure, relative theory, and unified theory that also give important contribution on the preservation of death penalty in Indonesia as of now.¹⁶⁰ In the further development, all the abovementioned motives are merely myths.

In the Indonesian context, the existence of laws and regulations that formulate death penalty and death execution during the last 10 years showed that Indonesia is categorized as a retentionist country. The presence of norms that legalize death penalty causing pros and cons within the Indonesian society, in particular for the human rights observers and institutions that are against the use of death penalty towards criminal offender. They who are against the use of death penalty viewed that death penalty is violating human rights. This group argued that death penalty contradicts the constitution and Law No. 39 of 1999 on Human rights, along with other human rights international legal instruments that have been ratified by Indonesia such as the International Covenant on Civil and Political Rights and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Using this consideration, death penalty should be abolished as a punishment under Indonesia's national legal system.

In contrast, the group that supports the use of death penalty is of the view that death penalty is imposed to prevent a crime being repeated, which is believed as a signal to give a terrifying effect for the society so a person will not commit a crime. Death penalty is imposed towards crimes that are clearly endangering the society. This group also suggests that death penalty must be conducted selectively and not as "legalization" of revenge.¹⁶¹

¹⁵⁶ *Ibid.*

¹⁵⁷ Akhiar Salmi, *Eksistensi Hukuman Mati*, (Jakarta: Aksara Persada Press, 1985), dalam Eddyono, *Jalan...*, *op.cit.*, pg. 7.

¹⁵⁸ *Ibid.* See also interview with Marcus Priyo Gunarto, 23 August 2017.

¹⁵⁹ According to special prevention, the purpose of a sentencing is to prevent the offender from repeating his action or prevent potential offender from committing a crime that has been premeditated. Example of sentencing that is a special prevention described by Van Hamel as follows: (1) sentencing should incorporate element that terrifies the offender so that he will not conduct a bad intention; (2) sentencing should also incorporate element that improve the offender; (3) sentencing must incorporate an element to exterminate an offender that cannot be improved; (4) the only purpose of a sentencing is preserving the law and order. See Djoko Prakoso and Nurwahid, *Studi Tentang Penapat-Pendapat Mengenai Efektifitas Hukuman Mati*, (Jakarta: Ghalia Indonesia, 1985). *Ibid.*

¹⁶⁰ *Ibid.*, pg. 12.

¹⁶¹ For instance, the opinion from Edward OS Hiariej and Marcus Priyo Gunarto from the Faculty of Law of Gadjah Mada University. Interview with Marcus Priyo Gunarto, 23 August 2017.

In terms of constitution, up to this date, there were several death penalty-related cases that are being reviewed at the Constitutional Court (“MK”). There were at least two application of judicial review related to death penalty, which were judicial review on the provision regarding the limitation of case review under the Supreme Court Law and Judicial Power Law, and provisions in regards to pardon consideration by the President regulated under the Pardon Law, along with judicial review on Law No. 22 of 1997 on Narcotic to the 1945 Constitution.

Furthermore, the Indonesia Draft Bill on Criminal Code (“RKUHP”) still also formulates 15 articles that incorporating death penalty, even though these provisions are more selective and limited. Other important topic includes that death penalty in Indonesia *vis-à-vis* with honest and fair trial issue, in which the performance of the court is yet to satisfy the standards of justice.

Similar debates also arised at international level, which was reflected from the UN General Assembly session when UN member states were discussing death penalty in 2007. At that time, the UN General Assembly was dominated by two main perspectives, a manifestation from legal character on death penalty in the modern world. The supporters of the resolution encouraged a moratorium of death execution towards death convicts, as a human rights issue that requires a universal limitation towards the government authority. On the other side, the opponents of the resolution was of the view that death execution is national autonomy and falls under the state sovereignty to determine the law for itself.¹⁶²

3.2 The Dynamics of Death Penalty Policy During Colonial Era

The arrival of the Dutch East Indies Company or VOC marked the presence of European power in Indonesia. Consecutively, European powers took turns occupying the region. From the historical point of view, the occupying power from Europe in Indonesia can be divided into four periods as follows: (i) *Vereenigde Oost-Indische Compagnie* (VOC); (ii) Government of Netherlands prior to 1811; (ii) Government of Britain (1811-1816); and (iv) Government of Netherlands after 1816.¹⁶³

The power of those colonial forces passed down their legal system into Indonesian legal system, amongs other was the Dutch legal system. This criminal legal system introduced death penalty, which was initiated by the enforcement of several VOC rules in the form of law that only limitedly enforced in several regions that controlled by the VOC. Death penalty during that time was also applicable in the context of local law, both written or unwritten that was also used limitedly.¹⁶⁴

It is noteworthy that before the arrival of VOC in Indonesia, there were some small monarchs in Indonesia that enforced death penalty. Each monarchy established its own law different from each other.¹⁶⁵ Several crimes that were punishable with death in that time were, amongst other, murder,

¹⁶² Johnson and Zimring, *op.cit.*, pg. Xi.

¹⁶³ A. S. S. Tambunan. *Hukum Militer di Indonesia*, (Jakarta: Pusat Studi Hukum Militer, Sekolah Tinggi Ilmu Hukum Militer, 2005), pg. 30.

¹⁶⁴ In this context, it is necessary to present the relation between local punishment tradition with the influence of colonial law, as manu literatures showed adoption of punishment which was taken from the colonial law. See Tresna, *Peradilan Indonesia dari Abad ke Abad*, 1957. See also Supomo and Djokosutono, under Eddyono, *Jalan...*, *op.cit.*, pg. 3.

¹⁶⁵ Purba and Sulistyawati, *op.cit.*, pg. 21.

impeding the murder of a person who was guilty before the king, in-family marriage, and so forth.¹⁶⁶ For instance, in South Sulawesi, when Aru Palaka was in power, the criminals that threatened his power, such as La Sunni, was executed to death by Aru Palaka by beheading and his head was placed on the top of a tray as a proof that death penalty has been executed.¹⁶⁷

In Aceh, the Sultan in power can impose five types of special punishment, including death penalty, which was conducted by using a javelin or pounding the convicted head in a mortar (*sroh*). Meanwhile, in Toraja area, those who were conducting incests were usually executed to death by strangling or inserted into a rattan basket with stones and thrown into the sea. Also death penalty was applicable in other regions such as Minangkabau and Timor Islands.¹⁶⁸

Entering the colonial period, the use of death penalty was more common. The VOC issued implementing regulations that were announced in plaques (*plakaten*) to conduct all instructions related to VOC's policies in several regions. Initially, these regulations were only enforced in Betawi area and after the regions that were controlled by the VOC became larger, these plaques also applicable in other regions in Indonesia. In 1642, these plaques were pooled into a volume of collection, known as Betawi Statute.¹⁶⁹

During this colonial period, many "criminals" with various crimes were severely punished, including by death penalty. There were some episodes of death penalty that were conducted during VOC's occupying period in Indonesia.¹⁷⁰ The execution of death penalty was conducted on gallows, with primitive sword or guillotine, organized at the front of City Hall foyer in certain days every month. Hans Bonke, Dutch historian and archeologist, using the data from early 18th century, described the frequency of death penalty on gallows in Batavia area. This data elaborated the comparison between death penalty in Amsterdam and Batavia (today's Jakarta), in which Amsterdam with 210.000 population, had five death execution per annum in average, meanwhile in Batavia with 130.000 population, the death execution can be twice as much compared to the number of death convicts in Amsterdam per annum.¹⁷¹

In other notes, a German who was working at VOC office, in his diary described that in 19 July 1676, four individuals were beheaded at the City Hall, due to the accusation of murder. At mostly similar timeline, four slaves were broken to death, with the accusation of strangling their master.¹⁷² Other cases including Mestizo, a son of native mother and white father, was hanged due to theft; eight sailors were stamped with hot and smoldering VOC logo, due to desertion and robbery;¹⁷³ and two Dutch soldiers were hanged after two consecutive nights left their respective checkpoint.

¹⁶⁶ Andi Hamzah and Sumagelipu, *Pidana Mati di Masa Lalu, Kini, dan Masa Depan*, (Jakarta: Ghalia, 1984), pg. 59.

¹⁶⁷ Leonard Y. Andaya, *The Heritage of Arung Palaka*, (The Hague: Martinus Nijhoff, 1981), pg. 243.

¹⁶⁸ *Ibid.*

¹⁶⁹ In the implementation of all instruction related to VOC policies in their area, VOC created implementing regulations that were announced in plaques (*plakaten*), which was initially only applicable in Betawi area. After VOC was getting power into more regions, these plaques also applicable in other area in Indonesia. In 1642, these plaques were gathered into a volume collection known as Betawi Statute, enforced in 1650. In 1715, this Statute was amended into the New Betawi Statute. Utrecht, *Hukum Pidana I*, (Surabaya: Pustaka Tinta Mas, 1950). See Tresna, *Peradilan Indonesia dari Abad ke Abad*, 1957; See also Supomo and Djokosutono, *Sejarah politik Hukum Adat*, (Jakarta, 1982), under Eddyono, *Jalan...*, *op.cit.*, pg. 3.

¹⁷⁰ Alwi Shahab, *Hukuman Gantung di Alun-Alun-2*, <<https://alwishahab.wordpress.com/2009/12/02/hukuman-gantung-di-alun-alun-2/>>, accessed on 10 September 2017.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

The crime of adultery and affairs also severely punished. A Dutch woman, the wife of a teacher, was covered with iron necklace and arrested in female prison for 12 years after several times had affairs.¹⁷⁴ Governor General JP Coen beheaded a young VOC recruit named Pieter Contenhoef at the City Hall square (*Stadhuis*), now Jakarta Historical Museum, because the 17 year-old recruit caught red-handed making out with Sara, a 13 year-old girl who was staying at Coen's house. Meanwhile, Sara was punished with half-naked body at the entrance of the City Hall.¹⁷⁵ Leonard Busse in a book titled *Persekutuan Aneh* noted that many adultery cases committed by women when their husbands were still alive and already passed away. There were four cases, in which they were punished by drowned in a barrel full of water; three other cases were tied into gallows and were strangled until they passed away, one by one. Afterwards, their face was stamped and their properties were forfeited.¹⁷⁶ Another victim of the execution was Oey Tambahsia, called as Betawi playboy, who died in the gallows. He was far from satisfied with women, always chasing women, regardless the respective woman is a daughter or wife of some one else, including committed a murder towards several women and his business competitors. He was finally executed to death by hanging, at 31 years old.¹⁷⁷

Further, execution towards Pieter Erbeveld, a Dutch-German descendant who was accused of revolt, also executed with barbaric method on 22 April 1722. His hands and feet were tied into a rope, where each of the rope was connected into a horse that were facing four direction. With one pounding, the four horses went into four direction, while Pieter's was dismembered into four parts. Afterwards, his head was beheaded and stuck into a pole that later placed at a house in Jayakarta Street, Jakarta Kota. This monument can be found at DKI Historical Museum and Prasasti Park, Tanah Abang. After several research, the accusation of revolt faced by Pieter was only far-fetched by the court. After that incident, the location of the execution was named as Skin Break Village (*Kampung Pecah Kulit*).¹⁷⁸ Other execution in the form of lynching towards a robber named Tjoe Boen Tjeng was conducted at the City Hall square in 1896. When the lynching was organized at the North Jakarta City Hall, the perpetrator was executed in a pole with sword or similar to primitive guillotine.¹⁷⁹

3.2.1. Death Penalty during Daendles Period: Silencing Rebellion and Resistance

While already implemented, the first consolidation of the use of this type of punishment, was comprehensively used in the Dutch East Indies (Indonesia) in 1808, under the order from Daendles. This consolidation resulted into a legislation concerning laws and court (*Raad van Indie*)¹⁸⁰, in which one of the provision stipulated the imposition of death penalty that became the authority of the Governor General. According to this provision, before a death execution can be carried on, a *fiat executie* from the

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ Alwi Shahab, *Betawi: Queen of East*, (Jakarta: Republika, 2002), pg. 84.

¹⁷⁹ Alwi Shahab, *Berakhirnya Kisah Pembunuh Sadis di Tiang Gantungan Belanda*, Opini, 29 December 2016, <<http://www.republika.co.id/berita/selarung/nostalgia-abah-alwi/16/12/29/oijw5n282-berakhirnya-kisah-pembunuh-sadis-di-tiang-gantungan-belanda>>, accessed on 7 September 2017.

¹⁸⁰ For Europeans, the applicable laws were the Betawi Statute, while for the native population, the customary law prevailed. However, the Governor General can change the legal system of the punishment was considered not proper with the crime that had been committed or the customary law cannot solve the case, under Eddyono, *Jalan..., op.cit.*, pg. 6.

Governor General is required,¹⁸¹ for the exception if the death penalty was imposed by military in charge due to insurgency. Pursuant to Plaque dated 22 April 1808, the court was allowed to impose punishment with the following methods: (1) burn to death while tied into a pole; (2) killed using a sword (keris); and so forth.¹⁸² Plaque dated 22 April 1808 consisted provisions, in which death penalty during that time was carried on with cruel method, including burn alive, stabbed with sword, stamped with hot coals, beaten to death, and forced labor.¹⁸³

During Daendels era, the motive to conduct criminal law consolidation and to implement death penalty policy was only to adjust the punishment under the written criminal law with the local legal system.¹⁸⁴ According to him, many local laws that were still implementing death penalty and punishment towards the body (cruel punishment). However, it was possible that Daendels did not know other alternatives other than using such policy in Indonesia.¹⁸⁵ In addition to that, he did not have any experience in regards to affairs within the occupied territories, and another possibility on why Daendels was malignant in conducting consolidation to implement death penalty (and other cruel punishment) because it was his duty to defend Java Island from the attack of Britain troops. Therefore, Daendels was very cautious on the possibility of the insurgency from the colonized citizens.¹⁸⁶

Preserving Death Penalty under the *Wetboek van Strafrecht voor Indonesie*: Based on Discriminative Racial Perspective

The punishment system as stipulated under plaques were still implemented until 1848, with the issuance of the criminal code known as *Intermaire Strafbepelingen LNHB 1848*. Article 1 of the legislation stated that the law still continued the punishment system that had been implemented prior to 1848, with the exception of several amendment under the punishment system. Death penalty was no longer implemented with the cruel method as formulated under the previous plaques, but with hanging method.¹⁸⁷ Previously, execution was conducted with different methods, similar to the period of Daendels.

The issuance of *Wetboek van Strafrecht voor Inlanders (Indonesiers)* or WvSinl on 1 January 1873, marked the second death penalty practice consolidation and the most important in the Dutch East Indies. In Netherlands, at that time, a new development was happened with the issuance of the first criminal law codification, which caused WvSinl was adjusted with the said development, and criminal law unification was executed in all Indonesian regions. In 1915, *Wetboek van Strafrecht voor Indonesie* (WvSI) was issued and it entered into force on 1 January 1918.¹⁸⁸

As mentioned in the previous chapter, there were differences in the implementation of death penalty under the criminal law in the Netherlands and Dutch East Indies. Death penalty was abolished in the Netherlands in 1870, or three years prior to the issuance of the WvSiNI. The Netherlands Colonial

¹⁸¹ *Ibid.*, pg. 3.

¹⁸² *Ibid.*

¹⁸³ Hamzah and Sumangelupu, *Pidana Mati...*, *op.cit.*, pg. 58.

¹⁸⁴ See Utrecht, under Eddyono, *Jalan...*, *loc.cit.*

¹⁸⁵ See Supomo-Djokosutono, under Eddyono, *Jalan...*, *loc.cit.*

¹⁸⁶ See Utrecht, under Eddyono, *Jalan...*, *loc.cit.*

¹⁸⁷ Sceppe, *Het Nederlands Indisch Strafstelsel*, pg. 51.

¹⁸⁸ Jonkers, *loc.cit.*

Government preserved death penalty as an emergency law,¹⁸⁹ and the implementation was only limited to the crimes that were considered as the most serious crimes by the Colonial Government, which were crimes against state security, murder, theft and extortion, robbery, piracy at the coast and river.¹⁹⁰

The motive of the Netherland Colonial Government to preserve the death penalty was vary. Sahetapy, by conducting a historical analysis, towards the debate on the implementation of death penalty in the Dutch East Indies (Indonesia),¹⁹¹ generally it can be concluded that the implementation of death penalty in Indonesia cannot be separated from the Netherland's colonial motive, which was to preserve and secure the occupied territories.¹⁹² Sahetapy elaborated three reasons of the formulation of death penalty under the KUHP, as follows: racial factor, public order reason, and the reason based on criminal law and criminology.¹⁹³

The stance and perspective of Dutch jurists in regards to the implementation of death penalty in the Dutch East Indies can be seen from the debates as elaborated below:

a. Racial Factor

During the drafting process of the criminal code that about to be enforced in Indonesia at that time, there were debates amongst criminal law experts in Netherlands. These debates were related to the equal treatment to Indonesian natives. As stated by Ideam, submitted principle question in regards on whether Indonesian natives will be imposed with Dutch criminal law with the amendment or customary criminal law with certain changes.¹⁹⁴ The answer towards Idema's question, can be seen from the current KUHP provisions, which is a Dutch KUHP based on concordance principle¹⁹⁵ with certain changes. Answering that principle question, Idema quoted the stance from another criminal law, de Wal, which was "*wat gij niet wilt, dat U geschiedt, doe dat ook aan een ander niet*" (if you do not like to be treated as such, do not conduct such thing to another people). However, de Wal's perspective was not considered, and the cause was otherwise.¹⁹⁶

Another jurist, Simons, questioned on whether it was necessary to preserve death penalty under the Indonesian criminal laws and regulations at that time. Simons described that when KUHP was enforced, which was later known with the current format with various changes and amendments, there was no hesitation to preserve death penalty. Simon further explained that the difference of opinion in regards to death penalty that was happened at the state commission (*Staatscommissie*) for the 1898 version of the WvSI, was not elaborated under *memorie van toelichting* (MvT) for the 1915 version of the WvSI,

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ Sahetapy, *Ancaman...*, *loc.cit.*

¹⁹² *Ibid.*, pg. 336.

¹⁹³ *Ibid.*, pg. 37.

¹⁹⁴ *Ibid.*, pg. 38.

¹⁹⁵ Dedi Soemardi, *Pengantar Hukum Indonesia* (Jakarta: Ind-Hill-Co, 1992), pg. 8. Concordance principle is a principle that underlies the applicability of European law or the law in the Netherland at that time to be applicable as well to the Europeans in the Dutch East Indies (Indonesia). In other words, towards Europeans that were in Indonesia, they were subject to the civil law that was applicable in the Netherland. See also Article 311 *Indische Staatregeling* (IS).

¹⁹⁶ See also Djoko Prakoso, *Masalah Pidana Mati (Soal Jawab)*, (Jakarta: Bina Aksara, 1987), pg. 2-3. Opinion from de Wal was translated by Sahetapy in the following quotes "*sebagaimana engkau tidak suka diperlakukan demikian, janganlah melakukan hal yang demikian pula terhadap orang lain*". Sahetapy, *Ancaman...*, *loc.cit.*

and therefore caused the 1915 WvSI did not show a clear stance on death penalty. In the end, Simons concluded with hesitation that the main reason to preserve death penalty was a very terrifying nature of death penalty.¹⁹⁷

Simons saw the character, attitude, and belief of the Indonesian natives, in particular related to the dishonesty of the natives as witnesses in criminal cases, as it was easy for the natives to provide perjury. Simons did not agree to preserve death penalty under KUHP, but he accepted that death penalty was an emergency measures during extraordinary times and therefore it can be preserved under KUHP. In regards to his opinion that contradicted each other, Simons suggested the reason that *Staatscommissie* also discussed about death penalty as the last resort, as an emergency law, which if that was the case this issue must be properly regulated in a written form.¹⁹⁸ The opinion from Simons in line with Kruseman's point of view, in which he opined that death penalty was only an emergency power (*noodrecht*). While Simons opined that Indonesian natives were ease to provide perjury, Kruseman had different opinion, which according to him that Indonesian natives were easy to believe in something, even accepted lies as the truth.¹⁹⁹

Another jurist, Kleintjes, expressed his disappointment on the reason of the implementation of death penalty under the explanatory nove (MvT) that had racial tendency. Kleintjes said that the data since 1872 there were no Europe civilians that faced death execution in Indonesia (during these times, Indonesia was known as the Dutch East Indies) and the accusation of the *Staatscommissie* towards the Indo-Netherlands offsprings as criminals was rejected by Kleintjes.²⁰⁰

In regards to racial perspective on the lack of honesty of the Indonesian natives also adressed by Enthoven, who gave a slight differentiation on the emphasis is that the lack of honesty was an art that was not properly understood by Indonesian natives. Enthoven said that:

"alleen zij nog opgemerkt, dat liegen een kunst is, die vele Inlanders nog maar matig verstaan, ook all beoefenen zij die nog zoo vaak ..." (it should be highlighted that lying is an art that is yet to be understood by Indonesian natives, even though they are constantly lying).²⁰¹

This perspective concluded by Enthoven after comparing the dishonesty in Europe and Indonesia, using *a contrario* interpretation, in Europe witnesses were lying as well, however lies provided by witnesses in Europe were considered by Enthoven as an art, because even though the witnesses in Europe provided incorrect statement, they were not lying, unlike in the Dutch East in Indies, in which they (the Indonesian natives) thought their statements were true.²⁰²

Kruseman, Kleintjes, and Enthoven were the individuals who supported the preservation of death penalty in regards to perjury in Europe and Indonesia. Sahetapy was of the opinion that Enthoven's perspective was regarded from the comparative aspect, as elaborated above scientifically was groundless.²⁰³ Sahetapy concluded as follows:²⁰⁴

¹⁹⁷ *Ibid.*, pg. 39.

¹⁹⁸ *Ibid.*, pg. 40.

¹⁹⁹ *Ibid.*, pg. 41.

²⁰⁰ *Ibid.*, pg. 42.

²⁰¹ *Ibid.*

²⁰² *Ibid.*, pg. 44-45.

²⁰³ *Ibid.*, pg. 45.

1. The stance of Dutch jurists was based on the superiority as the colonialist towards Indonesian natives as the occupied nations. This was evident from their writings. For several authors, the superiority was stated explicitly;
2. Based on the experience in court trials, the Dutch judges concluded that local witnesses were not trustworthy. This conclusion from the Dutch judges if scientifically reviewed cannot be justified;
3. The Dutch judges were generally had not mastered the language of the local witnesses. In addition, they did not understand the values and social structures of the local society at that time. No wonder if they provided a wrong conclusion or perspective;
4. Started from the similar premise, which was that local witnesses were not trustworthy, their final conclusion were not similar. Some were against, some were supporting of the preservation of death penalty; and
5. The political ego racial reason was mixed-up with the public order reason, law, and criminology. Therefore an incorrect conclusion was inevitable;

b. Reason Based on Public Order

The reason to preserve death penalty in the Dutch East Indies referred to the perspective that the state has the authority to maintain public order. In the statement provided by Modderman as quoted by Lemaire under *Het Wetboek van Strafrecht voor Nederlandsch Indie vergeleken met het Nederlandsche Wetboek van Strafrecht*, it was explained that the state has all authorities to maintain public order and therefore the existence of death penalty must be seen from the requirement criteria framework.²⁰⁵ Based on the source from Modderman, while death penalty has been abolished in the Netherlands in 1870, the drafters of KUHP were still preserving death penalty.²⁰⁶

Lemaire, when comparing Article 10 of KUHP with Article 9 of the WvSI, stated that the proper reasons to formulate death penalty that addressed by the drafters of KUHP were because the Dutch East Indies was an occupied territory, in which the population was consisted of many tribes.²⁰⁷ Lemaire, quoted the statement from the drafters, the situation in the Dutch East Indies at that time was very different from the Netherlands, in which the law and order in the Dutch East Indies were easily interfered and it was prone to be critical and dangerous. The composition of the government and tools to preserve the power in the Dutch East Indies was very difficult to implement the similar methods such as in Netherlands or other countries in Europe.²⁰⁸

Lemaire was of the opinion that under such condition, it would be irresponsible to relinquish a powerful tools such as death penalty which had a frightening nature that was not present in other punishment such as imprisonment and containment. Several behaviors in the Dutch East Indies, which was not clearly explained which behavior that has a risky nature and therefore for a hard retaliation for public order death penalty was necessary.²⁰⁹ Further, Lemaire stated that most of the experts in the Dutch East Indies were indeed preserved death penalty.²¹⁰ However, the drafters also stated their stance that only

²⁰⁴ *Ibid.*, pg. 46-47.

²⁰⁵ *Ibid.*, pg. 48.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.* pg. 49

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*,

time will tell on whether the law and order in the Dutch East Indies can be preserved without the formulation of death penalty for severe crimes, then it is the time similar to the Netherlands to abolish death penalty from the list of punishment.²¹¹

Sahetapy was of the view that the public order reason to preserve death penalty are: *first*, that the reason based on public order cover several aspects including aspect pertaining to the nature of the case, aspect pertaining to the government structure and power infrastructure, aspect pertaining to pardon institution and aspect pertaining to the time of death penalty abolishment. With the background of the mentioned aspects, the Dutch Colonial Government and Dutch jurists who agreed on the preservation of death penalty looked for various argumentation and motivation to justify and preserve their opinion related to death penalty.

Second, Concordance Principle was never consequently executed. Therefore, not only it was evident the imbalance on the applicable laws and regulations, but the implementation also caused many implications and unfairness. That meant for a criminal act that is similar, in this case if premeditated murder will be subject to two criminal charge measurement.

Third, the Netherlands as a small country cannot deploy its citizens in large number to supervise and maintain its occupied territories. This meant that the Netherlands was forced to use the Indonesian natives. No wonder that death penalty was tried to be linked with the government structures and means of power.²¹²

Referring to the context of public order reason, the concept of emergency authority reasoning to justify the preservation of death penalty had a lack of principle ground and weak. The necessary for emergency authority and when the emergency authority can be abolish is very problematic. The logical consequence with the linkage between death penalty and emergency authority is that the abolishment of emergency authority therefore death penalty must be abolished.²¹³ Other than that, at that time (and even now) Indonesia is not equal with the Netherlands from the aspect of government structure, the nature and culture of the nation, climate, and everything else. Therefore, the consideration on when the time to abolish death penalty as what happened in the Netherlands in 1870 is a fantasy, a fatamorgana.

c. Reason Based on Criminal Law and Criminology

The reason on death penalty still implemented from the perspective of criminal law and criminology, was less emphasized in any elaboration or review from Dutch jurists. Sahetapy explained that criminology at that time was yet to be developed and advanced as of today, which made such discipline did not acquire a proper place in the scientific field.²¹⁴ Moreover, Sahetapy obtained a strong impression that the Dutch jurists considered death penalty as a reasonable element under the criminal law and therefore it did not need any questioning. Death penalty seemed inherent with criminal law.²¹⁵

²¹¹ *Ibid.*, pg. 50.

²¹² *Ibid.*, pg. 68-70.

²¹³ *Ibid.*

²¹⁴ *Ibid.*, pg. 71.

²¹⁵ *Ibid.*

Sahetapy quoted several opinions addressed by some of Dutch jurists in regards to death penalty, systematized under those who were for death penalty and those who were against death penalty. From those who are for death penalty, the following reasons are generally highlighted:

1. Death penalty guarantees that the perpetrator is no longer able to do similar act. The society will no longer be interfered with criminals because "his body has been buried therefore there is no reason to be scared of the convict" (*de aarde bedekt het lijk en van den veroordeelde is niets meer te vreezen*).²¹⁶
2. Death penalty was a strong repression tool for the government, particularly for the government in the region of the Dutch East Indies;
3. With the strong repression tool, the public interest can be guaranteed and therefore tranquility along with law and order can be protected;
4. This strong repression tool also served as a general prevention tool, therefore potential criminal can be discouraged from committing a crime;
5. Mainly with the execution in the front of the public, it was expected a greater fear to commit a crime;

The views that agreed with the implementation of death penalty showed the argument on why death penalty was necessary to be implemented. Enthoven, quoted the opinion from Lombroso, said that with the imposition and implementation of death penalty, it was expected that there would be a selection and the society can be cleaned from evil and bad elements, and it was hoped that the society will consist of only law-abiding citizens. The view of Lombroso was affirmed by Garofalo's opinion, who said that with the implementation of death penalty to almost 70.000 individuals, based on the law under the administration of Eduard VI and Elisabeth, it was proven that the crime rate had been reduced significantly.²¹⁷

Dutch jurists that were against death penalty that were categorized in the group of abolition, did not agree with the abovementioned reasons, they addressed the following counterreasons:

1. In general, the Dutch jurists that were against death penalty (later known as abolitionist) cannot understand why based on the concordance principle death penalty was still preserved in the Dutch East Indies;
2. The abolitionists were of the view that death penalty is not a punishment, because death penalty does not satisfy all the criteria required from a punishment. They also wondered that the substance of the speech from Minister Modderman which was brilliant that was addressed to oppose death penalty in the Netherlands, was not implemented in the Dutch East Indies. In general, Modderman opined that:
 - a. Death penalty is not worth with the mistake committed by the perpetrator;
 - b. By imposing death penalty, the possibility for the perpetrator to improve himself is totally closed;
 - c. the guarantee that the judge's decision is proper, right, and fair, is difficult to ensure as the judge is still a man with error;
 - d. With the execution of death penalty, the possibility to review a decision that may be erroneous no longer available;

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*, pg. 72-73.

- e. The decision and the implementation of death penalty has a wretched influence towards the society;
3. A man's life, even though he is a villain, cannot be deprived by conducting a death execution, it is also according to the norms within the native society that was qualified as "low culture and uneducated society" (*minbeschaafde of min-intellectueel ontwikkelde volken*);²¹⁸
4. If death penalty is considered as a tool to frighten the potential criminals, it will be very difficult to accept the thought on the basis of a controversial pardon institution;
5. In addition, it is difficult to understand that if death penalty has a deterrent effect, why the implementation should be conducted in a closed space that cannot be seen by the public, such as inside a prison (*intra muros*);
6. If it is true that death penalty is an effective tool and appals the potential criminals, why the abolition of death penalty in the Netherlands, crimes did not increase?

The abolitionists also brought up the teachings of Kant and Hegel on the pure vengeance is difficult to maintain. The absolute theory and the basis of punishment based on the Bible, in practice, is no longer gave followers and does not have a firm rationale in the current time.²¹⁹

While there were two groups of supporters and opponents of death penalty within the Dutch jurists, the argumentation from the supporters of death penalty were not firm and consistent enough. It was evident from the point of view of Enthoven, who was known as the supporter of preserving death penalty in the Dutch East Indies, did not have a consequent opinion towards the implementation of death penalty for political "criminals". The opinion of Enthoven is addressed below:

*"Met name kan dus de doodstraf niet meer opgelegd worden wegens gewapend verzet tegen het Gouvernement, een feit, dat hoe gevaarlijk ook voor de openbare orde, een zoo strenge straf uit een oogpunt van zedelijke gerechtigheid niet verdient".*²²⁰

(In general, death penalty is not executable because (or related to) the armed resistance against the government, a fact which, as it is dangerous (armed resistance) for public order, it is now fair to the implemented from the justice point of view).

Enthoven felt that death penalty is too cruel, as since a long time ago the authority always imposed death penalty to these people without a clear result. Therefore, death penalty towards political criminals as a cruelty because it did not give any benefit and did not give a clear expected result, which were the cessation of mischief and political rebellion. In essence, Enthoven's stance was addressed to the expected result (result-oriented) and not towards the principle that becomes the basis (principle-oriented).²²¹

Pursuant to the abovementioned elaboration, it can be concluded that: (i) the discussion of death penalty from the criminal law theory aspect was denied; (ii) analysis of death penalty based on practical penology was not exist, even though the initial thoughts appeared from penology point of view as well as analogy analysis. Such issue was caused by the fact that both disciplines were yet to develop, unlike the current time, and there was lack of victimology-based approach; (iii) Sometimes it is difficult to

²¹⁸ Translated by Sahetapy: "*penduduk yang kurang berbudaya dan kurang pendidikan*". *Ibid.*

²¹⁹ *Ibid.*, pg. 73-75.

²²⁰ *Ibid.*, pg. 76.

²²¹ *Ibid.*

differentiate from the criminology perspective and theoretical based on criminal law, even the elaboration on criminal law was always mixed with racial motive; (iv) every discussion, directly or not, always questioned in the context of the Netherlands. This was understandable, considering the Dutch East Indies was the occupied territory; and (v) while Dutch readers had different stances, however there was one similarity that must be applauded, which was a brave, open, attitude, and if it was necessary they were critical to the government of Netherlands or the Dutch East Indies.²²²

3.3 Death Penalty During Japanese Occupation: Continuing Dutch Colonial Footsteps

While in 1942 Indonesia was occupied by Japan, however in essence the criminal law that was applicable in Indonesia did not undergo significant change. The Government of the Japanese Military (*Dai Nippon*) was once again re-enforcing the regulation from Dutch colonial era with several legislation as the bases. The WvSI then maintained to be applicable until the Japanese occupation came to an end.²²³

During this period, a legislation known as *Osamu Gunrei* No. 1 of 1942 and Special Numbered Law of 1942 were issued, including *Osamu Seirei* No. 25 of 1944 on *Gunsei Keizirei* (Criminal Law of the Military Government). This legislation included the general and special formulation and applicable for every person who committed crime inside or outside of the *Gunsei Keizirei* jurisdiction. Article 3 of the *Osamu Seirei* said that all government agencies/institutions and their authorities, laws and regulations from the previous government were still recognized for the time being, insofar that those legislations were not in contradiction with the Japanese military government. In other words, only articles that were related to the Dutch Government, such as mentioning the king/queen was no longer applicable. This was conducted to prevent legal vacuum within the Indonesia legal system at that time.²²⁴

With such basis, it was known that the law that regulate the governance and other affairs, including the criminal law, was still using the Dutch criminal law pursuant to Article 131 in conjunction with Article 163 of the *Indische Staatregeling*. Therefore, criminal law that was enforced for all groups of the society was similar, as determined under Article 131 of the *Indische Staatregeling* and other groups of citizens under Article 163 of the *Indische Staatregeling*.

However, there was another legislation that is important to be highlighted, which was *Gunsei Keizirei* a criminal code that enforced since 1 June 1944, even though at that time the WvSI was still applicable. When the *Gunsei Keizirei* was implemented, several violations were regulated in regards to the punishment under the WvSI to be punished under the provisions under the *Gunsei Keizirei*, for instance the act of destroying or damaging electric installation or communication media. These violations were regulated under the WvSI, however after the *Gunsei Keizirei* was implemented, the legislation that was in force was the *Gunsei Keizirei*.²²⁵

²²² *Ibid.*, pg. 76-77.

²²³ Since 1942 after Japan occupied the Dutch East Indies, in addition to the enforcement of the WvSI, Japan also enforced the criminal law issued by the Japanese military. Lihat Eddyono, *Jalan...*, *op.cit.* pg. 4.

²²⁴ Han Bin Siong, *An Outline of The Recent History of Indonesian Criminal Law*, (Gravenhage: Martinus Nijhoff/Brill, 1961), pg. 5.

²²⁵ *Ibid.*, pg. 6.

In regards to death penalty, on 2 March 1942, Lieutenant General Hitoshi Imamura, Leader of the 16th Army, issued Martial Law through special decree. The martial law stipulated death penalty and gross punishment that can be imposed to those who were.²²⁶

1. Against the Japanese Army, including spying for the enemy;
2. Destroying oil wells, plantations, and other natural resources;
3. Damaging communication infrastructures including highways, railroad, telephone and telegraph, and postal communication;
4. Poisoning with the purpose of destructing the Japanese army;
5. Complicating the society's livelihood;
6. Destroying properties, banknotes, and goods;
7. Improper profiteering;
8. Committing an act that against the objectives of the Japanese army;
9. Ignoring orders from the superiors; and so forth

In that legislation, the party that instigated or helped such instigation can be imposed with sanctions at the same level with the ones who committed the act. Death penalty was conducted by shooting.²²⁷

3.4 Legislative Policy of Death Penalty after the Independence (1945-1950)

The description of the making of death penalty legislation during the period after the Independence Proclamation in 1945 was the period when the Republic of Indonesia was trying to arrange the foundation and establishment of the statehood with various discourse, internal/domestic political dynamics, or even external dynamics related to the state sovereignty after the World War II was ended.

This period also noted on how Indonesia experienced the alteration of the structure of the state, from unitary state to a federal state, by the enforcement of two constitutions namely the 1945 Constitution and UUD RIS. During August 1945 until December 1949, it was a period of Indonesian Revolution that was marked with the establishment of a Republic government in Jakarta, which since its formation only able to conduct weak administration control over the regions and authorities solely on the fact that, by many Indonesians, considered as the logical peak of the Indonesia's independence struggle.²²⁸

The proclamation resulted in social revolution in many regions, that was often marked with the violence act from the society towards the traditional elites, Dutch, and Chinese. When occupied by a strong and centralistic Japanese, the Republic of Indonesia which was only recently established, was not able to exercise consolidation, and the state did not own the governing structure below its central government. The Soekarno administration carried out its governance, helped by the Central Indonesia National Committee (pursuant to Vice President Declaration No. X, dated 16 October 1945, this committee was given a legislative power and involved in the determination of State Policy Guidelines, before the formation of the People Consultative Assembly and the House of Representatives) and afterwards every region established the Indonesia National Committee.²²⁹ This Indonesia National Committee in each

²²⁶ *Ibid.*, pg. 3.

²²⁷ *Ibid.*

²²⁸ Robert Bridson Cribb, *Gejolak Revolusi di Jakarta 1945 -1949 Pergulatan Antara Otonomi dan Hegemoni*, (Jakarta: Grafiti, 1990), pg. 203-204.

²²⁹ Wilson, *Warisan Sejarah Bernama Hukuman Mati, dalam Politik Hukuman Mati di Indonesia*, (Jakarta: Marjin Kiri dan P2D, 2016), pg. 35-37.

region that became the liaison body between the Government of the Republic with people powers in every level.²³⁰ The power and authority of the Republic and other regions in Indonesia were opposed by the Netherlands.

The Dutch-Indonesian Round Table Conference, held on 23 August 1949, was the peak of political settlement between the Republic of Indonesia and the Netherlands. One of the deals in the conference was the establishment of the Constitution of the Federal Republic of Indonesia, which was temporary. This constitution determined that all existing laws, if those were not in contradiction with the provisions under the Provisional Constitution or with the agreement reached during the Conference prevailed, until the laws issued by the institution that were authorized to conduct such action, pursuant to the regulations that stipulated under the Provisional Constitution.²³¹

The Provisional Constitution later known as the Constitution of the Federal Republic of Indonesia (UUD RIS), which was the result of the discussion from the Commission for Political and Constitutional Affairs—one of five commissions under the Central Commission of the Round Table Conference. The handover of sovereignty to the Federal Republic of Indonesia must be based on the Provisional Constitution, therefore the constitution must be concluded before the Round Table Conference was ended. Prior to that event, during the Inter-Indonesia Conference in Yogyakarta and Jakarta on 22 July-2 August 1949, the Republic of Indonesia and the Federal Consensus Meeting (*Pertemuan Musyawarah Federal*) reached an agreement on the basic principles and main provisions of the constitution for the Federal Republic, and therefore the constitution can be drafted during the Round Table Conference. On 29 October 1949, the Constitution was concluded and signed by the leaders of the delegation, and afterwards on 31 October 1949 the document was sent to the Central Commission of the Round Table Conference.²³² On 14 December 1949, the UUD RIS was signed by the proxies of the states, conducted in Jakarta.

In this constitution, the basic rights and freedoms of mankind were incorporated more detailed compared to the 1945 Constitution, a document that influenced by the 1948 UDHR included under the discussion amongs the drafter of RIS constitution. In regards to the right to life as mentioned under Article 3 of the UDHR, which says that “Everyone has the right to life, liberty and security of person”, the RIS Constitution did not include this provision. The emphasis in the early articles of the RIS Constitution in regards to basic rights and freedoms of mankind are regarding the acknowledgement of individual human being before the law, as stipulated under Article 6 of the UDHR.²³³ Philosophically, the right to life was not a elementary factor in the drafting process of the RIS constitution. In that condition, during the legislative drafting at the level of a law, it can be understood that the death penalty punishment can be found under the Indonesian positive law as of now.

In the unstable national political situation after the Indonesia’s independence proclamation, there were no legislations that incorporated death penalty punishment except for two laws that in essence were

²³⁰ Anton Lucas, *One Soul One Struggle; Peristiwa Tiga Daerah*, (Yogyakarta: Resist Book, 2004), pg. 124.

²³¹ Notosoetardjo, *Dokumen Konferensi Meja Bundar*, (Jakarta: Penerbit Endang, 1956), pg. 56-57.

²³² Ide Anak Agung Gde Agung, *Renville*, (Jakarta: Sinar Harapan, 1983), pg. 295-296.

²³³ The 1948 Universal Declaration of Human Rights in fact influenced the discussion on the rights of citizens as discussion in the First Inter-Indonesia Conference in Yogyakarta on 22 July 1949, quoted Article 10 of the UDHR, related to the freedom of religion that must be guaranteed under the RIS Constitution and States Constitution. Notosoetardjo, *op.cit.*, pg. 214.

the legislation that were originated from the Dutch East Indies government, namely the Criminal Code (KUHP) and Military KUHP.

3.4.1 Indonesia Criminal Code

From the issuance of Law No. 1 of 1946 on Criminal Law Regulation issued on 26 February 1946, the Criminal Code of the Dutch East Indies that was implemented in Indonesia was enforced in Indonesia. This provision included a transitional article which stated that all criminal provisions that were in contradiction with the Republic of Indonesia were no longer applicable, changed the title *Wetboek van Strafrecht voor Nederlandsch-Indie* into *Wetboek van Starfrecht* (WvS) or Criminal Code (KUHP), and amended several words and deleted several articles under the WvS. Law No. 1 of 1946 ended the criminal law regulation during the Japan occupation period, which was started on 8 March 1942. The Law was initially only applicable for Java and Madura, as stated under Government Regulation No. 8 of 1946, dated 8 August 1946, KUHP was started to be enforced in Sumatera Province.²³⁴

KUHP post-independence period still incorporated death penalty as stipulated under WvSI, which were charged for serious crimes towards state security, murder, theft and extortion, robbery, and piracy,²³⁵ as elaborated on under the following table:

Table 3.1 Death Penalty Provisions under KUHP

Book II of KUHP on Crimes	
Article 104	The attempt undertaken with intent to deprive the President or Vice President of his life or his liberty or to render him unfit to govern, shall be punished by capital punishment or life imprisonment or a maximum imprisonment of twenty years.
Article 111 (1) and (2)	<p>(1) Any person who colludes with either a foreign power or a king or a community, with the intent to induce them to conduct hostilities or to wage a war against the state, to strengthen them in the intention made up thereto, thereby promising them assistance or assisting them in their preparations, shall be punished by a maximum imprisonment of fifteen years.</p> <p>(2) If the hostilities are committed or the war breaks out, either capital punishment or life imprisonment or a maximum imprisonment of twenty years shall be imposed</p>
Article 124 (3) 1st and 2nd	<p>(1) Any person who in time of war intentionally renders assistance to the enemy or prejudices the state against the enemy, shall be punished by a maximum imprisonment of fifteen years.</p> <p>(3) <u>Capital punishment or life imprisonment or a maximum imprisonment of twenty years shall be imposed, if the principal:</u></p> <ol style="list-style-type: none"> 1. betrays to the enemy, smuggles into the enemy's hands, destructs or damages an stronghold or post, which is reinforced or occupied, a means of communication, a storehouse, a military provision, or a military, naval or army

²³⁴ In 1958, KUHP was declared to be applicable for all Indonesian regions, started on 2 September 1958 with the issuance of Law No. 3 of 1958.

²³⁵ *Ibid.*

	<p>chest or any part thereof, obstructs, prevents or frustrates a plan for inundation or another military plan devised or executed for defense or attack;</p> <p>2. causes or facilitates a revolt, mutiny or desertion among the armed forces.</p>
Article 140 (3)	<p>(1) The attempt on the life or the liberty of a ruling king or another head of a friendly state shall be punished by a maximum imprisonment of fifteen years.</p> <p>(3) If the attempt on said life, undertaken with premeditation, results in death, the capital punishment or life imprisonment or a maximum imprisonment of twenty years shall be imposed.</p>
Article 340	The person who with deliberate intent and with premeditation takes the life of another person, shall, being guilty of murder, be punished by capital punishment of life imprisonment or a maximum imprisonment of twenty years
Article 365 (4)	Capital punishment or life imprisonment or a maximum imprisonment of twenty years shall be imposed, if the fact results in a serious physical injury or death, committed by two or more united persons and thereby accompanied by one of the circumstances mentioned under first and thirdly.
Article 368 (1) and (2)	<p>(1) Any person who, with intent to unlawfully benefit himself or another, by force or threat of force forces someone either to deliver a good that wholly or partially belongs to that person or to a third party, or to negotiate a loan or to annul a debt, shall, being guilty of extortion, be punished by a maximum imprisonment of nine years</p> <p>(2) The provisions of the second, third and fourth paragraph of article 365 shall be applicable to this crime.</p>
Article 444	If the acts of violence described in articles 438 - 441 result in the death of one of the persons on board the attacked vessel or of one of the assaulted persons, the skipper, commander or captain and those who have participated in the acts of violence shall be punished by capital punishment, life imprisonment or a maximum temporary imprisonment of twenty years.
Article 479 k (2)	<p>Article 479 i Any person who on board an aircraft, unlawfully seizes or maintains the seizure, or exercises control of that aircraft while it is in flight, shall be punished by a maximum imprisonment of twelve years.</p> <p>Article 479 j Any person who on board an aircraft, by force or threat thereof, or by any other form of intimidation, seizes or maintains the seizure, or exercises control of that aircraft while it is in flight, shall be punished by a maximum imprisonment of fifteen years</p> <p>Article 479 k (1) Life imprisonment or a maximum imprisonment of twenty years, shall be imposed if the act mentioned in Article 479i and Article 479j:</p> <ol style="list-style-type: none"> is committed by two or more persons jointly; is a continuation of a conspiracy; is committed with premeditation;

	<ul style="list-style-type: none"> d. causes serious physical injury to a person; e. causes damage to said aircraft, such that its navigation may be endangered; f. is committed with intent to deprive a person of his liberty or to maintain the deprivation of liberty of a person. <p>(2) If said act causes the death of a person or the destruction of said aircraft, the punishment shall be death punishment or life imprisonment or a maximum imprisonment of twenty years..</p>
Article 479 o (2)	<p>Article 479 l Any person who with deliberate intent and unlawfully performs an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of that aircraft, shall be punished by a maximum imprisonment of fifteen years.</p> <p>Article 479 m Any person who with deliberate intent and unlawfully damages an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight, shall be punished by a maximum imprisonment of fifteen years.</p> <p>Article 479 o (1) Life imprisonment or a maximum imprisonment of twenty years, shall be imposed if the act mentioned in article 479 l, article 479 m, and article 479 n: <ul style="list-style-type: none"> a. is committed by two or more persons jointly; b. is a continuation of a conspiracy; c. is committed with premeditation; d. Causes serious physical injury to a person </p> <p>(2) If said act causes the death of a person or the destruction of said aircraft, the punishment shall be death punishment or life imprisonment or a maximum imprisonment of twenty years.</p>

With such provisions, it raised questions on the reasons why death penalty is still preserved under KUHP. When the law was drafted, it was stated under the elucidation that the reason was the special situation of Indonesia as a Dutch occupied territory.²³⁶ According to Roeslan Saleh, the reason on why death penalty is still preserved was the danger of disturbance towards the law and order in Indonesia was greater and more threatening compared to Netherlands. Indonesian population that are multi-colored had the potential to cause conflict, while the Indonesian government and police force were yet to be sufficient. Pursuant to this situation, it was deemed necessary that death penalty cannot be eliminated as the most powerful weapon from the government.²³⁷

In line with the opinion, Adami Chazawi gave the opinion that there were two main reasons from the government to preserve death penalty, which were: *first*, the possibility of an act that threatens the interest of the law and order in Indonesia is greater compared to the Netherlands, considering the country had a vast geography and population with various tribes and groups with different customary and tradition. This situation was very potential to cause conflict, clash, and large chaos within the

²³⁶ Putra, *op.cit.*, pg. 52-53.

²³⁷ Roeslan Saleh, *Masalah Pidana Mati*, (Jakarta: Aksara Baru, Cetakan Kedua, 1978), pg. 22.

society. *Second*, the security tools that governed by the Dutch East Indies government was very limited or not as perfect and complete as the one in the Netherland.²³⁸

As mentioned under the previous chapter, the enforcement of death penalty in the Dutch East Indies (Indonesia) as stipulated under the *Wetboek van Strafrecht voor Indonesie* (WvSI), the implementation cannot be separated from the Dutch colonial motive, which were to preserve and secure its occupied territory.²³⁹ There were no sufficient reasons over the preservation of death penalty under the *Wetboek van Strafrecht voor Indonesie* (WvSI) in KUHP. In 1958, KUHP was declared to be enforced in all Indonesia's regions started 2 September 1958 with the issuance of Law No. 73 of 1958 on the Declaration of the Enforcement of Law No. 1 of 1946 of the Republic of Indonesia on the Stipulation of Criminal Law for All Indonesian Regions and Amend the Criminal Code.

3.4.2 Death Penalty under the Military Law in Indonesia

Along with the development of KUHP, the military criminal code is also a legacy and originated from the military criminal law system in the Netherlands. The Military Criminal Code (KUHPM) is a legacy from the Dutch East Indies Government, which was previously enforced for KNIL (I.S 1934 No.7), and later added with Law No. 39 of 1947 on the Adjustment of Army Criminal Law (Staatsblad 1934, NO. 167) with the Current Situation.

KUHPM was intended as an additional document to KUHP, in which KUHPM only applicable for military forces and individuals that are subject to the judicial power within the military court system. This is based on the consideration that the provisions under KUHP are not hard enough for the perpetrator who was a military force in a criminal act or in certain situation that was severe in nature for a military member. In addition, certain action under KUHPM can only be conducted by military members.²⁴⁰ For comparison, Articles that incorporated death penalty under KUHPM are more in numbers than articles concerning death penalty under KUHP, in this case KUHP has 11 articles on death penalty, while KUHPM has 27 articles.

From historical perspective, the current applicable KUHPM is originated from the *Wetboek van Militair Strafrecht voor Nederlandsch-Indie* (Stbl 1934 Nr. 167). While having similar pattern with the development of KUHP, KUHPM however are not experiencing many changes, as stated under Article 312 of the *Indische Staatsregeling*:

“De Militaire Strafrechtspleging berust op Ordonanties, zoeveel mogelijk overeenkomende met de in Nederland bestaande wetten”

(The implementation of Military Criminal Law is formulated under ordinances that are as far as possible are in line with the laws in the Netherlands).²⁴¹

²³⁸ Adami Chazawi, *Pelajaran Hukum Pidana Bagian 1 (Stelsel Tindak Pidana, Teori-teori Pemidanaan, & Batas Berlakunya Hukum Pidana)*, (Jakarta: PT Raja Grafindo Persada, 2002), pg. 30.

²³⁹ *Ibid.*, pg. 336.

²⁴⁰ Marjoto, *Kitab Undang-Undang Hukum Tentara serta Komentar-Komentarnya Lengkap Article demi Article*, (Bogor: Polites, 1958), pg. 8-11.

²⁴¹ SR Sianturi, *Hukum Pidana Militer di Indonesia*, (Jakarta: Alumni AHAEM PETEHAEM, 1985), pg. 12.

However, the *Wetboek van Militair Strafrecht* introduced a deviation. Deviation is allowed only if: (i) there is a special situation in Indonesia that require such deviation (*Specifieke Indische toetstanden daartoe noopten*); (ii) in practice, there is a dire situation that require changes or addition (*in de praktijk de noodzakelijkheid van wijziging of aanvulling had Aangetoond*); and (iii) it is to explain an article (*verduidelijking van enig artikel gewenst bleek*).²⁴²

In addition to issued KUHPM, the government of the Dutch East Indies also implemented the *Wetboek van Krijgstucht voor Nederlandsch-Indie* (Stbl. 1934 Nr 168). From two legislation inherited from the Netherlands, only KUHPM that is still implemented based on Law No. 39 of 1947 on the Adjustment of Military Criminal Law (Staatsblad 1934, No 167) with the Current Situation.²⁴³

The implementation of death penalty under the Indonesian military criminal legal system cannot be separated from the Dutch military justice system that has been implemented prior to the World War II. The Dutch Military Court in Indonesia was known as "Krijgsraad" and "Hoog Militair Gerechtshof". The jurisdiction of this court covered the military criminal act and the members are Dutch Army in the Dutch East Indies (KNIL) and members of the Dutch Navy.²⁴⁴

After the independence, pursuant to the Transitional Rules (Article II) and to avoid legal vacuum within the Indonesian military criminal law, the *Wetboek van Militaire Strafrecht* (WvMS) was adopted by the Dutch Colonial Government. Article II of the Transitional Rules stated that:

"Every State Agencies and regulations are directly applicable until there are no agencies and regulations established based on this Constitution."

This provisions later gave path for the Dutch military criminal law and military justice system into the Indonesian legal system and military justice. However, at that time, Indonesia did not directly adopt or take over the military justice system that was established prior to the independence. When the establishment of the Army of the Republic of Indonesia on 5 October 1946, the Indonesian military court had not been established.

The Indonesian military court was established on 8 June 1946, with the issuance of Law No. 7 of 1946 on Military Court.²⁴⁵ The Military Court at that time consisted of two level of courts: Military Court and Supreme Military Court, and if necessary the court may establish the Extraordinary Military Court. The amendment and improvement of the Indonesian military criminal legal system continuously conducted until 1950 when the Soekarno administration issued Emergency Law No. 16 of 1950 and Government Regulation No. 37 of 1948 on the Structures and Jurisdiction of the Court/Prosecutor within the Military Court. The military court consisted of Military Court, High Military Court, and Supreme Military Court.

²⁴² *Ibid.*, pg. 13.

²⁴³ Indonesia, *Undang-Undang No. 39 Tahun 1947 Tentang Menyesuaikan Hukum Pidana Tentara (Staatsblad 1934, No. 167) Dengan Keadaan Sekarang*, <<http://www.dpr.go.id/dokjdih/document/uu/876.pdf>>.

²⁴⁴ Sejarah Pengadilan Militer, <<http://www.dilmilti1-medan.go.id/index.php/profil/sejarah-pengadilan-militer>>, accessed on 25 September 2017.

²⁴⁵ In practice, due to the lack of competent and educated resources to carry the duties and function of the military court. Therefore, Law No. 7 of 1946 determined that the Chairman, Vice Chairman and judges in the district court became the Chairman, Vice Chairman, and judges of the military court. For more information, see Moch Faisal Salam, *Peradilan Militer Indonesia*, (CV Mandar Maju, 1994), pg. 34

The Indonesian military criminal legal system that was established, closely related the substantive law that stipulated the crimes committed by the military personnels or non-military personnels that subject to the military criminal legal system.²⁴⁶ The substantive law can be found under the Military Criminal Code (KUHPM) and Military Discipline Code (KUHDM).

a. Military Criminal Code in Indonesia

The military criminal law in broad terms covered the the definition of military criminal law, in the sense of substantive law, and military criminal law in the sense of procedural law. In essence, the military criminal law can be defined in short and simple as the criminal law that applicably in particular to the military personnels.²⁴⁷

In regards to the definition of the word military itself, can be understood from the origins of the word “military”. The term military was originated from the word “miles”, from the Greek language which means that a person who is armed and prepared to fight in battles or wars, in particular for the purpose of defense and security. Military are the persons who are armed and ready to be at war, they are trained to face challenges and threats from the enemies that may endanger the integrity of a region or state.²⁴⁸ However, not every person who is armed and ready to fight or be at war can be called as military. The characteristic of military is a organized structure, using uniforms, adopting disciplines, and obeying the law applicable during war. If these characteristics are not satisfied, then a group cannot be called as the military, but will fall under the category as a belligerent.

A legal definition can be found under several laws and regulations in Indonesia, among others the Military Criminal Code and Law No. 31 of 1997 on Military Court. Under Law No. 31 of 1997, the term that is used is “soldier”, instead of using the term “military”. This is stated under Article 1 (42) of Law No. 31 of 1997:

“Soldier and the Armed Forces of the Republic of Indonesia, hereinafter referred to as Soldier is citizen who is satisfied the requirements determined under the provisions of prevailing laws and regulations and appointed by the authorized official to serve for the purpose of defending the State using firearm, willing to sacrifice and involved in the national development and obey the military law.”

Therefore Article 1 (42) of Law No. 31 of 1997, in essence, stipulates the persons that are called as military personnels, which pursuant to Law No. 3 of 2002 on State Defense, covering the personnels of the Army, Navy, and Air Force. In addition to the definition of “military/soldier” mentioned above, Article 9 (1) of Law No. 31 of 1997 also stipulates the provision in regards to the group of individuals that can be considered to have similar characteristics with the “military/soldier”, therefore this group is also subject to the military law and military criminal law, and this group consists of:

- a. ...;
- b. Those who are under the law also considered as soldiers;
- c. Personnel of a group or institution or agency, or considered as equal to soldier pursuant to the law.

²⁴⁶ *Ibid*, pg. 27.

²⁴⁷ EY Kanter dan SR Sianturi, *Hukum Pidana Militer di Indonesia*, (Jakarta: Alumni AHM-PTM, 2012), pg. 16.

²⁴⁸ Salam, *Peradilan...*, *op.cit.*, pg. 14.

- d. A person who is not categorized under paragraph a, b, and c, but pursuant to the decision of the Armed Forces Commander, with the approval of the Minister of Justice, must undergo trial by a tribunal under the Military Court system.

Pursuant to the abovementioned article, it can be concluded that in essence the definition of “military” covers a broad scope, due to the fact that the individuals who can be categorized as military personnels can cover the following groups:

1. Military in terms of the Armed Forces (Army, Navy, Air Force).
2. Group of individuals that equal to the military of armed forces.
3. Member of an organization that is equal to the military/armed forces.

Using the starting point of the relationship with the said definition of military criminal law, Sianturi provides a formulation on the definition of military criminal law from the perspective of justiciable, meaning the persons that are subject and subdued to a certain jurisdiction of a certain court system.²⁴⁹ The procedural and substantive criminal law are part of the positive law that applicable to the military court justiciable. This provision determines the principles and regulations on the actions that are considered prohibition and obligations, as well as violations that may be charged with criminal sanctions.

The military criminal law is a *lex specialis* of the criminal law that is a *lex generalis*, and the applicability of the general criminal law for the military personnels is based on Article 103 of KUHP:

“The provisions of the first eight Chapters of this Book shall also apply to facts on which punishment is imposed by other statutory provisions, unless determined otherwise by statute.”

This provision is affirmed by the provisions under Article 1 and 2 of KUHPM. Article 1 of KUHPM stated that:

“(amended by Law No. 9 of 1947) for the implementation of this code, will be applied the general criminal law provisions, including Chapter Nine of the Book I of the Criminal Code, for the exception of deviations that are determined under the law.”

Furthermore, Article 2 of KUHPM stated that:

“(amended by Law No. 9 of 1947) towards the crimes that are not formulated under this code, committed by the persons who are subject to the jurisdiction of the military courts, the general criminal law will prevail, for the exception of the deviations that are determined under the law.”

Pursuant to Article 1 and Article 2 of KUHPM, the general criminal law applies to every person, including the Armed Forces/military. However, for the military, there are provisions that can be deviated and from the provisions under the KUHP specifically applicable for the military, regulated under KUHPM.

With the formulation of special provisions under KUHPM, there are additional clauses from the stipulation under KUHP, including the crimes that are subject to death penalty, which in military environment related to the crimes against the state defense.

²⁴⁹ Kanter and Sianturi, *Hukum...*, *op.cit.* pg. 18.

Before discussing the substantive aspect related to death penalty under KUHPM, short elaboration in regards to military crimes is necessary to be explained, as follows:²⁵⁰

- 1) General crimes (*komunne delicta*) that can be committed by any person, which is in contrast with the special crimes (*delicta propria*) that can only be committed by certain individuals, in this case committed by a military personnel.
- 2) Military crimes that are regulated under KUHPM is categorized into two parts, namely pure military crime (*Zuiver Militaire Delict*) and mixed military crime (*Gemengde Militerire Delict*).

Pure military crime is a crime that can only be committed by a military personnel because its special military nature. Meanwhile, mixed military crime is a prohibited act that already stipulated in a provision, however the article is found under other laws and regulations. Meanwhile, the punishment is considered to light if the act is committed by a military personnel. There are four qualifications that are categorized as pure military crime, namely:

1. Military personnel who commits desertion for the purpose to withdraw from his service obligations;
2. Military personnel who commits desertion for the purpose to escape from the danger of war;
3. Military personnel who commits desertion for the purpose defecting to enemy;
4. Military personnel who commits desertion for the purpose to enter a military service in another state or jurisdiction without being justified for such action.

Under Article 87 of KUHPM, the provision stipulated desertion that is qualified as a pure military criminal act. Article 87 of KUHPM stated that:

- (1) Charged for desertion, a military personnel:
 1. Who leaves for the purpose of escaping himself forever from his service obligations, avoiding the danger of the war, defecting to the enemy, or entering a military service of another country or another jurisdiction without being justified for such action;
 2. Who due to his fault or intentionally committed an absence without permission during peacetime for more than thirty days, and during wartime for more than four days;
 3. Who intentionally committed an absence without permission and therefore he is not able to conduct part or all of his duty from an ordered course, as mentioned under Article 85 2nd;
- (2) Desertion that is committed during peacetime, will be charged with imprisonment for two years eight months at maximum.
- (3) Desertion that is committed during war time, will be charged with imprisonment for eight years and six months at maximum.

Meanwhile, mixed military criminal act is actions that are prohibited or obligated that already determined under other laws and regulations, but also stipulated under the Military Criminal Code or other military criminal laws, because a condition specific to the military or because other nature, and therefore it is necessary to stipulate more substantial criminal charge, or maybe even heavier from the

²⁵⁰ Laporan Penelitian Dosen, *Jenis-jenis Tindak Pidana Militer di Magelang*, (Magelang: Universitas Muhammadiyah Magelang, 2014), pg. 9.

original crime punishment under Article 52 of KUHP. For instance, theft under Article 362 of KUHP is also stipulated under Article 140 of Military Criminal Code.

Therefore, other criminal acts that have been formulated under other laws and regulations that are similar, are formulated as well under KUHPM with heavier criminal charge adjusted with the specific situation to the military. So that it is necessary to be stipulated specifically under the Military Criminal Code. Because stipulating a specific affairs, the military criminal law is known as special criminal law. The definition of special is the provisions only applicable to military personnels and in certain situation.

b. Death Penalty under KUHPM

Towards criminal acts that are committed by persons who are subject to the military criminal law, they will be charged with punishment as stipulated under Article 6 of KUHPM:

- a. Main Punishment
 - 1. Death Penalty
 - 2. Imprisonment
 - 3. Confinement
 - 4. House arrest (Law No. 20 of 1946)
- b. Additional Punishment
 - 1. Discharged from the military service with or without revocation of rights to enter the armed forces
 - 2. Demotion
 - 3. Revocation of rights as stipulated under Article 35 first paragraph, number 1, 2, and 3 of the Criminal Code

The stipulation of criminal charge towards military personnel, in essence, must be considered as educational or development measures, not as a deterrent tool. This is due to the assumption that a person who is charged with criminal punishment will re-enter the military service after serving his punishment,²⁵¹ with the hope that the said person will be a good and useful military personnel as an effect of the “educational measures” that have been undertaken during his time in punishment. Under this framework, the function of a military criminal charge is similar with the function of criminal charge in general. Criminal charge towards military personnel has the function so that the military personnel will not repeat the criminal act that has been committed and therefore he will be ready to be stationed in any place for his service. Event hough the meaning of this educational measures will not work for military personnels that are convicted with death penalty, in this case not only stipulated under KUHP and for general criminal act, but also formulated under KUHPM in which the special criminal acts are committed by the personnel of the Indonesia Armed Forces/military, both for general offense or military offense.

The provisions in regards to death penalty under KUHP can also be found under several articles, which all of them are related to actions or behaviours directly related with the oath or duty that should be one’s responsibility and cannot be committed by a military personnel, such as insurgency, desertion, becoming a spy for the enemy, and sabotage.

²⁵¹ Kanter and Sianturi, *op.cit.*, pg. 66.

Table 3.2 Death Penalty Provisions under KUHPM

No	Items	Articles	Provision of the Articles
1.	Basic Provisions	Article 6	Punishments that are determined under this code are: a. Main punishment: 1st, Death penalty; 2nd, Imprisonment; 3rd, Confinement; 4th, House arrest (Law No. 20 of 1946).
2.	Crime of Treason	Article 64	1) Military, who during the war time intentionally providing assistance to the enemy or injure the interest of the state towards the enemy, will be charged with military treason, with death penalty, life imprisonment or temporary imprisonment for twenty years at maximum. 2) Charged with the similar punishment, military personnel who during the wartime committed conspiracy to conduct military treason
3.	Crime of Rebellion	Article 65	1) Military personnel that committed rebellion, will be punished due to military rebellion, with life imprisonment or temporary imprisonment for twenty years at maximum 2) Military rebellion, committed during war time, will be charged with death penalty, life imprisonment, or temporary imprisonment for twenty years at maximum 3) Promotors, leaders, and organizers of military rebellion will be charged with will be charged with death penalty, life imprisonment, or temporary imprisonment for twenty years at maximum.
4.	Crime of Espionage -	Article 67	1) Charged because of espionage (verspieding) with will be charged with death penalty, life imprisonment, or temporary imprisonment for twenty years at maximum: 1st (amended by Law No. 39 of 1947). Anyone who intentionally for the interest of the enemy, tries to obtain information in regards to war information on the ship or airplane from the Armed Forces, in the frontline of checkpoints, in a place or checkpoint that is armed or occupied, or inside a building of the Armed Forces; 2nd Anyone who is during the war time, with surreptitiously with false statement, by means of undercover or other methods other than the usual methods, tries to enter an area mentioned under the 1st part, and with such method he enters the area, or by one of the methods or tools tries to escape from the area; 3rd Anyone who is during war time intentionally taking a record or structure or writing, in regards to something related to the military interest 2) Provisions under nomor 2 and 3 of the first paragraph are not applicable, if according to the judge, that the perpetrator did not conduct such action for the interest of the enemy.
5.	Crime of Leaking Classified information/oath	Article 68	(Amended by Law No. 39 of 1947). Anyone who is during the war time intentionally escaped, which in contradiction with the oath that he took during the captivity of war in

			Indonesia, or breaching a promise that he provided or a requirement that he promised to satisfy, for which he is released temporarily or permanently from the captivity of war in Indonesia, or committing a conspiracy for the said action, will be charged with death penalty, life imprisonment, or temporary imprisonment for twenty years at maximum.
6.	Surrendering the command checkpoint	Article 73	Will be charged with death penalty, life imprisonment, or temporary imprisonment for twenty years at maximum, military personnel who is during war time intentionally: 1st (amended by Law No. 39 of 1947). Surrendered to the enemy, or made possible or let the enemy take over, an area or checkpoint that is armed or in control under his order, or the Army, Navy, Air Force or in part of which, without conducting any means necessary that are required or mandated by his responsibility in that situation; 2nd Vacating or abandoning an area, checkpoint, ship, airplane, or vehicle of the Armed Force that are under his supervision, with his will without any force majeure; 3rd During a battle with the enemy, he neglects his responsibility with the Armed Forces under his supervision encountering the enemy, attacking the enemy, involved in the battle, pursuing the enemy, or conducting defense against the attack from the enemy; 4th Displace or permitting a move wholly or partially an Armed Forces that are under his supervision to the neutral zone without any force majeure.
7.	Crime of surrendering without order	Article 74	Will be charged with death penalty, life imprisonment, or temporary imprisonment for twenty years at maximum: 1st anyone, who is intentionally during a battle against enemies or during a place or checkpoint that is attacked or threatened by the enemy, waving surrendering signs without a clear order from or behalf of the highest local military command; 2nd anyone, who is during war time tries to deceive, discourage, or disrupt the military community
8.	Crime of sabotage	Article 76	1) anyone who is during war time, intentionally thwart a military operation, will be charged with imprisonment of 15 years at maximum. 2) (Amended by Law No. 39 of 1947) The perpetrator will be charged with <u>death penalty</u> , or life imprisonment or temporary for twenty years at maximum if he committed the crime as a military personnel in charge or appointed as the administrator or supervisor of the supply of the Army, Navy, or Air Force.
9.	Violating the war treaty	Article 82	Military personnel, who intentionally against the law violates a treaty that is agreed upon with the enemy, Will be charged with <u>death penalty</u> , life imprisonment, or temporary imprisonment for twenty years at maximum,
10.	Desertion	Article 89 of KUHPM	Will be charged with death penalty, life imprisonment, or temporary imprisonment for twenty years at maximum:

			1st Committed desertion to the enemy; 2nd, (amended by law No. 39 of 1947), Committed desertion during war time, from the unit of troops, vessel, or airplane that is assigned for security service, or from a place or checkpoint that is attacked or threatened by the enemy. From the formulation of Article 87, it can be concluded that there are two forms of desertion, namely: 1) a pure desertion (Article 87 (1) 1st) and 2) Desertion as a step-up from the crime of absence without permission (Article 87 (1) 2nd and 3rd).
11.	Insubordination	Article 109	Will be charged with <u>death penalty</u> , life imprisonment, or temporary imprisonment for twenty years at maximum; 1st insubordination with real action during war time; 2nd (Amended by Law No. 39 of 1947) actual collective resistance on board of a vessel or airplane, located in a place that lacks of immediate assistance
12.	Disruption of military force	Article 114	1) Advisors (behavels) amongst the members of the disruption of military forces, will be charged with imprisonment for fifteen years at maximum 2) (Amended by Law No. 39 of 1947). If the action is committed during war time, or above a vessel or airplane that is located in an area that is lack of immediate assistance, the perpetrator Will be charged with death penalty, life imprisonment, or temporary imprisonment for twenty years at maximum. 3) The same punishment will also be imposed to the leaders and administrators of the disruption of military force;
13.	Crimes against the state	Article 133	1) Anyone who is aware of a conspiracy to commit a crime that is charged with criminal punishment under this criminal code, or an intention to commit a crime that is formulated under this criminal code towards state security, or charged with death penalty for conducting a military insurgency during peace time, desertion during war time, insubordination with real action or disruption of military force, when the crime can be prevented, intentionally disregarding the proper announcement in the correct moment to the commander or the perpetrator, if the crime is happened, will be charged with the same criminal punishment with the co-conspirator 2) Will be charged with similar criminal punishment, anyone who is aware of such crime under the first paragraph, and the crime still can be prevented, and intentionally disregarding such announcement.
14.	Abuse of power during war time	Article 137	1) Will be charged with death penalty, life imprisonment, or temporary imprisonment for twenty years at maximum, military personnel who serves in an armed force that is prepared for a war, using the power of the association conducting a violence towards one person or more, or intentionally against the law damaging, destroying, destructing whole or partial properties of someone else's and when conducting such action he is

			abusing or threatening his opportunities or tools obtained as a military 2) Charged with the similar criminal punishment, individuals that are subject to military court jurisdiction who under a official relationship are under an armed forces prepared for war, or accompanying or following with the approval from the military commander, who conducted similar actions and therefore abusing or threatening the power, opportunities, or tools obtained as a military personnel 3) Article 89 of the Criminal Code is not applicable
15.	Violence against the victims of war	Article 138	1) Anyone who commits violence against a dead, ill, or injured perosn during a battle that are member of the armed forces from one of the conflicting parties, will be charged with death penalty, life imprisonment, or temporary imprisonment for twenty years at maximum. 2) In the implementation of this Article, those who are included under the Armed Force of one of the conflicting parties, are those who are employed, under an official relationship, or with the approval from the military commander, accompanying or following such Armed Forces.
		Article 142 (2)	If the action is committed by two persons or more under an association, the perpetrators will be charged with <u>death penalty</u> , life imprisonment, or temporary imprisonment for twenty years at maximum.

Pursuant to the abovementioned table, death penalty is a main basic criminal punishment and the most severe from the prioritization of criminal punishment that can be found under KUHPM. Those provisions affirm the politics of law of the colonial government that being imposed towards the Dutch East Indies (Indonesia) area, which was concordantly adopted and preserved under KUHPM. Whereas, under the Dutch KUHPM, death penalty only limitedly imposed towards the following crimes:²⁵²

1. Committed by a military personnel during war time;
2. Committed by a military personnel for the interest of the enemy and for several crimes that are mentioned under the criminal code (*criminal wetboek*), and only if those crimes are committed above the vessel that located on the sea or located on the territorial waters of foreign countries, either during war time or peace time.

In the context of Indonesian military criminal law, the death penalty punishment can also be imposed towards the crimes that are related to the state security.

The adoption of death penalty under KUHPM was closely related to the implementation of Concordance Principle under the Indonesian legal system. After the independence in 1945, for the purpose of preventing legal vacuum, Article II of the Transitional Rules of the 1945 Constitution allowed the possibility of the implementation of WvMS in the Republic of Indonesia. The WvMS that was applicable during the occupation period of the Netherlands, is in concordance with the WvMS that was applicable in the Netherlands. The WvMS that was applicable in the Dutch East Indies, was only formulated several

²⁵² PAF Lamintang dan Theo Laminrang, *Hukum Penitensier Indonesia*, (Jakarta: Sinar Grafika, 2010), pg. 48.

possibilities of deviation according to the *Indische Staats regeling* Art. 132 which stated that: *The implementation of the military criminal law is formulated under ordinances that as far as possible in line with the laws that are applicable in the Netherlands.*²⁵³

The formulation of death penalty provisions under KUHPM cannot be separated from the perspective regarding the purpose of the law that is similar with the purpose of sentencing, which is to ensure the law and order of a society, in this case an organized military force. In addition, the military personnel livelihood that aims for order and discipline for all its members, causing the imposition of death penalty is considered as an “educative measures” that will provide deterrent effect towards other military personnels. However, such perspective is no longer in line with the development of modern criminal law school, which makes criminal law for the purpose of protecting the society’s interest. Beccaria, for instance, was of the view that the implementation of sentencing should consider the humanity principles. Beccaria questioned the state authority to impose death penalty. His opinion was based on the social contract thought, one of which opined that it is illogical if a person gives up his freedom absolutely to the state, including the authority to take his life.²⁵⁴

c. The Practice of Death Penalty Implementation in Extraordinay Military Tribunal

After the incident of G30S, President Soekarno issued Presidential Decree No. 370 of 1965. This Presidential Decree was based on the consideration that the “30 September Movement” (*Gerakan 30 September*) has committed kidnapping and murders, threw the Dwikora Cabinet, and formed what was known as the “Indonesia Revolutionary Council” (*Dewan Revolusi Indonesia*) as the replacement. Whereas, the great struggle of the state and nation of Indonesia against neo-colonialism and neo-imperialism (*Nekolim*) and its agents was entering a decisive phase. Therefore, the “30 September Movement” was a counter-revolutionary adventure that required an immediate response. Referring to the President of the Republic of Indonesia Determination No. 16 of 1963 (State Gazette of 1963 No. 119), the Extraordinary Military Tribunal (*Mahkamah Militer Luar Biasa – “MAHMILLUB”*) was the proper institution to be appointed as a court that was handed over the duty to adjudicate the individuals that were involved in the so-called “30 September Movement”.²⁵⁵

Presidential Decree No. 370 of 1965 also awarded authority to the Major General of the Armed Forces Soeharto or high-ranking military personnel appointed by him, to:

- a. Determine the individuals that are the key figures, as mentioned under the first determination above
- b. Act as the Officer of Case Hand over in those cases.
- c. Determine the structure of the Extraordinary Military Tribunals to prepare, examine, and adjudicate the abovementioned case.

One of the most interesting issues from the process in the MAHMILLUB was the issuance of Minister/Army Commander (MenPangad) Decree as the Commander of the Operation for the Restoration of Security and Order No. : KEP-5/KOPKAM/1/66 on the appointment of the Extraordinary

²⁵³ Kanter dan Sianturi, *Hukum...*, *op.cit.*, pg. 11.

²⁵⁴ Cesare Beccaria, perihal Kejahatan dan Hukumannya(Yogyakarta, Genta Publishing, 2011, hlm 94-105

²⁵⁵ Kasus pertama yang ditangani lembaga ini adalah perkara Dr. Soumokil dengan Republik Maluku Selatan-nya. Perkara Soumokil diputus berdasarkan Putusan Mahmilub No.1, 25 April 1964.

Military Tribunal to examine and adjudicate the case of figures of KONTREV “G 30 S” namely: Nyono bin Sastroredjo, in a open court in Jakarta.

This MenPangad Decree also appointed to act as Chief Judge/Chief Judge Replacement, Member of the Panel of Judges, Military Prosecutor/Military Prosecutor Replacement, and Clerk/Clerk Replacement of the Extraordinary Military Tribunal that adjudicate the case with defendant Nyono. After determined MAHMILLUB and appointed the personnels to adjudicate defendant Nyono, MenPangad Major General Soeharto as the Commander of the Operation for the Restoration of Security as the Officer of Case Hand Over issued Case Hand Over Decree No. : KEP-13/KOPKAM/1/1966, which determined the case hand over of defendant Nyono bin Sastroredjo a.k.a Tugimin a.k.a Rukma to the EXTRAORDINARY MILITARY TRIBUNAL presiding in Jakarta.

SK MenPangad that was issued by Major General Soeharto as the Commander of the Operation for the Restoration of Security as the Officer of Case Hand Over also formulated indictment so that the suspect (defendant Nyono) to be examined and adjudicated according to the indictment drafted by the Extraordinary Military Tribunal Military Prosecutor, and determined that the suspect (defendant) to be kept at detention.

Approaching the first trial that adjudicated Nyono bin Sastroredjo, General Soeharto stated that the Indonesia Communist Party (PKI) clearly committed a coup d’etat. In regards to this issue as well, PKI also committed three crimes, namely criminal, political, and crimes against the morality of Pancasila. However, the examination and trials against the counter-revolutionary adventurer also conducted under the principle of fairness and legal protection. This was one of revolutionary wins, which was the win of Pancasila morality over counter-revolution morality.²⁵⁶

At the end of the tribunal, the Military Prosecutor stated that defendant Nyono had committed three crimes at once, namely crime against the state; crime against the revolution that is acted in counter-revolutionary manner, in the sense of betraying the teachings of the Great Leader of the Revolution (*Panglima Besar Revolusi – “PBR”*) Bung Karno, especially to the ones related to the national unity that adopt Nasakom principles and tried to remove the leadership of PBR Bung Karno; and mental crime against the revolution in the sense of undermining the ideology of Pancasila

The acts of defendant Nyono had violated the provisions under Article 110 (1) in conjunction with Article 107 and Article 108 in conjunction with Article 88 of KUHP; Article 107 (2) in conjunction with paragraph (1) of KUHP and Article 108 (2) in conjunction with paragraph (1) 1st of KUHP in conjunction with Presidential Detemrnation No. 5 of 1959, with the indictment “Death Penalty”.²⁵⁷

Towards the indictment from the military prosecutor, on 21 February 1966 MAHMILLUB led by Lieutenant Colonel CKH Ali Said, S.H. stated that defendant Nyono was guilty of committed crimes:

1. Organized conspiracy to commit treason for the purpose of or intention to overthrow the Government of the Republic of Indonesia that is legitimate and to conduct armed uprising against the legitimate power;

²⁵⁶ Quoted by G. Dwipayana and Nazarudin Sjamsuddin (ed.), *Jejak Langkah Pak Harto 01 October 1965 – 27 March 1968*, (Jakarta: PT Citra Kharisma Bunda, 2003), pg. 46.

²⁵⁷ Center of Army Judicial Education, *G30S dihadapan MAHMILLUB I (Perkara Nyono)*, (Pusat Pendidikan Kehakiman AD, AHM-PTHM, Cetakan I, 1966), pg. 233.

2. Led and organized treason with the purpose to overthrow the legitimate Government of the Republic of Indonesia
3. Led and organized the armed uprising against the legitimate Government of the Republic of Indonesia.

Therefore, Mahmillub sentenced defendant Nyono due to those crimes with “death penalty”.²⁵⁸

Samuel Gultom, in his book titled *Mengadili Korban*²⁵⁹ stated that at that time, Soeharto who was in power to determine an individual that is categorized as “figure”, acted as the office of case hand over and determined the structure of MAHMILLUB. As the venue of the trial, the building that was chosen was the current Bappenas building at Diponegoro Street, Central Jakarta.

The specialty of MAHMILLUB, according to Gultom, are two things. *Firstly*, the institution is the court of first and last instance, because the defendant and the prosecutor cannot file for an appeal. *Secondly*, MAHMILLUB was a military judicial institution that adjudicate civilian.

Gultom stated that overall, MAHMILLUB examined 17 cases that were related to the G.30.s action. Meanwhile, until 1978, the Military High Tribunal (*Mahkamah Militer Tinggi* – “Mahmilti”) examined 291 cases and district court examined 466 cases. However, White Book of G.30.S published by the State Secretariat of the Republic of Indonesia in 1994, noted that there were 24 individuals out of hundreds or even thousands figures that were involved in PKI that “fortunate” to be tried at the court. Most of them are categorized as Group A.²⁶⁰

Table 3.3 Names of PKI Figures who were tried at MAHMILLUB

No	Convicted	Position/Last Rank	Decision
1	Njono	Member of Politbiro CC PKI	Tribunal Decision No.PTS-009/MB-I/A/1966, dated 21 February 1966
2	Untung bin Samsuri	Lieutenant Colonel of the Infantry	Tribunal Decision No.PTS-03/MB-III/U/1966, dated 6 March 1966
3	Wirjomartono	Member of PKI Special Bureau	Tribunal Decision No.PUT-07/MB-II/WN/1966, dated 18 May 1966
4	Sujono	Major of the Air Force	Tribunal Decision No. PUT-07/MLB-V/SJN/66, dated 3 June 1966
5	Peris Pardede	Chairman of Commission	Tribunal Decision No. PTS 07/MB/VI/PPAA/1966, dated 23 June 1966

²⁵⁸ *Ibid.*, pg. 334.

²⁵⁹ Samuel Gultom, *Mengadili Korban*, (Jakarta: ELSAM, 2003).

²⁶⁰ The complete version of this article can be found under Editorial Team, *Menyibak Tirai Hitam Mahmilub*, Hukum Online, 30 September 2003, <<http://www.hukumonline.com/berita/baca/hol8893/menyibak-tirai-hitam-mahmilub>>, accessed on 13 December 2017.

		of Control CC PKI	
6	Sudisman	Chairman of Commission of Control CC PKI	Tribunal Decision No. PTS 23/MLB/VI/PPAA/1966, dated 23 June 1966
7	Heru Atmodjo	Lieutenant Colonel of the Air Force	Tribunal Decision No. PTS-010/MLB- VII/H.A/1966, dated 12 August 1966
8	Ulung Sitepu	Brigadier General of the Armed Forces	Tribunal Decision No. PTS-012/I/MHL/1966, dated 18 September 1966
9	Dr. Soebandrio	Deputy Prime Minister / Minister of Foreign Affairs of the Republic of Indonesia	Tribunal Decision No. PTS-013/MLB- XI/BDR/1966, dated 23 October 1966
10	Omar Dani	Vice Admiral of Air Force, Minister / Air Force Commander	Tribunal Decision No. PTS- 017/MLB/XIV/OD/1966, dated 23 December 1966
11	Supardjo	Brigadier General of the Armed Forces	Tribunal Decision No. PTS-19/MLB- II/SPD/1967, dated 12 March 1967
12	Tamuri Hidajat	Chief Warrant Officer	Tribunal Decision No. PTS-026/MLB- IX/SPD/1967, dated 30 September 1967
13	Kamaruzzaman bin Achmad Mubaidah a.k.a Sjam	Head of PKI Special Bureau	Tribunal Decision No. PTS- 27/MLB/I/K/1968, dated 9 March 1968
14	Moeljono bin Ngali a.k.a Bono Walujo	Leader of PKI Special Bureau	Tribunal Decision No. PTS-028/MLB- II/W/1968, dated 9 October 1968
15	Abdullah Alihami	First Secretary CBD PKI Riau	Tribunal Decision No. PTS-PK-032/MLB- I/AA/70, dated 16 February 1970
16	Ranu Sunardi	Lieutenant Colonel of the Navy	Tribunal Decision No. PTS- 033/MLB/X/RS/1970, dated 18 October 1970
17	Sukatno	General Secretary of the People's Youth National	Tribunal Decision No. 51/70/Vord, dated 11 March 1971

		Council, member of CC PKI	
18	Supono Marsudidjojo a.k.a Pono	Leader of PKI Special Bureau	Tribunal Decision No. PTS-035/MLB- III/SM/1972, dated 8 March 1972
19	Suwandi	Secretary CDB PKI East Java	Tribunal Decision No. 520/K/1973, dated 11 June 1973
20	Ismail Bakri	First Secretary I CDB PKI West Java	Tribunal Decision No. 1/1973/PID.SUBV, dated 3 October 1973
21	R. Sugeng Sutarto	Brigadier General of the Police	Tribunal Decision No. PTS-37/MLB- IX/RSS/1973, dated 24 December 1973
22	Ruslan Widjajasastra	Member of CC PKI, Chariman of PKI Politbiro South Blitar	Tribunal Decision No. 15/PID-SUB/74Vord, dated 15 July 1974
23	Rustomo a.k.a Istam a.k.a Hasjim a.k.a Amat a.k.a Hasdi	-	Tribunal Decision No. 40/1975, dated 22 October 1975
24	Gatot Sutarjo a.k.a Gatot Lestarjo a.k.a Sadi	-	Tribunal Decision No. 456/1975/PIOD/SUBV, dated 2 January 1976

Source: State Secretariat of the Republic of Indonesia, 1994

For the execution of Lt. Col. (Air Force) Heru Atmodjo who was sentenced into life imprisonment, all defendant that were tried at the MAHMILLUB was sentenced to death. Meanwhile, the top leaders of PKI such as Aidit, Nyoto, and Lukman who were accused masterminded the G.30.S movement, were executed after minimum interrogation, without ever being tried at the court.

Historian from the Indonesian Institute of Sciences, Asvi Warman Adam, opined that the revival of MAHMILLUB was only to reveal PKI as the mastermind. The purpose was to eliminate PKI. As the main objective of the MAHMILLUB was only to demolish PKI, it was the reason why all defendants were sentenced to death.²⁶¹

Related to the imposition of death penalty and life imprisonment that was rendered by MAHMILLUB towards the individuals that were allegedly involved with G30S, it was discussed during the meeting with the leaders of MPRS, DPR-GR, and DPA, accompanied by Coordinating Minister for Agencies and Government, Mintaredja, SH at the Istana Merdeka. Soeharto, who at that time has been appointed as the president, asked the advice from the chairs of the relevant institution on the death penalty and life

²⁶¹ *Ibid.*

imprisonment execution that have been rendered by the Extraordinary Military Tribunal towards 26 convicts.

President Soeharto said that his request to ask for advice was not to avoid responsibility, as the President has prerogative right, but to affirm the decision that has been rendered by the Tribunal and in addition to accelerate the implementation process. All the participants to the meeting trust the President and confirmed that such action is all President's responsibility and depends on the President, according to the 1945 Constitution.²⁶²

3.5 Legal Policy of Death Penalty during Liberal Democracy Era

The period of 1950 until 1959 was known as the liberal democracy period with the entry into force of the Provisional Constitution of 1950 (1950 UUDS). During this period, the Indonesian political system encouraged the birth of political parties that had significant influence in determining the governance through the balance of power at the parliament. The 1950 UUDS marked the reinstatement of unitary state from the previous federal state that was the agreement from the Dutch-Indonesian Round Table Conference. On 19 May 1950, the Agreement Treaty of the Government of the Republic of the United States of Indonesia and Government of the Republic of Indonesia stated the approval of the establishment of the unitary state effective immediately as the incarnation of the Republic of Indonesia pursuant to the Proclamation on 17 August 1945.²⁶³ From the substantive aspect, UUD RIS and 1950 UUDS did not have significant changes. This period recorded seven cabinets that ran the government.²⁶⁴ Under UUD RIS, the government cannot be demoted by the parliament and the parliament cannot be dissolved by the president, on the contrary, under the 1950 UUDS, the government can be demoted by the parliament. The 1950 UUDS determined the parliamentary governance structure that placed the president in the seremonial function position only.²⁶⁵

During this period, there was only one law issued on 1 September 1951, in which is stipulated death penalty, which was Emergency Law No. 12 of 1951 on the Amendment to *Ordonnantietijdelijke Bijzondere Strafbepalingen* (STBL 1948 No. 17) and Law of the Republic of Indonesia No. 8 of 1948.²⁶⁶ Death penalty provision under the Emergency law No. 12 of 1951 is stipulated under Article 1, which stated that:

²⁶² Dwipayana and Samsuddin (ed), *op.cit.*, pg. 48-49.

²⁶³ The Treaty of Approval was ratified by *Law No. 20 of 1950 on the Establishment of the Unitary State of the Republic of Indonesia*, dated 14 August 1950. Lihat Sutomo, *Himpunan Peraturan Penjelmaan Negara Kesatuan Republik Indonesia*, (Yogyakarta: Penerbit Indonesia, 1954), pg. 82-83.

²⁶⁴ Cabinet of Natsir (6 September 1950 – 21 March 1951), Cabinet of Sukiman (27 April 1951– 3 April 1952), Cabinet of Wilopo (3 April 1952 – 3 June 1953), Cabinet of Ali Sastroamijoyo I (31 July 1953 – 12 August 1955), Cabinet of Burhanuddin Harahap (12 August 1955 – 3 March 1956), Cabinet of Ali Sastroamijoyo II (20 March 1956 – 4 March 1957), and Cabinet of Djuanda (9 April 1957 – 5 July 1959).

²⁶⁵ Adnan Buyung Nasution, *Aspirasi pemerintahan Konstitusional di Indonesia, Studi Sosio Legal atas Konstituante 1956 – 1959*, (Jakarta: Grafiti, 1995), pg. 28

²⁶⁶ Law No. 8 of 1948 stipulated the distribution of firearms, ammunition, explosives, and sharp weapon in Indonesia.

“Anyone who is not authorized to enter to Indonesia to create, accept, attempt to obtain, handover or attempt to handover, possess, convey, have in stocks, store, ship, conceal, use, or release from Indonesia firearm, ammunition or explosives, will be punished with death penalty or life imprisonment or temporary imprisonment for twenty years at maximum.”

Under that Law, the definition of firearm and ammunition can be found under Article 1 (1) of 1936 Firearm Regulation (Stbl 1937 No.170), which was amended by *Ordonnantie* dated 30 May 1939 (Stbl No. 278). The definition of firearm under that regulation did not include the definition of firearm that clearly has the purpose only as antique, firearm that is designed as firearm but cannot be functionalized/used. Meanwhile, the ones that included under the definition of explosives are all types of gunpowder, fire bomb, mine, hand grenade, and all other explosives that are single chemical solvents or mixed materials of explosives, and other explosives that are used for explosion.

During 1950, there were some armed conflict incidents and insurgencies, such as an incident on 23 January 1950 APRA incident in Bandung, April 1950 Andi Azis incident in Makassar and Republic of South Maluku, and October 1950 Ibnu Hadjar insurgency in South Kalimantan (part of DI/TII Kartosuwiryo). Meanwhile in 1951, there were two insurgencies conducted by DI/TII, August 1951 by DI/TII Kahar Muzakkar and September 1951 DI/TII Daud Beureueh.²⁶⁷ Pursuant to Article 96 of 1950 UUDS, the Government is authorized to determine emergency law to regulate the governance, as in emergency situation it is required for immediate regulation.

After the series of insurgencies and armed conflict incidents during 1950 and 1951, it can be concluded that the issuance of Emergency Law No. 12 of 1951 on *Ordonnantietijdelijke bijzondere strafbepalingen* (Stbl. 1948 No. 17) and Law No. 8 of 1948, were caused by those incidents. Even on 14 March 1957, President Soekarno declared that all regions of the Republic of Indonesia, including its territorial waters, were in state of war, and on 1 December 1957 was increased to war. The politics of law in the establishment of law very clearly related with the domestic condition and political situation, due to many armed insurgencies incidents in many regions. As a crime that threatened the very existence of the government/state therefore the government considered death penalty relevant.

During this period, the Konstituante Council was in charge to draft the Constitution that will replace the 1950 UUDS. During the working period of the Konstituante Council until July 1959, two main points of discussion that emerged were the debate on the nation's foundation and the debate on human rights. Within the Konstituante Council there were three ideological factions, namely Pancasila Bloc, Islamic Bloc, and Social-Economic Bloc.²⁶⁸ The views of these factions were on the debates on the discussion over human rights. From the search of minutes of meeting at the Konstituante Council, the topic in regards to the right to life and death penalty, only one member of the Konstituante Council named Asmara Hadi from the Pancasila Defender Movement, who proposed to stipulate the norm in the Constitution in regards to right to life and the right not to be imposed with death penalty. On 14 August 1958, Second Session in 1958 27th Meeting, Asmara Hadi stated that:

“Gentlemen, when studying the report from the Committee for the Preparation of the Constitution, I believe that there is something that we forget. We read several topics

²⁶⁷ State Secretariat of the Republic of Indonesia, *30 Tahun Indonesia Merdeka 1950-1964*, (Jakarta: Citra Lamtoro Gung Persada, 1985).

²⁶⁸ Nasution, *op.cit.* pg. 32-33.

regarding human rights. However, in my opinion, there is one right that falls into oblivion, which is fundamental for me. What I meant is the right to life. Not the right to livelihood, but the right to life, which in foreign language called “het naakt leven zelf”.

Ms. Chairman, it is hard for me to discuss about this topic, because this is caused due to the association with great events happening outside the Konstituante building. The right to life, right to own a life with no one has the right to take it away from us, except for natural cause or caused by accident. The negative side of the right to life is stating “No person or citizen can be imposed with punishment that causes him to lose his life”.

Yes Mr. Chairman and fellow honorable gentlemen as the members of the Konstituante Council, I want that in our future Constitution, it will be clearly and firmly stated the prohibition of death penalty which will marked the triumph of humanity principle in Indonesia..”²⁶⁹

Further Asmara Hadi stated that:

“The future Constitution, has the spirit that any punishment to any person, is not a form of revenge, not a form of “an eye for an eye and a tooth for a tooth”, but such punishment must be an effort to improve the person that has violated the society’s norms. As for me, regardless how evil a human being is, a person is not essentially evil, but that person is ill and when the person is ill, we have to try to rehabilitate him.”²⁷⁰

At the end of the day, the perspective and suggestion from Asmara Hadi in regards to “right to life” and “right not to be punished to death” were not included in the Decree of the Committee for the Preparation of the Constitution No. 26/K/PK/1958 on Draft Formulation of the Articles of the Constitution regarding Human Rights as well as Rights and Obligations of Citizens, that sent to the Plenary Meeting of the Konstituante to obtain approval. The idea to abolish death penalty from one of the criminal punishment, by means of formulation under the Constitution in the 1950s was a courage and progressiveness of thought that must be applauded, and during the discussion at the Konstituante Council, that issue was a minor deliberation, including during the discussion in the faction which Asmara Hadi was a member of—Pancasila Bloc. The culmination of political situation peaked when the Konstituante Council was dissolved when President Soekarno issued Presidential Decree 5 July 1959 and the debate on death penalty was ended..²⁷¹

3.6 Legal Policy of Death Penalty during Guided Democracy Era: Death Penalty to Preserve Stability for Securing the Revolution and Government Programs

Presidential Decree of 5 July 1959, which dissolved the Konstituante and reinstated the applicability of the 1945 Constitution marked the new era of Indonesia’s politics, in which the President becomes the central figure for government affairs and statehood, which was known as the Guided Democracy Era (*Zaman Demokrasi Terpimpin*). The political direction of law development in Indonesia during this period referred to the Planned and Comprehensive National Development Design (*Pola Pembangunan*

²⁶⁹ Konstituante of the Republic of Indonesia, *Risalah Perundangan tahun 1958 Jilid IV, Sidang Ke-II Rapat ke-26 sampai ke- 34*, pg. 1830.

²⁷⁰ *Ibid.*, pg. 1903.

²⁷¹ *Ibid.*

Nasional Semesta Berencana), which was the Formulation of Thoughts Principles regarding Indonesian Socialism stated that “the planned and comprehensive national development is a revolutionary development, because realizing rapid changes within the society through the levels of progress with prompt and firm”. The objective of the development was for the Indonesia socialist society, fair and prosperous based on Pancasila and with the direction of “Manipol Usdek”, which was the demand of the people’s struggle mandate. Such elaboration showed the national interests that must be given a legal protection. Death penalty, according to Koesnoen is a punishment exemption, because it was specifically aimed to secure the revolution, state principle and objective, the unity of the Indonesian state and nation. If the interests were attacked and the state of danger caused by the offenders are significant, and the effort to socialize the society can only be achieved if he is obliterated, then the convict can be sentenced to death. Based on Manipol that take the affirmation on the pro and counter revolution, for the purpose of the security of revolution struggle to achieve collective purpose, the existence of death penalty becomes legal.²⁷²

During this period, there were four regulations that incorporated death penalty, namely:

1. Presidential Determination No. 5 of 1959 on the Authority of the Attorney General / Military Attorney General to Aggravate the Punishment Towards Crimes that Endanger the Implementation of Food and Clothing Equipment;
2. Government Regulation in Lieu of Law No. 21 of 1959 on Aggravating the Punishment towards Economic Crimes;
3. Presidential Determination No. 11 of 1963 on Eradication of Subversive Activities; and
4. Law No. 31 of 1963 on Basic Provisions of Nuclear Energy.

These four legislation that were issued during this period referred to the spirit to secure the continuity of government programs. Article 2 of Presidential Determination No. 5 of 1959 on the Authority of the Attorney General / Military Attorney General to Aggravate the Punishment Towards Crimes that Endanger the Implementation of Food and Clothing Equipment stated that:

“Anyone who is committing economic crimes as stipulated under Emergency Law of 1955 (State Gazette Year 1955 No. 27), crimes under the Regulation on Eradication of Corruption / Regulation of Central War Command No. Prt/Peperpu/013/1958 and crimes under Book I and Book II of KUHP (crimes threatening state security and crimes towards the dignity of the head of state), by knowing or alleging that such crimes will interfere with the continuity of government programs that are:

1. *To supply people’s food and clothes in the shortest timeframe as possible*
2. *To conduct people’s security,*
3. *To continue the struggle against economic and political imperialism (in West Irian), will be punished with imprisonment of one year at minimum and 20 years at maximum, or life imprisonment, or death penalty.”*²⁷³

Under the Elucidation of the Regulation it was stated that the situation of Indonesia’s state administration that compel the President to issue Decree of 5 July 1959, was still considered ongoing and therefore this situation required tough, firm, and quick measures towards the incendiaries in the economic and security field, which was why it was determined that granting additional jurisdiction to

²⁷² RA. Koesnoen, *Susunan Pidana dalam Negara Sosialis Indonesia*, (Bandung: Penerbit Sumur 1966), pg. 118-119.

²⁷³ Rudi T. Erin, *Himpunan Peraturan-Peraturan Hukum Acara Pidana*, (Jakarta: Erlangga, 1969), pg. 186-189.

the Attorney General/Military Attorney General to execute preventive and repressive police function, one of which by aggravating the maximum punishment of death penalty.

The second legislation, Government Regulation in Lieu of Law No. 21 of 1959 on Aggravating the Punishment towards Economic Crimes incorporated the aggravation in the form of death penalty towards the perpetrators of economic crimes as mentioned under the Emergency Law No. 7 of 1955, which was added by the Emergency Law No. 8 of 1958. According to the Emergency Law No. 7 of 1955, there were still possibilities for judges to choose between physical punishment or fines or imposing both punishment, pursuant to this Government Regulation in Lieu of Law, judges were obligated to impose both punishment.

Article 1 Stated that criminal acts that are charged with death penalty must satisfy the qualification which are causing turmoil in the areas of economy within the society. The threat to aggravate with death penalty, was aimed as an effort to render deterrent effect so that individuals will not commit the crimes that are stipulated under those two emergency laws. Under the Elucidation of the Government Regulation in Lieu of Law No. 21 of 1959, stated that:

"It is becoming a reality that the charges under the law concerning economic crimes under the regulations that are still applicable until this date, are considered too light if these are compared to the impact as a result of these actions, which are economic turmoil within the society. Moreover, during these days where public welfare is the top priority, it is proper that all crimes that are committed intentionally or not intentionally, which can cause economic turmoil within the society, must be prevented or at least reduced. The only measure to execute such prevention is by aggravating the punishment in regards to the existing economic crimes, and therefore these economic crimes are expected to be prevented or reduced."

The pinnacle of guided democracy regime was the issuance of Law No. 11/PNPS/1963 on the Eradication of Subversive Activities. Under the Elucidation of this law, the nature of subversion is the manifestation of the conflict of interest that cannot be reconciled, a continuity of political struggle by impairing the forces of the opposition with undercover measures, are often accompanied and followed by overt violence acts (war, insurgencies). The qualification of the actions that are categorized as subversion is incorporated under Article 1, which stated that:

(1) Will be charged for the crime of subversion:

- 1. Anyone who commits an action with the purpose of with the clear intention or that is known or should be known may:*
 - a. Reverse, interfere, misappropriate the Pancasila as the state ideology or direction of the state, or*
 - b. Overthrow, undermine, or interfere with the state authority or legitimate government or state apparatus, or*
 - c. Spreading hostility or creating hostility, discordance, conflict, chaos, shocks, or unrest within the society or the general public or between the Republic of Indonesia and with friendly state, or*
 - d. Interfere, obstruct, or disrupt the industry, production, distribution, trade, cooperatives, or transportation managed by the government, or that have impacts towards the general public.*
- 2. Anyone who commits an action or activity that expresses sympathy for the enemy of the Republic of Indonesia or a state that is currently not friendly with the Republic of Indonesia;*

3. *Anyone who commits damages or destruction of buildings that function as public interest or owned individually or an institution that committed broadly;*
 4. *Anyone who is conduction espionage;*
 5. *Anyone who is conducting sabotage.*
- (2) *To be blamed for committing a crime of subversion for anyone who attract such action as mentioned under paragraph (1) above.*²⁷⁴

The Elucidation of the Subversion Law explained that since the proclamation of independence era until the issuance of the respective law, it is very clear that there were many subversive activities in many field, including within the political field, military, social, economic/finance or even within the cultural/ideological landscape that aimed to interfere and circumvent the power and the potential of Indonesia's state and nation to achieve the revolution objectives.²⁷⁵ The regulation at that time was felt to be insufficient for the implementation of the efforts in eradication subversion activities effectively, and therefore it was important to issue new regulations to realize a broader room to be adjusted with the revolution rhythm without diminishing the principles of justice. Article 13 that stipulate criminal charges, stated that all qualification of action as formulated under Article 1 mentioned above, will be charged with death penalty for the perpetrator.

Article 13:

- (1) *Anyone who commits the crime of subversion that is formulated under Article 1 paragraph (1) 1,2,3,4, and paragraph (2) will be charged with death penalty, life imprisonment or imprisonment for 20 (twenty) years at maximum.*
- (2) *Anyone who commits the crime of subversion that is formulated under Article 1 paragraph (1) point 5 will be charged with death penalty, life imprisonment or imprisonment for 20 (twenty) years at maximum and/or fines IDR 30 (thirty) million rupiah at maximum.*

It is also the similar situation with the Subversion Law, in which the death penalty charges was an effort to render the effect of fear, preventive measures, and deterrent effect for anyone who commits such actions that were qualified as subversive activities under the Law.

The last legislation during this period that incorporate death penalty charges was Law No. 31 of 1964 on Basic Provisions of Nuclear Energy. The spirit of this Law was similar to other laws and regulations that were issued during this period, which were aimed to protect the interest of the state/government in executing its programs. Article 22 stated that the officials at the installation of National Nuclear Energy Agency and other organizations that handle the use of nuclear energy were obligated to store classified information related to their job description. Death penalty charges awaited them that intentionally unsealed classified information in the field of nuclear energy employment.²⁷⁶

²⁷⁴ Under the Elaboration of the Subversion Law, the definition of attract has a broad nature compared to the definition of provocation (*uitlokking*) under Article 55 of KUHP and covers all actions that may cause other individuals to commit the crime of subversion.

²⁷⁵ According to the Elucidation of the Subversion Law, the purpose of Indonesian revolution is the Unitary State of the Republic of Indonesia as a place with a just and prosperous society, materially, spiritually, or a state with social society based on Pancasila which is a just and prosperous society that adopts socialism adjusted with the condition and situation in Indonesia along with a good friendship between the Republic and all countries in the world based on respect and cooperation to form a new world that is free from imperialism and colonialism towards a immaculate world peace.

²⁷⁶ See Article 23 Law No. 31 of 1964 on Basic Provisions on Nuclear Energy. "Anyone who is intentionally unsealed classified information as formulated under Article 22, will be punished with death penalty or life imprisonment or

Article 23:

Anyone who is intentionally unsealed classified information as formulated under Article 22, will be punished with death penalty or life imprisonment or temporary imprisonment for fifteen years at maximum by being not discharged or discharged from the right to take office under Article 35 of the Criminal Code.

Under the Elucidation of Article 23, it is elaborated that criminal charges that incorporate death penalty was caused by the intention from the state to protect the interests of the state, society, and revolution, and therefore such actions required severe punishment. This period also recorded one legislation that was related to the procedures of death execution, which was regulation under Presidential Determination No. 2 of 1964 on Procedures of Death Penalty Execution Imposed by Courts under the General and Military Court Jurisdiction. Under this Regulation, death penalty in Indonesia was conducted by shooting the convicts until he is dead, executed by a team of shooters from the mobile brigade in the case that the convict is a civilian and for convict in the military court, will be executed by military police.

Other than the legislation that were issued during the Guided Democracy era, the discourse in regards to death penalty amongst criminal law experts happened in the context of criminal law reform in Indonesia. At this point of time, KUHP was still the central theme of the discussion, considering the applicability in Indonesia that in the historical reality timeline placed Indonesian KUHP as a copy from the Netherlands KUHP (with several amendment and changes). For this reason, the early 1960s marked the idea to amend this legislation with the criminal law that drafted by the Indonesian nation. From the First National Law Seminar conducted in March 1963, the participants accepted a resolution that encouraged a draft on national criminal law codification to be concluded immediately.²⁷⁷

During the First National Law Seminar in 1963, in the subject regarding criminal law, Oemar Seno Adji became the speaker with the theme National Legal System Principles in the Criminal Law Field. Related to the topic of death penalty, Oemar Seno Adji was aware since the beginning that such topic of discussion contains controversial aspect; "Death penalty often becomes an emotional problem that sometimes is no longer based on 'nuchter' perspective anymore. And if it has been discussed what is the purpose and function of death penalty, then it can cause a controversial position." However, according to him, in the situation where the state security and statehood are threatened, even abolitionists did not put any objection towards death penalty. In the conclusion related to the implementation of death penalty, Oemar Seno Adji said that "Therefore, as long as our country is still self-affirming to struggle with its own livelihood that is threatened with danger, as long as public order is perplexed and

temporary imprisonment for fifteen years at maximum by being not relieved or relieved from the right to take office os such position under Article 35 of KUHP.

²⁷⁷ See Sofjan Sastrawidjaja, *Hukum Pidana Asas Hukum sampai dengan Alasan Peniadaan Pidana*, (Bandung: Armico, 1995), pg. 59-63. In year of 1964, a document was issued titled Draft Bill on the Principles and Basic Foundation of Criminal Law System and Indonesian Criminal Law that was aimed to replace Article 1 to Article 103 of KUHP. Further, according to Prof. Soedarto, the effort of criminal law reform in Indonesia was based on three arguments; *firstly*, political reason that was based on the consideration that the independent Republic of Indonesia must have a national Criminal Law, drafted by the Indoensian nation, for the sake of national pride. *Secondly*, sociological reason that want to have criminal law reflecting the cultural and religious values of Indonesian nation. *Thirdly*, practical reason based on the reality that the official tect of KUHP inherited from the Dutch colonial government that was applicable in Indonesia is in Dutch language, translated into Indonesian language with many approach. The translation may cause devation from the original intention of the text.

threatened by parts that do not acknowledge humanity, the country still needs death penalty, even though this punishment is considered as ultimum remedium and exceptional measures towards certain crimes that are grave in nature.”²⁷⁸

The position of death penalty within the Indonesian criminal law system, as stated by Oemar Seno Adjie, obtained supports from all criminal law experts that were involved in the discussion during the 1963 National Law Seminar, for instance A. Kasman Singodimedjo who served as the Chair of the Criminal Law Section at the Jakarta Islamiyah Science Council, supported the presentation from Oemar Seno Adjie regarding death penalty. According to him, under the proposed criminal law, it was suggested that the criminal punishment incorporated *hudud* and *qishash* for crimes under Islamic sharia law for moslems to be used by judges in special circumstances.²⁷⁹

Similar opinion but with more critical position addressed by Han Bing Siong, who questioned the idea of the presentation that want preserve death penalty under the Indonesian criminal law without considering on whether the death penalty was in line or against Pancasila. Han Bing Siong compare it with the law drafters when they adjusted the Dutch-Indies Criminal Code that probably preserve the provisions that can be said reflecting the values of undemocratic, liberal, and capitalist, without questioning these values, but with prioritized the use of those provisions to preserve law and order. The conclusion ontes from Han Bing Siong was the full approval of Oemar Seno Adji opinion to preserve death penalty within the national criminal law, when the state is still struggling with polical and economic instability that are threatened from enemies domestic and foreign. However, in the last part of his opinion, Han Bing Siong stated that “only for temporary!”, approving that death penalty can only be treated as an special treatment towards certain crimes with severe impact. In the later national legal development, another review is required towards the existing provisions that incorporated death penalty punishment.²⁸⁰

Therefore, it is clear that during the period of Guided Democracy, the legislation and ideas in regards to death penalty was still around the fundamental position, which was rooted from the Dutch-Indies Criminal Code, strengthened by the context of domestic political-economic dynamics, which in that time required stability and a strong government that can control the political livelihood in a country.

3.7 Legal Policy of Death Penalty during the New Order Period (1966-1998): For State Stability

The beginning of the New Order regime was marked with the appointment of Soeharto as the Acting President on 22 February 1967, pursuant to MPRS Decree No. XXXIII/MPRS/1967 of 1967 on the Revocation of State Government Authority from President Soekarno.²⁸¹ Further, Soeharto was later appointed as the President according to the result of MPRS General Session on 27 March 1968,

²⁷⁸ Oemar Seno Adji, *Cakupan Prasaran Azas-Azas Hukum Nasional dalam Bidang Hukum Pidana, Seminar Hukum Nasional Pertama Tahun 1963 Buku ke IV*, (Jakarta: Badan Pembinaan Hukum Nasional Departemen Kehakiman dan Hak Asasi Manusia, 2003), pg. 18 -19.

²⁷⁹ A. Kasman Singodimedjo, *Bahasan Umum mengenai Pemrasaran Asas-Asas tata Hukum Nasional dalam Bidang Hukum Pidana*, in Seno Adji, *Ibid.*, pg. 64.

²⁸⁰ Han Bing Siong, *Azas-Azas Tata Hukum Nasional dalam Bidang Hukum Pidana*, Pembahasan Umum pada Seminar Hukum Nasional, Jakarta, 1963, pg. 89 and 111-118.

²⁸¹ Indonesia, *Ketetapan Majelis Permusyawaratan Rakyat Sementara Republik Indonesia Nomor XXXIII/MPRS/1967 Tahun 1967 tentang Pencabutan Kekuasaan Pemerintahan Negara dari Presiden Soekarno*.

confirmed by MPRS Decree No. XLIV/MPRS/1968 on the Appointment of Caretaker MPRS Decree No. IX/MPRS/1966 as the President of the Republic of Indonesia.²⁸²

During the New Order period, President Soeharto administration emphasized national stability as the main component in his political program. In order to achieve the said national stability, the New Order period developed the main consensus, which was the strong determination from the government and the society to implement Pancasila and the 1945 Constitution with pure and consequent approach. This main consensus was issued under MPRS Decree No. XX/MPRS/1966 of 1966 on DPR-GR Memorandum Regarding the Sources of Law and Order of the Republic of Indonesia and Hierarchy of Laws and Regulations in the Republic of Indonesia.²⁸³ National stability and the statement to implement Pancasila and the 1945 Constitution with pure and consequent approach were the main part of the politics of law that was executed during the President Soeharto administration.

As the first step to execute the politics of law that was aimed to create the said national stability, President Soeharto administration also amended various regulations that were considered not in accordance with the spirit of MPRS Decree No. XX/MPRS/1966 of 1966 by issuing Law No. 5 of 1969 on Statement regarding Presidential Determination and Presidential Regulation as Laws.²⁸⁴ Since the issuance of this law, various regulations that were issued during President Soekarno administration were improved and remained applicable as part of the positive law in Indonesia.

In general, referring to various legislation that were issued during the New Order period, the character of criminal law legislation that were issued closely related the authoritarian nature and character of government power that carried by President Soeharto administration. Therefore, the politics of law that was executed was a strong regulation establishment, amongst which through the issuance of criminal law and implementation of death penalty.

The politics of law in this context accepted as the statement of will from the ruler of the country regarding the applicable law in his territories and regarding the direction where the law is developed.²⁸⁵ This statement of will was later formulated under laws and regulations for specific objective and reason and later interpreted into a legal provision.²⁸⁶ The politics of criminal law is part of the politics of law, and therefore the politics of criminal law contained the entire policy that was taken into laws and regulations and official institutions, aimed to enforce the norms within the society.²⁸⁷ Therefore, implementing the politics of criminal law meant that providing options to achieve the best result of criminal laws and regulations, in the sense of justice and usefulness.²⁸⁸ The development of the politics of

²⁸² Indonesia, *Determination of Provisional People Consultative Assembly No. XLIV/MPRS/1968 of 1968 on Appointment of the Carrier of MPRS Determination No. IX/MPRS/1966 as the President of the Republic of Indonesia*.

²⁸³ Indonesia, *MPRS Determination No. XX/MPRS/1966 of 1966 on DPR-GR Memorandum Regarding the Sources of Law and Order of the Republic of Indonesia and Hierarchy of Laws and Regulations in the Republic of Indonesia*.

²⁸⁴ Indonesia, *Law No. 5 of 1969 on Statement regarding Presidential Determination and Presidential Regulation as Laws*.

²⁸⁵ Teuku Mohamad Radie, *Pembaruan dan Politik Hukum dalam Rangka Pembangunan Nasional*, Prisma No. 6 Tahun ke II, December 1973, pg. 4.

²⁸⁶ Hikmahanto Juwana, *Politik Hukum Undang-Undang Bidang Ekonomi di Indonesia*, Jurnal Hukum Vol. I No. 01, 2005, pg. 24.

²⁸⁷ Sudarto, *Hukum dan Hukum Pidana*, (Bandung: Alumni, 1986), pg. 153.

²⁸⁸ Sudarto, *Hukum Pidana dan Perkembangan Masyarakat*, (Bandung: Sinar Baru, 1983), pg. 161

law, in particular the politics of criminal law, which was issue during specific timeline depends on the political character and configuration that happened in that specific period.²⁸⁹

3.7.1 Legislation on Psychotropic and Death Penalty

Regulations on drugs in Indonesia has been on the table since a long time ago. This was closely related to the History of Batavia, or now known as Jakarta, that already has the reputation as the paradise for drug-addicts. Since the mid of 17th century, Batavia was the center of opium trade from VOC. In addition to official trade conducted by VOC, the illicit trade of opium happened with fantastic volume and value.

To overcome the illicit trade of opium, on 30 November 1745, Governor-General of VOC Gustaaf Willem van Imhoff established *De Sociëteit tot den Handel in Amfioen* (Society of Opium Trade) or famously known as *Amfioensociëteit* (Opium Society) with the purpose of conducting monopoly towards opium trade for the interest of VOC. However, the illicit trade of opium still happened without barriers.²⁹⁰ It was estimated that during 1619-1799, VOC supplied 56 tonnes of opium per annum to Java Island and from this opium trade, the government of Dutch Indies collected tax on opium trade. The tax on opium trade was the largest income for the government of Dutch Indies.²⁹¹ The opium trade increased during the 1800s and kept increasing until the end of 19th century. During this period, the government of Dutch Indies even issued license to private parties to trade opium and collected taxes from opium trade. The tax on opium trade reached 26 million gulden at certain point.²⁹²

The first opium factory was built in 1894 in Struiswijk (Gang Tengah, Jakarta) and in Meester Cornells or Jatinegara, however the establishment of these factories cannot satisfy the demand of opium that increased exponentially. In 1901, a modern opium factory equipped with railway was established in Kramat, Central Jakarta. This railway connected the factory area with Tanjung Priok Port. This factory processed 100 tonnes grainy opium from Benggala into 70 tonnes of ready-to-use opium, and even in 194 the figure was increased to 100 tonnes.²⁹³ In Java, Oei Tiong Ham, became the last king of opium who successfully established the largest and the first business imperium in Southeast Asia.²⁹⁴ This situation pushed the government of Netherlands to prohibit the use of opium in its colonies.²⁹⁵

²⁸⁹ Moh. Mahfud MD, *Pergulatan Politik dan Hukum di Indonesia*, (Yogyakarta: Gamamedia, 1999), pg. 6

²⁹⁰ Martijn Burger, *The Forgotten Gold? The Importance of the Dutch opium trade in the Seventeenth Century*, <http://www.mjburger.net/Forgotten_Gold_Eidos.pdf>, accessed on 28 September 2017.

²⁹¹ Kerta Rahayu Ucu, *Pabrik Candu*, *Republika*, 3 January 2016, <<http://www.republika.co.id/berita/senggang/nostalgia-abah-alwi/16/01/03/o0c9yc282-pabrik-candu-di-batavia>>, accessed on 28 September 2017.

²⁹² Dany Putra, *Opium di Tanah Jawa*, *Sinar Harapan.co*, 18 September 2014, <<http://www.sinarharapan.co/news/read/140918052/opium-di-tanah-jawa-span-span->>>, accessed on 13 October 2017.

²⁹³ Tim Viva, *Ternyata Dulu Gedung Fakultas Kedokteran UI Pabrik Opium*, *Viva*, 13 May 2015, <<http://www.viva.co.id/berita/metro/625307-ternyata-dulu-gedung-fakultas-kedokteran-ui-pabrik-opium>>, accessed on 28 September 2017.

²⁹⁴ Mahandis Yoanata Thamrin, *Oei Tiong Ham, Sang Raja Candu Terakhir*, *National Geographic Indonesia*, <<http://nationalgeographic.co.id/berita/2015/07/oei-tiong-ham-sang-raja-candu-terakhir>>, accessed on 13 October 2017.

²⁹⁵ Tim Lindsey dan Pip Nicholson, *Drugs Law and Legal Practice in Southeast Asia: Indonesia, Singapore, Vietnam*, (Oxford: Hartpublishing, 2016), pg. 43.

Laws and regulations that formulated narcotic in Indonesia have been on the table since the issuance of *Verdoovende Middelen Ordonnantie* (Staatsblad No. 278 Jo. 536 Year 1927). This ordinance was the regulation that consolidated for the first time. This regulation also a compliment to the draft regulation of opium that was later issued under *Opium Verpakking Bepalingen* (Staatsblaad No. 514 Year 1927).²⁹⁶ This provision was part of the implementation of the International Opium Convention, the first international agreement on drugs international supervision, agreed upon in the Hague, Netherlands, on 23 January 1912, signed by Germany, the United States, China, France, the United Kingdom, Italy, Japan, Netherlands, Persia, Portugal, Russia, and Siam.²⁹⁷

Before the recognition of Indonesian sovereignty, the government of Dutch-Indies through the High Representative of the Netherlands Kingdom, issued *Staatsblaad* No. 377 of 1949 on Dangerous Substance Ordinance and *Staatsblaad* No. 419 of 1949 on Prescription Drugs Ordinance. Both regulations in essence stipulated a strict provisions on the distribution of drugs that were considered dangerous for mental and physical health. Meanwhile the criminal aspect of these drugs still refer to KUHP, as formulated under Article 204²⁹⁸ and Article 205 of KUHP²⁹⁹. During the independence period until the issuance of Law No. 9 of 1976 on Narcotic, the legislation from the Dutch Indies period was still applicable pursuant to Article II of the Transitional Rules under the 1945 Constitution.

3.7.1.1 Heading to Law No. 5 of 1997 on Psychotropic

The development of Indonesia economy created impact to the improvement of society's welfare. The improvement was followed by the increase of narcotic consumption for recreational purpose.³⁰⁰ In addition to the welfare improvement, the convenience in communication method with society outside Indonesia also presumed to be the driver of rampant use of narcotic.³⁰¹

To overcome the narcotic problem, in 1971, the government issued Presidential Directive No. 6 of 1971 on Coordination of Measures and Activities from the Institution related to the Effort in Resolving, Preventing, and Eradicating Violation Problem in regards to the Narcotic Countermeasures Effort. The Directive was given to the State Intelligence Coordinating Agency (*Badan Koordinasi Intelejen Negara – BAKIN*) to coordinate measures and activities from agencies/institutions that related to the effort in

²⁹⁶ *Ibid.*, pg. 47.

²⁹⁷ UN Chronicles, *The Beginning of International Drug Control*, <<https://www.questia.com/magazine/1G1-54157834/the-beginnings-of-international-drug-contro>>, accessed on 28 September 2017.

²⁹⁸ Article 204 of KUHP: (1) *Any person who sells, offers for sale, delivers or distributes goods, knowing that they are harmful to life or to health and conceals said harmful nature, shall be punished by a maximum imprisonment of fifteen years.* (2) *If the fact results in the death of any person, the offender shall be punished by life imprisonment or a maximum imprisonment of twenty years.* (KUHP 35, 43, 206, 336, 338, 386, 486, 501.)

²⁹⁹ Article 205 KUHP: (1) *(as amended by Law No. 18/Prp/1960.) Any person through whose fault goods harmful to life or to health are sold, delivered or distributed without knowledge of the buyer or the person who acquires the goods of said harmful nature, shall be punished by a maximum imprisonment of nine months or a maximum light imprisonment of six months or a maximum fine of three hundred Rupiahs.* (2) *If the fact results in the death of any person, the offender shall be punished by a maximum imprisonment of one year and four months or a maximum light imprisonment of one year.* (3) *The goods may be confiscated.* (KUHP 35, 39, 41, 43, 206, 359, 386.)

³⁰⁰ Lindsey and Nicholson, *op. cit.*, pg. 44.

³⁰¹ Petrik Matanasi, *Kisah Narkoba di Jakarta Tempo Dulu*, Tirto.id, 2017, <<https://tirto.id/kisah-narkoba-di-jakarta-tempo-dulu-ciWb>>, accessed on 13 October 2017.

resolving, preventing, and eradicating violations within the society, directly or indirectly may cause interference to the security and public order.³⁰²

The narcotic problem drew a serious attention. The People Consultative Assembly (*Majelis Permusyawaratan Rakyat* – MPR) even stated that, narcotic as one of many objectives in the national development direction by using health approach.

*“The efforts to improve the public health upgrade is addressed towards..., protecting the public from the harm of narcotic and the use of other drugs that are not in accordance with the applicable requirement,...”*³⁰³

In line with the affirmation that delivered to the MPR, President followed up the effort by sending Letter No. R.05/P.U./VI/1976 dated 3 June 1976 to the House of Representatives regarding the Draft Bill on Ratification of Single Convention on Narcotic Drugs and its Protocols as well as Draft Bill on Narcotic.³⁰⁴

Under the Draft Bill addressed by the government, there were two actions that may be charged with death penalty that are formulated under Article 23 (4) in conjunction with Article 36 (4) (a) and Article 23 (5) in conjunction with Article 36 (5) (a) as long as the actions were not related to coca or marijuana plants.³⁰⁵

In government’s point of view, as delivered by the Minister of Justice on 14 June 1976, one of the thoughts on why a severe punishment is imposed to the crime of narcotic is in regards to the concern that narcotic will be used as a tool for subversion.³⁰⁶ Therefore smugglers and dealers are likely to be imposed with severe punishment to give deterrent effect to the society.³⁰⁷ The view that narcotic as a tool for subversion was approved by Karya Pembangunan Faction,³⁰⁸ Indonesia Democratic Party Faction,³⁰⁹ United Development Faction,³¹⁰ and Armed Forces Faction.³¹¹

From this elaboration, the formulation of death penalty was really an answer to the concerns from the government over the possibility that narcotic crime can be used as one of important tools to commit subversion. A perspective that later approved by all factions at the House of Representatives.³¹² Even though, the government rejected the proposal to include the crime of subversion to this Draft Bill.³¹³

³⁰² Indonesia, *Presidential Directive No. 6 of 1971*.

³⁰³ Indonesia, *People’s Consultative Assembly Determination No. VI/MPR/1973*, pg. 27.

³⁰⁴ Directorate General of Laws and Regulations, Department of Justice, *Sejarah Pembentukan Undang-Undang Republik Indonesia No. 9 Tahun 1976 tentang Narkotika*, pg. 11.

³⁰⁵ *Ibid*, pg. 20 and 23

³⁰⁶ *Ibid*, pg. 39

³⁰⁷ *Ibid*, pg. 41

³⁰⁸ *Ibid*, pg. 47

³⁰⁹ *Ibid.*, pg. 54

³¹⁰ *Ibid.*, pg. 65

³¹¹ *Ibid.*, pg. 71

³¹² Indonesia, *Law No. 9 of 1976 on Narcotic*, General Elucidation.

³¹³ Directorate General of Laws and Regulations, Department of Justice, *op.cit.*, pg. 81.

Eventually, on 2 July 1976, the House of Representatives approved the Draft Bill on Ratification of Single Convention on Narcotic Drugs and Draft Bill on Narcotic into laws.³¹⁴ This law opened the possibilities to import, export, plant, nurture narcotic for the purpose of medication and/or science, in which narcotic is still factually required for medication purpose.³¹⁵ In addition, these laws also opened the possibilities for narcotic addicts to undergo rehabilitation process. However, Law No. 9 of 1976 was still considered to have weakness in overcoming psychotropic crime.

Law No. 9 of 1976 has several specific characteristics:³¹⁶

- a. Regulating all activities related to narcotic that are planting, compounding, production, trading, transporting and usage of narcotic
- b. Regulating types of narcotic into more details.
- c. Regulating services on health issues for addicts and rehabilitation.
- d. Specific criminal law procedures.
- e. Incentives for those that play a role in dismantling narcotic crime.
- f. Regulating international cooperation on narcotic countermeasures.
- g. Criminal provisions are deviation from KUHP.
- h. More severe criminal charges

The issuance of Law No. 9 of 1976 in Narcotic was closely related to the establishment of the Single Convention on Narcotic Drugs of 1961 and its Amendment Protocols of 1972,³¹⁷ which was ratified by Indonesia on 3 September 1976.³¹⁸ This Convention introduced criminalization over actions that were regulated under the said Convention and categorized as serious crimes.³¹⁹ This Convention also asked for criminalization, but the punishment imposed to the perpetrators only limited to imprisonment or other forms of deprivation of liberty.

Even though the Single Convention on Narcotic Drugs of 1961 only introduced narcotic crime as a serious crime and did not introduce death penalty, Law No. 9 of 1976 on the other hand introduced death penalty as a part of sentencing framework under narcotic regulations in Indonesia. There are two offenses that can be imposed with death penalty, both of which were regulated under Article 23 (4) in conjunction with Article 36 (4) b and Article 23 (5) in conjunction with Article 36 (5) b.

Article 23 (4) in conjunction with Article 36 (4) b:

It is prohibited for any person who is not authorized to carry, deliver, transport, or transit narcotic and such person will be punished with death penalty of life imprisonment or imprisonment for 20 (twenty) years at maximum and fines of IDR 50.000.000,- (fifty million rupiah) at maximum if such offense related to other narcotic.

Article 23 (5) in conjunction with Article 36 (5) b:

³¹⁴ *Ibid.*, pg. 118

³¹⁵ Indonesia, *Law No. 9 of 1976 on Narcotic*, Consideration letter a.

³¹⁶ Hari Sasangka, *Narkotika dan Psikotropika dalam Hukum Pidana*, (Bandung: Mandar Maju, 2003), pg. 164

³¹⁷ UN General Assembly, *1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961*, A/RES/3444, 9 December 1975.

³¹⁸ The list of countries that ratified this Convention can be accessed at

<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=VI-15&chapter=6&lang=en>, accessed on 28 September 2017.

³¹⁹ UN Economic and Social Council, *Single Convention on Narcotic Drugs 1961*, Article 36.

It is prohibited for any person who is not authorized to import, export, offer for further sales, distribute, sell, buy, handover, receive, become a middleman in a buy and sell or exchange narcotic and such person will be punished with death penalty of life imprisonment or imprisonment for 20 (twenty) years at maximum and fines of IDR 50.000.000,- (fifty million rupiah) at maximum if such offense related to other narcotic.

The implementation of criminal law policy during this time was considered as too general and contain a very broad definition, for instance: (i) did not express the definition on categorization of psychotropic drugs; (ii) can only be imposed towards drug dealers, producers, importers, and smugglers; and (iii) did not elaborate the limitation of possession towards psychotropic and other types of drugs.³²⁰ This law was considered failed to specify the details on psychotropic and only focused on narcotic that contained cannabis, coca, and opium.³²¹

Meanwhile, enforcement towards the crimes related to psychotropic conducted by using various provisions under the following laws and regulations:

1. Article 204 and Article 205 of KUHP;
2. Article 102 of Law No. 10 of 1995 on Customs;³²² and
3. Article 80, Article 81 (2) c, Article 82 (2) e, and Article 83 of Law No. 23 of 1992 on Health³²³

Pursuant to the abovementioned weakness, psychotropic was further regulated under a specific legislation separated from narcotic, by the issuance of Law No. 5 of 1997 on Psychotropic.³²⁴ In general, there were three objectives aimed to be accomplished by the issuance of Law No. 5 of 1997 on Psychotropic, namely: (i) the objective of social engineering by involving the society in the enforcement of psychotropic law; (ii) the objective of law and order; and (iii) the objective of social order.³²⁵

In line with the issuance of Narcotic Law, Law No. 5 of 1997 cannot be separated from the ratification effort from Indonesia towards two main conventions regarding psychotropic, namely:

- a. Convention on Psychotropic Substances of 1971,³²⁶ ratified by Law No. 8 of 1996 on Ratification of the Convention on Psychotropic Substances.³²⁷
- b. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substance of 1988,³²⁸ ratified by Law No. 7 of 1997 on Ratification of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substance.³²⁹

³²⁰ Murtiningsih, *Kebijakan Hukum Pidana dalam Penanggulangan Tindak Pidana Psikotropika*, Tesis, (Semarang: Universitas Diponegoro, 2001), pg. 125

³²¹ Indonesia, *Law No. 9 of 1976 on Narcotic*, Article 1.

³²² Indonesia, *Law No. 10 of 1995 on Customs*.

³²³ Indonesia, *Law No. 23 of 1992 on Health*.

³²⁴ Indonesia, *Law No. 5 of 1997 on Psychotropic*.

³²⁵ AR Sujono dan Boy Daniel, *Komentar & Pembahasan Undang-Undang Nomor 35 Tahun 2009 tentang Narkotika*, (Jakarta: Sinar Grafika, 2011), pg. 31.

³²⁶ UN General Assembly, *1971 Convention on Psychotropic Substances*, A/RES/3443, 9 December 1975.

³²⁷ See Indonesia, *Law No. 8 of 1996 on Ratification of the Convention on Psychotropic Substances*.

³²⁸ UN Economic and Social Council, *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 19 December 1988.

³²⁹ Indonesia, *Law No. 7 of 1997 on Ratification of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substance*.

However, Law No. 5 of 1997 re-regulated death penalty that contradicted two related international treaties. Under the Single Convention on Narcotic Drugs of 1961 and Convention on Psychotropic Substances of 1971, the clauses only introduced psychotropic as crime and did not introduce death penalty, as stipulated under Article 22 (1):

“Subject to its constitutional limitations, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty.”

Similar clause also found under United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substance of 1988, which only introduced psychotropic as crime and did not introduce death penalty. Article 3 (4) a of this Convention stated:

“Each Party shall make the commission of the offences established in accordance with paragraph 1 of this article liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation.”

Article 59 (2) of Law No. 5 of 1997 determined the actions that are charged with death penalty, namely offenses that are organized.

(1) Anybody who:

- a. uses psychotropic substance category I other than for the purpose specified in Article 4 section (2), or
 - b. produces and or uses in production process of psychotropic substance category I as referred to Article 6, or
 - c. traffics psychotropic category I without compliance with the provisions stipulated in Article 12 section (3), or
 - d. imports psychotropic substance category I, other than for scientific purpose, or
 - e. illegally possesses, keeps, and or brings psychotropic substance category I
- shall be punished with an imprisonment for not less than four years and not more than 15 years and a fine of not less than IDR 150,000,000.(one hundred fifty million Rupiahs) and not more than IDR 750,000,000: (seven hundred fifty million rupiahs).

(2) If the criminal act as referred to in section (1) committed as an organized crime, shall be subject to a capital punishment or life imprisonment, or 20 year imprisonment, plus fine of IDR 750,000,000. (seven hundred fifty million rupiahs).

In general, from the perspective of the politics of criminal law, Law No. 5 of 1997 on Psychotropic is: (i) elaborates in details regarding psychotropic drugs; (ii) all abusers of psychotropic can be charged with criminal punishment; and (iii) existence of severe punishment that is expected to be a deterrent and therefore reducing the quantity of psychotropic abusers.³³⁰

³³⁰ Murtiningsih, *op.cit.*, pg. 131.

3.7.1.2 Politics of Law pertaining to Death Penalty under Law No. 5 of 1997 on Psychotropic

The implementation of death penalty during the New Order era under Law No. 9 of 1976 on Narcotic, which was followed by Law No. 5 of 1997 on Psychotropic, was closely related to the configuration of the politics of criminal law adopted by the New Order administration. The character of the New Order administration that was conservative and repressive, oppressive, and interventionist, created legislation that were repressive and authoritarian. The main objective of the legislation was to enlarge the power and subjective purposes of the man in power.³³¹

The description of the politics of law during the New Order era, was in fact similar to the description of the politics of law during the colonial period. During the colonial period, the attention and consideration at the occupied territories were the main key of the issuance of legislation.³³²

As mentioned in the previous paragraphs, the Netherlands that has eliminated death penalty under KUHP since 1870, deviated from the concordance principle, which was resulted to KUHP as applicable in Indonesia. Several reasons were used as justification why this deviation was conducted, namely: (i) vast geographical area and many ethnic groups, which require severe punishment; (ii) the number of police forces for the vast area was limited, therefore death penalty was required to intimidate the public; and (iii) after the independence of Indonesia, death penalty was also still required and deemed relevant with the consideration that death penalty was necessary for a developing country.³³³

The perspective used by the Colonial Government was similar with the politics of criminal law under the Psychotropic Law. This legislation was aimed to intimidate the public so that they will not commit crime, both to intimidate the general public (*generale prevantie*) or intimidate certain persons that already committing crime, so therefore they will not commit crime in the future (*speciale preventie*). In addition, this law was also aimed to educate or improve the persons that constantly committed crime so that they can be a good person, and benefit the public.³³⁴

Death penalty was deemed as a proper punishment, as this punishment is the most severe from all types of punishment. Death penalty was addressed to punish the very serious crimes, which are offense that cause the death of person who is attacked and offense that may cause significant danger or hold significant impact towards the livelihood of mankind and state in the field of politics, economy, social, cultural, and national security.³³⁵

At the end of the day, the deterrent effect with a severe punishment, including death penalty, became the target to achieve the purpose of the issuance of Law No. 5 of 1997, which was to reduce the quantity of psychotropic abusers. From the existing findings, the provisions prior to the enforcement of Law No. 5 of 1997 failed to create a deterrent effect and failed to educate the drug dealers, and tendency that the punishment is not equal to the action compared to the impact experienced by the

³³¹ Rusli Muhammad, *Reformasi Kekuasaan Kehakiman: Studi Sinkronisasi UUD dan UU No 14 Tahun 1970*, Jurnal Hukum dan Keadilan, Vol. 1, No 1, 1998, pg. 15.

³³² Sahetapy, *Ancaman...*, *op.cit.*, pg. 350.

³³³ Syamsul Hidayat and Hasan Asy'ari, *Kontroversi Penerapan Pidana Mati Terhadap Tindak Pidana Narkoba*, Jurnal IUS Vol. 1 No 3, 2013, pg. 519.

³³⁴ Wirjono Prodjodikoro, *Asas-Asas Hukum Pidana Di Indonesia*, (Bandung: Eresco, 1989), pg. 18.

³³⁵ Andi Hamzah dan Siti Rahayu, *Suatu Tinjauan Ringkas Sistem Pemidanaan di Indonesia*, (Jakarta: Akademika Pressindo, 1983), pg. 32.

victims.³³⁶ In other words, the target of death penalty is not only towards the death convicts but also towards the convicts that are not imposed with death penalty. Therefore, death penalty aims as a tool to reduce the high volume of criminality and ultimately a safe and secure society.

In its development, Law No. 5 of 1997 on Psychotropic fails to generate the expected impact and this law is considered unable to overcome the illegal distribution of psychotropic in Indonesia. It can be seen from the reasons addressed by the government when drafted a plan to revise Law No. 5 of 1997 on Psychotropic. The government expected a more severe punishment, with consideration: (i) the level of threat and distribution/expansion of psychotropic is increasing; (ii) the damage caused by psychotropic abuse is increasing; (iii) psychotropic are easier to obtain from the pharmacist, drug stores, or other drug markets without doctor's prescription; (iv) punishment under this law does not generate the expected deterrent effect; and (v) the criminal provision must stated mandatory minimum sentences, so that there is no significant disparity between the charges and imposed punishment and the mandatory minimum of life imprisonment or death penalty.³³⁷ In addition, specific desire to preserve death penalty also occurred, particularly towards the dealers as they are considered as parties with profit motives by damaging other people, the society, and the future of the state and country.³³⁸

3.7.2 Death Penalty regarding Criminal Provisions of Civil Aviation

From historical perspective, the provisions regarding civil aviation was in line with the development and human migration. This condition triggered the development of new technology that eased the human migration using airplanes. The pioneers of flight known to mankind was the Wright Brothers, who succeeded to initiate the first powered and controlled flight at Kill Devil Hills, North Carolina, four miles (eight kilometers) south of Kitty Hawk, North Carolina, on 17 December 1903.³³⁹ This first flight pushed the birth of the first commercial aviation industry and during 1914, a businessman named Percival Farnham opened the regular flight between Tampa and St. Petersburg.³⁴⁰

This development later sparked the first international treaty regarding international aviation, known as the *Convention Relating to the Regulation of Aerial Navigation* or Paris Convention on 1919.³⁴¹ This treaty served to handle the whole details related to international air navigation between countries that had political differences. This treaty acknowledges several important principles, as follows:³⁴²

1. Every country has complete and exclusive sovereignty over the airspace above its territories and waters. Therefore, a country shall have the right to refuse entrance and to regulate the aviation (foreign or domestic) into or passing its air space.

³³⁶ Murtiningsih, *op. cit.*, pg. 126-127.

³³⁷ Badan Pembinaan Hukum Nasional, *Naskah Akademik RUU Perubahan UU No 5 Tahun 1997 tentang Psikotropika*, 2008, pg. 35.

³³⁸ *Ibid.*

³³⁹ *The Wrights Brothers: The Invention of Aerial Age*, <<https://airandspace.si.edu/exhibitions/wright-brothers/online/>>. See also *Airplanes that transform Aviation*, <<http://www.airspacemag.com/history-of-flight/airplanes-that-transformed-aviation-46502830/?all>>, accessed on 29 September 2017.

³⁴⁰ *100 Years of Commercial Flight*, <<http://www.iata.org/about/Pages/flying-100-years.aspx>>, accessed on 29 September 2017.

³⁴¹ See 1919 Paris Convention or the *the Convention Relating to the Regulation of Aerial Navigation*, <http://www.spacelaw.olemiss.edu/library/aviation/IntAgr/multilateral/1919_Paris_convention.pdf>, accessed on 29 September 2017.

³⁴² *Ibid.*

2. Every country must impose similar air space regulation without discrimination towards the flight operating in its area and establish regulation in such manner that the sovereignty and security are respected while providing the freedom of passage
3. Registered airplane must be treated similarly before the law of each country.
4. An airplane must be registered in a country and these planes will be treated as a citizen of the country in which the airplane is registered.

After the 1919 Paris Convention, another treaty was emerged namely the Pan American Convention on Commercial Aviation or commonly known as Havana Convention of 1928.³⁴³ The Havana Convention exclusively regulated private airplanes and determined the basic principles and provisions for air traffic, by recognizing that every state has the complete and exclusive sovereignty over the airspace above its territory. This Convention also formulated the clause that allows United States airline companies to conduct their services freely in North and South America.

With the ever growing commercial flight industry, operating internationally during the 1920s, there was a demand to regulate the case of failures and cargo lost as well as death or injury cases suffered by the passenger or even damages for delays in passenger flight, cargo flight, or commercial goods. For this reason, another treaty was established namely the Convention for the Unification of Certain Rules relating to International Carriage by Air signed in Warsaw on 1929 and known as Warsaw Convention.³⁴⁴

These three conventions were later replaced by the *Convention on International Civil Aviation* signed by 52 states on 7 December 1944, known as the Chicago Convention of 1944. This international treaty was the basis for standards and procedures for peaceful international aviation that aimed to develop the international civil aviation by assuring the safety of international civil aviation, development of air transportation service based on equality of opportunity and operated in good manner and economically, and add safety into international aviation.³⁴⁵

Not long after the signature of 1944 Chicago Convention, a brawl was happened inside an airplane known as USA v. Cordova case. The case started with a brawl between Cordova and Santano as both of them were drunk. Machada, pilot captain, tried to divide the brawl, however Cordova cannot be controlled and instead attacked Machada and another flight attendant named Santiago. The plane tilted and lost its balance because the passengers were trying to see the incident and gathered at the back of the airplane. When the incident happened, the plane was flying above the Atlantic Ocean. At the New York District Court, Cordova and Santano were released as the United States law had no jurisdiction on that case. The judges opined that the court had no jurisdiction as the incident happened inside an airplane and above the international waters, and therefore it cannot be determined which court had the jurisdiction to handle the case.³⁴⁶

³⁴³ See Commercial Aviation (Inter-Americans), *Convention*, 20 February 1928, <<https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0698.pdf>>, accessed on 29 September 2017.

³⁴⁴ See *Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention)*, 12 October 1929, <<http://www.jus.uio.no/lm/air.carriage.warsaw.convention.1929/doc.html>>, accessed on 29 September 2017.

³⁴⁵ See *Convention on International Civil Aviation (Chicago Convention)*, 7 December 1944, <<https://www.icao.int/publications/pages/doc7300.aspx>>, accessed on 29 September 2017.

³⁴⁶ *United States v. Cordova*, <http://www.jaxa.jp/library/space_law/chapter_1/1-1-2-1_e.html>. See also Djoko Prakoso, *Tindak Pidana Penerbangan di Indonesia*, (Jakarta: Ghalia Indonesia, 1984), pg. 10.

Because the threatening incidents towards aviation safety were rampant, three more international treaties were established as follow ups from the Chicago Convention, namely:

1. *Convention on Offences and Certain Other Acts Committed on Board Aircraft* 1963 (Tokyo Convention of 1963)³⁴⁷;
2. *Convention for the Suppression of Unlawful Seizure of Aircraft* 1970 (*The Hague Convention of 1970*)³⁴⁸; and
3. *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* 1971 (Montreal Convention of 1971)³⁴⁹.

Under these three conventions, the development of criminalization towards actions related to civil aviation was also thriving. Under the Tokyo Convention, the provisions stipulate offenses conducted on airplane.³⁵⁰ Under the Hage Convention, the essence of the provision is the regulation on the possession of airplane,³⁵¹ while under the Montreal Convention, the provisions stipulate actions that endanger the safety of a flight.³⁵² Article 2 of the Hague Convention and Article 3 of the Montreal Convention requested the contracting states to criminalize the offenses that have been regulated under the Hague Convention and the Montreal Convention with severe penalties.

3.7.2.1 Death Penalty regarding Aviation Crime and Crimes against Aviation Facilities

In Indonesian context, aviation crime that was recorded in terms of aircraft hijacking happened in 1972. During a flight from Surabaya to Jakarta, a man named Hermawan threatened the pilot of Merpati Nusantara Airlines to fly the airplane to Yogyakarta and it was also reported that he carried hand grenade while asking for ransom of IDR 1.000.000. During the incident, Hermawan was shot to death by the pilot when the plane has been landed at Adi Sucipto Airport, Yogyakarta.³⁵³

The incident triggered debates, as during that time when the crime happened, aircraft hijacking was nor part of the national criminal law.³⁵⁴ Therefore in 1976, the government and parliament ratified the Tokyo Convention, The Hague Convention, and the Montreal Convention by passing Law No. 2 of 1976 on Ratification to Tokyo Convention of 1963, Hague Convention of 1970, and Montreal Convention of 1971.³⁵⁵

As of that time, the government acknowledged that the ratification to the three conventions will be the basis to draft a national policy, in order to prevent and eradicate aviation crimes. The ratification to the three conventions caused by the increasing number of aviation crimes and concerns over the possibility that aviation crimes can be happened within the jurisdiction of the Republic of Indonesia or committed

³⁴⁷ *Convention on Offences and Certain Other Acts Committed on Board Aircraft* 1963, <<http://treaties.un.org/doc/db/Terrorism/Conv1-english.pdf>>, accessed on 29 September 2017.

³⁴⁸ *Convention for the Suppression of Unlawful Seizure of Aircraft* 1970 <<http://treaties.un.org/doc/db/Terrorism/Conv2-english.pdf>>, accessed on 29 September 2017.

³⁴⁹ *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* 1971, <<http://www.un.org/en/sc/ctc/docs/conventions/Conv3.pdf>>, accessed on 29 September 2017.

³⁵⁰ *Convention on Offences and Certain Other Acts Committed on Board Aircraft* 1963, Article 11.

³⁵¹ *Convention for the Suppression of Unlawful Seizure of Aircraft* 1970, Article 1.

³⁵² *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* 1971, Article 1.

³⁵³ Soedarto, *Kapita Selektta Hukum Pidana*, (Bandung: Alumni, 2010), pg. 2.

³⁵⁴ Indonesia, *Law No. 4 of 1976*, Consideration letter c.

³⁵⁵ Indonesia, *Law No. 2 of 1976*.

against Indonesian citizens/legal persons.³⁵⁶ The government also acknowledged the necessity of severe punishment towards aviation crimes, which was in line with the influence from Article 2 of the Hague Convention and Article 3 of the Montreal Convention, both of which were requesting severe penalties.

After the ratification of the three important conventions, the government and parliament followed up with the issuance of Law No. 4 of 1976 on the Amendment and Addition of Several Articles under KUHP in regards to Expansion of Applicability of Criminal Provisions, Aviation Crimes, and Crimes Against Aviation Facilities. Several important points under this law as follows:³⁵⁷

1. Expansion of territorial principle (Article 3 of KUHP) and addition of universality principle (universal jurisdiction) (Article 4 (4) of KUHP)
2. Addition of three new provisions, namely Article 95a, 95b, and 95c.
3. Addition of new chapter, which was Chapter XXIXA of KUHP, consisted of Articles 479a to 479r.

3.7.2.2 The Politics of Law of Death Penalty under Law No. 4 of 1976

During the New Order regime, the situation was conservative and repressive, and the legislation produced by policymakers were also adopting the same spirit as well. In the context of Law No. 4 of 1976, the influence of the three international conventions, which asked the contracting states to criminalize the actions that were regulated under the said conventions, gave significant impact to the issuance of Law No. 4 of 1976.

The influence was not only impacting the adoption of legal principles or rules that were regulated under international treaties, but also from the criminal punishment requested by the said international treaties. The influence from Article 2 of the Hague Convention and Article 3 of the Montreal Convention, both of which were asking for severe punishment, was also evident under the General Elucidation of Law No. 4 of 1976, which stated that “these aviation crimes must be punished with severe criminal penalties”.³⁵⁸

Pertaining to severe penalties, the criminal punishment stipulated under Law No. 4 of 1976 were death penalty, life imprisonment, and imprisonment. Confinement and fine were not formulated as part of the criminal punishment under this law, because the threatening nature of the crimes that were committed against the safety of a flight.³⁵⁹ Law No. 4 of 1976 formulated death penalty for aviation crimes, as also stipulated under Article 479 k and Article 479 o.

Tabel 3.4 Death Penalty Articles under Law No. 4 of 1976

Article	Ketentuan
	(1) Life imprisonment or a maximum imprisonment of twenty years, shall be imposed if the act mentioned in Article 479i and Article 479j: a. is committed by two or more persons collectively;

³⁵⁶ Indonesia, *Law No. 2 of 1976*, General Elucidation.

³⁵⁷ Soedarto, *op.cit.*, pg. 16.

³⁵⁸ Compared with Article 2 of the Hague Convention and Article 3 of the Montreal Convention that stated “severe penalties”.

³⁵⁹ Prakoso, *Tindak..., op. cit.*, pg. 72.

Article 479 k	<ul style="list-style-type: none"> b. is a continuation of a conspiracy; c. is committed with premeditation; d. causes serious physical injury to a person; e. causes damage to said aircraft, such that its navigation may be endangered; f. is committed with intent to deprive a person of his liberty or to maintain the deprivation of liberty of a person <p>(2) If said act causes the death of a person or the destruction of said aircraft, the punishment shall be death penalty or life imprisonment or a maximum imprisonment of twenty years.</p>
Article 479 o	<p>(1) Life imprisonment or a maximum imprisonment of twenty years, shall be imposed if the act mentioned in Article 479i, Article 479 m, and Article 479 n:</p> <ul style="list-style-type: none"> a. is committed by two' or more persons jointly; b. is a continuation of a conspiracy; c. is committed with premeditation; d. Causes serious physical injury to a person. <p>(2) If said act causes the death of a person or the destruction of said aircraft, the punishment shall be death penalty or life imprisonment or a maximum imprisonment of twenty years</p>

The problem in regards to death penalty stipulated under Law No. 4 of 1976, is the accuracy in interpreting “severe penalties” as requested by several international treaties. It is admitted that the terminology “severe penalties” was not clearly defined under the Hague Convention and the Montreal Convention. However, the contracting states to the Hague Convention and the Montreal Convention, in general, implemented imprisonment for more than five years.³⁶⁰ The terminology “severe penalties” is related to the serious crimes and from the general standpoint, every country has different definition in formulating what is the scope of serious crime.

In Indonesian context, the term “severe penalties” that was later interpreted by the government with the phrase “*ancaman pidana yang berat*” as stated under Law No. 4 of 1976.³⁶¹ The statement from the government during the drafting process of Law No. 4 of 1976, stated that the severe criminal punishment due to the reason that the offenses regulated under this law, which is interference towards the safety of airplane and composure within an airplane, can cause a large and direct danger.³⁶² More severe criminal punishment, including the adoption of death penalty as stipulated under Article 479k and Article 479o of KUHP, according to the government, was caused by significant danger not only

³⁶⁰ Elmar Maria Giemulla and Ludwig Weber, *International and EU Aviation Law: Selected Issues*, (The Netherlands: Kluwer Law International, 2011), pg. 290.

³⁶¹ Statement from the Government pertaining to the Draft Bill on Amendment and Addition of Several Articles under KUHP in regards to Expansion of Applicability of Criminal Provisions, Aviation Crimes, and Crimes Against Aviation Facilities on 2 February 1976, Prakoso, *Tindak...*, *op.cit.*, pg. 95.

³⁶² *Ibid.*, pg. 93.

threatening to material damages and life but also trust of the international community towards the security of airports.³⁶³

3.8 Legislative Policy of Death Penalty Post-1998 Reformasi

3.8.1 Transitional Justice: A Missing Momentum for Human Rights Improvement and Enforcement

Entering the reform period since 1998, Indonesia confronted with transitional period from the New Order regime, which was authoritarian and repressive, towards a more democratic period. The transitional period towards democracy was marked with various legal supremacy development agenda through legal reform and protection of human rights. Therefore, this period is actually a period where law development is conducted in line with human right principles, including executing a correction in this case the abolishment of death penalty as a form of correction towards inherited policies, laws, and regulations that are not in accordance with democracy agenda, rule of law, and protection of human rights for citizens.

The transitional condition in Indonesia cannot be separated from the context of movement towards the age of death penalty abolition, which is one of global trends that is critical in the last few decades. During this period, institutions that were regarded having no issues whatsoever, and universally accepted, quickly transformed to be regarded as human rights violation that universally prohibited. In such transformation context, the abolition of death penalty is *de facto* and *de jure* concur with the global shift towards democracy, and coincide with the third wave of democratization.³⁶⁴

Relations between death penalty policy and the transition can be highlighted through the main obligation of the transition which stands upon the values of democratization, rule of law, security, and transitional justice. This is closely related to the new government in understanding criminal punishment.³⁶⁵ The downfall of authoritarian regime is one of contributing factors towards the decrease of death penalty in Asia and global level as well. Johnson identified several factors that caused the decrease, covering: (1) leadership from the political elites; (2) downfall of authoritarian regime; (3) increase of economic development; and (4) international human rights movement.³⁶⁶

Transitional justice³⁶⁷ has occurred in the last two decades from experience in many countries, especially in Latin America, Eastern Europe, and Africa, for the purpose of developing new norms at the

³⁶³ Response from the Government to the General Opinion of the Members of the House of Representatives regarding the Draft Bill on Amendment and Addition of Several Articles under KUHP in regards to Expansion of Applicability of Criminal Provisions, Aviation Crimes, and Crimes Against Aviation Facilities on 2 February 1976. *Ibid.*, pg. 123.

³⁶⁴ Christopher Hobson, *Democratization and the Death Penalty*, (Tokyo: Institute for Sustainability and Peace United Nations University, 2013), pg. 1.

³⁶⁵ Madoka Futamura, *Death Penalty Policy in Countries in Transition: Policy Brief*, (Tokyo: United Nations University, 2013), pg. 2.

³⁶⁶ Iqra Sulhin, *Mitos Penggantar Hukuman Mati dalam Robet dan Lubis, Politik.*, *op.cit.* pg. 87.

³⁶⁷ The term transitional justice was first coined in early 1990s. Since then, this terminology has been used to explain the expansion of mechanism and institution that constantly developing, including the court, commission of truth, commemoration project, rehabilitation and the like to rectify the mistakes made in the past, vindicate victim's dignity and provide justice during the transition period. See Susanne Buckley-Zistel, *et.al.*, *Transitional Justice Theories: An Introduction*, on Susanne Buckley-Zistel, *et.al.* (ed.), *Transitional Justice Theories*, (New York: Routledge, 2014), pg. 1.

international level, pursuant to rights to truth, justice, reparation, and assurance of non-repetition. If it is placed in the context of the appearance of this concept that was concurring with the momentum of new democratic foundation after the dictatorship in Latin America, then the concept of transitional justice mainly related to the first generation of human rights, namely the violation towards civil and political rights.³⁶⁸ To be more specific, it was related to grave crime such as massive or systematic extrajudicial killing, arbitrary detention, rape, and torture.³⁶⁹ Transitional justice at the moment is operating in various context and differ between Latin America classic cases and Eastern Europe. Therefore, many countries that implemented transitional justice not only to respond when the society faces past human rights violation, but they also have to make peace with diversity of ethnicity, religion, or language that may be the root of such violation.³⁷⁰

Human rights violations often awfully occurred within a transitional society that experiencing significant transformation in the field of politics, social, and economy. The effort to improve human rights practice in the transitional society must be the main objective for domestic reformers as well as international community. This effort not only because the intrinsic value of human rights protection, but also due to the indirect impact happened towards democratization, economic development, and conflict resolution.³⁷¹ Therefore, transtitional justice is a response towards a systematic and expanding human rights violation in the context of regime changes.³⁷²

Transitional justice refers to series of measures that is designed and implemented to improve the inherited massive human rights violations that happened during armed conflict and under authoritarian regime in the past, and rectifying such violations, especially to give power towards human rights norms that have been systematically violated.³⁷³ Transitional justice is marked with a particular shift in the political order and checking the effort from the state to improve injustice and cruelty executed by previous regime.³⁷⁴ This is affirmed by Ruti G. Teitel who stated that the creation of transitional justice terminology was aimed to explain the construction of concept of justice that is related to radical political transformation period during a repressive government.

Such political transformation is related with the post-conflict development within a country to calculate the sense regarding the existence of humanity values themselves. However, the global accountability aspiration trend is diluted with the focus towards mere regime changes and constitutional

³⁶⁸ The term transitional justice as a certain measure to handle serious human rights violation and to facilitate political transition towards democracy that was ongoing at that time in Latin America and Eastern Europe. Therefore, certain violations that were handled including civil and political problems, not economic and social issues, even though economic and social inequality existed in that context. See Roger Duthie, *Incorporating Transitional Justice into the Response to Displacement*, on Roger Duthie (ed.), *Transitional Justice and Displacement*, (Social Science Research Council, 2012), pg. 12.

³⁶⁹ Paige Arthur, *Introduction: Identities in Transition*, dalam Paige Arthur (ed.), *Identities in Transition: Challenges for Transitional Justice in Divided Societies*, (New York: Cambridge University Press 2011), pg. 1.

³⁷⁰ *Ibid.*, pg. 2-3.

³⁷¹ Shale Horowitz and Albrecht Schnabel, *Human rights and Societies in Transition: International Context and Sources of Variation*, dalam Shale Horowitz dan Albrecht Schnabel (ed.), *Human Rights and Societies in Transition: Causes, Consequences, Responses*, (Tokyo: United Nations University Press, 2004), pg. 3.

³⁷² Stephen Winter, *Transitional Justice in Established Democracies: A Political Theory*, (Hampshire: Palgrave Macmillan, 2014), pg. 4.

³⁷³ Duthie, *loc. cit.*

³⁷⁴ Stephanie Wolfe, *The Politics of Reparations and Apologies*, (New York: Springer, 2014), pg. 39.

reconstruction.³⁷⁵ Whereas, the next dimension of transitional justice is related to changes of traditional obligation that is state-based because of interest and broader non-state actors, both from the perspective of offenders and victims, as long as these are accommodated. This dimension is clearly related with globalization and the rise of private sector, as well as a weak state phenomenon. Along with these two changes, additional transformation is necessary that is aimed towards the role of law in transformation period, as the objective of transitional justice becomes more complex, not only for state development or liberalization in general, but also many problems related to conflict, including peace and security for mankind. However, these changes do not work in linear, because the possibility of creating rupture and conflict of laws and regulations norms, such as other values related to the protection of various state interest, individuals, and society.³⁷⁶

Transitional justice has gained global recognition as a general term for approaching past events after violent conflict or dictatorship regime.³⁷⁷ Furthermore, transitional justice often placed as the forefront of development strategy for transnational democratic countries, improving countries based on the rule of law, and development of peace post-conflict.³⁷⁸ Therefore, various factors that are required to established a holistic approach towards transitional justice are constituent elements completing each other, both practical and conceptual as providing recognition towards the victim, encouraging public trust, and promoting the possibility of realizing democratic order.³⁷⁹

The definition of transitional justice always related to the political change period, marked through the response of the law in facing the mistakes of the predecesing repressive regime, caused concerns. This implies a period that determined after the country experiences transition. Meanwhile, in practical terms, transition may encompass several decades, and may take place longer to overcome several problems over other issues. In addition, the problem in articulating what is meant as a transitional state, if the similar government regime executed repression or war then conducting transitional measures, whether that state can truly experiencing transition. Transitional justice that underline legal aspects

³⁷⁵ This situation is a global phase of transitional justice. It is a complex phenomenon, with several different aspects. The first aspect relates to the normalization of transitional justice, which starts from the consideration that this order is a form of justice for extraordinary period. The second aspect relates to the fundamental change due to various institutions, actors, and broader goals, in addition to state, and the purpose is evident from the imposition of punishment. At the same time, the interpretation towards transitional justice cannot be separated from the dynamic relationship between the court, legal normative substance, and politics. This relationship changes the lawmaking process significantly and the influence shifting from the state to private parties. Pursuant to this situation, law is trapped in various manners through the contestation of several actors, including NGO, individuals, corporation, and society. See Ruti G. Teitel, *Global Transitional Justice*, (Washington, D.C.: Center for Global Studies, 2010), pg. 2-4.

³⁷⁶ *Ibid.*

³⁷⁷ Padraig McAuliffe, *Transitional Justice's Impact on Rule of Law: Symbol or Substance?* on Cheryl Lawther, Luke Moffett and Dov Jacobs (ed.), *Research Handbook on Transitional Justice*, (Cheltenham:Edward Elgar Publishing Limited, 2017), pg. 82.

³⁷⁸ Lucy Hovil, *The Nexus between Displacement and Transitional Justice: A Gender-Justice Dimension*, dalam Duthie (ed.), *op.cit.*, pg. 352.

³⁷⁹ Duthie, *loc.cit.* The study regarding transitional justice is closely related to the study of democratization, a field that studies the transition towards a more democratic political regime. The study of democratization is focusing on the transition process, while the transitional justice is focusing on how the action taken by the government may improve the ruthlessness of injustice in the past. Transitional justice, in general, is understood as a part of the study of democracy transition. Meanwhile, transitional justice is a study on how an autocratic, authoritarian, or totalitarian regime is shifting to a more democratic regime, and how the succeeding government responses to the ruthlessness and injusticeness from the previous regime. See also Winter, *loc.cit*

with the emphasis on the state based on the rule of law and development of legislation related to the past that can be interpreted, the definition of transitional justice put little attention towards the role of education and culture and distributional justice.³⁸⁰

Transitional justice than is only concentrated towards the dimension of institutional change and ignore the change of culture and individuals, in contrast will impact the institutional change³⁸¹ that is aimed. Therefore, culture intervention becomes more important during the said transition period. In other words, negating the cultural and individual dimension from the transition process will limit the available instruments to conduct a wider social change. Further, a successful transition eventually must be reflected through changes on the individual perspective, including relevant principles, disposition, and attitude.³⁸² The dependency towards the pattern of transitional justice help to explain how this mechanism is often hampered by the norms and practice of pre-transition and weakened the institution that was initially aimed to strengthen the transitional justice process.³⁸³

In the concept of a state based on the rule of law within a transitional state, the obligation of discontinuity and normative dependency towards an inherited legal framework from the prior regime, with the hope that it will create a consolidation of democracy, in contrast often override the protection of other values. The deviation of conventional legality concept can be justified, as long as the conducted effort assists the the normative shift between regimes. This is also affirmed by Catherine Turner who stated that the law during transition must be placed as a sign of fundamental shifting from the legality idea, interpreting transcendent principles into the law, and providing a legal framework model that is

³⁸⁰ Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, on Naomi Roht-Arriaza and Javier Mariezcurrena (ed.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, (Cambridge: Cambridge University Press, 2006), pg. 1.

³⁸¹ Transitional justice, under literature and practical reference, reflect the institutional bias. Meanwhile, cultural and individual dimension were later abandoned from the transitional justice process. This cannot be separated from the following considerations:

1. Steps in transitional justice are determined after the brutality incident in the past. This incident showed not only the inability of the previous government regime to ensure basic rights, but also to explain the necessity of a new institution or institutional reform to prevent repeating incident. The origin of transitional in the policy after the authoritarian regime, because the existing institution not only being ineffective in protecting citizens rights, but also being responsible for the majority of violation. This rationale can help to explain such process is focused on the institutional dimension
2. The transition period is very political in statehood affairs. This period justifies renegotiation of social contracts. This means that most of political activities are directed to institutional transformation.

³⁸² Pablo de Greiff, *On Making the Invisible visible: The Role of Cultural Interventions in Transitional Justice Processes*, dalam Clara Ramírez-Barat (ed.), *Transitional Justice, Culture, and Society: Beyond Outreach*, (New York: Social Science Research Council, 2014), pg. 13-14.

³⁸³ The weakness of this institution caused by several factors. *Firstly*, the mechanism of transition usually is subject to the fast institutional design, marked by institutional loan or by copying the best practice (*isomorphic mimicry*). *Secondly*, the transitional justice mechanism is vulnerable to the poor stability and/or poor law enforcement that affecting other formal institutions. This encouraged a short-term planning and the lack of cooperation of various actors. *Thirdly*, the institutional challenger will cause impairment because the government leaders neglected the transitional justice institution without political or financial support. In the end, informal institution, such as the relationship of patron-client and corruption, will damage the implementation of transitional justice institution. See Lars Waldorf, *Institutional Gardening in Unsettled Times: Transitional Justice and Institutional Contexts*, under Roger Duthie and Paul Seils (ed.), *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, (New York: International Center for Transitional Justice, 2017), pg. 50.

more responsive directly handling justice issues.³⁸⁴ Furthermore, the UN Special Rapporteur on Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence identified four specific objectives for transitional justice, including: (1) providing recognition to the victims; (2) encouraging trust, both horizontally and vertically; (3) contribution towards social reconciliation; and (4) strengthening the state based on the rule of law.³⁸⁵

A society that is trying to handle the legacy of massive gross violations of human rights through the effort of overcoming impunity, seeking effective rehabilitation, and preventing repeating incident, are intergral part of the transitional justice concept. The context of the society that is trying to handle the legacy of past human rights violation through the means of transitional justice are varies. The contextualization covers the continuing conflict, post-authoritarian transition, post-conflict transition, and post-transition period. These factors contributed to the differences of institutional and political vulnerability, as well as economic and social development. The broader objective of the policy in such context may cover the promotion of a stated based on the rule of law, conflict resolution, peace development, vindication and protection of human rights, democratization, development, and social change.³⁸⁶

Transitional justice, as a term or context in which the society is facing transitional justice process with different level of transition. This factor is important, as transition creates an opportunity to overcome past injustice, while at the same time may maintain the continuity with the past that created obstacles to realize transitional justice. The context of the state affecting the objective and process to actualize the transitional justice, which in turn affecting the specific response that is most proper and worthy to execute in accordance with contextuality. At this point, the process referes to various methods in which ideas and movement are developed, promoted, and integrated for the sake of accountability, recognition, and reform after a massive gross violation of human rights.³⁸⁷ In regards to this, the state is responsible to respond a serious violation of international humanity, human rights, and criminal law with different method and in different situation, including during armed conflict and during peace time. Accountability, recognition, and reform for such violation may be justified as obligation and rights-based policy.³⁸⁸

At this point, the context of transition is important due to the three considerations, as follows::³⁸⁹

1. Opening opportunity to respond violations that may not appear during the authoritarian regime or during the armed conflict;
2. Such respond can provide potential contribution towards specific objective, such as vindication and human rights protection, reconciliation, democratization, laws and regulations, or peace development. The objectives depend on the transition context itself;
3. At the same time, a transition can result in limitation or specific obstacles, such as political, institutional, or material. Opportunities and obstacles occurred during the transition may be eliminated and streamed from time to time.

³⁸⁴ McAuliffe, *op.cit.*, pg. 82.

³⁸⁵ UN Human Rights Council, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, A/HRC/21/46, 9 August 2012, para. 15 and 21.

³⁸⁶ Duthie, *op.cit.*, pg. 9.

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*, pg. 10.

³⁸⁹ *Ibid.*, pg. 11.

In the context of that political regime change, the new leader that replaces the previous leader is often want to punish or neutralize the institution and the leaders of the previous regime. The new leaders during the transition process, usually limit themselves from the practice of their predecessors.³⁹⁰ The momentum of democracy transition plays important role in establishing the path of transitional justice in new democratic countries. This means that latecomer democracies have the advantage to choose its policies from a set of models, references, and practices of transitional justice that executed by many countries.³⁹¹ Moreover, Lars Waldorf showed that even though there are many issues pertaining to the term “transition”, this term regardless is useful to describe the critical junctures that involve the democratization effort or the effort of peace development that usually pioneered by an extraordinary legal moment.³⁹²

The effort to abolish death penalty, in essence, can be fast and firm, especially when there is a strong political will or advantageous momentum marked by positive change and development.³⁹³ This is in line with the prespective from Eric Neumayer who stated that political factor is not the only determining factor to abolish death penalty. The character and doctrine from certain religion may affect the implementation of death penalty in a country, because it may be regarded as an acceptable part of culture from the criminal system. However, the effort to abolish death penalty mainly determined by political factor. Even this factor is more substantially important than social or cultural factor, including the economic factor (income per capita).³⁹⁴ Similar highlights also stated by Robert that perspective towards human rights merely as a law, negates the basis and the main supposition of human rights which is the politics itself. Politics under human rights is an important element of the functional logic framework of human right itself. Robert identified the basic prerequisite so that rights can be human rights, namely: (1) in normative way, human rights is fundamental and universal; (3) human rights is under a guarantee of general political institution; (3) becomes a part of state institution legal framework.³⁹⁵

Indonesia as a country that experiencing democratic transition, is a country that still preserves death penalty as a method to undergo the transition. The momentum of transitional justice in Indonesia after the fall of Soeharto administration regime on 21 May 1998, which was assumed as a political capital to improve and enforce the universal values of human rights, was negated in the reform of criminal justice system. The direction of the politics of criminal law showed deviation with the global trend to abolish death penalty. This trend cannot be separated from the paradox of democracy after the fall of New Order authoritarian regime. Even though the democratic process and institution have resulted to regime changes, death penalty is still the political expression choice and power instrumentation of every government regime. The effort to preserve death penalty as criminal punishment for certain crimes showed that the politics of human rights is yet to change from the New Order authoritarian regime situation. Even after the Reformasi, the execution towards the death convicts showed retentionist

³⁹⁰ Jon Elster, *Introduction*, under Jon Elster (ed.), *Retribution and Reparation in the Transition to Democracy*, (Cambridge: Cambridge University Press, 2006), pg. 1.

³⁹¹ Jiwon Suh, *The Politics of Transitional Justice in Post-Suharto Indonesia*, Requirements for the Degree Doctor of Philosophy in the Graduate School of The Ohio State University, (Ohio: The Ohio State University, 2012), pg. 3.

³⁹² Duthie, *loc.cit.*

³⁹³ Didier Burkhalter, *Foreword*, under Death Penalty Worldwide, *Pathways to Abolition of the Death Penalty*, (Cornell Law School, 2016), pg. 1.

³⁹⁴ Neumayer, *op.cit.*, pg. 15-29.

³⁹⁵ Robertus Robet, *Politik Hak Asasi Manusia dan Transisi di Indonesia: Dari Awal Reformasi hingga Akhir Pemerintahan SBY*, (Jakarta: ELSAM, 2014), pg. 8.

politics is strengthening. The legislative reform which was part of the Reformasi agenda did not eliminate death penalty from the main punishment, even though the political system seemed more democratic.

After the fall of President Soeharto administration, the People's Consultative Assembly (MPR) organized Extraordinary Session on November 1998. One of the results from the Extraordinary Session is MPR Decree No. V MPR/1998 on Principles of Development Reform for Securing and Normalizing National Statehood as State Guideline. Under the MPR Decree, which was also known as "Mini GBHN", several political direction of national legal framework were formulated, aimed to the enforcement and implementation of law with the objective to actualize public orders, serenity, and tranquility. The reform agenda that were agreed upon are as follows:³⁹⁶

1. Firm separation of the function and authority of law enforcement apparatus to achieve perfect proportionality, professionalism, and integrity;
2. Improving the support of legal tools and infrastructures that guarantee the fluency and continuity of law as national statehood regulator;
3. Affirming the respect and appreciation towards human rights through law enforcement and the improvement of legal awareness for all society;
4. Issuing Law on State Safety and Security to replace Law No.11 /PNPS/1963 on Eradication of Subversive Crime.

From the result of the MPR Extraordinary Session, one of the most important points to be addressed is in regards to affirmation of the acknowledgement and appreciation towards human rights through law enforcement and improvement of legal awareness for the society.

In line with that concern, the first legislation regarding the guarantee of right to life as part of non-derogable rights in any circumstances, is formulated under Article 4 of Law No. 39 of 1999 on Human Rights which stated that:³⁹⁷

"The right to life, the right to not to be tortured, the right to freedom of the individual, to freedom of thought and conscience, the right not to be enslaved, the right to be acknowledged as an individual before the law, and the right not to be prosecuted retroactively under the law are human rights that cannot be diminished under any circumstances whatsoever."

In addition, MPR during the annual session in 2000 has determined the Second Amendment to the 1945 Constitution, which declared that the right to life is part of constitutional rights guaranteed under the 1945 Constitution. The formulation of the right to life is promulgated under Article 28A of the 1945 Constitution "Every person shall have the right to live and to defend his/her life and existence".

It is important to note that the right to life formulated under Article 28A is declared as part of absolute right of every person and included as non-derogable rights which is right that cannot be diminished under any circumstances, as promulgated under 28I (1) *"The rights to life, freedom from torture,*

³⁹⁶ Azis Budianto, *Pembangunan Politik Hukum Pasca Reformasi di Indonesia*, (Jurnal Lex Librum Vol. III, 2016), pg. 437.

³⁹⁷ Other provision related to the guarantee of the right to life can be found under Article 9, which states that: (1) *Everyone has the right to life, to sustain life, and to improve his or her standard of living;* (2) *Everyone has the right to peace, happiness, and well-being;* (3) *Everyone has the right to an adequate and healthy environment.*

freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances.”

With the formulation of the right to life under the 1945 Constitution, the right to life as absolute right (non-derogable right) becomes constitutional rights, because its higher status under the hierarchy of legal norm. The further legal implication from the constitutionality of the right to life is that all policies and discretion from the government must be in accordance with the provisions regarding the right to life. At the same time, no more policies in the form of law or other laws and regulations are allowed to be in contradiction with the right to life as constitutional right.³⁹⁸

Similar affirmation also addressed by R. Herlambang Perdana Wiratraman who stated that the guarantee of human rights that became broader under the articles of the 1945 Constitution can be considered as progress in establishing the foundation of law to strengthen the social contract between the government and the society under the Indonesian constitution framework. Therefore, the spirit of constitutionalism must put forward two main level of the politics of law of the constitution. *Firstly*, the limitation of power to prevent arbitrary actions. *Secondly*, the guarantee towards respect, protection, and fulfillment of human rights.³⁹⁹ Therefore, all legislation after the formulation the constitutionality of the right to life as non-derogable rights under Article 28I of the 1945 Constitution, cannot be in contradiction with the said constitution norm.

The two legal instruments regulated the right to life of a person as absolute right. However, laws and regulations that contained death penalty were increasing after the fall of President Soeharto regime.

In that context, the motivation of every government regime to formulate death penalty under legislation and implement that norm as criminal law enforcement, can be assumed has the connection with the interest and objectives of each regime. Differences in motivation that underlies the legislation and the implementation of death penalty clause can be seen from the following historical timelines.⁴⁰⁰ The implementation of death penalty during the period before Reformasi, was addressed towards the perpetrators of political crimes (subversion) as described by the table below:⁴⁰¹

Tabel 3.5. Comparison on the Implementation of Death Penalty

Government Regime	Motivation
President Soekarno	The implementation of death penalty was caused by the history of rebellion. Death penalty was imposed towards the rebels of RMS, DI/TII, and PRRI.
President Soeharto	Death penalty was imposed towards individuals that were accused

³⁹⁸ Jimly Asshiddiqie, *Green Constitution: Nuansa Hijau Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, (Jakarta: Rajawali Pers, 2009), pg. 91

³⁹⁹ R. Herlambang Perdana Wiratraman, *Hak-Hak Konstitusional Warga Negara Setelah Amandemen UUD 1945: Konsep, Pengaturan dan Dinamika Implementasi*, (Jurnal Hukum Panta Rei, Vol. 1, No. 1, Konsorsium Reformasi Hukum Nasional, 2007).

⁴⁰⁰ Benny Hari Julyawan, *Hukuman Mati Sebagai Pertunjukkan Kekuasaan Negara* under Lucia Ratih Kusumadewi and Gracia Astriningsih (ed.), *Menolak Hukuman Mati: Perspektif Intelektual Muda*, *op.cit.*, pg. 44-45

⁴⁰¹ Benny Hari Julyawan, *ibid.*,. See also Julyus Ibrani, *Pidana Mati Zainal Abidin: Potret Imajinasi Sang Pengadil* under Koalisi Hapus Hukuman Mati (Koalisi Hati), *Unfair Trial: Analisis Kasus Terpidana Mati di Indonesia*, (Jakarta: Imparsial, 2016), pg. 105 - 107

committing political crimes, murder, terrorism, and narcotic.

During the Reformasi of 1998, death penalty was no longer imposed towards individuals that were accused to commit subversion. The rise of democracy has made this type of accusation much more difficult to be accepted by the society. During the reformasi, death penalty was mostly imposed towards the perpetrators of narcotic crime.⁴⁰² The implementation of death penalty by every regime after Reformasi and the underlying motivation are described by the table below:

Tabel 3.6 Comparison of Death Penalty Implementation during Reformasi

Government Regime	Motivation
President Susilo Bambang Yudhoyono	Death penalty is imposed towards the perpetrators of murder, terrorism, and narcotic.
President Joko Widodo	Death penalty is imposed towards the perpetrators of narcotic crimes with the justification of emergency situation. Death penalty is imposed towards the perpetrators of child sexual abuse.

Reviewing the abovementioned justification, the reason to justify death penalty as an effort to generate deterrent effect, usually underlied by the justification referring to the cultural and political interpretation that required control instrument through criminal policy. This excuse is not in line with eh findings from Hood and Hoyle, who stated that mainly among the factors that have encouraged the new movement to abolish death penalty as a political movement. The political movement to change the consideration of death penalty from an issue that decided merely on or mainly as the aspect from national criminal justice policy, fundamental violation of human rights. In addition, this new dynamic also adopts a perspective that death penalty is not a problem that must be judged based by cultural or socio-political values. The distribution of international human rights norms, make it impossible that cultural relativism reason or national sovereignty to define what can be considered as universal rights, in particular right to life and/or right to free from cruel treatment or punishment, inhuman, and degrading to human dignity.⁴⁰³ Futher, human rights approach reject the justification of death penalty, which are revenge and the obligation to redeem the crimes that interfering with the citizens.⁴⁰⁴

3.8.2 Death Penalty under Law No. 31 of 1999 on Eradication of Corruption Crime

Corruption problem is one of many issues in Indonesia that seems to be unsolved. From historical perspective, corruption in Indonesia can be traced since the VOC period until 31 December 1799, when the VOC was declared bankrupt, as it cannot pay its debt due to corruption committed by its management.⁴⁰⁵ During the VOC period, the practice to pay for a job position and cost other than the

⁴⁰² Benny Hari Julyawan, *ibid.* See also, Julyus Ibrani, *ibid.*, pg. 119

⁴⁰³ This movement was getting stronger as many countries emerged from totalitarian and colonial repression and they started to embrace the values of democracy and freedom, to protect citizens from state power and tyranny. See Roger Hood and Carolyn Hoyle, *Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic*, (Crime and Justice, Vol. 38, No. 1, 2009), pg. 16-17

⁴⁰⁴ Human rights approach towards death penalty issue does not have any political power, if two post-war political entities, namely the Council of Europe and the European Union did not fully support this effort. These two institutions were committed to propagate the goal from a death penalty free continent to a death penalty free world. See Hood and Hoyle, *ibid.*, pg. 22.

⁴⁰⁵ Shahab, *Korupsi...*, *loc.cit.*

salary was common. The corruption was not only committed by low-level VOC employees, but also by high-ranking officials. Alwi Shahab described Governor General Van der Parra as the governor general who lived luxuriously and often appointed his family members to hold high-ranking office at the VOC.⁴⁰⁶

The effort to eradicate corruption in the Dutch Indies has been executed at that time. It was recorded that King Louis Bonaparte, who ruled the Netherlands during 1806 – 1810 gave the special task to Governor General Herman Willem Daendels to clean the government of the Dutch Indies from corruption, inherited by the VOC.⁴⁰⁷ In doing such task to eradicate corruption, Daendels opted to conduct bureaucracy reform, among other by disbanding the local government of Java Sea Eastern Coast, prohibiting officials from spending tributes (*uang bekti*), and constructing Trans-Java highway.⁴⁰⁸

Entering the early period after the independence, corruption eradication was also carried on. At that time, many high-ranking officials were tried at the Court with corruption charges. For instance Mr. Djody Gondokusumo (Minister of Justice), Iskaq Tjokrohadisurjo (Minister of Economy), and Jusuf Wibisono (Minister of Finance), were amongst the officials that during the early period after the independence accused to commit corruption.⁴⁰⁹ On 20 August 1955, Prime Minister Burhanuddin Harahap prioritized the corruption eradication as one of his cabinet programs, in order to redeem the government authority and the trust from the public and the military to the government.⁴¹⁰

3.8.2.1 Legislative Policy on Corruption Eradication during Pre-New Order Era

The clauses regarding corruption crime during the pre-New Order period, which also applicable during pre-independence era, were referring to the clauses as stipulated under KUHP. There are at least 15 articles under KUHP that formulate corruption crime.

Table 3.7 Stipulation of Corruption Crime under KUHP

No	Article	Clause
1.	Article 52	If an official by committing a punishable act violates a special official duty or by committing a punishable act employs the power, opportunity or means conferred upon him by his office, the punishment may be enhanced with one third."
2.	Article 209	By a maximum imprisonment of two years and eight months or a maximum fine of three hundred Rupiahs shall be punished: 1. any person who gives a gift or makes a promise to an official with intent to move him to commit or omit something in his service contrary to his duty; 2. any person who gives a gift to an official following or in pursuance of what this official has committed or omitted in his service in contravention of his duty. Deprivation of the rights mentioned in article 35 nos. 1-4 may

⁴⁰⁶ Shahab, *Kisah...*, *loc.cit.*

⁴⁰⁷ Peter Carey and Suhardiyoto Haryadi, *Korupsi dalam Silang Sejarah Indonesia*, (Jakarta: Komunitas Bambu, 2016), pg. 2.

⁴⁰⁸ *Ibid.*, pg. 12 and 37.

⁴⁰⁹ Bonnie Triyana, *Korupsi*, *Historia*, 25 March 2017, <<http://historia.id/kolom/korupsi>>, accessed on 1 October 2017.

⁴¹⁰ Hendri F. Isnaeni, *Keadaan Darurat Korupsi*, *Historia*, 27 September 2012, <<http://historia.id/modern/keadaan-darurat-korupsi>>, accessed on 1 October 2017.

		be imposed.
3.	Article 210	<p>(1) By a maximum imprisonment of seven years shall be punished:</p> <p>1. any person who gives a gift or makes a promise to a judge with intent to exercise influence on the decision on a case which has been submitted to his judgement;</p> <p>2. any person who gives a gift or makes a promise to a person who by virtue of statutory provisions has been designated counsellor or advisor to attend the sessions of a court, with intent to exercise influence upon the advice or opinion to be brought out by him concerning a case which has been submitted to the judgement of the court.</p> <p>(2) If said gift is given or promise is made with intent to obtain a verdict in a criminal case, the offender shall be punished by a maximum imprisonment of nine years.</p> <p>(3) Deprivation of the rights mentioned in Article 35 first to fourthly may be imposed.</p>
4.	Article 387	<p>1) By a maximum imprisonment of seven years shall be punished any master builder or any architect of a work or any seller of building materials who in performing the work or the delivery of the materials commits a fraudulent act, as a result of which the security of persons or property, or the security of the state in time of war may be endangered.</p> <p>(2) With the same sentence shall be punishable any person who, charged with the supervision of the work or of the delivery of the materials, with deliberate intent allows the fraudulent act.</p>
5.	Article 388	<p>(1) Any person who in the delivery of materials for use by the navy or the army commits a fraudulent act, as a result of which the security of the state in time of war may be endangered, shall be punished by a maximum imprisonment of seven years.</p> <p>(2) By the same sentence shall be punished any person who, charged with the supervision of the delivery of the goods, with deliberate intent allows the fraudulent act</p>
6.	Article 415	Any official or any other person continuously or temporarily in charge of a public service who deliberately embezzles money or securities which he in service has under his custody, or allows them to be taken away or embezzled by another, or thereby aids the other person as an accomplice, shall be punished by a maximum imprisonment of seven years.
7.	Article 416	Any official or any other person continuously or temporarily in charge of a public who with deliberate intent falsely draws up or falsifies books or registers, exclusively designed for the control of the administration, shall be punished by a maximum imprisonment of four years.
8.	Article 417	Any official or any other person continuously or temporarily in charge of a public service who with deliberate intent embezzles, destroys, damages or renders useless property intended to serve' as a conviction or as a proof before the competent authority, deeds, documents or registers which he in service has under his custody, or allows them to be mislaid, destroyed, damaged or rendered useless by another, or thereby aids the other person as an accomplice, shall be punished by a maximum imprisonment of five years and six months.
9.	Article 418	Any official who accepts a gift or promise, knowing or having reason to believe that it is given to him with a view to a power or competence which

		is related to his office, or which is related to it in the opinion of the person who makes the gift or promise, shall be punished by a maximum imprisonment of six years or a maximum fine of four thousand five hundred rupiahs.
10.	Article 419	By a maximum imprisonment of five years shall be punished any public officer: 1. who accepts a gift or promise, knowing that it is given to him in order to move him, contrary to his duty, to do or to admit something in his service; 2. who accepts a gift, knowing that it is given to him as a result or on account of what has been done or omitted by him in his service contrary to his duty.
11.	Article 420	(1) By a maximum imprisonment of nine years shall be punished: 1. any judge who accepts a gift or promise, knowing that it is given to him in order to exercise influence on the decision of a case which has been submitted to his judgment; 2. any person who, in compliance with statutory provisions designated as counsellor or as adviser to attend the session of a court of justice, accepts a gift or promise, knowing that it is given or made to him in order to exercise influence on the advice or opinion given by him concerning a case that has been submitted to the judgment of the court. (2) If said gift or promise is accepted in the consciousness that it is made to obtain a conviction in a criminal case, the offender shall be punished by a maximum imprisonment of twelve years.
12.	Article 423	Any official who with intent to unlawfully benefit himself or another by misuse of power, forces someone to give off something, to make a payment, to accept a withholding of payment, or to perform a personal service, shall be punished by a maximum imprisonment of six years.
13.	Article 425	Being guilty of extortion shall be punished by a maximum imprisonment of seven years: 1. any official who in the exercise of his service demands or accepts or withholds payment, as being due to him, to another official or to a public fund, which he knows is not due; 2. any official who in the exercise of his service demands or accepts personal services or deliveries as being due, knowing that they are not due; 3. the official who in the performance of his service, as being due in compliance with the relative provisions, disposes of lands belonging to the state on which Indonesian rights of use are exercised to the prejudice of the rightful claimant, knowing that he thereby acts contrary to said provisions.
14.	Article 426	(1) Any official who, being in charge of the custody of someone who by public authority or by virtue of a judicial verdict or decree has been deprived of the liberty, with deliberate intent allows him to escape or releases him or aids him in his release or self-release, shall be punished by a maximum imprisonment of four years. (2) If the escape, release or self-release is due to his fault (negligence), he shall be punished by a maximum light imprisonment of two months or a maximum fine of three hundred rupiahs.
15.	Article 435	Any official who with deliberate intent takes part, directly or indirectly, in tenders, deliveries or leases, over which at the moment of the act he has been wholly or partially charged with the management or supervision, shall

		be punished by a maximum imprisonment of nine months or a maximum fine of eighteen thousand .
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Under the corruption crime clauses mentioned above, there are no death penalty to be imposed and the maximum punishment is only imprisonment. The maximum punishment can be found under Article 420 KUHP that stipulates 12 years of imprisonment, if a perpetrator committed a passive bribery towards judges and lawyers. Meanwhile, the minimum punishment is found under Article 435 KUHP, for the abuse of power and other misconduct.

With the clauses promulgated under KUHP, the government is of the view that there is a necessity of specific provisions, considering that corruption is a systemic crime in Indonesia and therefore it requires a hard and firm measures against corruption. In the view of the government, rampant corruption will damage the society and the state itself.⁴¹¹ After the General Election in 1955, the government drafted a draft bill that established a separate court to try corruption cases in Jakarta, Surabaya, Makassar, and Medan. This draft bill will adopt the principle of reverse burden of proof and the elimination of the Attorney General's authority limitation, so that he can exercise his authority freely. However, this Draft Bill was not further processed.⁴¹²

With the domestic political situation was getting worse, in March 1957, the government declared an emergency situation, which allowed the military to intervene to the civilian matters.⁴¹³ Afterwards, the Military Authority issued anti-corruption regulations. In 1957, there were three regulations issued by the military authority to eradicate corruption, namely:⁴¹⁴

1. Military Authority Regulation No. PRT/PM-06/1957 dated 9 April 1957;⁴¹⁵
2. Military Authority Regulation No. PRT/PM-08/1957 dated 27 May 1957; and
3. Military Authority Regulation No. PRT/PM-011/1957 dated 1 July 1957.

In 1958, the three regulations were later replaced with two regulations from the war authority, namely:

1. Central War Authority Regulation (Chief of Staff of the Army as the Central War Authority for the Army) No.Prt/Peperpu/031/1958 dated 16 April 1958; and
2. Decree of the Chief of Staff of the Navy (Chief of Staff of the Navy as the Central War Authority for the Navy) No.Z.1/I/7 dated 17 April 1958 on Investigation, Prosecution, and Examination of Corruption Crime and Property Ownership

Under the Central War Authority Regulation No.Prt/Peperpu/031/1958, the provisions were aimed to enable the function of the law for corruption eradication. This regulation was accompanied with rules

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*

⁴¹³ David T. Hill, *Pers di Masa Orde Baru*, (Jakarta: Yayasan Pustaka Obor Indonesia, 2011), pg. 27.

⁴¹⁴ Rudy Satriyo Mukantardjo, *Aspek Hukum Pemberantasan Korupsi*, (Jakarta: Badan Pembinaan Hukum Nasional, 2008), pg. 23.

⁴¹⁵ Pursuant to Military Authority Regulation No. PRT/PM-06/1957 dated 9 April 1957, the term corruption as a legal term was firstly introduced, "*Considering the lack of continuity of the measures taken to eradicate the actions that damage the state finance and economy named by the general public as corruption, it is necessary to determine a work procedures to infiltrate the stagnancy in eradicating corruption and so forth*". See Tumian Lian Daya Purba, *Pemidanaan Sebagai Salah Satu Sarana dalam Penanggulangan Tindak Pidana Korupsi*, Jurnal Hukum dan Masyarakat Vol. 14, No. 2, (Jayapura: Universitas Cendrawasih, April 2015), pg. 86.

and norms that aimed to catch corruptors, both from criminal law measures and civil law measures, along with the publication of the list of state official's assets as a preventive instrument.⁴¹⁶

Before the end of President Soekarno administration, another regulation was issued namely Perppu No. 24 of 1960 on Investigation, Prosecution, and Examination of Corruption Crime. The law explained that the corruption eradication measures since 1958 were only temporary solution that were necessary to tear down corruption practices. With the issuance of Perppu No. 24 of 1960, the government was of the view that extraordinary measures were no longer required.⁴¹⁷ During the period of Perppu No. 24 of 1960, death penalty was yet to be introduced. However, the maximum punishment that can be imposed by the court was 12 years of imprisonment for corruption and bribery.⁴¹⁸

3.8.2.2 Legislative Policy on Corruption Eradication during New Order Era

During the early days of the New Order administration, the government issued Presidential Decree No. 228 of 1967 on Establishment on Corruption Eradication Team.⁴¹⁹ This team was assigned the duty to help the government in eradicating corruption with repressive and preventive measures.⁴²⁰ In line with this effort, the government and parliament were later issued Law No. 3 of 1971 on Eradication of Corruption Crime. This law aggravate the punishment under Perppu No. 24 of 1960 with the consideration "*damages and dangers caused by corruption crime*".⁴²¹

In order to strengthen the corruption eradication agenda as stipulated under Law No. 3 of 1971 on Eradication of Corruption Crime, several implementing regulations to the Law No. 3 of 1971 on Eradication of Corruption Crime were also issued, among others:

1. Presidential Decree No. 52 of 1971 on Tax Report for State Officials and Civil Servants;
2. GBHN of 1973 on Development of Precipice and Clean Apparatus in State Management;
3. GBHN of 1978 on Policies and Measures in Controlling State Apparatus from Corruption Problems, Abuse of Power, Leak and Wasteful State Finance, Illegal Charges and other Misconduct that hamper the State Development;
4. Presidential Directive No. 9 of 1977 on Control Operation; and
5. Law No. 11 of 1980 on Crime of Bribery

3.8.2.3 Legislative Policy on Corruption Eradication during Reformasi Era

During Reformasi era, in particular under President BJ Habibie Administration, the corruption eradication agenda became the politics of law and was an important part of the reform agenda. The Poeple Consultative Assembly issued MPR Decree No. XI/MPR/1998 on Good Governance Free from Corruption, Collusion, and Nepotism. The MPR Decree firmly stated that there were collusion practices taht damaged the state governance and for the purpose of national statehood rehabilitation, it was

⁴¹⁶ Mukantardjo, *op. cit.*, pg. 52-53.

⁴¹⁷ Indonesia, *Government Regulation in lieu of Law No. 24 of 1960*, General Elucidation.

⁴¹⁸ *Ibid.*, Article 16 and Article 17.

⁴¹⁹ Denny Indrayana, *Jangan Bunuh KPK*, (Malang: Intrans Publishing, 2016), pg. 21.

⁴²⁰ *Ibid.*

⁴²¹ Indonesia, *Law No. 3 of 1971 on Eradication of Corruption Crime*, Elucidation of Article 28.

necessary to create good governance that can be trusted and free from corruption, collusion, and nepotism practices.⁴²²

At the same time, strong pressure to create a law on corruption eradication with severe punishment was also risen. One of the strong demands and aspirations from the general public was the imposition of death penalty towards corruptors. The public was of the view that death penalty is the effort to achieve a more effective purpose to prevent and eradicate corruption crime.⁴²³ It was recognized that corruption crimes caused by three main factors, namely the presence of pressure, the presence of opportunities, and the presence of rationalization and therefore the fraud can be considered reasonable.⁴²⁴

The demands from the general public was later responded by the government and parliament by issuing Law No. 31 of 1999 on Eradication of Corruption Crime. Under this law, it is clearly stated that corruption is harming the state finance or economy and hampering the growth and continuity of national development that requires high efficiency.⁴²⁵

Pursuant to Law No. 31 of 1999, for the first time in history, since the regulations on corruption eradication issued by the government, death penalty can be charged for corruption crime. In particular, this law determined the death penalty charge for the purpose of a more effective corruption prevention and eradication.⁴²⁶ The use of death penalty as one of criminal policy tools (crime prevention policy) in particular to mitigate corruption in Indonesia through the issuance of this law, was considered as reasonable.⁴²⁷ As a note, with the new clauses, Law No. 31 of 1999 is the most severe and tough anticorruption law in the ASEAN region.⁴²⁸

Death penalty is stipulated under Article 2 (2) of Law No. 31 of 1999, which stated that:

- (1) *Anyone unlawfully enriching himself and/or other persons or a corporation in such a way as to be detrimental to the finances of the state or the economy of the state shall be liable to life in prison, or a prison term of not less than 4 (four) years and not exceeding 20 (twenty) years and a fine of not less than Rp 200,000,000 (two hundred million rupiah) and not exceeding Rp 1,000,000,000 (one billion rupiah).*
- (2) *In the event that corruption as referred to in paragraph (1) is committed under certain circumstances, capital punishment may be applied.*

Article 2 of Law No. 31 of 1999 provides the affirmation that death penalty may be imposed if the corruption act is committed in “certain circumstances”. The definition of “certain circumstances” is as follows:

⁴²² Indonesia, MPR Decree No. XI/MPR/1998 on Good Governance Free from Corruption, Collusion, and Nepotism, Consideration.

⁴²³ Barda Nawawi Arief, *Kebijakan Reformulasi Ancaman Pidana Mati Tindak Pidana Korupsi Dalam Peraturan Perundang – Undangan*, (Semarang: MMH, Jilid 42, No. 1. January 2013), pg. 24.

⁴²⁴ Suradi, *Korupsi di Sektor Pemerintahan dan Swasta*, (Jogjakarta: Gaya Media, 2006), pg. 101.

⁴²⁵ Indonesia, *Law No. 31 of 1999 on Eradication of Corruption Crime*, Consideration.

⁴²⁶ *Ibid.*, General Elucidation.

⁴²⁷ Arief, *Kebijakan...*, *op.cit.*, pg. 24.

⁴²⁸ Andi Hamzah, *Pemberantasan Korupsi ditinjau dari Hukum Pidana*, (Jakarta: Pusat Studi Hukum Pidana Universitas Trisakti, 2002), pg. 69.

“What is meant by certain circumstances in this provision is intended as a liability for the perpetrators of corruption if the offense is committed when the country is in a state of danger according to the prevailing law, in the event of a national natural disaster, as a repetition of a criminal act of corruption, or time state in a state of economic and monetary crisis.”

As a comparison, the definition of “certain circumstances” was later updated by Law No. 20 of 2001 on Amendment to Law No. 31 of 1999 on Eradication of Corruption Crime. The definition of “certain circumstances” under the new provision is as follows:

“Referred to as “certain circumstances” is the circumstance that may serve as a reason for meting out heavier punishment to those embezzling funds earmarked for the control of emergency state, national disaster, widespread social unrest, economic and monetary crisis, and corruption offenses.”

Certain circumstances as provided under Article 2 of Law No. 20 of 2001 was a punishment option that can be found under Article 2 mentioned above. This was underlied by situation and condition that may happened when a corruption is committed, such as corruption towards the funds allocated for emergency mitigation, national natural disaster, mitigation of widespread social unrest, mitigation of economic and monetary crisis, and mitigation of corruption crime. Certain circumstances becomes the legal charge in imposing death penalty for corruptors, if one of the acts is committed by the corruptor.

The reason of certain circumstances as stipulated under Article 2 became debates within the human rights activism circle, because this term was deemed ineffective in reducing the number of corruption in Indonesia. In addition, the requirements under certain circumstances can be declared ineffective as it must satisfy the requirements, and if a person that committed mega corruption valued billions of rupiahs, while the money that he corrupted was not originated from the allocated state budget as stated under the requirement of certain circumstances or recurring corruption crime, then death penalty cannot be imposed towards the perpetrator.

As stated by ICW researcher, Donal Fariz, the implementation of death penalty as stipulated under Article 2 (2) of Corruption Law. Therefore, there is no necessity to create an umbrella provision to stipulate such clause. However, in order to implement death penalty for corruption, it cannot be automatically imposed if the state is not under disaster or economic crisis. “The implementation of death penalty can be imposed when the state in under disaster emergency situation or economic crisis. The problem is such condition cannot be pushed. Therefore the nature of such situation is circumstantial”.⁴²⁹ Only corruption that satisfies the requirements of certain circumstances that can be charged with death penalty, and also taking into consideration the reasoning from the judge on whether death penalty is required or not. Therefore, the role of the judge is also affecting the decision in imposing death penalty under the Corruption Law.

Law No. 31 of 1999 was later revised by Law No. 20 of 2001 on Amendment to Law No. 31 of 1999 on Eradication of Corruption Crime. During the discussion to revise Law No. 31 of 1999, one faction at the parliament adressed the issue on death penalty, which was the Army/Police faction. They proposed revision towards the elucidation of Article 2 (2) regarding certain circumstances, which was initially defined as situation and condition, place, and time when the corruption is committed, into corruption

⁴²⁹ Vonis mati bagi koruptor layak diterapkan, <<http://kpk.go.id/id/nukpk/id/berita/berita-sub/547-vonis-mati-bagi-koruptor-layak-diterapkan>>, accessed on 6 December 2017.

that is committed towards the allocated state budget for the mitigation of certain situation and condition.⁴³⁰ This elucidation, according to Army/Police faction was a step forward from the government, therefore the death penalty charge for corruptor can have a broader coverage.⁴³¹ In addition, the Army/Police faction added another element into Article 2 (2), which was the element of “mitigation caused by widespread social unrest”, with the justification to protect the allocated state budget for rehabilitation after social unrest to prevent irregularities, considering that the criminal charge is death penalty.⁴³²

A question arised later, which was whether death penalty provision under Law No. 31 of 1999 was not operational/functional enough in order to eradicate corruption?.⁴³³ The death penalty charge under Law No. 31 of 1999 considered as a serious effort from the government and parliament at that time to eradicate corruption. However, the fact showed that after 11 years the law is enforced, there was no corruptors that have been charged with death penalty. It was different with narcotic crime offenders (dozens of them) that have been executed.⁴³⁴

Romli Atmasasmita said that death penalty under the Corruption Eradication Law is not effective, as since the law was enforced, there is no single corruptor who has been executed until today. Atmasasmita also added that Indonesia should focus on prevention and no longer threatening to impose death penalty towards corruption defendant.⁴³⁵ Atmasasmita opined that it is better for Indonesia to model China, a country that is no longer threatening death penalty towards corruption defendant, but started to execute prevention, so that corruption no longer continuing in the country. China is now learning from South Korea to conduct prevention towards corruption crime.⁴³⁶

However, Atmasasmita added that the stipulation or determination of death penalty as one of the tools to mitigate crimes, in essence is a policy choice. When determining a police, a person can be a supporter or opponent of death penalty. Nonetheless, after a police is determined/affirmed and later formulated under a law, then from the penal policy perspective and the policy of death penalty formulation, it is to be expected that such policy can be implemented during the application phase.

Sinintha Yuliansih Sibarani elaborated that as of today, there is no single corruption crime case that has been imposed with death penalty, due to the lack of similarty between the judges in regards to the definition of corruption crime itself. Some of the judges are of the view that corruption crime is regarded as an extraordinary crime, systematic and endemic in nature with widespread impact, and therefore in order to handle such crime it is required to take comprehensive extraordinary measures, including death penalty. Some other judges, in contrast, viewed that corruption is only a common crime, and the effort to handle it does not require death penalty. This specific perspective is pursuant to human rights.⁴³⁷

⁴³⁰ Dewan Perwakilan Rakyat, *Risalah Sidang Pembahasan Revisi Undang-Undang Nomor 31 Tahun 1999 tentang pemberantasan tindak pidana korupsi*, June 2001.

⁴³¹ *Ibid.*

⁴³² *Ibid.*

⁴³³ Arief, *Kebijakan..., op.cit.*, pg. 26.

⁴³⁴ Barda Nawawi Arief, *Pidana Mati, Perspektif Global, Pembaharuan Hukum Pidana dan Alternatif Pidana Untuk Koruptor*, (Semarang: Pustaka Magister, 2012), pg. 54.

⁴³⁵ Interview with Romli Atmasasmita, 18 September 2017.

⁴³⁶ *Ibid.*

⁴³⁷ Risva Fauzi Batubara, Barda Nawawi Arief, and Eko Soponyono, *Kebijakan Formulasi Pidana Mati Terhadap Pelaku Tindak Pidana Korupsi Di Indonesia*, (Semarang: Jurnal Law Reform, 2014), pg. 79.

Corruption that is rampant in Indonesia under a systematic situation in all livelihood of the society, has threatened the effort to conduct sustainable development and to achieve the welfare of Indonesian society. During the early period of reform, one of the demands and aspirations from the general public was the imposition of death penalty towards corruptors. The public was of the view that death penalty is a measure to achieve a more effective objective in order to prevent and eradicate corruption crime. Therefore, death penalty for corruption crime was formulated under Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 on Corruption Crime.⁴³⁸

Shidarta opined that death penalty under the Corruption Law formulated by the parliament and the government, was caused by the demands from the public, which at that time wanted a severe punishment towards corruptors, that can be a shock therapy for the perpetrator. Shidarta added, this showed that legal awareness was not developed when formulating death penalty under the Corruption Law, but using emotion that play important role in the formulation of death penalty under the legislation, due to the significant demand from the public at that time.⁴³⁹

Karni Ilyas, one of the opponents of death penalty under the Corruption law, said that corruption took place due to a system that provides opportunity to conduct corruption. If the corruption prevention system is better, then corruption can be eliminated. He took examples from the developed countries, most of the people there are afraid to conduct corruption, as the system is already running well. To improve the system in Indonesia from corruption, it has to be started from the selection of state civil apparatus.⁴⁴⁰

3.8.3 The Politics of Law of Death Penalty under Law No. 26 of 2000 on Human Rights Court

After the fall of New Order authoritarian regime and the start of Reformasi era, the demand was skyrocketed to solve various human rights in previous years and change at instrumental level to encourage law enforcement and respect towards human rights. One of the most important instrument that was issued during this Reformasi period was the establishment of the mechanism of human rights violation case resolution through the Human Rights Court. The issuance of Human Rights Court mechanism was accelerated due to pressure from the UN Human Rights High Commission in 1999, after the alleged gross violation of human rights in East Timor during the referendum in 1999. The pressure encouraged the government of Indonesia under President Habibie to issue Government Regulation in lieu of Law No. 1 of 1999, announced by the President on 8 October 1999, three days before the accountability speech (*pidato pertanggungjawaban*) was delivered before MPR.⁴⁴¹

The issuance of this Perppu at least showed the international community that the Indonesian government had the willingness to establish human rights court at domestic level. However, the presence of this Perppu was rejected by the parliament during the plenary meeting in March 2000, as it was regarded as lack of constitutional argument in regards to emergency situation. In just less than

⁴³⁸ *Ibid.*, pg. 24.

⁴³⁹ Interview with Shidarta, 29 October 2017.

⁴⁴⁰ Interview with Karni Ilyas, 6 October 2017.

⁴⁴¹ Zainal Abidin, *Pengadilan Hak Asasi Manusia di Indonesia: Regulasi, Penerapan dan Perkembangannya*, Makalah untuk Kursus HAM Pengacara ke XIV, ELSAM, 27 October 2010, pg. 1. <http://referensi.elsam.or.id/wp-content/uploads/2014/09/25.-Pengadilan-Hak-Asasi-Manusia-di-Indonesia_Regulasi-Penerapan-dan-Perkembangannya.pdf>, accessed on 4 November 2017.

two weeks after the rejection from the parliament, the government proposed Draft Bill on Human Rights Court. The pressure on the possibility of the establishment of international tribunal has forced the government to propose a new draft legislation to replace the Perppu. During this time limitation, the discussion process of the Draft Bill was concluded in less than seven months. In November 2000, the parliament passed the draft bill, which was later issued under Law No. 26 of 2000 on Human Rights Court.⁴⁴²

Law No. 26 of 2000 stipulates two types of crimes that can be charged with severe punishment, namely the crime of genocide and crimes against humanity. These crimes are the crimes that considered the most serious crimes by the international community and deserved to have more indictment and even no amnesty for the perpetrator. These two crimes based on the international law are prohibited from obtaining amnesty.⁴⁴³ In the event that genocide and crimes against humanity occurred, then every country has the duty and responsibility to prosecute and convict in proportion the perpetrators and will not grant amnesty toward the officials and state officers until they are prosecuted before the court. Therefore, there is a state responsibility to convict the perpetrator and provide compensation to the victims.⁴⁴⁴

The crime of genocide and crimes against humanity have a very special status under the international law. These crimes are the most crimes of international concern as a whole. Both crimes are considered as violations towards *jus cogens* and *erga omnes*, both of which are the highest norms of the international laws that override other norms (overriding norms) and it is a responsibility for all countries to conduct prosecution.⁴⁴⁵

During the discussion of the Draft Bill on Human Rights Court, the government proposed a recommendation that insert life imprisonment as the maximum punishment or imprisonment for 20 years at maximum and 5 years at minimum for the human rights offenders. The government was referring to the Second Optional Protocol to the ICCPR, which was addressed towards the abolishment of death penalty. The state parties to the convention were reminded that all effort in abolish death penalty will be considered as progress to enjoy the right to life. Under Article 1 (1) of the Optional Protocol, it is stated that no one within the jurisdiction of a State Party to the present Protocol shall be executed. Meanwhile, under Article 1 (2), it is stated that each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.⁴⁴⁶

Furthermore, still at the discussion of the Draft Bill on Human Rights, the majority of the factions at the parliament proposed death penalty to be included. Meanwhile, the United Development Faction and Army/Police Faction proposed to insert death penalty as a replacement to life sentence. The members of the United Development Faction agreed to impose death penalty towards human rights offenders, because death penalty already implemented in Indonesia even before the independence and it is never

⁴⁴² *Ibid.*

⁴⁴³ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 2006, A/RES/60/147, 1 March 2006. See also UN Human Rights Commission, *Report of the independent expert to update the Set of Principles to combat impunity*, E/CN.4/2005/102, 18 February 2005, Principles 1, 19, 22 and 24.

⁴⁴⁴ Abidin, *op.cit.*, pg. 25.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ Inay/Apr, *Pelanggar Berat HAM diancam Pidana Mati*, Hukumonline, 20 July 2000, <<http://www.hukumonline.com/berita/baca/hol141/pelanggar-ham-berat-diancam-pidana-mati>>, accessed on 11 October 2017.

amended until it is regulated under the current framework. Amini compared that under KUHP that the elements of a crime that is not as severe as gross human rights violations can be charged with death penalty, but why the crimes under the Draft Bill on Human Rights court that have more severe elements to the crimes cannot be charged with death penalty.⁴⁴⁷ Amini described that ordering murder to a tribe may have lighter punishment, in contrast Article 340 KUHP stated that “The person who with deliberate intent and with premeditation takes the life of another person, shall, being guilty of murder, be punished by capital punishment of life imprisonment or a maximum imprisonment of twenty years”.

When the discussion took place on 13 July 2000, United Development Party Faction (PPP Faction) addressed death penalty issue during the discussion regarding Draft Bill on Human Rights Court. Representative from the PPP Faction said that “criminal punishment clauses must be added with death penalty for a person who commits gross violation of human rights, which is reasonable to be imposed because we know that under the criminal law or KUHP we recognize death penalty, especially in the discourse of gross human rights violation, it should be considered to include death penalty”.⁴⁴⁸

In addition, the Army/Police Faction during the discussion meeting also asked an attention towards the phrases under the Consideration chapter. In principle, all provisions are accepted as they were copied from the definition of Law No. 39 of 1999 on Human Rights. However, due to the correction of the words “reduced or seized”, in legally that human rights is limited, both under Article 29 (2) of the UN Declaration of Human Rights, and under Articles 34 and 36 of MPR Decree No. 17 of 1999. Human rights is limited by the clause under a law, even a very basic right that is the right to life has limitation, namely the provision on death penalty.⁴⁴⁹

The point of view of the Army/Police Faction was later elaborated from the government who argued that when formulating the clauses under the Draft Bill, the government took several references, international law standards in regards to human rights, and human rights conventions. The government understood that when implementing human rights instruments, it must consider the elements that are particular and universal, and the government is committed to the protection according to MPR Decree No. 17 of 1998 and later formulated under Law No. 39 of 1999 and according to ratification on human rights conventions. Therefore, under the Consideration Chapter, the government took into account the general principle of law, in which the general principles have exemption for the implementation, such as death penalty, deprivation of liberty, and so forth.⁴⁵⁰

On 18 July 2000, the United Development Party Faction (PPP Faction) proposed death penalty that can be imposed towards human rights offenders. The representatives from the PPP Faction opined that even KUHP incorporate death penalty for murder case, while under the Draft Bill on Human Rights Court, the most severe punishment is only life imprisonment.⁴⁵¹ Besides the PPP Faction, there was also Army/Police Faction who agreed to the proposal from the PPP Faction in regards to death penalty, which according to the Army/Police Faction, the maximum punishment under Article 30 of the Draft Bill on Human Rights court is lower than the maximum punishment under Article 340 of KUHP, which is death penalty. Further, the Star Crescent Party Faction (PBB Faction) also agreed to this proposal, as

⁴⁴⁷ *Ibid.*

⁴⁴⁸ Indonesia House of Representatives, *Risalah sidang pembahasan Rancangan Undang-Undang tentang Pengadilan Hak Asasi Manusia* (DPR dan Pemerintah). Year 2009

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*

⁴⁵¹ *Ibid.*

according to the representative of the PBB Faction, if the non-premeditated crime and non-massive crime under KUHP use death penalty, then the premeditated crime that is planned systematically is not punished with death penalty, will be peculiar.⁴⁵²

Other faction was PDIP, who agreed to the proposal from the PPP Faction and Army/Policy Faction, so that death penalty can be formulated as the offender kills many people. However, there was one faction that did not propose death penalty, namely the Reform Faction, who did not propose death penalty but asking for more severe punishment from the already proposed punishment from the government. If the government proposed 12-year of imprisonment, the Reform Faction proposed 15-year of imprisonment. It was also the case with mandatory minimum, in which the Reform Faction proposed 4-year of imprisonment and the government proposed 3-year of imprisonment.⁴⁵³

The government was of the view that death penalty issue is dilemmatic. The government argued that if referring to Perppu No. 1 of 1999 it is already death penalty, however after further studying several references from international law and discussion with the Amnesty International, there is a problem that death penalty is no longer allowed. However, at the end of the day, the government had no problem with the incorporation of death penalty.⁴⁵⁴

Table 3.8. Provisions of Death Penalty under Human Rights Court Law

No	Crime	Criminal Punishment
1.	<p>Article 8</p> <p>The crime of genocide as referred to in Article 7 section a is any action intended to destroy or exterminate in whole or in part a national group, race, ethnic group, or religious group by:</p> <ol style="list-style-type: none"> 1. killing members of the group; 2. causing serious bodily or mental harm to members of a group; 3. creating conditions of life that would lead to the physical extermination of the group in whole or in part; 4. imposing measures intended to prevent births within a group; or 5. forcibly transferring children of a particular group to another group. <p>Article 9</p> <p>Crimes against humanity as referred to in Article 7 section b include any action perpetrated as a part of a broad or systematic direct attack on civilians, in the form of:</p> <ol style="list-style-type: none"> 1. killing; 2. extermination; 	<p>Article 36</p> <p>Any person who perpetrates actions as referred to in Article 8, letter a, b, c, d or e, shall be sentenced to death or life in prison or to a maximum of 25 (twenty-five) years in prison and no less than a minimum of 10 (ten) years in prison.</p> <p>Article 37</p> <p>Any person who perpetrates actions as referred to in Article 9 letter a, b, d, e, or j shall be sentenced to death or life in prison or to a maximum of 25 (twenty-five) years in prison and no less than a minimum of 10 (ten) years in prison.</p> <p>Article 41</p> <p>For attempting, plotting, or assisting the perpetration of a violation as referred to in Article 8 or Article 9, the sentences set forth in Article 36, Article 37, Article 38, Article 39, and Article 40 shall apply.</p> <p>Article 42</p>

⁴⁵² *Ibid.*

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*

3. enslavement;
4. enforced eviction or movement of civilians;
5. arbitrary appropriation of the independence or other physical freedoms in contravention of international law;
6. torture;
7. rape, sexual enslavement, enforced prostitution, enforced pregnancy, enforced
8. sterilization, or other similar forms of sexual assault;
9. terrorization of a particular group or association based on political views, race, nationality, ethnic origin, culture, religion, sex or any other basis, regarded universally as contravening international law;
10. enforced disappearance of a person; or
11. the crime of apartheid

1. A military commander or person acting as military commander shall be held responsible for any criminal action within the judicial scope of a Human Rights Court perpetrated by troops under his or her effective command and control, and for any such criminal action by troops under his or her effective command and control arising from improper control of these troops, namely:

a. a military commander or aforementioned person acknowledges, or under the prevailing circumstances ought to acknowledge that these troops are perpetrating or have recently perpetrated a gross violation of human rights; and

b. a military commander or aforementioned person fails to act in a proper manner as required by the scope of his or her authority by preventing or terminating such action or delivering the perpetrators of this action to the authorised official for inquiry, investigation, and prosecution.

2. Both police and civil leaders are held responsible for gross violations of human rights perpetrated by subordinates under their effective command and control resulting from a failure on the part of the leader to properly and effectively control his or her subordinates, namely:

a) the aforementioned leader is aware of or deliberately ignores information that clearly indicates his or her subordinates are perpetrating, or have recently perpetrated a gross violation of human rights; and

b) the aforementioned leader fails to act in a proper manner as required by the scope of his or her authority by preventing or terminating such action or delivering the perpetrators of this action to the authorised official for inquiry, investigation, and prosecution.

3. Actions as referred to in clause (1) and clause (2) shall be liable to the same penal provisions set forth in Article 36, Article 37, Article 38, Article 39, and Article 40

3.8.4 The Politics of Law of Death Penalty under Law No. 15 of 2003 on Eradication of Terrorism Crime

The destruction of WTC buildings in the United States of America in September 2001 brought significant impact towards terrorism cases around the world, including Indonesia. There are many bombing incidents, marked by the bombing of Cathedral Church during Christmas Eve in 2000, which became the largest terrorism incident after the Reformasi. The terrorism incident kept continuing such as Bali

Bombing I and II, and the bombing of JW Marriott Hotel in Kuningan Area, Jakarta. These situation made the government of Indonesia to create a regulation that stipulate the crime of terrorism.

The effort to anticipate and overcome the problem regarding the crime of terrorism are in line with the preamble of the 1945 Constitution. The Republic of Indonesia is a unitary state that is based on the rule of law and has the duties and responsibilities to maintain a secure, peaceful, and prosperous livelihood, and actively involved in preserving world peace, and therefore the government is obliged to preserve and enforce its sovereignty and protect its citizens from every possible threats and destructive threats, both domestic and foreign.⁴⁵⁵

The government, when drafting a regulation for the eradication of the crime of terrorism used several consideration. The crime of terrorism is a crime against the humanity and civilization and one of the most serious threats towards the sovereignty of a state. In addition, terrorism is already a crime with international aspect that create hazards towards the world security and peace, and damaging the public prosperity, and therefore it must be eradicated with thorough plan and continuity, in order to protect and ensure the rights of the public.⁴⁵⁶

In addition, with the commitment from the international community to prevent and eradicate terrorism has been realized and various international conventions affirmed that terrorism is a crime with international aspect that threatened peace and security of mankind, and therefore all members of the United Nations including Indonesia are obliged to support and implement the UN Security Council resolution that condemn and encourage all UN members to prevent and eradicate terrorism through the establishment of national laws and regulations in each country.⁴⁵⁷

The government of the Republic of Indonesia has responded the effort and tips to anticipate and overcome the crime of terrorism by issueing two laws, namely Law No. 16 of 2003 on Determination of Government Regulation in Lieu of Law No. 1 of 2002 on Eradication of the Crime of Terrorism into a Law, signed by the President of the Republic of Indonesia on 4 April 2002. This legislation was further strengthened by the issuance of Law No. 15 of 2003 on Determination of Government Regulation in Lieu of Law No. 2 of 2002 on the Enforcement of Government Regulation in Lieu of Law No. 1 of 2002 on Eradication of the Crime of Terrorism, for Bombing Incident in Bali on 12 October 2002 into a Law, passed on 4 April 2003 upon the approval of the House of Representatives.⁴⁵⁸

The issuance of Law No.1 5 of 2003 that stipulates the determination of Government Regulation in Lieu of Law No. 1 of 2002 on Eradication of the Crime of Terrorism into a Law, has no other purpose than to realize the national objective as mandated by the Preamble of the 1945 Constitution.⁴⁵⁹ In addition, various bombing incidents happened within the jurisdiction of the Republic of Indonesia has caused the loss of live regardless the victims, causing a widespread fear within the society, property damages, and caused a wide impact towards the social, economic, political, and international relations affairs.

⁴⁵⁵ See Elucidation of Government Regulation in Lieu of Law No. 1 of 2002 on Eradication of the Crime of Terrorism. Minutes at the House of Representatives on the Drafting of Government Regulation in Lieu of Law No. 1 of 2002 on Eradication of the Crime of Terrorism Year 2003.

⁴⁵⁶ *Ibid.*, pg. 32.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *Ibid.*, pg. 3 and 53.

⁴⁵⁹ *Ibid.*, pg. 1 and 2.

Terrorism is a cross-border crime, organized, with a wide network, which at some point will threaten the national and international peace and security. Therefore, as an effort to restore orderly society livelihood that is safe and to provide a strong legal basis and legal certainty in overcoming an emergency issue in the eradication of the crime of terrorism, by referring to international conventions and national laws and regulations related to the crime of terrorism, it was necessary to issue Government Regulation in Lieu of Law, which was later determined under a law.⁴⁶⁰

Law No. 15 of 2003 also stipulates death penalty for the crime of terrorism. The death penalty charge may also be imposed towards a person who is planning and/or motivating other people to commit the crime of terrorism, towards a person who is committing conspiracy, attempting or assisting to commit the crime of terrorism, and towards all persons outside the jurisdiction of the Republic of Indonesia.

Table 3.9 Criminal Provisions under Law No. 15 of 2003

No	Article	Provision
1.	Article 6	Everyone who deliberately uses violence or threats of violence that: creates a sense of terror or fear among the wide public; claiming massive victims, taking away freedom, properties or lives of other human beings; and/or causing damage or destruction of strategic vital objects, the environment, public facilities and/or international facilities, are charged with death penalty, life sentence or a prison sentence with a minimum period of four years and maximum 20 years.
2.	Article 8	<p>A person commits a criminal act of terrorism according to the definition set out in Article 6 who does the following:</p> <ul style="list-style-type: none"> a. destroys, renders inoperational or damages facilities associated with air traffic and aviation security or causes the operation of such facilities to fail; b. causes the destruction, inoperability or damage to facilities associated with aviation security or causes the operation of such facilities to fail; c. intentionally and illegally destroys, damages, removes or moves signs or equipment associated with aviation security, or causes the operation of said signs or equipment to fail, or erects incorrect signs or equipment; d. due to his or her negligence aviation security signs or equipment are destroyed, damaged, removed or moved or incorrect aviation security signs or equipment are erected; e. intentionally and illegally destroys or renders inoperational any aircraft partly or wholly belonging to another party; f. intentionally and illegally causes the crash, destruction, rendering inoperational or damage to an aircraft; g. through his or her negligence causes an aircraft to crash, be destroyed, inoperational or damaged; h. for the purposes of self-enrichment or enrichment of another person, illegally obtains insurance and then causes the arson or explosion, crash, destruction, damage or renders inoperational an aircraft insured against danger or its contents or profit are insured against danger; i. while aboard an aircraft uses illegal means to takeover, defend a takeover or otherwise control an aircraft in flight; j. while aboard an aircraft uses violence or threats of violence or threats in any other form, takes over or defends a takeover or takes on control of an aircraft in flight; k. jointly engages in a criminal plot, with prior planning, to cause serious injuries

⁴⁶⁰ *Ibid.*

		<p>to any person, resulting in damage to an aircraft that could endanger the flight, committed with the intention of takeover the freedom or of infringing upon the freedom of any person;</p> <p>l. intentionally and illegally commits violence against a person in an aircraft in flight, where the act could endanger the safety of the aircraft;</p> <p>m. intentionally and illegally damages an aircraft on duty or causes damage to an aircraft that renders the aircraft incapable of flight or endangers the safety of the flight;</p> <p>n. intentionally and illegally places or causes to be placed aboard an aircraft on duty, by any means whatsoever, an object or substance capable of destroying an aircraft, rendering it incapable of flight or causes damage to the aircraft capable of endangering the flight;</p> <p>o. jointly commits with two or more other persons as part of previously planned plot resulting in serious injuries to a person any act as defined in subsections l, m and n;</p> <p>p. provides information known to be false and thereby endangers the safety of an aircraft in flight;</p> <p>q. while aboard an aircraft commits an act capable of endangering the safety of the aircraft in flight;</p> <p>r. while aboard an aircraft commits an act capable of disturbing law and order on the aircraft in flight.</p>
3.	Article 9	Any person who unlawfully imports into Indonesia, makes, receives, attempts to acquire, delivers or attempts to deliver, controls, carries, has the stock of his own or has in his possession, stores, transports, hides, uses, or carries in or out of Indonesia any firearm, ammunition, explosive substance or other dangerous material, with the intention to commit any criminal act of terrorism, is punishable with death penalty or life imprisonment or imprisonment for 3 (three) years at the minimum and 20 (twenty) years at the maximum.
4.	Article 14	Any person who plans and/or incites another person to commit any criminal act of terrorism as defined in Articles 6, 7, 8, 9, 10, 11 and 12 is punishable with death penalty or life imprisonment.
5.	Article 15	Any person who conducts any plot, attempt, or assistance to commit any criminal act of terrorism as stipulated in Articles 6, 7, 8, 9, 10, 11 and 12 will be punished with the similar punishment as the perpetrator of the crime.
6.	Article 16	Any person outside the territory of the Republic of Indonesia who provides any assistance, facilitation, means or information for the committing of any criminal act of terrorism, will be punished with the same punishment as the perpetrator of said criminal act of terrorism as stipulated in Articles 6, 7, 8, 9, 10, 11 and 12.
7.	Article 19	Provisions concerning the handing down of a minimum sentence as set out in Articles 6, 8, 9, 10, 11, 12, 13, 15 and 16, and provisions concerning the handing down of a death sentence or life imprisonment as set out in Articles 14 do not apply to persons under the age of 18 (eighteen) years.

The incorporation of death penalty under Law No. 15 of 2003 was not met with significant debate. This was confirmed by one of the members of the drafting team, Atmasasmita, who stated that, “In regards to death penalty as stipulated under the terrorism law, the government and the parliament were agreed to include death penalty under this law”.⁴⁶¹ The government and parliament at that time agreed to include death penalty under one of the articles of the terrorism law, because they considered terrorism as an extraordinary crime and requires a punishment that may create deterrent effect for the offenders.

⁴⁶¹ Interview with Romli Atmasasmita, 18 September 2017.

In addition, because there were terror acts happened after the Reformasi era, causing many victims not only Indonesian citizens, but foreign citizens as well. This was the reason why there was lack of significant debates during the discussion of the terrorism law.⁴⁶²

However, the eradication of the crime of terrorism conducted by the government generated criticism from the public. Munir, human rights activists, reminded that the government only relied on counter-terrorism act and failed to conduct anti-terrorism. The government only considered that by issuing a legal instrument that can punish the perpetrator of the crime, terrorism can be stopped. Whereas, the reality says otherwise. On the other side, the anti-terrorism action is not conducted by the government. Anti-terrorism is an action that establishes a system model framework that can prevent a person to conduct terrorism. This can be done by controlling the distribution of explosives materials, customs and excise control, immigration control, money laundering control, and implementation of early warning system.⁴⁶³

Furthermore, Munir added that terrorism act is ideological and therefore the perpetrator could careless to the death penalty charge. Therefore, what can be done are preventing the person that adopt violent ideology to have access to conduct terrorism act. "If the action is ideological then there will be no deterrent effect. Deterrent effect can be used towards common crimes. If I steal something, I may repent. But if it relates to ideology, there is no one that repents from ideology. It is our mistake since a long time ago, to be sure that ideology can be changed". If what is opposed is ideology, what can be done is stopping the perpetrator or closing the access where the person can obtain explosives and other materials.⁴⁶⁴

In the present context, the discussion regarding death penalty under the terrorism law is still debated. On one side, many parties agreed death penalty to be imposed towards the perpetrator of terrorism while other parties argued that death penalty is inappropriate to be imposed. Asrul Sani, one of the members of Commission III of the House of Representatives, stated that the revision of Law No. 15 of 2003 on Eradication of the Crime of Terrorism will still preserve the provision regarding death penalty stipulated under Article 6 and Article 14. According to one of the members of the Special Committee on Revision of the Terrorism Law, the provision under the Article pertaining to death penalty is still considered relevant, because we are of the view that even with death penalty is stipulated, there is no deterrent effect towards the perpetrator, let alone if the legislation is lack of death penalty. Asrul Sani further added, if the death penalty charge is deleted, parties that have radical ideology will have more room to conduct terror act. Moreover, Asrul Sani also opined that terror act is a tyranny over mankind that must be severely punished. Member of Commission III of the House of Representatives also said that "We believe that what they (terrorist) do is not jihad, by tyranny over their equals". Asrul Sani is also of the view that majority of the faction within the Special Committee wanted to stipulate death penalty under the Terrorism Law. Meanwhile, the House of Representatives also encouraging the

⁴⁶² *Ibid.*

⁴⁶³ Nay, *Ancaman Hukuman Mati Tidak Selesaikan Masalah Terorisme*, Hukumonline, 6 August 2003, <<http://www.hukumonline.com/berita/baca/hol8430/ancaman-hukuman-mati-tidak-selesaikan-masalah-terorisme>>, accessed on 10 October 2017.

⁴⁶⁴ *Ibid.*

National Agency for Combating Terrorism (*Badan Nasional Penanggulangan Terorisme* – “BNPT”) to maximize the role of deradicalization.⁴⁶⁵

Different point of view offered by Shidarta, who explained that terrorism itself is difficult to be eradicated with death penalty, and further Shidarta stated that the perpetrators of terror are willing to die in conducting their action, therefore death penalty is similar if he died when he commits the action. Hence, according to Shidarta, death penalty under the Terrorism Law is not effective and will not generate deterrent effect towards the perpetrator.⁴⁶⁶

Similar opinion provided by Supriyadi, who said that by referring to the historical point of view, death penalty charge is inappropriate to be used. In addition to create other terrorism cases, death penalty charge will also generate larger resistance. The House of Representatives must have a better looking towards the reality and the facts. The policy to eliminate death penalty for the crime of terrorism must be seen from the broader agenda. Supriyadi asserted that death penalty will undermine the deradicalization program that is expected by the government to be included under the revision of the Terrorism Law. This is due to the fact that with death execution, terrorists will feel honored and they feel that they die honorably.⁴⁶⁷

The effectiveness of punishment and deterrent effect that always promoted by the government and the parliament in imposing death penalty towards the perpetrators of terrorism are in appropriate, this is caused by opposite perspective. For the government and the House of Representative, the imposition of death penalty towards the perpetrators of terror will cause the public to experience fear and reluctance to conduct similar action, even though if such is examined that the fact shows opposite result, in this case the perpetrator of terrorism considered that if they died when conducting terror act or being executed, they will feel very honored and they will be considered as heroes by their groups or community.⁴⁶⁸

Such fact is overlooked by the government and the House of Representatives during the drafting process of the Terrorism Law, as they still considered that imposing death penalty towards the perpetrators of terrorists will generate deterrent effect and no one will repeat similar action in the upcoming future, even though such opinion is not correct, especially when terrorism remains in Indonesia and there is no solid statistics that prove terrorism case is decreasing in Indonesia, even though some convicts in terrorism cases have been executed, such as Amrozi and his peers. The spirit to punish the offenders that committed serious crimes such as terrorism must be based on the legal awareness and not emotion, because if the government and the House of Representatives always using emotion when drafting laws at the House of Representatives, in the upcoming future death penalty can occur in any incidents that are considered as “emergency” for a crime in Indonesia.⁴⁶⁹

⁴⁶⁵ Nyu, *Revisi UU Terorisme Pertahankan Hukuman Mati*, Media Indonesia, 7 May 2016, <<http://mediaindonesia.com/news/read/44097/revisi-uu-terorisme-pertahankan-hukuman-mati/2016-05-07>>, accessed on 17 September 2017.

⁴⁶⁶ Interview with Shidarta, 29 September 2017.

⁴⁶⁷ Martahan Sohuturon, *Ancaman pidana mati bagi terorisme dinilai tidak berguna*, CNN Indonesia, 5 June 2016, <<https://www.cnnindonesia.com/nasional/20160506191422-12-128995/ancaman-pidana-mati-bagi-terorisme-dinilai-tak-berguna/>>, accessed on 4 October 2017.

⁴⁶⁸ Interview with Shidarta, 29 September 2017.

⁴⁶⁹ *Ibid.*

3.8.5 The Politics of Law of Death Penalty under the Narcotic Law

3.8.5.1 The effort in Establishing a National Policy on Narcotic

As mentioned under the previous chapter regarding death penalty policy in relation to psychotropic, since a long time ago Indonesia has been involved in the war against the distribution of prohibited materials and drugs, including narcotic. In the year of 1970, along side the economic growth of Indonesia during that year, the income of society was constantly increasing. Even though the economic growth was stagnating during the administration of President Soekarno, the administration of President Soeharto tried to increase the economy by implementing economic reform, which includes stabilization, rehabilitation, and reconstruction of the economy.⁴⁷⁰ The growth of the economy affected the increasing level of prosperity of the society. The increase of prosperity was followed by the increase of narcotic consumption for recreational purposes.⁴⁷¹ In addition to the increase of prosperity, the convenience in communication method with communities outside Indonesia was also expected as a contributing factor of the increasing use of narcotic.⁴⁷²

To overcome the issue regarding narcotic, in the year of 1971, the government issued Presidential Directive No. 6 of 1971 on Coordination of Action and Activities from Related Institution for the Purpose of Overcoming, Preventing, and Eradicating the Issue of Violation Pertaining to the Narcotic Problem. The Presidential Directive 6/71 was later given to the State Intelligence Coordination Agency (*Badan Koordinasi Intelejen Negara – “BAKIN”*) to coordinate the actions and activities from related agencies/institutions for the purpose of overcoming, preventing, and eradicating problems and violations that occurred within the society, directly or indirectly can cause harm towards the public security and order.⁴⁷³

As mentioned under the previous chapter, during that period of time, the government and the House of Representatives were pushing the Draft Bill on Ratification to Single Convention on Narcotic Drugs of 1961 and its Protocols and Draft Bill on Narcotic.⁴⁷⁴ Under the Draft Bill that was proposed by the government, there were two actions that can be charged with death penalty, namely the action as stipulated under Article 23 (4) in conjunction with Article 36 (4) letter a and Article 23 (5) in conjunction with Article 36 (5) letter a, as long as such action is not related to coca or cannabis plants.⁴⁷⁵ Death penalty, in essence, was an answer to the restlessness from the government of the possibility of narcotic crime to be used as an important tool to commit subversion. This was a perspective that later affirmed by all factions within the House of Representatives.⁴⁷⁶ However, the government was also proposing to incorporate the crime of subversion into the Draft Bill.⁴⁷⁷ On 2 July 1976, the House of Representatives agreed to pass the Draft Bill on Ratification to the Single Convention on Narcotic Drugs and Draft Bill on Narcotic as laws.⁴⁷⁸

⁴⁷⁰ Tulus Tambunan, *Perkembangan Industri dan Kebijakan Industrialisasi di Indonesia sejak Orde Baru hingga Pasca Krisis*, Makalah, (Jakarta: KADIN Indonesia - JETRO, 2006), pg. 2.

⁴⁷¹ Lindsey dan Nicholson, *op. cit.*, pg. 44.

⁴⁷² Petrik Matanasi, *Kisah Narkoba di Jakarta Tempo Dulu*, Tirto, 2017, <<https://tirto.id/kisah-narkoba-di-jakarta-tempo-dulu-ciWb>>, accessed on 13 October 2017.

⁴⁷³ Indonesia, *Instruksi Presiden No 6 Tahun 1971*.

⁴⁷⁴ Direktorat Jenderal Hukum dan Perundang-undangan Departemen Kehakiman, *op.cit.*, pg. 11.

⁴⁷⁵ *Ibid.*, hlm 20 dan 23.

⁴⁷⁶ Indonesia, *Undang-Undang No. 9 Tahun 1976 tentang Narkotika*, Penjelasan Umum.

⁴⁷⁷ Direktorat Jenderal Hukum dan Perundang-undangan Departemen Kehakiman, *op.cit.*, pg. 81.

⁴⁷⁸ *Ibid.*, hal 118

With the increasing volume of new technology for the distribution of narcotic, the government decided to establish a new law, namely Law No. 22 of 1997 on Narcotic. This legislation is also an implementation to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,⁴⁷⁹ which was ratified by Law No. 7 of 1997. The framework of the politics of law of these two legislation is similar. Under Law No. 7 of 1997 it is stated that:⁴⁸⁰

“Due to the significant profits, the crime organizations tries with every possible efforts to preserve and develop the business of illegal distribution of narcotic and psychotropic, by means of infiltrating, influencing, and damaging the government structure, legitimate trade and financial business and influential groups within the society”

Meanwhile, Law No. 22 of 1997 stated that:⁴⁸¹

“...considering the level of danger caused by the abuse and illegal distribution of narcotic is threatening the national security and resilience.”

Under Law No. 22 of 1997, the crimes that can be charged with death penalty are stipulated under Article 80 (1) letter a, Article 80 (2) letter a, Article 80 (3) letter a, Article 82 (1) letter a, Article 82 (2) letter a, and Article 82 (3) letter a.

3.8.5.2 The Policy of Death Penalty under Law No. 35 of 2009 on Narcotic

After Reformasi, the idea to improve Law NO. 22 of 1997 on Narcotic was getting stronger. At that time, the People’s Consultative Assembly had given the recommendation to the President to conduct a revision towards Law No. 22 of 1997 on Narcotics, through MPR Decree No. VI/MPR/2002 on Recommendation towards the Reports of the Implementation of the People’s Consultative Assembly Decree by the President, DPA, House of Representatives, the Audit Board of the Republic of Indonesia, and the Supreme Court. Under this MPR Decree, MPR highlighted narcotic issue from three main sides, namely related to morality and its decline, increasing number of people with HIV/AIDS, and the increasing level of public anxiety. Therefore, the steps that were recommended to be undertaken by the government are as follows:⁴⁸²

1. Increasing the budget for the purpose of further development pertaining to religious affairs;
2. Executing firm actions according to the prevailing laws towards producers, dealers, and abusers as well as conducting coordination efforts that are effective, anticipative, and educative with relevant stakeholders and society;
3. Seeking effort to increase the budget for the purpose of rehabilitation for victims of narcotics, psychotropics, and other addictive substances abuse;
4. Along with the House of Representatives, revising Law No. 22 of 1997 on Narcotic and Law No. 5 of 1997 on Psychotropic; and

⁴⁷⁹ Dewan Ekonomi dan Sosial PBB, *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 19 December 1988.

⁴⁸⁰ Indonesia, *Undang-Undang No. 7 Tahun 1997 tentang Narkotika*, Penjelasan Umum

⁴⁸¹ Indonesia, *Law No. 9 of 1976 on Narcotic*.

⁴⁸² Indonesia, *MPR RI Decree No VI/MPR/2002 on Recommendation pertaining to the Report on the Implementation of the People’s Consultative Assembly Decree by the President, DPA, DPR, BPK, and MA*.

Therefore, the government and the House of Representatives further issued and enacted Law No. 35 of 2009 on Narcotic. One of the most notable amendment from this legislation was the status upgrade of the National Narcotic Agency (*Badan Narkotika Nasional* – “BNN”) as a non-ministry government institution (*Lembaga Pemerintah Non Kementerian* – “LPNK”) that is authorized to conduct inquiry and investigation of narcotic and narcotic precursor crime.

Under Law No. 35 of 2009 on Narcotic, death penalty is determined as part of the effort to render deterrent effect towards the abuser of narcotic and illegal distribution of narcotic, as well as narcotic precursor. In line with Law No. 22 of 1997 on Narcotic, the punishment especially the formulation of death penalty was due to the argument that narcotic distribution will cause greater threats towards the livelihood and national values that at the end of the day will weaken national resilience.⁴⁸³

In regards to the formulation of death penalty for narcotic crime, the government has asserted its argument that death penalty is required as narcotic crime is regarded as a crime against humanity that has the purpose to annihilate mankind, slowly but surely. All the potential human intellect and mind are damaged massively for personal and group interest.⁴⁸⁴

The government then illustrated that with narcotic crime, a person is made into a living dead who is no longer has the potential to build the civilization and culture, but continuously behaving to damage the order of life.⁴⁸⁵ Therefore, narcotic crime will always be charged with severe punishment, including with death penalty.

The statistics of narcotic crime in general do not show any decline whatsoever, even though the government has executed its strongest effort to reduce the figure, for instance by establishing a special agency that is expected can conduct coordination between many institutions for the purpose of prevention, law enforcement, rehabilitation, and other efforts related to narcotic and drugs.

Criminal charges under the Narcotic Law and Psychotropic law are constantly increase exponentially since the issuance of Law No. 9 of 1976 on Narcotic, which was later replaced by Law No. 22 of 1997 on Narcotic. However, the reality shows that these efforts are failing to decrease the number of narcotic crimes, even the figures are increasing through the roof.⁴⁸⁶

Table 3.9 Law No. 35 of 2009 on Narcotic

No	Article	Provision
1.	Article 74	(1) Case of abuse and the illicit traffic of Narcotics and Narcotics Precursor, include cases that take precedence over the other cases to be submitted to the court for the completion as soon as possible. (2) The criminal act proceedings of Narcotics and Narcotics Precursor crime offense on the first appeal, second appeal, review, and execution of the death penalty, as well as the process of granting clemency, the implementation must be accelerated in accordance with the laws and regulations.

⁴⁸³ Indonesia, *Law No. 35 of 2009 on Narcotic*, General Elucidation.

⁴⁸⁴ Indonesia Constitutional Court, *Case Decision No. 2/PUU-V/2007*, pg. 131.

⁴⁸⁵ *Ibid.*

⁴⁸⁶ Piktör Aruro, *Hukuman Mati Bagi Pengedar Narkotika Dalam Konteks Uu No. 22 Tahun 1997 Dan Perubahan Uu No. 35 Tahun 2009*, Lex Administratum, Vol. IV, No. 3, March 2016, pg.182

2.	Article 113	(2) In the case of the act to produce, import, export, or distribute Narcotics Category I as referred to in paragraph (1) in the form of plants weighing more than 1 (one) kilogram or more than 5 (five) trees, or in the form of no plant weight exceeds 5 (five) grams, the offender shall be punished with death, imprisonment for life, or minimum imprisonment 5 (five) years and a maximum of 20 (twenty) years and a maximum fined referred to in paragraph (1) plus 1/3 (one third).
3.	Article 114	(2) In the case of the act offered to be sold, selling, purchased, brokered in the sale and purchase, exchange, deliver, or accept the Narcotics Category I as referred to in paragraph (1) that in the form of plant weighing more than 1 (one) kilogram or more than 5 (five) trees, or in the form of no plant weighed five (5) grams, the offender shall be punished with death, imprisonment for life, or minimum imprisonment 6 (six) years and a maximum of 20 (twenty) years, and the maximum fined referred to in paragraph (1) plus 1/3 (one third).
4.	Article 116	(2) In the case of narcotic use against others or giving the Narcotics Category I to be used by another person referred to in paragraph (1) resulted in the death of another person or permanent disability, the offender shall be punished with death, imprisonment for life, or minimum imprisonment 5 (five) years and a maximum of 20 (twenty) years and a maximum fined referred to in paragraph (1) plus 1/3 (one third).
5.	Article 118	(2) In the case of the act to produce, import, export, or distribute the Narcotics Category II referred to in paragraph (1) weighing more than 5 (five) grams, the offender shall be punished with death, imprisonment for life, or minimum imprisonment 5 (five) years and a maximum of 20 (twenty) years and a maximum fined referred to in paragraph (1) plus 1/3 (one third).
6.	Article 119	(2) In the case of the act offered to be sold, sell, purchase, receive, be an intermediary in sale and purchase, exchange, or deliver the Narcotics Category II referred to in paragraph (1) weighing more than 5 (five) grams, the offender shall be punished with death, imprisonment for life, or minimum imprisonment 5 (five) years and a maximum of 20 (twenty) years and a maximum fined referred to in paragraph (1) plus 1/3 (one third)..
7.	Article 121	(2) In the case of usage the Narcotics against others or giving the Narcotics of category II to be used another person referred to in paragraph (1) resulted in the death of another person or permanent disability, the offender shall be punished with death, imprisonment for life, or minimum imprisonment 5 (five) years and a maximum of 20 (twenty) years and a maximum fined referred to in paragraph (1) plus 1/3 (one third).
8.	Article 132	(3) weighting crime as referred to in paragraph (2) shall not apply to a criminal act punishable with death, imprisonment for life, or imprisonment of 20 (twenty) years.
9.	Article 133	(1) Every person who orders, give or promise anything, provide opportunities, encourage, provide facilities, force by threats, force with violence, deceit, or the persuade children not old enough to commit criminal acts referred to in Article 111, Article 112, Article 113, Article 114, Article 115, Article 116, Article 117, Article 118, Article 119, Article 120, Article 121, Article 122, Article 123, Article 124, Article 125, Article 126, and Article 129 shall be punished with death or life imprisonment, or the minimum imprisonment 5 (five) years and a maximum of 20 (twenty) years and fined of at least Rp 2.000.000.000,00 (two billion rupiah) and maximum 20.000.000.000,00 (twenty billion rupiah).
10.	Article 144	(2) The threat with additional 1/3 (one third) as referred to in paragraph (1)

	does not apply to offenders sentenced with the death penalty, life imprisonment, or imprisonment of 20 (twenty) years.
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3.8.6 The Politics of Death Penalty during President Joko Widodo Administration: Emergency Excuse that Negates Humanity Values

In less than 100 days after took the oath of the office, President Joko Widodo rejected clemency request from 64 death convicts of narcotic cases and orderd the Attorney General to immediately conduct death execution.⁴⁸⁷ During the hearings with academics from Universitas Gadjah Mada (UGM), Yogyakarta, President Jokowi affirmed that such crimes and mistakes are unforgivable as in general they are large drug dealers that for the interest of their profits and groups have damaged the future of the next Indonesian generation. The rejection towards clemency requests, according to President Joko Widodo, is important to be a shock therapy for the dealers, distributors, or abusers.⁴⁸⁸ When decided to conduct the death execution, the President gathered many supports, both from internal executive branch, as well as from the society. Vice President Jusuf Kalla, Minister of State Secretariat Pratikno, Coordinating Minister of Political, Law, and Security Affairs, the Attorney General, and National Police were supporting the policy taken by President Joko Widodo. Meanwhile, from outside the executive branch, organizations such as Nahdlatul Ulama (NU), Muhammadiyah, and Indonesia Democratic Party of Struggle, were also amongst the parties that supported the action taken by President Jokowi.⁴⁸⁹

Gufron Mabruuri, Deputy Director of Imparsial, was of the view that the policy of death penalty imposition was getting worse during the President Joko Widodo administration. According to Gufron, pursuant to the records made by Imparsial, the number of death execution conducted by President Joko Widodo are much more compared to the President Susilo Bambang Yudhoyono administration. Gufron further explained that, during 10 years of SBY administration, there were 21 death execution. While during 2.5 years of his administration, President Jokowi has carried 18 death execution.⁴⁹⁰

The quality of the court system and law enforcement institution in Indonesia that are still embedded with corruption, is one of many concerning problems in examining the quality of court decisions regarding death penalty. Whereas, even a clean court system and law enforcement institution cannot avoid to make mistakes. The weakness of death penalty is that it cannot be corrected if the decision is wrongfully rendered. Such poor legal situation can be seen from the Preception Index of Indonesia Rule of Law in 2012, which in overall the Perception Index of Indonesia Rule of Law was not exceptional, with the score 4.53 from 1-10 scale. The society is still of the view that the rule of law in Indonesia is still low.⁴⁹¹

⁴⁸⁷ Gandang Sajarwo, *Jokowi Tolak Permohonan Grasi 64 Terpidana Mati Kasus Narkoba*, Kompas, 12 September 2014, <<http://regional.kompas.com/read/2014/12/09/16545091/Jokowi.Tolak.Permohonan.Grasi.64.Terpidana.Mati.Kasus.Narkoba>>, accessed on 17 October 2017.

⁴⁸⁸ Daniel Pascoe, *Tiga Tantangan Hukum yang akan Dihadapi Rezim Hukuman Mati di Indonesia* dalam Robet dan Lubis, *Politik...*, pg. 103.

⁴⁸⁹ Andylala Waluyo, *NU dan Muhammadiyah dukung Hukuman Mati Bagi Pengedar Narkoba*, VOA Indonesia, 24 December 2014, <<https://www.voaindonesia.com/a/nu-muhammadiyah-dukung-hukuman-mati-bagi-pengedar-narkoba/2571769.html>>, accessed on 17 October 2017.

⁴⁹⁰ Kristian Erdianto, *Penerapan Hukuman Mati Dinilai Memburuk*, Kompas, 27 April 2017, <<http://nasional.kompas.com/read/2017/04/27/12412361/penerapan.hukuman.mati.dinilai.memburuk.di.era.presiden.jokowi>>, accessed on 1 October 2017.

⁴⁹¹ Arman Dhani, *Meragukan Hukuman Mati*, Geotimes, <<https://geotimes.co.id/meragukan-hukuman-mati/>>, accessed on 1 October 2017.

Unfair trial is another concerning issue within the Indonesian justice system. There are some cases, in which unfair trial almost took life of innocent individuals, including Yusman Telaumbanua, a child that was convicted to death after charged with murder case and Zulfiqar Ali who was convicted to death after being charged with the possession of 300 grams of heroin. Specific to the case of Yusman Telaumbanua, the defendant that was convicted to death by the District Court of Gunung Sitoli, was still a minor when he was imposed with death penalty. Law enforcers such as police, prosecutors, and judges have no information on his legal age when the legal process was carried on and carelessly imposed death penalty to a minor. The imposition of death penalty in this case contradicted Law No. 11 of 2012 on Juvenile Justice System. Within 5 years after the case is handled and after various legal remedies have been taken, a new evidence (*novum*) surfaced,⁴⁹² stating that when death convict was rendered, Yusman was only 15-16 years old.

3.8.7 The Politics of Law of Death Penalty under Law No. 17 of 2016 on Determination of Government Regulation in Lieu of Law No. 1 of 2016 on Second Amendment to Law No. 23 of 2002 on Child Protection as a Law

Two years after he took the oath of the office as the highest ranking official in Indonesia, President Joko Widodo issued Government Regulation in Lieu of Law (Perppu) No. 1 of 2016 on Second Amendment to Law No. 23 of 2002 on Child Protection (Child Protection Perppu). President Joko Widodo stated that the issuance of the Perpu was based on several considerations, which includes: (i) overcoming the emergency situation caused by sexual assault towards children that are increasing; (ii) sexual crime towards children is an extraordinary crime as it threatens and endangers the soul and development of children; (iii) such crime also impairing the safety, security, and order within the society. Furthermore, the President also stated that such extraordinary crime also requires extraordinary efforts, along with additional articles under Perppu will provide the room for judges to impose severe punishment for the purpose of deterrent effect towards the perpetrator and decreasing the number of sexual offenses against children.⁴⁹³

Similar perspective also shared by Yasonna Laoly, Minister of Law and Human Rights, who stated that the government is assured that sexual offense towards children is an extraordinary crime. In addition, death penalty clause was included under the Perppu, because pursuant to the prevailing laws and regulations, this type of punishment is still possible. Yasonna Laoly further added that such provision is a

⁴⁹² The new evidence that was discovered and submitted by KontraS in regards to the exact age of Yusman Telaumbanua that was gathered from the forensic examination of his tooth, was one of the possible factors that released Yusman from death penalty charges. From the expert testimonials, appeared during the case review under the Case No. 8/PID/B/2013/PN-GST, it was known that the examination of the bones and teeth of Yusman Telaumbanua conducted by Dentists Team of Padjadjaran University Bandung, proved that the age of Yusman Telaumbanua when the forensic examination was taken place in 2016 was around 18-19, therefore, if it is traced back from the crime that was committed in 2012, the age of Yusman at that time was 15-16 years of age. See KontraS, *Belajar Dari Kasus Yusman Telaumbanua: Pemerintah Harus Evaluasi Seluruh Penerapan Hukuman Mati di Indonesia*, Siaran Pers, 22 August 2017, <<http://www.kontras.org/home/index.php?id=2414&module=pers>>, accessed on 1 October 2017.

⁴⁹³ Ihsanuddin, *Jokowi Tanda Tangani Perppu yang Atur Hukuman Kebiri*, Kompas, 25 May 2016, <<http://nasional.kompas.com/read/2016/05/25/17001251/jokowi.tanda.tangani.perppu.yang.atu.hukuman.kebir>>, accessed on 20 September 2017.

form of executing state sovereignty because Indonesia still adopts main punishment (*pidana pokok*), one of which is death penalty.⁴⁹⁴

The provisions under the Perppu showed that firm punishment imposition, including adding more types of punishment and weighting of other punishment that were previously regulated under Law No. 23 of 2002 on Child Protection and Law No. 35 of 2014 on Amendment to Law No. 23 of 2002 on Child Protection. The weighting was carried on in the form of additional one third of punishment for the perpetrator, amongst which are perpetrator that have committed similar crime before the verdict is rendered and the perpetrator who has the responsibility to protect their child (parents, legal guardian, related family members, caregivers, and so forth),⁴⁹⁵ or action that caused severe injury, mental disorders, infectious diseases, the loss of reproduction function, and/or the death of the victim.⁴⁹⁶ The Perppu also introduced a new punishment namely forced chemical castration, use of electronic detector,⁴⁹⁷ and the announcement of the perpetrator's identity to the public.⁴⁹⁸ The Perppu also regulated the imposition of death penalty towards the crimes that caused more than one victims, causing severe injury, mental disorders, infectious diseases, the loss of reproduction function, and/or the death of the victim.⁴⁹⁹

Considerations under the said Perppu showed the basis of government perspective in regards to the condition of sexual offenses towards children happened in Indonesia. The affirmation of "sexual offense emergency" situation caused the weighting of criminal punishment as a solution to overcome such situation. The consideration of the Child Protection Perppu, in particular letter b and c, confirmed the background and rational of the issuance of Child Protection Perppu:

- a.
- b. *Whereas the sexual offenses towards children are increasing significantly that threatens and endangers the livelihood of children, damaging the personal life and development of the children, along with interfering the safety, security, and order of the society;*
- c. *Whereas the criminal punishment imposed to the perpetrators of sexual offenses towards children is yet to render deterrent effect and is yet to prevent sexual offenses towards children comprehensively, and it is necessary to amend Law No. 23 of 2002 on Child Protection as amended by Law No. 35 of 2014 on Amendment to Law No. 23 of 2002 on Child Protection;*
- d. ...

Therefore, with the weighting of criminal punishment, including death penalty, it was considered to be rational and justified as stipulated under the clause of the consideration. Referring to the perspective provided by Maria Farida, the consideration under a law is an elaboration of the foundation of philosophical, legal, and sociological elements under a lawmaking process.⁵⁰⁰ This perspective is in line

⁴⁹⁴ Halimanus Sa'diyah, *Ini Alasan Pemerintah Masukkan Hukuman Mati dalam Perppu Perlindungan Anak*, Republika, 12 May 2016, <<http://www.republika.co.id/berita/nasional/politik/16/05/25/o7qhb8335-ini-alasan-pemerintah-masukkan-hukuman-mati-dalam-perppu-perlindungan-anak>>, accessed on 20 September 2017.

⁴⁹⁵ Indonesia, *Government Regulation in Lieu of Law No. 1 of 2016 on Second Amendment to Law No. 23 of 2002 on Child Protection*, Article 82 (2).

⁴⁹⁶ *Ibid.*, Article 82 (4).

⁴⁹⁷ *Ibid.*, Article 81 (7).

⁴⁹⁸ *Ibid.*, Article 82 (5).

⁴⁹⁹ *Ibid.*, Article 81 (5).

⁵⁰⁰ Maria Farida Indrati S., *Ilmu Perundang-Undangan: Proses dan Teknik Pembentukannya*, (Yogyakarta: Kanisius, 2007), pg. 108.

with Law No. 12 of 2011 on Establishment of Laws and Regulations pertaining to the coverage of philosophical, sociological, and legal consideration. The philosophical element stated that the law must depicts provisions that are established and taking into consideration the views of life, awareness, and ideals that include the ideology and philosophy of Indonesian nation that is sourced from Pancasila and the Preamble of the 1945 Constitution. The sociological element stated that the law must be established to satisfy the demand from the society in all possible aspects of life. Meanwhile, the legal element stated that the law must be established to overcome legal issue or to fill legal vacuum by taking into consideration the existing rules, rules that will be amended, or to be revoked in order to ensure legal certainty and justice within the society.⁵⁰¹

Death penalty under this Perppu referring to the crime that is committed pursuant to Article 76D of Law No. 35 of 2014 on Amendment to Law No. 23 of 2002 on Child Protection. Death penalty, as stipulated under Article 81 (5) is imposed towards a perpetrator in case of crime that caused more than one victims, causing severe injury, mental disorders, infectious diseases, the loss of reproduction function, and/or the death of the victim.

Article 76D of Law No. 35 of 2014 on Amendment to Law No. 23 of 2002:

Any person is prohibited to commit violence or threat of violence to force a child to have intercourse with him or other person.

Article 81 (5) Perppu:

In the case of crime committed as stipulated under Article 76D⁵⁰² caused more than one victims, causing severe injury, mental disorders, infectious diseases, the loss of reproduction function, and/or the death of the victim, the perpetrator shall be imposed with death penalty, life imprisonment, or imprisonment for 10 years at minimum and 20 years at maximum.

On 12 October 2016, Perppu was later approved by the House of Representatives without any changes in its provisions.⁵⁰³ This Perppu was later issued as Law No. 17 of 2016 on Determination of Government

⁵⁰¹ Indonesia, *Law No 12 of 2011 on Establishment of Laws and Regulations*, Appendix number 19.

⁵⁰² Article 76D of Law No. 23 of 2002 on Child Protection stated that “every person is prohibited to commit violence or threat of violence to force a child to conduct an intercourse with him/her or with someone else.”

⁵⁰³ PKS faction provided several notes related to the issuance of Perppu as follows: (i) in regards to alternative measures from the government in overcoming sexual assault towards children. In addition, there is no available data that is published regarding sexual assault in Indonesia. Whereas, such data is important to examine the urgency to issue a policy: (ii) The said Perppu becomes the path to revise Law No. 23 of 2002 on Child Protection to be more comprehensive. It is necessary so that child protection is no longer merely provide more severe punishment towards the perpetrator of the assault towards minors; and (iii) more severe punishment imposed towards the perpetrator of sexual assault towards children must also consider the future of the children, not merely increasing the criminal punishment. See Nabilla Tashandra, *Sempat Menolak Perppu Kebiri Jadi UU, PKS Berikan Tiga Catatan*, Kompas, 12 October 2016, <<http://nasional.kompas.com/read/2016/10/13/10454711/sempat.menolak.perppu.kebiri.jadi.uu.pks.berikan.tiga.catatan>>, accessed on 13 December 2017. Meanwhile, Gerindra Party Faction rejected with the consideration that many organizations and institutions that directly involved with the perpetrator and victims of sexual assault towards children are opposing the provisions under the said Perppu. Furthermore, the faction supported the acceleration of discussion of Draft Bill on Elimination of Sexual Assault, so that the measures of victims protection is more comprehensive. See Ahmad Faiz, *DPR Sahkan Perppu Kebiri Menjadi Undang-Undang*, Tempo, 12 October 2016, <<https://nasional.tempo.co/read/811612/dpr-sahkan-perpu-kebiri-menjadi-undang-undang>>, accessed on 13 December 2017.

Regulation in Lieu of Law No. 1 of 2016 on Second Amendment to Law No. 23 of 2002 on Child Protection as a Law. Minister of Women Empowerment and Child Protection, Yohana Yembise, appreciated the result from the House of Representatives, by stating that “we now have the most severe punishment. Death penalty, life imprisonment, forced chemical castration, announcement of perpetrator’s name publicly, and the use of electronic chip.”⁵⁰⁴ Several factions at the House of Representatives provided notes on the issuance of the Perppu with the hope of a more comprehensive revision and so that it can be effectively implemented. In addition, it is necessary to have more clarity on the formulation of the articles and in technical level of implementation.⁵⁰⁵ Previously, several members of the House of Representatives stated their objection in regards to several clauses under Perppu related to the incorporation of forced chemical castration that is considered inhuman.⁵⁰⁶

Table 3.10 Death Penalty Articles under Law No. 17 of 2016

Article 81 of Law No. 17 of 2016 on Second Amendment to Law No. 23 of 2002 on Child Protection	Article 89 of Law No. 23 of 2002 on Child Protection
(1) Every person who violates the clause as stipulated under Article 76 D shall be punished with imprisonment of 5 (five) years at minimum and 15 (fifteen) years at maximum and fines IDR 5.000.000.000 (five billion rupiah) at maximum.	Everyone who violates the clause as stipulated under Article 76J paragraph (1), will be punished with death penalty or life imprisonment or imprisonment of 5 (five) years at minimum and 20 (twenty) years at maximum and fines IDR 50.000.000 (fifty million rupiah) at minimum and IDR 500.000.000 (five hundred million rupiah) at maximum.
(2) Criminal punishment as stipulated under paragraph (1) above also applies to any person who deliberately commits deceit, lies, or persuades a child to have an intercourse with him/her or with someone else	
(3) If the crime as stipulated under paragraph (1) is committed by the parents, legal guardians, relatives, caregivers, or committed by one or more person together, the punishment will be added with a 1/3 (one third) from the criminal punishment as stipulated under paragraph (1).	
(4) In addition to perpetrator as stipulated under paragraph (3), the additional 1/3 (one third) of the criminal punishment will also be imposed towards a perpetrator that has been sentenced with the crimes as stipulated under Article 76D.	
(5) In the event that the crime as stipulated under Article	

⁵⁰⁴ Muhammad Fikrie, *Pengesahan Hukuman Kebiri Beriring Catatan Dan Penolakan*, Beritagar, 16 October 2016, <<https://beritagar.id/artikel/berita/pengesahan-hukuman-kebiri-beriring-catatan-dan-penolakan>>, accessed on 20 September 2017.

⁵⁰⁵ Nabilla Tashandra, *DPR Sahkan Perpu Kebiri Jadi Undang-Undang*, Kompas, 12 October 2016, <<http://nasional.kompas.com/read/2016/10/12/13333281/dpr.sahkan.perppu.kebiri.menjadi.undang-undang>>, accessed on 28 November 2017.

⁵⁰⁶ Riza Harahap, *Alasan Kalangan DPR yang Tolak Hukuman Kebiri*, Antara News, 12 October 2016, <<https://www.antaranews.com/berita/589903/alasan-kalangan-dpr-yang-tolak-hukuman-kebiri>>, accessed on 29 November 2017.

<p>76D leads to more than 1 (one) victims, causing severe injuries, mental illness, infectious diseases, loss or damaged reproduction function, and/or the victim is passed away, the perpetrator shall be punished with imprisonment of 10 (ten) years at minimum and 20 (twenty) years at maximum</p> <p>(6) In addition to criminal punishment as stipulated under paragraphs (1), (3), (4), and (5), the perpetrator may be imposed with additional punishment with the publication of his/her name.</p> <p>(7) Towards the perpetrator as mentioned under paragraphs (4) and (5), he/she may be imposed with forced chemical castration and embedded with chip.</p> <p>(8) Additional punishment as mentioned under paragraph (7) will be decided along with the main punishment by incorporating the timeframe of the execution of such additional punishment.</p> <p>(9) Additional punishment and action will be exempted for minor perpetrator.</p>	
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3.8.7.1 The Rise of Death Penalty and Forced Chemical Castration under Law No. 17 of 2016: Pros and Cons

From historical perspective, the issuance of this Perppu was related to the sexual assault towards children that happened in Bengkulu on 5 April 2016.⁵⁰⁷ This case generated debates on the effectiveness of Law No. 23 of 2002 on Child Protection and Law No. 35 of 2014 on Amendment to Law No. 23 of 2002 on Child Protection. In regards to this case, a teenage girl aged 14 years old was raped by multiple persons and this resulted in her death, and not long after that another rape case involved a child aged 7 years old in South Kalimantan that resulted in the child's death. This encouraged the society to impose the most severe punishment towards the perpetrator of sexual assault to children, including imposing death penalty.

The high number of violence towards children, in particular sexual assault towards children, created a momentum for the supporters of death penalty to incorporate articles on death penalty under Perppu No. 1 of 2016. This was closely related with the point of view from the government, as has been elaborated in previous chapter, in which violence towards children is considered as extraordinary incident because it may damage the personality and development of the children, interfering the composure and comfort of the society, and therefore it requires extraordinary measures. Severe punishment towards the perpetrator is also expected to have deterrent effect towards the perpetrator.⁵⁰⁸

⁵⁰⁷ Redaksi, *Terlungkup Bugil, Tangan Terikat*, Bengkulu Ekspres, 5 April 2016. <<http://bengkuluekspres.com/terlungkup-bugil-tangan-terikat/>>, accessed on 29 September 2017.

⁵⁰⁸ Presiden Jokowi when announced Perppu at the State Palace, 25 May 2016.

The government, society, and most of the civil society organizations were seemed agreed with the notion to create more severe punishment for the perpetrator of sexual assault and they also agreed with the recommendation from KPAI in regards to death penalty for the perpetrator of child violence. The government, as stated by Minister of Law and Human Rights Yasonna Laoly said that by incorporating death penalty as a punishment for the perpetrator of sexual assault towards children, with the consideration that death penalty is still a possibility. Under many laws in Indonesia, death penalty can be imposed to the cases such as narcotic and drugs, terrorism, and premeditated murder.⁵⁰⁹ Yasonna Laoly further added that the Perppu only applies to a perpetrator above the legal age who commits sexual assault towards children.⁵¹⁰

Previously, the Indonesia Child Protection Commission (*Komisi Perlindungan Anak Indonesia – “KPAI”*) encouraged the government to incorporate death penalty for the perpetrator of sexual assault towards children, with the consideration that the increase of sexual assault cases towards children in Indonesia must be stopped immediately by incorporating severe punishment such as death penalty. The Commission asked for a firm regulation that can charge the perpetrator of violence towards children in order to create deterrent effect. KPAI was hoping that all perpetrators of violence towards children, in particular sexual assault, can be punished with death penalty or life imprisonment. KPAI Secretary at that time said that sexual assault caused damages towards five human organs at once and it is proper to impose death penalty.⁵¹¹ Another member of KPAI, Susanto, also stated that the criminal punishment for the perpetrator of violence towards children is considered not optimum yet, which the ideal mandatory minimum should be 15 years and maximum death penalty.⁵¹²

Similar support also offered by the General Chairman of PBNU Said Aqil Siraj who encouraged death penalty for perpetrators of sexual assault towards children. The imposition of severe punishment is expected to eliminate the intention from other potential perpetrator to commit similar crime. Sexual crime against children is considered a deviation of humanity principles and religious norms.⁵¹³ Karni Ilyas also said that with the implementation of death penalty under the Child Protection Law was based on many factors including ideologies and the spirit to punish the perpetrators of sexual assaults that often happened, the case of rape towards baby that happened previously is proper to be punished with death penalty, because it was a sadistic crime.⁵¹⁴ In addition, back in 2014, there was an online petition that

⁵⁰⁹ Sa'diyah, *loc.cit.*

⁵¹⁰ Ursula Florence, *Joko Widodo Sahkan Perppu Kebiri*, Rappler, 25 May 2016, <<https://www.rappler.com/indonesia/134251-joko-widodo-sahkan-perpu-kebiri>>, accessed on 20 September 2017.

⁵¹¹ David Setyawan, *KPAI Minta Pelaku Kejahatan Anak di Hukum Mati*, KPAI, 13 June 2015, <<http://www.kpai.go.id/berita/kpai-minta-pelaku-kejahatan-anak-dihukum-mati/>>, accessed on 29 September 2017.

⁵¹² Sip/Ndr, *KPAI: Idealnya, Hukuman Maksimal Pelaku Kekerasan Anak Hukuman Mati*, Detik, 10 May 2014, <<https://news.detik.com/berita/d-2579049/kpai-idealnya-hukuman-maksimal-pelaku-kekerasan-anak-hukuman-mati>>, accessed on 29 September 2017.

⁵¹³ Arga Sumantri, *PBNU Ingin Hukuman Mati bagi Pelaku Kekerasan Seksual Anak*, Metrotv News, 10 May 2016, <<http://news.metrotvnews.com/read/2016/05/10/525908/pbnu-ingin-hukuman-mati-bagi-pelaku-kekerasan-seksual-a>>, accessed on 29 September 2017.

⁵¹⁴ Interview with Karni Ilyas, 6 October 2017.

persuade people to fight for death penalty article for the perpetrator of pedophilia and human trafficking.⁵¹⁵

Sidharta, a criminal law expert, responded the opinion from KPAI by stating that KPAI is not a law enforcement institution and therefore KPAI is not competent to propose recommendation such as death penalty. The recommendation pertaining to death penalty made KPAI as an institution that reflecting a state institution that use a “legal emotion” in issuing its policies, whereas an institution such as KPAI should guide the society to think more rationally and not following other opinion, because within Indonesian legal culture, “legal emotion” is considerably stronger than legal awareness.⁵¹⁶

This situation caused the issuance of Perppu No. 1 of 2016 that was later agreed to be passed as a law. However, several debates between the pros and the cons also arised, in particular pertaining to the implementation of death penalty and forced chemical castration. The government insisted, as delivered by Minister of Women Empowerment and Child Protection Yohana Susana Yembise, the most important issue is that Perppu must be immediately issued as a proof that the government does not stay silent in responding to the high number of sexual assault.⁵¹⁷ Nasir Jamil, member of Commission III of the House of Representatives, viewed that the Child Protection Perppu must be re-strengthened, which is a strengthening to impose more severe punishment for the perpetrator of sexual assault towards children. Nasir Jamil highlighted the incorporation of punishment in form of forced chemical castration that threatens human rights and the impact towards deterrent effect that is originally expected, and therefore it is unnecessary to impose forced chemical castration, but directly to death penalty with an implementation that is proportional and masurable.⁵¹⁸

In the discussion process of the Perppu, not all members of the factions within the House of Representatives agreed with the implementation of forced chemical castration. Gerindra Party Faction, represented by Rahayu Saraswati, stated her opposition towards Perppu, stating that the punishment in the form of forced chemical castration is not the best solution. Saraswati added that there must be education and training conducted first to the judges before adding more punishment. Iskan Qolba Lubis, politician from PKS also stated that there is an impression that the government was hurried to issue the Perppu due to the pressure from public opinion, with the argument that the cause of a person to commit sexual crime is not merely due to high libido, but also caused by the mental state of the said person.⁵¹⁹

Meanwhile, from the sides that opposed death penalty, they already rejected the idea of death penalty and forced chemical castration since the drafting process of Perppu. *Aliansi 99*, a collective of civil society organizations consisted of institutions focusing on child protection issue and also institutions working on human rights issues as well as policies in Indonesia, stated that the government is giving

⁵¹⁵ *Perjuangkan Article Hukuman Mati Terhadap Pelaku Pedofil dan Human Trafficking*, <<https://www.change.org/p/komisi-iii-dan-komisi-viii-dpr-ri-perjuangkan-Article-hukuman-mati-terhadap-pelaku-pedofilia-dan-human-trafficking>>, accessed on 29 September 2017.

⁵¹⁶ Interview with Shidarta, 29 September 2017.

⁵¹⁷ Mitra Tarigan, Reza Aditya dan Agoeng, *Perppu Kebiri Hukuman Kekerasan Seksual Tak Segalak Aturan*, Tempo, 24 May 2016, <<https://nasional.tempo.co/read/773634/perpu-kebiri-hukuman-kekerasan-seksual-tak-segalak-aturan>>, accessed on 29 September 2017.

⁵¹⁸ Waspada, *Perppu Hukuman Kebiri, Komisi III Seharusnya Hukuman Mati*, Waspada Online, 26 May 2016, <<http://waspada.co.id/warta/perppu-hukuman-kebiri-komisi-iii-seharusnya-hukuman-mati/>>, accessed on 20 September 2017.

⁵¹⁹ Fikrie, *loc.cit.*

more attention towards retaliation instead of rehabilitation for the victims of sexual crimes towards children that happened. Meanwhile, the provisions regarding the victims are not prioritized by the government. The concerns over the implementation of the Perppu also addressed by Sri Mulyati, an activist from *Forum Pengada Layanan*, who said that the policy targets children that become perpetrator. Mulyati said that there is a trend showing the perpetrator of sexual crime is becoming younger and below 18 years old, and from the cases that have been handled by her, there is a trend that the perpetrators are below 18 years of age or very old, and almost half of them are children.⁵²⁰

Strong opposition towards death penalty and forced chemical castration under the Perppu comes from The Indonesian National **Commission** on Violence against Women (Komnas Perempuan). This institution was of the view that sexual crime is a cruel, uncivilized, and destroying the livelihood of the victim, however the new policy is not having conformity to the Constitution and human rights principles. Komnas Perempuan delivered six reason to oppose the incorporation of death penalty and forced chemical castration as a form of punishment for the perpetrator of sexual crime under the Perppu, namely:⁵²¹

1. Death penalty and forced chemical castration is not proven yet to prevent sexual assault, even several countries in the European continent that once implemented this form of punishment, are no longer using such punishment (for instance in this case is the United Kingdom, Germany, and Denmark). In the context of Indonesia, the implementation of these two punishment is feared to make the perpetrator of sexual assault using various ways to avoid legal process, including increasing the bribery in rendering court decision, and make more distance for the victim from access to justice and rehabilitation;
2. The implementation of death penalty and forced chemical castration require expensive cost. For one forced chemical castration (injection of hormones), it costs approximately IDR 700.000 (seven hundred thousand rupiah), with effective injection period for only three months. If every convict will be injected several times with drugs/hormones, for instance up to 8 times, then the state must provide the budget around IDR 5.6 million for 1 convict who is punished by forced chemical castration. Until today, Indonesia is still facing difficulties due to the lack of the budget for *visum et repertum* for the victims of sexual assault in related institution. So far, the funding for *visum et repertum* in many regions in Indonesia is paid by the victim. Each victim needs approximately IDR 80 thousand up to 500 thousand for *visum et repertum* cost. If the *visum et repertum* requires a specialist, then it requires approximately IDR 500 thousand up to 1 million. The cost for forced chemical castration can be transferred into the budget for *visum et repertum*, as a proof that the state is protecting the victim of sexual assault. *visum et repertum* is required by the victim so that the case can be followed up to the court;
3. Forced chemical castration, if such punishment is pushed to be implemented, then it may be unexecutable because the Indonesian Doctors Association (IDI), an institution that is expected to implement forced chemical castration, already rejected from the involvement in the execution of such punishment. The rejection is base on the argument that the action violates the Oath of the Doctors and Indonesian Medical Code of Ethics, and such action is considered contradict the humanity values;
4. Death penalty and forced chemical castration are violation towards the right to life and actions that are cruel, inhuman, and degrading human dignity. Therefore, these two forms of punishment are

⁵²⁰ *Ibid.*

⁵²¹ Komnas Perempuan, *Enam Alasan Menolak Pdana Mati dan Pidana Tambahan Kebiri Bagi Pelaku Kekerasan Seksual*, Pernyataan Pers, 12 October 2016.

considered violating the international human rights law. Death penalty revokes the right to life of a person that is a constitutional rights, in which the fulfilment of such right is guaranteed without limits on any measures by the 1945 Constitution of the Republic of Indonesia. Forced chemical castration can cause sexual dysfunction and osteoporosis for the convict. Indonesia has ratified the International covenant on Civil and Political Rights under Law No. 12 of 2005, and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, under Law No. 5 of 1998. As a state that has been ratified these international treaties, Indonesia must comply towards the human rights instrument. The implementation of death penalty and forced chemical castration for the perpetrator of sexual assault, is an action that is not proportional for the crime and steps backward from the government in the enforcement of human rights;

5. The legal clauses that already on the table for the perpetrator of sexual crime, so far cannot be implemented to maximum. There are several barriers that experienced by the victims in accessing justice, in particular related to the perspective from the law enforcement officers that who are still gender-biased in handling sexual assault cases as well as the proofing mechanism that still complicate the victims. This condition is related to the practice of legal mafia that strengthened the impunity of the perpetrator of sexual assault. The required regulation at this moment is the one that can solve such issue, not forming new punishment;
6. Extraordinary measures towards extraordinary crime (in this case, for example, rape case); can be conducted by optimizing the implementation of existing law (including life sentence) towards the perpetrator, and at the same time ensuring all existing policies for victim rehabilitation can be executed quickly, accurate, and easily accessed by the victims of sexual assault and their families, including in this case eliminating barriers that all this time experienced by the victims when accessing justice and rehabilitation

Komnas Perempuan also viewed that the existing laws are yet to be implemented to the maximum because the barriers that occurred in the form of gender-biased trial process, and legal mafia. The effort that must be taken is by resolving such barriers, not forming new punishment.⁵²² Komnas Perempuan urged the government to prioritize the discussion of Draft Bill on Eradication of Sexual Assault.

3.8.7.2 Death Penalty under Law No. 17 of 2016 Violating the Constitution and Human Rights

Death penalty under Law No. 17 of 2016 bring back the pros and cons in the establishment of laws and regulations in Indonesia, in particular if this issue is examined from the point of view Pancasila, the Constitution, and protection of human rights. From the philosophical aspect, the issuance of the Perppu has negated the constitutionality of the right to life as a non-derogable right in any circumstances as stipulated under Article 28I paragraph (1) of the 1945 Constitution. That Article qualified the right to life as a non-derogable right that cannot be reduced in any circumstances.⁵²³ This provision is essentially a manifestation from the second principles of Pancasila, which is “A just and civilized humanity”, as a principle that reflects the awareness of Indonesian nation as part of universal humanity.⁵²⁴

⁵²² Fikrie, *loc.cit.*

⁵²³ However, the legal argumentation from the Constitutional Court under Case No. 2-3/PUU-V/2007 is reducing the meaning of right to life as absolute right, because pursuant to the systematic interpretation (*sistematische interpretatie*), human rights that are stipulated under Article 28A to Article 28I of the 1945 Constitution are abide by the limitation under Article 28J of the 1945 Constitution.

⁵²⁴ Yudi Latif, *Negara Paripurna: Historisitas, Rasionalitas, dan Aktualitas Pancasila*, (Jakarta: PT Gramedia Pustaka Utama, Cetakan Ketiga, 2011), pg. 237.

At this point, it becomes important to put and contextualize Pancasila in the reality of global trend that require the abolishment of death penalty. The desire from the international community to abolish death penalty as stated under the ICCPR and strengthened through the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Up to this day, there are 85 contracting parties and 38 state signatories to this treaty. Therefore, the abolishment of death penalty is in line with the spirit of the Preamble under the 1945 Constitution, which states that *raison d'être* of Indonesia's existence is to be involved in implementing world security, based on freedom, eternal peace, and social justice.

Furthermore, if it examined from the sociological aspect, the reason of the issuance of the Perppu is not satisfied because the government cannot show the emergency reason of sexual assault towards children. The government stated that sexual assault towards children in Indonesia is fall under the category of extraordinary crime, therefore the legal measures towards those kind of cases must be extraordinary as well is a weak argumentation. Vivi Widyawati, a human rights activist, stated that the implementation of death penalty and forced chemical castration for the perpetrator of sexual assault will make the pshycological condition is getting worse. This situation is closely related from the empirical fact that sexual assault cases happened in Indonesia are usually committed by the closest person to the civtim and cause the victims to reconsider their decision to report the perpetrator.⁵²⁵ Agustinus Pohan, an academics, also statd that death penalty while it is originally intended by the proposers and the drafters of the Perppu to generate deterrent effect, doubt the effectiveness of the Perppu to push the number of sexual assault towards childred. Furthermore, Agustinus Pohan explained that light sentence from the court that cause the perpetrator or those who potentially commit the same crime, thought that the punishment for sexual assault is light eventhough the possible charges are severe.⁵²⁶

Meanwhile, from the legal aspect, the existence of the Perppu does not satisfy the reason of the establishment of laws and regulations, because Law No. 35 of 2014 on Amendment to Law No. 23 of 2002 on Child Protection alrady stipulated criminal punishment for the perpetrator of sexual assault towards children, therefore the rason of legal vacuum is not satisfied.

⁵²⁵ MTVN/OL-3, *Hukuman Kebiri bukan Solusi*, Media Indonesia, 11 May 2016, <<http://www.mediaindonesia.com/index.php/news/read/44795/hukuman-kebir-bukan-solusi-1/2016-05-11>>, aaccessed on 9 October 2017.

⁵²⁶ Statement from Agustinus Pohan was supported by the dissertation of a student from Parahyangan University Faculty of Law, Intan Mutia Suswanti, concluded that more severe punishment does not significantly change the sentence towards the perpetrator of sexual assault. Judges are more often to render imprisonment and minimum fines in their decision. Intan Mutia Suswanti compared sexual assault cases in which the verdict used the 2002 Law and similar cases in which the perpetrators were sentenced using the 2014 Law. All of these cases are selected randomly from all Indonesian region and measured using 10 comparative variables, including prosecutor indictment, the period of imprisonment, the number of dines, age and relationship with the victim, perpetrator's economic status, issues that help or incriminating the perpetrator in the verdict, and the sex of the judge. The data gathered shows that none of the perpetrators were indicted by the prosecutor with maximum imprisonment of 15 or 20 years. In addition, the verdicts from the judges are often lower than the indictment from the prosecutors. Even the light sentences imposed to several cases with the perpetrators as the family or closest person to the victim, which according to the law must be charged with severe punishment. Twenty cases were tried using Law No. 23 of 2002 that result in average of imprisonment indictment 6 years and 6 months, with 5 years of sentence. Similar situation also happened after the issuance of Law No. 35 of 2014: from 20 cases last year, the average of the indictment only 8 years 6 months of imprisonment with 6 years sentence. Lihat Tarigan, Aditya dan Agoeng, *loc.cit*.

Death penalty, while originally intended by the proposers and the drafters of the Perppu to generate deterrent effect, according to Agustinus Pohan, academic from Parahyangan University doubted the effectiveness of the Perppu to push the number of sexual assault towards children. Further, according to Agustinus Pohan, light sentence from the court that cause the perpetrator or those who potentially commit the same crime, thought that the punishment for sexual assault is light even though the possible charges are severe.⁵²⁷

From the human rights protection aspect, the incorporation of death penalty for the perpetrator of sexual assault towards children that stipulated under the Perppu must be viewed from the human rights perspective to examine its conformity with the human rights universal standards. That the legal basis for judicial execution under international law can be found under Article 6 of the ICCPR that stipulates the right to life. Paragraph 2 introduced the formulation of the most serious crimes. In the countries that are yet to abolish death penalty, such punishment can only be imposed for the most serious crimes according to the prevailing law when the crime was committed.⁵²⁸ The formulation of Article 6 of the ICCPR is opened for a wide interpretation. The idea of “seriousness can vary between national culture, religion, tradition, and political context. However, the relativist approach is concerning because it has the potential to interfere with the normative principle concept that applies universally under the international law. In the spirit of universality, Article 6 of the ICCPR determined the direction towards the abolishment of death penalty with incorporating the state obligation to limit the use of death penalty progressively.⁵²⁹

The government should conduct measures to immediately enact the Draft Bill on Eradication of Sexual Assault as one of strategic moves to reduce the sexual crime assault cases. Even the Perppu does not stipulate the right of the victims to obtain justice and rehabilitation because it is too focused on handling the perpetrator.⁵³⁰ In addition, the government should try to conduct preventive measures at the maximum by providing security towards women and children. The government effort that always put forward punishment towards the perpetrator, but ignored the victims show that the lawmakers are not sided with the victims. The Perppu shows that the lawmakers did not reflect the women experience, in particular the victim of sexual assault under a legislation.

The government also need to conduct various legislative reform to prevent violence towards women. The Committee to Eradicate Discrimination against Women recommended that the contracting parties: (i) ensuring the law that against domestic violence and harassment, rape, sexual assault, and other gender-based violence to give proper protection for all women, and respecting their integrity and

⁵²⁷ *Ibid.*

⁵²⁸ International Commission against the Death Penalty, *The death penalty and the “most serious crimes”: A country-by-country overview of the death penalty in law and practice in retentionist states* (International Commission against the Death Penalty, January 2013), pg. 5.

⁵²⁹ *Ibid.*

⁵³⁰ According to the Head of Criminal Justice System Reform Division at MaPPI FHUI, Anugerah Rizki Akbari, the government is mistaken to consider the problem of sexual crime towards children can be reduced with severe punishment. The government forgets one important factor, which is the necessity to pay attention to the protection of the victim, which is rehabilitation. See Ambaranie Nadia Kemala Movanita, *Perppu Perlindungan Anak Dinilai Terlalu Fokus pada Pelaku dan Lupakan Korban*, Kompas, 21 December 2016, <<http://nasional.kompas.com/read/2016/12/21/13553281/perppu.perlindungan.anak.dinilai.terlalu.fokus.pada.pe.laku.dan.lupakan.korban>>, accessed on 9 October 2017.

dignity; and (ii) take all legal measures and other necessary action to provide effective protection for women against gender-based violence, including effective legal measures, including criminal punishment, rehabilitation, and compensation provision under civil law to protect the women from any type of violence.⁵³¹ Pursuant to those recommendation, effective legal measures not only emphasizing on the imposition of criminal punishment to the perpetrator, but also treatment towards the victim that must obtain attention from the state. This is also strengthened by the Report from the UN Secretary-General on the intensification of effort to eradicate all types of violence against women..⁵³²

⁵³¹ Division for the Advancement of Women, *Handbook for Legislation on Violence against Women*, (New York: United Nations Publication, 2010), pg. 5.

⁵³² Majelis Umum PBB, *Intensification of efforts to eliminate all forms of violence against women*, A/65/208, 2 August 2010.

CHAPTER IV

Indonesian Legislation and Its Compatibility with Human Rights Principles

Indonesia, as a member of many international treaties on human rights, has an international obligation to implement the provisions under the human rights international treaties. Indonesia, at the least, is a state party, through ratification or accession, to more than eight international treaties on human rights, two of which are the essential international treaties on basic human rights that are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). As a state party to the ICCPR, Indonesia is obliged to honor and guarantee the rights acknowledged under the ICCPR and to take necessary actions in determining provisions under laws and regulations or other necessary policies, for the purpose of implementing the acknowledged rights under the ICCPR.⁵³³

This chapter discusses Indonesian legislation compatibility in regards to death penalty with human rights norms, as stipulated under international laws on human rights. This chapter also elaborates several key concepts related to the debate on death penalty, some of which are the concept on the right to life, derogation and limitation, the concept on the most serious crimes under international and the implementation under Indonesian legislation.

4.1 Concept of Limitation and the Right to Life

Human rights is now the world's mainstream civilization. This achievement is the peak of human rights defender fights that emerged since the beginning of human civilization—at the level of thought, as well as national livelihood. The thoughts on human rights can be traced since the old Greek period, in the context of purpose and main orientation of the statehood, as well as the right to be free from oppression.⁵³⁴

On the other side, the practice of human rights violation becomes the dark side of the human civilization itself, due to civil wars or oppression committed by the state to its own citizens. These experiences raise awareness of mankind and also the acknowledgement towards human dignity, as well as inherent rights to each human as the ground for freedom, justice, and world peace.

The adoption and proclamation of the Universal Declaration of Human Rights (UDHR) on 10 December 1948 by the UN General Assembly is the peak acknowledgement towards human rights as common standard achievement in the protection and development of human rights for all people and nations. While the UDHR is not legally binding, it is still the main foundation for human rights protection and development, as well as the foundation for other human rights document that legally binding such as the ICCPR and ICESCR, and many other international treaties on human rights.

⁵³³ UN General Assembly, *Covenant on Civil...*, *op.cit.*, Article 2 (1) and (2) .

⁵³⁴ Darren J. O'Bryne, *Human Rights: An Introduction*, (Delhi Pearson Education Limited, 2003), pg. 28.

The basic concept of human rights is the acknowledgement that all mankind is born free and equal in dignity and rights. Pursuant to Article 1 of the UDHR, all human are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. This basic concept is followed by three principles on human rights existence. Firstly, human rights has universal nature, inherent to each person disregarding the difference of ethnicity, race, gender, age, religion, political belief, or even political view. Secondly, human rights cannot be denied, as it is not given by the state and therefore it cannot be erased or rejected by any political authority. Thirdly, human rights is subjective in nature that is possessed individually because a person's capacity as a rational and autonomous human.⁵³⁵

One of many authorities owned by the state is law formulation and enforcement. By default, laws must be formulated and enforced with the main orientation to give human rights protection. Such laws will be the legitimate ground for every action committed by the state.

Limitations and Permissible Restrictions of Human Rights Fulfillment

In the concept of human rights, a concept of limitations and permissible restrictions are known. The limitations are stipulated under Article 29 (2) of the UDHR:

"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirement of morality, public order, and the general welfare in a domestic society."

The clause under Article 29 (2) of the UDHR shows that limitations can be conducted as an effort to balance the individual rights and public interest. Limitations are required merely due to the reason that other people rights and freedom can also be protected and fulfilled. In line with its limiting nature, the limitations clause is not at all eliminating the right that is limited. Such limitation can only be promulgated under a law and addressed to ensure the acknowledgement and honor towards other people rights, according to morality, public order, and requirements for public welfare within a democratic society.

Limitation clauses that are allowed can be found under several articles in the ICCPR. Article 18 (3) of the ICCPR stated that freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. It is also stipulated under Article 19 (3) of the ICCPR that the exercise of rights may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the rights or reputations of others and for the protection of national security or of public order, or of public health or morals.⁵³⁶ More general limitation can be found under Article 20 of the ICCPR, which stated that any propaganda for war shall be prohibited by law and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

In addition to limitation concept, another concept that is also familiar is the derogation concept, which means as a reduction or postponement. A right that being derogated does not mean that it cannot be

⁵³⁵ *Ibid.*, 27.

⁵³⁶ Further information on the limitation clauses can be found under the UN Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, CCPR/C/GC/34, 12 September 2011.

satisfied at all. Therefore, derogation can only be exercised for certain period of time and with a strict mechanism, and usually it is only allowed during a state of emergency.⁵³⁷ After this state of emergency is ended, derogation must be terminated.

It can be said that limitation can be applied to all rights and freedoms, for the exception that such limitation can be totally revoked the rights, or in other words such limitation also causes derogation. Derogation can also be conducted towards all rights, except for non-derogable rights. Article 4 of the ICCPR stated that:

1. *In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*
2. *No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision..*
3. *Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.*

Rights that are categorized as non-derogable rights are the basic and principle rights for the humanity. Such rights cannot be violated, even when the statehood is threatened.⁵³⁸ If such rights are derogated, it will degrade human dignity and even can eliminate the nature of mankind that cannot be restored in normal circumstances. Therefore, rights that fall under non-derogable rights are not subject to the limitation clauses. In regards to these non-derogable rights, some classify those rights as the core of human rights and the peak of hierarchy in the international law order.

Right to Life

The right to life is part of non-derogable rights. This right, as previously elaborated under Chapter II, has been determined under many international human rights law. The right to life is acknowledged under Article 3 of the UDHR, which stated that: “Everyone has the right to life, liberty, and security of persons”. According to Eleanor Roosevelt and Rene Casin, two drafters of the UDHR, the right to life does not acknowledge exemption and the purpose of the formulation of such right is the elimination of death penalty.⁵³⁹

⁵³⁷ Belay Frenesh Tessema, *A Critical Analysis of Non-derogable Rights in a State of Emergency under the African System: The Case of Ethiopia and Mozambique*, thesis at Universidade Eduardo Mondlane Maputo, Mozambique, 2005, pg. 11-14.

⁵³⁸ Wang Zhenjun, *Several Issues Relating to Protecting Non-derogable Rights in China*, paper presented during Constitutions and Emergencies Workshop, Athena, 12 June 2017, pg. 1.

⁵³⁹ Lubis and Lay, *Kontroversi...*, *op.cit.*, pg. 13.

The formulation of the right to life as non-derogable rights can be found under the ICCPR. Article 4 (2) of the ICCPR specifically stated that provision under Article 6 of the ICCPR on the right to life, as a non-derogable right in any circumstances. The UN Human Rights Committee⁵⁴⁰ also affirmed that the right to life is “the supreme right”, in which derogation of such right is not allowed, even during the state of emergency.⁵⁴¹ Considering that the right to life is part of non-derogable rights, and death penalty cannot prevent crimes, the international community agreed to adopt the “Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty” in 1990. This Optional Protocol explicitly stated the prohibition towards death penalty.

There are some international law instruments that prohibit death penalty as elaborated in the table below:

Table 4.1 International Human Rights Instrument on Death Penalty

No.	Legal Instruments	Elaboration	Notes
1.	<i>Universal Declaration of Human Rights (UDHR) 1948</i>	Article 3	Acknowledgement towards the right to life
2.	<i>International Covenant on Civil and Political Rights (ICCPR) 1966</i>	Article 6 A derivative from the UDHR, stating that the right to life classifies as non-derogable rights	Until 2 November 2003, 151 states have ratified (including Indonesia)
3.	<i>Second Optional Protocol of ICCPR aiming of the Abolition of Death Penalty 1990</i>	This instrument was specifically formulated to abolish death penalty	Up to this date, 50 states have ratified this protocol
4.	<i>Protocol No. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1985</i>	This instrument was aimed to abolish death penalty in European region	
5.	<i>The Rome Statute of International Criminal Court 1998</i>	This instrument does not incorporate death penalty as a form of punishment.	Up to this date, 94 countries have ratified the Rome Statute

The guarantee towards the right to life is promulgated under Article 6 of the ICCPR, which states that:

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 penalty, 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.

⁵⁴⁰ UN Human Rights Committee is an agency established pursuant to Article 28 of the ICCPR.

⁵⁴¹ Human Rights Committee, *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982, par. 1.

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 capital punishment by any State Party to the present Covenant.*

The formulation of Article 6 (1) of the ICCPR affirms that the right to life is an inherent rights in every human being and this right must be protected by the law. The spirit of Article 6 of the ICCPR is to abolish death penalty, however the ICCPR still allows death penalty with strict limitation when it is exercised. Therefore, the formulation under Article 6 of the ICCPR considers death penalty incompatible with the right to life.

Such is evident from Article 6 (2) of the ICCPR, with the phrase “*...in countries which have not abolished the death penalty...*”, which shows that death penalty is incompatible with the right to life as affirmed under Article 6 (1) of the ICCPR and it is expected that death penalty will be abolished pursuant to such affirmation of rights. However, for countries that still implementing death penalty when ICCPR is entered into force, the exercise of such punishment must be limited and strict with certain requirements, as an initial phase for further abolishment. In addition, Article 6 of the ICCPR is addressed to the abolishment of death penalty, as evident from paragraph (6) stating that “*Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.*” Therefore, death penalty must be abolished and Article 6 (2) of the ICCPR cannot be used as a reason to postpone death penalty.

As a continuation to abolish death penalty, the UN then adopted the Second Optional Protocol of ICCPR aiming of the Abolition of Death Penalty in 1990. This protocol was aimed to abolish death penalty during any situation, for both peace time and war time. The Protocol’s consideration states that “*Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable*”.

The desire to abolish death penalty is also reflected under Paragraph 6 General Comment No. 6 for Article 6 of the ICCPR⁵⁴² prepared by the UN Human Rights Committee. The provision said that “*The article also refers generally to abolition in terms which strongly suggest [paras. 2 (2) and (6)] that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life...*”. This provision means that Article 6 of the ICCPR was aimed to the abolishment in a very clear sense, which is aiming to the abolishment of death penalty. The Committee concluded that all abolition efforts must be considered as a progress in respecting the right to life.

⁵⁴² Human Rights Committee , *General Comment No. 6...*, *op.cit.*, par. 6.

The UN Human Rights Committee, when discussing the case of *Roger Judge v. Canada*⁵⁴³ related to the implementation of Article 6 of the ICCPR, stated that death penalty is prohibited. Death penalty constitutes an arbitrary deprivation of the right to life. With the formulation of Article 6 (2) of the ICCPR, the UN Human Rights Committee stated that countries that are yet to abolish death penalty, may continue to implement such punishment, under the condition that such exercise is in accordance/compatible with the restriction promulgated thereunder. However, states that already abolished death penalty are no longer able to use Article 6 (2) of the ICCPR, and no longer able to contribute on the use of death penalty, for instance, by extraditing a person to a state that may implement death penalty.

The UN Human Rights Committee delivered some of its views in the abovementioned case, as follows:

10.4 In reviewing its application of article 6, the Committee notes that, as required by the Vienna Convention on the Law of Treaties, a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Paragraph 1 of article 6, which states that "Every human being has the inherent right to life...", is a general rule: its purpose is to protect life. States parties that have abolished the death penalty have an obligation under this paragraph to so protect in all circumstances. Paragraphs 2 to 6 of article 6 are evidently included to avoid a reading of the first paragraph of article 6, according to which that paragraph could be understood as abolishing the death penalty as such. This construction of the article is reinforced by the opening words of paragraph 2 ("In countries which have not abolished the death penalty...") and by paragraph 6 ("Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."). In effect, paragraphs 2 to 6 have the dual function of creating an exception to the right to life in respect of the death penalty and laying down limits on the scope of that exception. Only the death penalty pronounced when certain elements are present can benefit from the exception. Among these limitations are that found in the opening words of paragraph 2, namely, that only States parties that "have not abolished the death penalty" can avail themselves of the exceptions created in paragraphs 2 to 6. For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.

10.5 The Committee acknowledges that by interpreting paragraphs 1 and 2 of article 6 in this way, abolitionist and retentionist States parties are treated differently. But it considers that this is an inevitable consequence of the wording of the provision itself, which, as becomes clear from the Travaux Préparatoires, sought to appease very divergent views on the issue of the death penalty, in an effort at compromise among the drafters of the provision. The Committee notes that it was expressed in the Travaux that, on the one hand, one of the main principles of the Covenant should be abolition, but on the other, it was pointed out that capital punishment existed in certain countries and that abolition would create difficulties for such countries. The death penalty was seen by many delegates and bodies participating in the drafting process as an "anomaly" or a "necessary evil". It would appear logical, therefore, to interpret the rule in article

⁵⁴³ Komite HAM PBB, *Roger Judge v. Canada*, CCPR/C/78/D/829/1998, 13 August 2003.

6, paragraph 1, in a wide sense, whereas paragraph 2, which addresses the death penalty, should be interpreted narrowly.

10.6 For these reasons, the Committee considers that Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty, violated the author's right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out. The Committee recognizes that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution of the author.⁵⁴⁴

The decision from the Human Rights Committee was rendered unanimously. Therefore, the Human Rights Committee, consists of 18 international experts that was appointed to interpret the ICCPR, is of the view that Article 6 (1) of the ICCPR is a general affirmation on the right to life that is similar to many similar provisions under constitution in many countries, including the Indonesian constitution, which prohibit death penalty. When death penalty is explicitly exempted, as promulgated under Article 6 (2), death penalty can be applied. However, this provision must be narrowly interpreted and only applies to countries that have not abolished death penalty. In the case *Judge v. Canada* mentioned above, the Human Rights Committee views that if Canada is involved in death penalty by extraditing the applicant to a country where a person can be charged with death penalty, hence Canada has violated Article 6 of the ICCPR because Canada has abolished death penalty.

Many development on the right to life and its relation with death penalty show the trend to the abolishment of death penalty. This spirit is still in line with the spirit of death penalty abolishment since the issuance of the ICCPR.

4.2. The Right to Life under the Indonesian Constitution

As of today, Indonesia has used four constitutions that are: (1) 1945 Constitution; (ii) The Constitution of the Republic of the United States of Indonesia ("**UUD RIS**"); (iii) 1950 Provisional Constitution ("**UUDS 1950**"); and (iv) 1945 Constitution with Amendment I-IV, as the prevailing constitution nowadays. In the history of Indonesian constitution development, the right to life also took the center of attention during the drafting process of constitution in Indonesia.

In the drafting process of the 1945 Constitution, sources described the consistency of Supomo (as the person that was predicted to have prepared a draft of constitution in 1942), in regards to articles that promulgated the rights of the citizens, consisting of 74 articles, in which 15 articles incorporated the formulation of "Citizens Rights and Obligation" (identical with human rights). As a comparison, those provisions are twice as much the provisions under the 1945 Constitution.⁵⁴⁵ However, the formulation of human rights protection under the 1945 Constitution was very minimum and the discussion on the right to life was not incorporated under the 1945 Constitution.

⁵⁴⁴ *Ibid.*

⁵⁴⁵ RM A.B Kusuma, *Lahirnya Undang-Undang Dasar 1945 (Memuat Salinan Dokumen Oetentik Badan Oentoek Menyelidiki Oesaha-Oesaha Persiapan Kemerdekaan)*, (Jakarta: Fakultas Hukum Universitas Indonesia, 2009), pg. 18.

That was different compared to UUD RIS and UUDS 1950, which fully incorporated the formulation of human rights, in which most of the provisions under the UDHR were adopted into the articles of the constitution. Regardless, the explicit formulation on the right to life cannot be found under both constitution, even though the document stated the acknowledgement as an individual before the law and the provision regarding the prohibition to be sentenced malignantly without humanity or degrading. The formulation of Article 3 of the UDHR, which states that “Everyone has the right to life, liberty and security of person”, was not incorporated into UUD RIS and UUDS 1950.

The discussion on the right to life appeared during the Konstituante sessions. Member of the Konstituante, Asmada Hadi, straightforwardly referred to the prohibition of death penalty under the constitution (the elaboration on his concept of thoughts related to the right to life and prohibition of death penalty in the Constitution, was elaborated in the previous chapter). Asmara Hadi protested the result of the drafting team that did not incorporate his inputs on the formulation regarding the right to life and prohibition to death penalty under the Report of the Drafting Committee on Human Rights/Citizens Rights and Obligations during the second Session, 29th Meeting, Tuesday, 19 August 1958. His quote is as follows:

*“Chairman, I will not give any evaluation, but I felt discriminated by the members of the Drafting Committee. In the second appendix, there is an input on the formulation of the new materials substance, which can be found under the general overview speech. During the speech, I also proposed several recommendation, but none of that was included in this document. What I was proposing were 1. Right to Life; 2. Right not to be imposed with death penalty. I hereby affirmed, Chairman, that my request or my recommendation is not related to the Cikini incident, I only asked that our upcoming Constitution has the spirit in which any sentence to anyone, is not a vengeance, not an eye for an eye, a tooth for a tooth, but the punishment should be an effort to improve the person who violated the social norm. As for me, regardless how evil that person is, a person is not essentially evil, but a person who is ill and when a person is ill we have to fix him. Thank you.”*⁵⁴⁶

The Drafting Committee made changes by incorporating the right to life and right not to be death executed in the committee’s report on “Additional New Basic Substances”.⁵⁴⁷ However, in the end it is known that the right to life related to death penalty was not included in the then-new constitution draft.

During 1957 until 1959, Konstituante also worked to draft a new constitution for the Republic of Indonesia, but the process was stopped because the President Soekarno issued a Decree which re-activated the 1945 Consitution. The provisions under the 1945 Constitution were applicable until the New Order period and several amendments were made after the Reformasi in 1998.

The discussion on the right to life was occurred once again when the deliberation for the amendment to 1945 Constitution, which can be seen in the discussion of Ad Hoc III Committee People Consultative Assembly (“MPR”) in 1999. Issues pertaining to human rights and the right to life were mentioned by several MPR members, including Taufiqurrohman Ruki, Valina Singka Subekti, and Slamet Efendy Yusuf. Taufiqurrohman Ruki said that citizens rights under the human rights, included the acknowledgement from the state over human rights; rights that cannot be reduced in any circumstances and by anyone.

⁵⁴⁶ The Konstituante of the Republic of Indonesia, *Risalah Perundangan...*, *op.cit.*, pg. 1903.

⁵⁴⁷ *Ibid.*, pg. 1905. New Basic Substances: No. 15: “Right to life and right not to be execute to death”; No. 16: “Right to recall”; No. 17: “Right not to lose citizenship”; No. 18: “Right to free to choose citizenship”; No. 19: “Right to be punished according to humanity.”

Furthermore, Taufiqurrohman Ruki said that “Right to life, right not to be tortured, right to privacy, thought, and conscience, freedom of religion, right not to be enslaved, right to be acknowledged as an individual and equality before the law, and right not to be charged with a retroactive law are non-derogable rights in any circumstances and by anyone.”⁵⁴⁸

In line with Taufiqurrohman Ruki, Valina Singka Subekti from the Functional Group Faction (Fraksi Utusan Golongan – “F-UG”) also elaborated several principles that were the basis of her faction related to the amendment to the 1945 Constitution. Two principles that were related to the formulation of the right to life: *firstly*, agreement at international level and the development in the discussion within many agreement at national level. The international agreement is an agreement that binds the state parties as signatories, for instance the UDHR 1948, ICCPR, and ICESCR. Meanwhile, the agreement at the national level were MPR Decree No. 17 of 1998, law No. 39 of 1999 on Human Rights, State Policy Guidelines (*Garis-Garis Besar Haluan Negara*) 1998, and also referred to UUD RIS, UUDS 1950, and formulation from the Konstituante. *Secondly*, rights that are considered as non-derogable rights, which are rights that cannot be revoked by any person. Therefore, F-UG recommended that non-derogable rights must be formulated and formulated that such rights are guaranteed and protected by the state, and cannot be revoked by anyone. Non-derogable rights including the right to life, right not to be tortured, right to the freedom of thoughts and conscience, right to freedom of religion, right no to be enslaved, right to be acknowledge as an individual before the law and right not to be prosecuted using retroactive laws, as rights that cannot be reduced in any circumstances.⁵⁴⁹

In regards to the discussion on the non-derogable rights, Slamet Efendy Yusuf recommended that the constitution should include the affirmation towards the rights related to human rights that cannot be reduced in any circumstances, because non-derogable rights are very important. According to his explanation, Slamet Effendy Yusuf also read the provisions of the articles pertaining to human rights in detail. Specific to the right to life, it was proposed to be formulated under a standalone article, which was recommended as Article 29, stated that : “Every person is entitled to life, maintaining his life and livelihood”.

However, the overall discussion at MPR regarding the right to life was lack of depth, and therefore several of those are left unclear. This was continued and evident from the judicial review at the Constitutional Court in regards to the constitutionality of death penalty.

⁵⁴⁸ Sekretariat-General of the Constitutional Court, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 195 Latar Belakang, Proses, dan Hasil pembahasan 1999-2002*, Buku VIII Warga Negara dan Penduduk, Hak Asasi Manusia dan Agama, (Jakarta: Sekretariat Jenderal Mahkamah Konstitusi, Edisi Revisi, 2010), pg. 227.

⁵⁴⁹ *Ibid.*, pg. 280 – 282.

Table 4.2 Provisions under the 1945 Constitution related to Right to Life and Freedom from Torture or Inhuman or Degrading Treatment

1945 CONSTITUTION	UUD RIS	UUDS 1950	HUMAN RIGHTS SUB-COMMISSION AND COMMITTEE FOR THE PREPARATION OF THE CONSTITUTION (KONSTITUANTE)	SECOND AMENDMENT TO THE 1945 CONSTITUTION
No article stipulating such issue	<p>Chapter 5 Basic Rights and Freedoms of Mankind</p> <p>Article 7</p> <ol style="list-style-type: none"> 1. Every person is acknowledged as an individual before the law 2. Every person is entitled to the treatment and protection by the law <p>Article 11</p> <p>No person shall be tortured or treated or punished malignantly, with no respect to humanity or degrading</p>	<p>Chapter V Basic Rights and Freedoms of Mankind</p> <p>Article 7</p> <ol style="list-style-type: none"> 1. Every person is acknowledged as an individual before the law 2. Every person is entitled to the treatment and protection by the law <p>Article 11</p> <p>No person shall be tortured or treated or punished malignantly, with no respect to humanity or degrading</p>	<p>Rights fully agreed by Human Rights Sub-Commission and the Konstituante</p> <ol style="list-style-type: none"> 1. Right to life, freedom, and personal security 2. Right to be acknowledged as an individual before the law 3. Equal protection of rights pertaining to human rights 4. Right to be free from torture and/or from cruel treatment that are against the humanity and/or human dignity 	<p>CHAPTER XA HUMAN RIGHTS</p> <p>Article 28A</p> <p>Every person shall have the right to live and to defend his/her life and living.</p> <p>Article 28G</p> <ol style="list-style-type: none"> 1. Every person shall have the right to protect him/herself, his/her family, honor, dignity and property under his/her control, and shall have the right to feel secure and be protected from the threat of fear to do, or not to do something which constitutes a human right. 2. Every person shall have the right to be free from torture or treatment degrading human dignity and shall have the right to obtain political asylum from another country. <p>Article 28I</p> <ol style="list-style-type: none"> 1. The right to life, the right not to be tortured, the right of freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under retroactive law are human rights which may not be prejudiced under any circumstances whatsoever

4.3. Right to Life under the Consideration of Constitutional Court Decisions

The 1945 Constitution places the right to life as a very important human rights, and therefore it is classified as “human rights that cannot be limited in any circumstances”, as promulgated under Article 28I (1) of the 1945 Constitution. Placing the right to life in the first order before other rights that are categorized as “human rights that cannot be limited in any circumstances” is a proof the importance of such right.

Article 28I ayat (1) UUD 1945:

The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances.

The formulation of the phrase “cannot be limited under any circumstances” is a very strong indication that the 1945 Constitution does not wish any limitation over human rights mentioned specifically under Article 28I (1) of the 1945 Constitution. In principle, if there is any limitation over human rights, the constitution will explicitly stated under its provisions.

However, rights that are guaranteed under Article 28I (1) of the 1945 Constitution often interpreted that such rights can be limited according to the human rights limitation clauses, as stipulated under Article 28J (2) of the 1945 Constitution. Whereas, by using systematic interpretation, it is clear that Article 28J (2) is addressed as a limitation towards other human rights (including the rights under Chapter XA of the 1945 Constitution regarding Human Rights), and not towards seven human rights specifically stated under Article 28I (1).

Article 28J ayat (2) UUD 1945:

In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.

Different point of view on the interpretation towards the limitation clause under Article 28J (2) and its relationship with Article 28I (1) of the 1945 Constitution emerged in many judicial reviews at the Constitutional Court (MK). The first issue is in regards to “the right not to be prosecuted under retroactive law” as a right that cannot be limited under any circumstances. This right is considered as absolute rights, as it is with the prohibition to implement the principle of “non-retroactive”. There were differences from the MK justices in discussing this issue, as evident from Decision No. 013/PUU-I/2003 and Decision No. 065/PUU-II/2004. This controversy can be understood, because on one side the principle of non-retroactive is a fundamental principle under criminal law, however, on the other side, exemption towards this principle has been implemented in limited fashion at international court, particularly when conducting trial towards serious crimes such as crimes against humanity and genocide.

The second difference is in relation to the right to life under, which under Article 28 (2) is also a right that cannot be limited under any circumstances. MK has discussed this issue in many decision, including Decision No. 019-020/PUU-III/ 2005 on the Review of Law No. 39 of 2004 on Placement and Protection of Indonesian Workers in Overseas. Under this decision, MK unanimously opined that the right to life is a

crucial human right, and therefore Article 28I (1) of the 1945 Constitution affirms the right to life as a right that cannot be limited under any circumstances.

*The Court is of the view that human rights acknowledge important rights for the livelihood of mankind. It can be said that amongs other human rights, the right to life, right to defend his life and his livelihood are important rights. It is so important of such righ that Article 28I (1) of the 1945 Constitution affirms the right to life as one of many rights that cannot be limited under any circumstances.*⁵⁵⁰

The meaning of the phrase “cannot be limited under any circumstances” also discussed by MK justices in previous cases. Under Decision No. 013/PUU-I/2003 on the Review of Law No. 16 of 2003 on the Enforcement of the Determination of Government Regulation in Lieu of Law No. 2 of 2002 on the Enforcement of Government Regulation in Lieu of Law No. 1 of 2002 on the Eradication of Terrorism for Bali Bombing 12 October 2002 into a Law, referring to the opinion from the expert Maria Farida Indrati (now MK Justice), MK with majority vote opined that the limitation towards human rights under Article 28J (2) of the 1945 Constitution cannot be applied to other human rights under Article 28I (1) of the 1945 Constitution, due to the phrase of “under any circumstances”.

*“Considering that Article 28I (1) of the 1945 Constitution affirms the previous laws and regulations and places the principles in question at the level of the highest laws and regulations (hogere optrekking) at the level of constitutional law. Constitutie is de hoogste wet! The state cannot negate the constitution, because if it is the case, the constitution has ripped of its own provisions (de constitutie snijdt zijn eigen vlees). Also referring to the opinion from expert Dr. Maria Farida Indrati, S.H., M.H. therefore the provision under Article 28J (2) of the 1945 Constitution that consists of possibility to conduct limitation towards human rights cannot be applied towards Article 28I (1), due to the phrase “under any circumstances”. Considering that, the Court is of the view that all rights are subject to limitation, unless stated otherwise by the constitution.”*⁵⁵¹

Similar opinion can also be found in the dissenting opinion under Decision No. 065/PUU-II/2004 regarding Review of Law No. 26 of 2000 on Human Rights Court. Under this decision, Justice Achmad Roestandi, stated that:

“There are several human rights guaranteed under the 1945 Constitution. Pursuant to Article 28J, all human rights can be limited with certain rationale, except for human rights that are stated under Article 28I (1). It has to be affirmed that the article must be read in that way, because of the seven human rights stipulated under Article 28I (1) can be imposed with limitation promulgated under Article 28J, there will be no difference between the seven human rights and other human rights. Therefore, there will be no point to stipulate the seven human rights specifically under Article 28J.

In other words, what is the point of Article 28J to be existed after all!. The phrase “...the right not to be prosecuted under retroactive law are human rights which may not be limited under any circumstances whatsoever”, in particular the wording “may not be limited under any

⁵⁵⁰ Constitutional Court, Decision No. 019-020/PUU-III/2005, pg. 106.

⁵⁵¹ Constitutional Court, Decision No. 013/PUU-I/2003, pg. 42.

*circumstances” are very clear and explicit words, or using the terms under Islamic fiqh law, is a qoth’i principle.”*⁵⁵²

Under Decision No. 011-017/PUU-I/2003 in the Review of Law No. 12 of 2003 on General Election of the Members of House of Representatives, Regional Representative Council, and Regional House of Representative to the 1945 Constitution, Justice Achmad Roestandhi also asserted his opinion in regards to the interpretation of Article 28I (1) of the 1945 Constitution as follows:

*“In Indonesia, pursuant to the 1945 Constitution such limitation can be executed by the lawmakers towards all human rights that are stipulated under Chapter XV on Human Rights, except for the rights under Article 28I, that are: (i) Right to life. (ii) Right not to be tortured. (iii) right of freedom of thought and conscience. (iv) right to freedom of religion. (v) right not to be enslaved. (vi) right to be recognized as a person before the law. (vii) Right not to be prosecute under a retroactive law.”*⁵⁵³

Another MK Justice, Laica Marzuki, also shared similar views that the rights provided for under Article 28I (2) cannot be negated by Article 28J (2) of the 1945 Constitution. Under Decision No. 065/PUU-II/2004, Justice Laica Marzuki stated that:

*“..... Article 28I (1) of the 1945 Constitution of the State of the Republic of Indonesia cannot be negated by Article 28J (2) of the 1945 Constitution of the State of the Republic of Indonesia, which only determines the limitation on the use of rights and freedom of each person pursuant to the law in the meaning of wet, Gesetz, but not at all in the meaning of limitation with the ground of Grundgesetz (Constitution).”*⁵⁵⁴

In the same case, Justice Abdul Mukthie Fadjar, shared the point of view with Justices Achmad Roestandhi and Laica Marzuki, which in essence stated that the limitations provided for under Article 28J (2) are not aimed to limit the rights stipulated under Article 28I (1), but aimed to other human rights that are also stipulated under Chapter XA of the 1945 Constitution on Human Rights. Justice Abdul Mukthie Fadjar stated that:

*“.....if the 1945 Constitution under Article 28I (1) formulates that “ The right to life, the right not to be tortured, the right of freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under retroactive law are human rights which may not be prejudiced under any circumstances whatsoever” are of course with full conscience and a proof of commitment towards human rights religiosity and universality. Article 28J (2) of the 1945 Constitution is a restriction towards various human rights except for the rights that already stated under Article 28I (1).”*⁵⁵⁵

Various perspectives of MK justice mentioned above are the initial debates on the meaning of Article 28I (1) and Article 28J (2) of the 1945 Constitution. Under the Decision No. 013/PUU-I/2003 MK Justices unanimously stated that the right to life is a crucial human rights, and therefore Article 28I (1) of the

⁵⁵² Constitutional Court, *Decision No. 065/PUU-II/2004*, pg. 63-64.

⁵⁵³ Constitutional Court, *Decision No. 011-017/PUU-I/2003*, pg. 41.

⁵⁵⁴ Constitutional Court, *Decision No. 065..., op.cit.*, pg. 65.

⁵⁵⁵ *Ibid.*, pg. 67.

1945 Constitution affirms the right to life as one of many rights that cannot be limited under any circumstances. It is also the same situation with the perspective of some MK justices who said that Article 28J (2) cannot be used to limit or reduce the human rights guaranteed under Article 28I (1), including the right to life that cannot be limited under any circumstances.

Affirmation of MK Point of View: Article 28I (1) of the 1945 Constitution is not absolute.

Under Decision No. 2-3/PUU-V/2007 on the Review of Law No. 22 of 1997 on Narcotic, MK once again discussed the issue in regards to the enforcement of Article 28I of the 1945 Constitution and its relationship with limitation clauses under Article 28J (2) of the 1945 Constitution. MK also provided interpretation over several issues related to Article 28I (1) of the 1945 Constitution, which is an interpretation over the concept of the right to life and the scope of serious crimes related to death penalty. The ground of the constitutional review in this case is in essence related to the guarantee towards the right to life as stipulated under Article 28A of the 1945 Constitution, which stated that “Every person shall have the right to live and to defend his/her life and livelihood” and Article 28I (1) of the 1945 Constitution, which stated that, “The right to life, the right not to be tortured, the right of freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under retroactive law are human rights which may not be prejudiced under any circumstances whatsoever.”

MK gives many argumentation that the promulgation on human rights can be limited or rights that are guaranteed under Article 28 (1) are not absolute. The argumentation from MK are: *First*, MK Decision referred to the history of the drafting process of Article 28I of the 1945 Constitution with the conclusion that human rights under the 1945 Constitution are not absolute, include the rights provided for under Article 28I (1) of the 1945 Constitution.⁵⁵⁶ This point of view was based on the statement from Lukman Hakim Saefuddin, former member of the Ad Hoc Committee I of MPR (PAH I BP MPR), which was appointed to prepared the draft of the 1945 Constitution amendment. In the drafting process of Chapter XA (on Human Rights), the main reference or background was MPR Decree No. XVII/MPR/1998, and from the Decree a legislation was later issued Law No. 39 of 1999 on Human Rights. The spirit of the two provisions is similar, which adopted the stance that human rights are not unlimited. Human rights are not freedom as you wish, but rather a possibility to be limited insofar that such limitation is determined under a law and this spirit realized Article 28J of the 1945 Constitution.⁵⁵⁷ Limitation as provided for under Article 28J covers Article 28A to Article 28I of the 1945 Constitution.⁵⁵⁸

MK quoted the point of view from Lukman Hakim Syaifuddin who said that:

“... I reaffirmed that the existence of Article 28J, is the only article, consists of two paragraphs that stipulate obligations, even though the chapter is titled human rights. It was intended to be placed in the last article as the key provision of Article 28A to Article 28I.”

MK further concluded that seeing from the perspective of original intent of the drafters of the 1945 Constitution, all provisions regarding to human rights provided for under Chapter XA of the 1945 Constitution can be limited when being enforced. This human rights limitation is strengthened with the

⁵⁵⁶ *Ibid.*, pg. 412.

⁵⁵⁷ *Ibid.*, pg. 411-412.

⁵⁵⁸ *Ibid.*

placement of Article 28J as the closing article of all provisions that promulgated human rights under Chapter XA of the 1945 Constitution. Using the systematic interpretation (*sistematische interpretatie*), human rights that are stipulated under Article 28A to Article 28I of the 1945 Constitution are subject to limitation that provided for under Article 28J of the 1945 Constitution.⁵⁵⁹

Furthermore, MK stated that the systematic of the stipulation in regards to human rights under the 1945 Constitution is in accordance with the systematic of the stipulation under the Universal Declaration of Human Rights, which also placed an article on human rights limitation as the closing article, which is Article 29 (2), quote “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”⁵⁶⁰

Second, in order to support the point of view on the limitation over human rights or the opinion that human rights are not absolute, MK also provided an argumentation in regards to the development of Indonesian Constitution. MK argued that by referring to the history of the development of the Indonesian constitutionalism, as reflected from the previous applicable constitutions, which were the 1945 Constitution before the amendment, UUD RIS, UUDS 1950, and the 1945 Constitution after the amendment, appeared the tendency not to make human rights as absolute, in the sense that for certain issues, as mandated by the constitution, human rights can be limited by a law. The approach from the history of constitution point of view was elaborated by MK as follows:

- (a) *The 1945 Constitution before the Amendment did not explicitly and completely incorporate the formulation in regards to human rights, including the right to life, even though under the Paragraph 4 consisted what was referred to as Pancasila, which one of its principle is “A just and civilized humanity”;*
- (b) *Article 32 (1) of the UUD RIS also incorporated the limitation on “Basic Rights and Freedoms of Mankind” as follows, “Laws and regulation on the rights and freedoms elaborated under this chapter, if necessary, will determine the limits of such rights and freedoms, but only for the purpose to ensure the recognition and respect that must be existed towards the right and freedoms of other persons, and for the purpose to satisfy fair requirements for order, decency, and public welfare in a democratic association”;*
- (c) *Article 33 of the UUDS 1950 also limited human rights (basic rights and freedoms of mankind) as follows, “Conducting rights and freedoms elaborated under this chapter can only be limited by laws and regulations for the purpose to ensure the recognition and respect that must be existed towards the right and freedoms of other persons, and for the purpose to satisfy fair requirements for order, decency, and public welfare in a democratic association”;*
- (d) *The 1945 Constitution after Amendments, under Article 28J seems to continue the nature of constitution (constitutionalism) that adopted by the previous Indonesian constitutions, which is executing limitation on human rights as elaborated above.*⁵⁶¹

Third, in line with the Indonesian constitutionalism perspective on human rights, when the MPR Decree No. XVII/MPR/1998 on Human Rights was issued and it was further elaborated under the Human Rights Law, both legislations can be seen as a continuation as well as affirmation that

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*, pg. 412-413.

⁵⁶¹ *Ibid.*, pg. 414-415.

Indonesian constitutionalism perspective does not change, as both legislations also incorporated limitations towards human rights, including the right to life, as follows:

- a. MPR Decree No. XVII/MPR/1998 in addition to incorporating “View and Attitude of the Nation towards Human Rights” that is originated from religious teachings, universal moral values, and the noble value of one nation’s culture, and also pursuant to Pancasila and the 1945 Constitution, Article 1 of the Human Rights Charter stipulated the provision on the right to life, which stated that *“Every person has the right to life, preserving his life and livelihood”*, however Article 36 also incorporated the limitation towards human rights including the right to life as follows, *“In executing his rights and freedoms, every person is subject to the limitations that determined under the laws for the purpose to recognize and respect other person’s rights and freedoms, and in order to satisfy a fair demand according to moral, security, and public order consideration in a democratic society”*;
- b. Article 9 (1) of the Human Rights Law incorporates the provision in regards to the right to life and Article 4 states that the right to life is classified as a non-derogable right under any circumstances and by any one. However, the Elucidation of Article 9 of the Human Rights Law states that the right to life can be limited by two matters: in regards to abortion to save a mother’s life and in regards to death penalty due to court decision. In addition, Article 73 of the Human Rights Law also incorporates the provision regarding the limitation towards human rights as follows, *“The rights and freedoms governed by the provisions set forth in this Law may be limited only by and based on law, solely for the purposes of guaranteeing recognition and respect for the basic rights and freedoms of another person, fulfilling moral requirements, or in the public interest”* ;

Fourth, MK was referring to the Cairo Declaration. Indonesia as the largest country with moslem population in the world and also the member of the Organisation of Islamic Conference, from the moral perspective, must consider the provision under the Cairo Declaration regarding Islamic human rights conducted by the OIC. Article 2 (a) of the Cairo Declaration stated that, “Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to safeguard this right against any violation, and it is prohibited to take away life except for a shari’ah prescribed reason”. Therefore, according to the OIC member state, the deprivation towards the right to life that is not pursuant to a law originated from sharia is prohibited.

Fifth, MK also referred to previous decisions related to the judicial review on Article 28I (1) of the 1945 Constitution, in particular on the applicability of retroactive laws. MK referred to Decision No. 065/PUU-II/2004 on the applicability of retroactive law under Law No. 26 of 2000 on Human Rights Court. Article 28I (1) of the 1945 Constitution, there are rights that literally formulated as *“rights that cannot be derogated in any circumstances,”* including the right to life and right not to be prosecuted under a retroactive law. MK was firm in its stance with Decision No. 065/PUU-II/2004, affirmed that Article 28I (1) must be read in conjunction with Article 28J (2), and therefore the right not to be prosecuted under a retroactive law is not absolute. As the right to life is also classified as the rights under Article 28I (1) of the 1945 Constitution, which falls under the formulation *“rights that cannot be derogated in any circumstances”*, the legal consideration and the stance of MK in that decision also applies to the right to life.⁵⁶²

Sixth, MK presented other facts that showed the lack of absoluteness of the right to life, including the provisions that allow the use of deth penalty with certain limitations or provisions in regards to judicial

⁵⁶² *Ibid.*, pg. 415-416.

murder/killing. Several provisions were referred by MK are international law instruments that stipulated or related to human rights, including the International Covenant on Civil and Political Rights (ICCPR), Protocol Additional I to the 1949 Conventions and Relating to the Protection of Victims of International Armed Conflict, Protocol Additional II to the 1949 Conventions and Relating to the Protection of Victims of Non-International Armed Conflict, Rome Statute of International Criminal Court, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), American Convention on Human Rights, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty.⁵⁶³

Referring to the provisions provided for under various international law instruments above, MK concluded that the implementation of death penalty or deprivation of life is justified, as long as such action satisfies the requirements or limitations that have been determined. It means that the abolishment of death penalty is yet to be a legal norm that applies generally and yet to be accepted by the international community universally. What is currently applied as a legal norm is the limitation over the implementation of death penalty. MK concluded that the definition of the phrase “cannot be derogated in any circumstances” under Article 28I (1) of the 1945 Constitution is not absolute.⁵⁶⁴

Dissenting Opinions

Under Decision No. 2-3/PUU-V/2007 four Constitutional Court Justices rendered their dissenting opinions. Justices Achmad Roestand, Laica Marzuki, and Maruarar Siahaan provided different opinion in regards to the law and the submission.⁵⁶⁵

Justice Achmad Roestand said that the prohibition towards the limitation of seven human rights as stipulated under Article 28I (1) is absolute. Limitation as stipulated under Article 28J (2) cannot be applied towards these seven rights as mentioned under Article 28I (1), therefore the drafters of the 1945 Consitution, *quad non*, have incorporated useless article.⁵⁶⁶

Justice Achmad Roestand also explained the relationship between a state with a rule of law and Islamic law. Justice Roestand admitted the fact that Islamic law allows death penalty. However, there are differences in paradigm between the implementation of religious norm that is internal in nature related to the motivation and intention, with the legal norm that is external in nature related to the physical implementation. Justice Roestand said that the Indonesian community is a plural society, consists of many nations, languages, cultures, and religion. A plural nation has agreed upon a national consensus that realized under Pancasila and the 1945 Constitution, as the fundamental law in society, nationhood, and statehood. This fundamental law is the highest positive law that must be used as the highest reference by all citizens, including constitutional court justice in deciding judicial review. Article 28I (1) of the 1945 Constitution said that the right to life is human rights that cannot be derogated under any circumstances, therefore death penalty in which the main purpose is depriving a person's life contradicts the 1945 Constitution.⁵⁶⁷

⁵⁶³ *Ibid.*, pg. 416-419.

⁵⁶⁴ *Ibid.*, pg. 416-419.

⁵⁶⁵ Lubis dan Lay, *Kontroversi... op.cit.*, pg. 383.

⁵⁶⁶ Mahkamah Konstitusi, *Putusan Nomor 2-3..., op.cit.*, pg. 438.

⁵⁶⁷ *Ibid.*, pg. 430-440.

Echoed Justice Roestandi's opinion, Justice Laica Marzuki also said that the articles under the Narcotic Law, in regards to the phrase "death penalty or" does not have binding power as it contradicts Article 28A and Article 28I (1) of the 1945 Constitution.⁵⁶⁸ This perspective is based on the fact that under the Second Amendment of the 1945 Constitution, dated 18 August 2000, Article 28A of the 1945 Constitution applies, which states that *"Every person shall have the right to live and to defend his/her life and livelihood"*, in addition to Article 28I (1) of the 1945 Constitution, which states that *"The right to life ... are human rights that cannot be derogated under any circumstances whatsoever"*.

Furthermore, Justice Laica Marzuki explained that:

*"Both of the articles under the Constitution stipulate the right to life for every person. The phrase under Article 28I (1) of the 1945 Constitution, which states that "Right to life ... are human rights that cannot be derogated under any circumstances whatsoever" affirms that the right to life is classified as non-derogable rights, or non-derogable human rights. The right to life cannot be deviated, ruled out, not to mention negated, and cannot be limited by a lower level of a law".*⁵⁶⁹

*"The right to life is a basic right, cannot be limited by a law, wet, or Gesetz that is lower than the constitution. Article 28J (1) of the 1945 Constitution and Article 29 (2) of the UDHR cannot be applied. Basic rights bind the three branches of the states to be complied with and respected. Article 1 (3) of the Grundgesetz of the Federal Republic of Germany states that "... basic rights are binding on legislature, executive and judiciary as directly valid law". When death penalty is still preserved it means a contradictio in se (tegenspraak in zich zelf) towards the basic right itself."*⁵⁷⁰

Justice Laica Marzuki advised that in the future death penalty shall not be implemented to any crimes (*abolitionist for all crimes*). Several arguments were delivered by Justice Laica Marzuki, which is death penalty cannot be restored (*herstel met de vorige toestand*) if the convicted is declared innocent. Justice Laica Marzuki referred to the French court in the 18th century, when Jean Calas was sentenced to death and executed, but it was later determined that he did not commit the crime as alleged by the court. In addition, Justice Laica Marzuki also stated that life is God-given, and cannot be deprived by anyone.⁵⁷¹

Justice Maruarar Siahaan gave further perspective that discussion over death penalty should be in accordance with the philosophy of Indonesian nation. The starting point of the review conducted by MK should back to the philosophical judgement in line with the spirit and morality of the constitution as formulated under the Preamble of the 1945 Consitution and further conducts an interpretation towards Article 28J (2) which said that in executing rights and freedoms—including the right to life under Article 28A and 28I (1) of the 1945 Constitution that is non-derogable—binds towards the limitations determined by law, that must be read according to principles, spirit, and morality of the principles under Pancasila incorporated under the Preamble of the 1945 Constitution, and articles that are related to its provisions.⁵⁷²

⁵⁶⁸ *Ibid.*, pg. 445.

⁵⁶⁹ *Ibid.*, pg. 444

⁵⁷⁰ *Ibid.*, pg. 445.

⁵⁷¹ *Ibid.*

⁵⁷² *Ibid.*, pg. 459-460.

Justice Maruarar Siahaan stated that Article 28J (2) of the 1945 Constitution, cannot be interpreted as something that justifies death penalty, which limits the right to life under Article 28I of the 1945 Constitution. Justice Maruarar Siahaan said that:

“Limitations stipulated under Article 28J (2) of the 1945 Constitution, cannot be interpreted as a provision that justifies death penalty, which deprives the right to life under Article 28I (1); the position of Article 28J (1) and (2) is a general provision affirming that the rights under Articles 28A to 28I are not absolute because those rights cannot be separated from the obligation to respect another person’s right, and can also be limited with the reason to ensure the recognition and respect towards another person’s rights and freedoms and to satisfy a fair demand according to moral, religious values, security, and public order consideration in a democratic society. Therefore, it was not specifically meant to limit Article 28I, in particular that is used as a justification towards death penalty, because the right to life that is interpreted broadly as elaborated above, causes the limitation to the right to life cannot be interpreted as a deprivation of life itself.”⁵⁷³

4.3.1 Implementation of the Most Serious Crimes under Indonesian Legislation

a. The Concept of the Most Serious Crimes under International Law

The concept of the most serious crimes is the only justification that can be used by many states to preserve death penalty. This is evident from the provision under Article 6 (2) of the ICCPR:

“In countries which have not abolished the death penalty, sentence of death may only 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.”

Definition on the most serious crimes is not clearly stated. As a consequence, the concept is interpreted differently by many states, depending on the culture, religion, customs, as well as the political situation of each state.⁵⁷⁴ However, Philip Alston opined that the concept of the most serious crimes under the ICCPR must be interpreted at the international level, instead of by each country, because only with the “objective and universal” standards this concept will have an actual meaning.⁵⁷⁵

The UN Human Rights Committee affirmed that the interpretation towards the most serious crimes must be in line with international law. Broad interpretation towards such concept, may defeat the objective of the implementation of universal standards on death penalty that has been initiated by the drafters of the ICCPR and will render this international human rights instruments becomes irrelevant.⁵⁷⁶

⁵⁷³ *Ibid.*, pg. 465.

⁵⁷⁴ International Commission against the Death Penalty, *op.cit.*, pg. 5

⁵⁷⁵ Colman Lynch, *Indonesia’s Use of Capital Punishment for Drug-Trafficking Crime: Legal Obligations, Extralegal Factors, and the Bali Nine Case*, (Columbia Human Rights Law Review, 40, 2008), pg. 534.

⁵⁷⁶ *Ibid.*, pg. 539.

Under the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty, also appeared the term “the most serious crimes”. The Optional Protocol aims to give further explanation on death penalty that is stipulated under Article 6 of the ICCPR. However, similar with the ICCPR, the Optional Protocol does not give the limitation on what constitute “the most serious crimes”. The only article that can give a slight comprehension regarding “the most serious crimes” is Article 2 (1) of the Optional Protocol:

“No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.”

The article mentioned above is linking the most serious crime that used as justification to render a death penalty with the most serious crimes that have military characteristic and conducted during wartime.⁵⁷⁷

Ever since the ICCPR entered into force in 1976, the interpretation towards the most serious crime has been refined by several international human rights institutions. The UN Human Rights Committee has given the definition that most serious offense must involve, at a minimum, intentional act of violence resulting in the death of a person. The UN Human Rights Committee stated that “the expression “most serious crime” must be read restrictively to mean that the death penalty should be a quite exceptional measure”,⁵⁷⁸ as stipulated under General Comments No. 6 ICCPR, which stated that the most serious crime must be interpreted restrictively. It means that death penalty should be an extraordinary measures cannot be implemented without limitation.

Paragraph 7 of the General Comments No. 6 ICCPR affirms that.⁵⁷⁹

“...the expression “most serious crime” must be read restrictively to mean that the death penalty should be a quite exceptional measure.”

It should be noted that even though the UN Human Rights Committee is not a judicial institution that has the authority to render a legally-binding decision, its perspective, however, on the interpretation and the implementation of the ICCPR is every authoritative and should be given a fair measurement when it comes to the interpretation towards the ICCPR.⁵⁸⁰

In 1984, the UN adopted Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.⁵⁸¹ This was a measure to provide clarification over certain provisions under Article 6 of the ICCPR. In regards to the limitation of death penalty that can only be imposed to “most serious crimes”, this guideline stated that: “In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go

⁵⁷⁷ Chen Zexian, *Restrictions on the Imposition of the Death Penalty*, Paper for the International Symposium on Death Penalty, 9-10 December 2002, China, pg. 3.

⁵⁷⁸ UN Human Rights Committee, *Compilation of general comments and general recommendations adopted by human rights treaty bodies*, HRI/GEN/1/Rev.9, 9 May 2008.

⁵⁷⁹ UN Human Rights Committee, *General Comment No. 6...*, *op.cit.*, para 7.

⁵⁸⁰ Andrew Byrnes, *Drug Offences, the Death Penalty and Indonesia's Human Rights Obligations in the Case of the Bali*, Opinion delivered at the Constitutional Court of the Republic of Indonesia, 2007, para 22.

⁵⁸¹ UN Economic and Social Council, *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, 1984, E/RES/1984/50, 25 May 1984.

beyond intentional crimes with lethal or other extremely grave consequences”.⁵⁸² Article 2 of this document stated that death penalty can only be imposed towards the most serious crime that encompasses the crimes that are committed intentionally to be lethal or other serious consequences.

“... Member States in which the death penalty has not been abolished to effectively apply the safeguards guaranteeing protection of the rights of those facing the death penalty, in which it is stated that capital punishment may be imposed for only the most serious crime, it being understood that their scope should not go beyond intentional crime with lethal or other extremely grave consequences.”

In further development, this guideline is not sufficiently clear for the current context, considering the development of the international human rights law. The UN Secretary-General has appointed Roger Hood to provide a periodical report on the progress in regards to the abolishment of death penalty, which in the latest report, Roger Hood explained that the guideline is not clear and must be revised. Roger Hood proposed revision as follows: “In countries that are yet to abolish death penalty, such punishment can only be applied towards the most serious crimes at the same level with the most serious offences of culpable homicide/murder, the implementation, however, towards such crimes cannot be mandatory.”⁵⁸³

This perspective is in line with the report from the UN Special Rapporteur on extrajudicial, summary and arbitrary executions issues,⁵⁸⁴ who stated that under Article 6 (2) of the ICCPR, death penalty can only be implemented “in cases where it can be shown that there was an intention to kill which resulted in the loss of life”.⁵⁸⁵ In addition, the Special Rapporteur also narrowed the definition of the most serious crime by stating that death penalty can only be executed in exceptional situation.

“the death penalty must be under all circumstances be regarded as an extreme exception to the fundamental right to life, and must be interpreted in the most restrictive manner possible.”

In accordance with the abovementioned provision, the UN Human Rights Committee in 2004 has issued Resolution to the state parties to the ICCPR, not to impose death penalty towards crime that are not categorized as the most serious crime. This Resolution also requested all the state parties to the ICCPR to ensure that the notion most serious crime does not go beyond intentional crime with lethal or extremely grave consequences. This concept was further elaborated under Paragraph 91 of the Report of the Special Rapporteur to the Human Rights Committee, dated 24 December 1996, which states that “the scope of crime subject to the death penalty should not go beyond intentional crime with lethal or other extremely grave consequences.”⁵⁸⁶

⁵⁸² *Ibid.*, para 1.

⁵⁸³ Roger Hood, *The death penalty, A Worldwide Perspective*, (Oxford: Oxford University Press, Third Edition, 2003), pg. 77.

⁵⁸⁴ UN Human Rights Committee, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/HRC/4/20, 19 February 2007, para 39-53.

⁵⁸⁵ *Ibid.*, para 53.

⁵⁸⁶ UN Economic and Social Council, *Report of the Special Rapporteur on the Extrajudicial, Summary or Arbitrary Execution*, E/CN.4/1997/60, 24 December 2006.

In addition, the UN Human Rights Committee under Resolution 1999, affirmed the view from the Special Rapporteur, to encourage the state parties not to impose death penalty towards non-violent financial crime such as corruption or non-violent religious practice.⁵⁸⁷

Therefore, what constitutes the most serious crime according to the UN Human Rights Committee is international crimes that committed intentionally or premeditated and causing extraordinary impact. This concept is in line with the opinion from Philip Alston, stipulated under a report at UN session in January 2007, paragraph 53 of the Report stated that the ones that fall under the category of the most serious crimes are the crimes that involving intention to commit a lethal murder.

Several UN agencies have reached an agreement for the concept of the most serious crimes that can be punished with death penalty, which are “intentional crime with deadly outcomes” or crimes that are premeditated and caused death (such as premeditated murder). In particular, the UN Secretary-General stated, countries that imposing death penalty towards crimes that do not cause death are very problematic. While the definition of the most serious crime is not stipulated under the ICCPR, however, implicitly, there is an international agreement that the most serious crime under the ICCPR is limited to crimes that causing death.⁵⁸⁸ Interpretation on the most serious crimes in practice has been conducted by the international human rights committee in Zambia case.⁵⁸⁹ In this case, the Human Rights Committee stated that the imposition of death penalty towards a violent robbery suspect who used firearms is not in line with Article 6 (2) of the ICCPR.⁵⁹⁰

The concept of the most serious crimes also elaborated on under the 1998 Rome Statute on the establishment of the International Criminal Court. Article 5 of the 1998 Rome Statute stipulates that:⁵⁹¹

“...jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crime: (a) the crime of genocide; (b) crime against humanity; (c) war crime; (d) the crime of aggression.”

Under the 1998 Rome Statute, it can be seen that the concept of the most serious crimes cover four crime that are war crimes, genocide, crimes against humanity, and crime of aggression. In addition, the lack of death penalty sentencing in the international criminal tribunals has an important meaning, which shows that the UN rejects the argument that death penalty is the correct punishment for crimes that are clearly categorized as “the most serious crimes”. The rejection of death penalty under international criminal tribunals also affirmed by other constitutional courts as a proof the tendency/general trend of the international community to abolish death penalty.⁵⁹²

In the debates regarding the concept of the most serious crimes, difficulties are evident, in particular pertaining to the determine the methodology. Practice from many countries after adopting a treaty is an

⁵⁸⁷ UN Economic and Social Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary execution*, E/CN.4/1999/39, 6 January 1999, para 63.

⁵⁸⁸ Yingyos Leechainan dan Dennis R. Longmire, *The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia and Thailand: A Comparative Legal Analysis*, (Laws 2(2), 2013), pg. 123-124.

⁵⁸⁹ UN Human Rights Committee, *Lubuto v. Zambia*, CCPR/C/55/D/390/1990//Rev.1 (1995), 1 January 1990.

⁵⁹⁰ Markus. G Schmidt, *Universality of Human Rights and The Death Penalty-The Approach of The Human Rights Committee*, (ILSA Journal International and Comparative Law, 3, 1996) , pg. 483.

⁵⁹¹ UN General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998, Article 5.

⁵⁹² Canada, *United states v. Burns and rafay*, 1 SCR 283, 195 DLR (4th) 1, 151 CCC (3d) 97, 39 CR (5th) 205, 2001.

accepted approach to interpret such treaty, as affirmed under Article 31 (3) of the Vienna Convention on the Law of Treaties. As a regulation, such approach is reasonable, as interpreting the meaning of a short treaty by means of referring to the action of the parties after the treaty has been made, under the assumption that this method helps to determine the intention and objectives from the parties when drafting the text of the treaty to conduct similar thing towards international treaty. However, the use of such interpretation must be limited into legal interpretation, because the action of the parties (after the treaty has been made) not only affirm the meaning of a provision in the agreement thereunder but also in terms of violation of the agreement. It is also similar with international treaty, it is unreasonable if the interpretation towards “the most serious crime” is by making a catalogue that consists of all crimes that subject to death penalty by the states that have ratified the ICCPR.

William A. Schabas proposed a helpful method in interpreting the coverage of the most serious crimes as mentioned under Article 6 (2) of the ICCPR, which is by looking for consensus between countries pertaining to crimes that can be imposed with death penalty.⁵⁹³ This method will direct to answer, which is essentially similar to the opinion from Philip Alston. In other words, for countries that are yet to abolish death penalty, such punishment always be imposed towards crimes that “can be shown that there are intention to murder or depriving someone’s life” when committing a crime.

From many concepts above, it can be concluded that the concept of the most serious crimes under international law is very limited to crimes with the following characteristics:

- a. Crime that is committed is a vicious and cruel action, and deeply shock the conscience of humanity;
- b. There is an intentional, organized, systematic, and escalating elements in order to caus death or other extremely grave consequences;
- c. The outcome of the crime is a very serious impact towards the country or general society such as interfering public order, involving large amount of money such as economic crime, conducted with extremely heinous methods and cruel beyond the limits of humanity as well as causing threats or endangering state security.

Therefore, Article 6 (2) of the ICCPR is a provision that requires interpretation, because this article states a principle (protection towards arbitrary reduction over rights to life), however with an exception that is stated explicitly in regards to death penalty in countries that are yet to abolish such punishment. However, such punishment must be in conformity with further exceptions, such as the requirement that death penalty must be limited only to “most serious crimes”, which in development cannot be imposed to pregnant woman or minors. Therefore, it must be reminded once more that Article 6 of the ICCPR, which was adopted half-century ago in a very specific context. Even at that time, the intention of the UN General Assembly to encourage the abolishment of death penalty can be seen from the wording of the provision formulated under Article 6 (6) of the ICCPR.

b. Narcotic Crime is not Categorized under the Most Serious Crimes

The UN Human Rights Committee opined that drug trafficking crime that does not involve murder cannot be classified under the category of the most serious crimes. This point of view was stipulated under the conclusion of the review prepared by the UN Human Rights Committee on the Thailand’s

⁵⁹³ Schabas, *Keterangan Ahli...*, *op.cit.* pg. 78. Lihat Schabas, *The Abolition...*, *op.cit.*, pg. 99

periodical report on the implementation of the ICCPR, published in July 2005. The Committee stated that:

*The Committee notes with concern that the death penalty is not restricted to the “most serious crimes” within the meaning of article 6, paragraph 2, and is applicable to drug trafficking. The Committee regrets that, despite the amendment in 2003 of the Penal Code, which prohibits imposition of the death penalty on persons below 18 years of age, the State party has not yet withdrawn its declaration to the Covenant on article 6, paragraph 5 (art. 6). The State party should review the imposition of the death penalty for offences related to drug trafficking in order to reduce the categories of crime punishable by death. The State party should also consider the withdrawal of its declaration on article 6, paragraph 5, of the Covenant...*⁵⁹⁴

The conclusion of the Human Rights Committee was rendered unanimously, and therefore there is no room for hesitation pertaining to the position taken by the Committee that drug trafficking is not restricted to the most serious crimes as stipulated under Article 6 (2) of the ICCPR.

As mentioned under previous chapter, in 1984 the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty was an effort to clarify certain provisions under Article 6 of the ICCPR. This Guideline states that countries that are yet to abolish death penalty, such punishment can only be imposed to the most serious crimes, meaning that the coverage cannot be extended towards crimes that are intended to be lethal or convey serious impact.⁵⁹⁵

the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty recommended that crimes that can be imposed with death penalty “should not go beyond intentional crimes with lethal or other extremely grave consequences”.⁵⁹⁶ In this case, the UN Special Rapporteur clarified that death penalty “can only be imposed towards crime that involve intentional killing. In particular, the Special Rapporteur asserted that “The death penalty may not be imposed for drug related offences unless they meet this requirement.”⁵⁹⁷

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, also asserted that the imposition of death penalty towards drug-related offences, violating the international human rights law. The report from the Special Rapporteur stated that “drug offences do not meet the threshold of most serious crimes. Therefore, the imposition of the death penalty on drug offenders amounts to a violation of the right to life, discriminatory treatment and possibly, as stated above, also their right to human dignity”.⁵⁹⁸

The practice of imposing death penalty towards drug trafficking crimes can only be found in Southeast Asia region and small number of countries that are using an extreme form of sharia law, such as Iran. There is no proof that death penalty is imposed towards drug trafficking crime (without murder) other

⁵⁹⁴ UN Human Rights Committee, *Concluding observation of the Human Rights Committee: THAILAND*, CCPR/CO/84/THA, 8 July 2005, para 14.

⁵⁹⁵ UN Economic and Social Council, *Safeguards...*, *op.cit.*, para 1.

⁵⁹⁶ *Ibid.*

⁵⁹⁷ UN General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/67/275, 9 August 2012, para 122.

⁵⁹⁸ UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/10/44, 14 January 2009, para 66.

than these regions. The fact that countries that are still preserving death penalty in other regions of the globe are not charging drug trafficking crimes with death penalty implies that drug trafficking crimes cannot be considered as an exception mentioned under Article 6 (2) of the ICCPR. This means that the ICCPR is an international treaty that applies universally and must be interpreted in similar way wherever it is applicable.

The fact that drug trafficking crime is rampant and causing serious social problems, is not necessarily the correct reason to categorize drug trafficking crime in the coverage of the most serious crime. If that is the benchmark (rampant and causing serious social problems), it means that other crimes also qualified to be imposed with death penalty, such as environmental crime, white-collar crime, domestic violence, of course an absurd elaboration.

Another aspect that often addressed is the emergency aspect in handling drug trafficking. In regards to this issue, Article 4 of the ICCPR allows countries to derogate certain provisions when there is a reason of “emergency situation that threatens the statehood”. The concept of “derogation” is a term of art that is used in many international human rights treaties to postpone the fulfillment of certain rights under the reason of emergency situation. However, as mentioned earlier, the concept of “derogation” must be differentiated with the concept of “limitation, which is a concept used to determine the limitation of what norms that are not absolute in the implementation level. For instance, pursuant to the international human rights law such as the ICCPR, the freedom of opinion must comply with the limitation and derogation. Freedom of opinion can be limited, for instance, under laws and regulations in regards to defamation or prohibition of statement that propagates hate speech and the judges that determine these boundaries by considering the normative framework, which, in general, relates to the provision under Article 29 (2) of the UDHR. Derogation, on the other side, is a total postponement of fulfillment of such right, when there is a general emergency situation that justifies such postponement. In such situation, judges are no longer in liberty to interpret the coverage of such freedom, as if the authority if the judges to evaluate how far the coverage of such freedom has been totally uprooted. Judges may only assess the legality of the derogation implementation, whether is it true that there is an emergency situation and whether the formal requirements have been satisfied.

Some parties may argue that drug trafficking has satisfied the requirement as the general emergency situation that threatens a nation and therefore it fulfills the requirements for exemption under Article 6 of the ICCPR. However, this argument is weak, due to several reasons: firstly, Article 4 (2) of the ICCPR stipulate that there is no derogation allowed towards Article 6. Secondly, there are formal requirements formulated under Article 4 (1) and (3), including the official statement in regards to emergency situation and such statement must be deposited to the UN Secretary-General, without which the drug trafficking issue cannot be declared as an emergency situation.

4.4. Indonesian Legislation and the Interpretation of the Most Serious Crimes

In Indonesia, issues in regards to the most serious crimes also included under the debates during the drafting process of many laws that are considered necessary to formulate death penalty. The elaboration under Chapter III shows that how the debates on the implementation of death penalty have formed the justification on why such punishment is imposed. The argument on the necessities of death penalty, under the justification that those crimes are the most serious crimes can only be found under several laws.

As elaborated under the previous chapter, the concept of the most serious crimes, which initially was not given a proper explanation under Article 6 (2) of the ICCPR, has reached a clear definition. The concept of the most serious crimes under international law is limited to the crimes with the following characteristics: (i) crimes that have been committed is a vicious and cruel action, deeply shock the conscience of humanity; (ii) was committed intentionally, organized, systematic, and spreading to cause death or other extremely grave consequences; and (iii) impact caused by the crimes is very serious to the state or general public, such as interfering with public order, involving a large sums of money such as economic crimes, crime with extremely heinous methods and vicious beyond the limits of humanity, and causing threats or threatening state security.

Referring to such concepts, which is still developed until recently, several laws in Indonesia that implement death penalty and issued prior to the reformasi period, must be reviewed on whether such laws are still in accordance with the characteristics of the most serious crimes. This is important, considering the fact that those laws were issued when the human rights norms were not as advanced as the current framework, including the concept of the most serious crimes. The situation is different compared to the laws that were issued after 1998, which obliged Indonesia to comply with the recognized international human rights legal norms, as stated under the 1945 Constitution (Amendment), MPR RI Decree No. XVIII of 1998 on Human Rights, Law No. 39 of 1999 on Human Rights.

As elaborated under Chapter III, many laws that were issued before 1998 were not discussing and were not formulated in accordance with the concept of the most serious crimes. The implementation of the provisions under *Wetboek van Strafrecht voor Indonesie* that was implemented in Indonesia with a discriminative racial prejudices and later was determined as the Indonesia Criminal Code until nowadays, has never been reviewed on whether crimes that may be imposed with death penalty are categorized as the most serious crimes. It is also similar with the Military Criminal Code, with death penalty punishment that is referring to the crimes that are considered grave in the military field and as a part of state defense strategy. While death penalty in several laws that were issued during the liberal democracy and guided democracy era were stipulated to prevent insurgency, harboring the revolution and government programs.

During the New Order era, death penalty in general was imposed to maintain the political stability and state security, with the emphasis on behaviors that are considered subversive. Within this period, there were arguments on the crimes that were considered having serious impact, such as crimes related to narcotic and psycho tropic, and crimes related to aviation. Under Law No. 5 of 1997 on Psychotropic, for instance, the provisions that were issued prior to the law were considered to have deterrent effect and the tendency that the punishment imposed was not comparable with the defendant's action compared to the victims.⁵⁹⁹ Death penalty was considered as the proper punishment as this kind of sentencing is the toughest from all types of punishment.⁶⁰⁰ Likewise with the aviation-related crime, in which Law No. 4 of 1976 in regards to aviation referred to many international convention on the necessity of "severe penalties", which was further formulated by the government with the phrase "grave punishment".⁶⁰¹ Such grave punishment was due to the fact that the action stipulated under that law, which was the interference towards the safety of an airplane and security within the airplane can cause a greater and direct danger.⁶⁰²

⁵⁹⁹ Murtiningsih, *op.cit.*, pg. 126 – 127,

⁶⁰⁰ Hamzah dan Rahayu, *loc.cit.*

⁶⁰¹ Prakoso, *Masalah...*, *op.cit.*, pg. 95.

⁶⁰² *Ibid.*, pg. 93.

Discourse and debates pertaining to death penalty towards crimes that are categorized under the most serious crimes getting clearer in the issuance of many laws after 1998. Law No. 31 of 1999 on the Eradication of Corruption, charging death penalty with the objective to conduct prevention and more effective corruption eradication,⁶⁰³ and death penalty as one of many criminal policies (crime countermeasures policy) in handling corruption in Indonesia using this law was considered as reasonable.⁶⁰⁴ In addition, the argument that corruption is spreading in Indonesia in a systematic way in all sectors of society livelihood has threatened the effort of sustainable development and achievement of Indonesia public welfare. Up to this day, corruption is still debatable on whether it can be considered as “the most serious crime” or not.⁶⁰⁵

Debates on the crime that are considered as the most serious crimes are evident on the discussion of Law No. 26 of 2000 on Human Rights Court. This legislation has the jurisdiction over gross human rights violation, namely genocides and crimes against humanity, in which the provision is adopting the 1998 Rome Statute on International Criminal Court. The government, initially, did not include the death penalty punishment for those crimes by referring to the international human rights law, however several factions at the parliament pushed on the urgency of death penalty with the consideration that death penalty for human rights violators, and death penalty has been used in Indonesia even before Indonesia’s independence and it is never been changed until today. This argument is supported by the fact that the Criminal Code, in which the elements of crime is not as grave as genocides and crimes against humanity, formulate death penalty, while crimes under the Human Rights Court Law that has severe crime are not punishable by death.⁶⁰⁶ However, during the discussion process, it forgets the fact that even under the 1998 Rome Statute, which is the main reference of the Human Rights Court Law, death penalty was not included and the practice from various international criminal tribunals with similar jurisdiction were not imposing death penalty as well.

The concept of the most serious crime as the only justification to implement death penalty is always disregarded or not the main attention in the issuance of other laws. The concept of the most serious crime was further mixed with the concept of extraordinary crimes. Under Law No. 15 of 2003 on the Terrorism Eradication, for instance, the government and parliament agreed to stipulate death penalty under that legislation, as they considered terrorism as an extraordinary crime and it needed to be imposed with equitable to have a deterrent effect for the perpetrators. In addition, due to the frequent terror attacks after the Reformasi, which caused many victims not only Indonesia citizens, but also foreigners.⁶⁰⁷

Meanwhile, under Law No. 35 of 2009 on Narcotic, death penalty is implemented as a part of laying deterrent effect to the abuser of drugs and illegal distribution of narcotic and narcotic precursors. The formulation of death penalty because the distribution of narcotic will lead to larger peril for the livelihood and nation state values, which in the end can attenuate the national resiliency.⁶⁰⁸ The

⁶⁰³ Indonesia, Law No. 31 of 1999 on Eradication of Corruption Crimes, General Elucidation.

⁶⁰⁴ Barda Nawawi Arief, *Kebijakan...*, loc.cit.

⁶⁰⁵ Andhika Prasetya, *Beda dengan Benny Harman, Sekjen PPP: Korupsi itu Serious Crimes*, Detik, 7 July 2017, <<https://news.detik.com/berita/3551747/beda-dengan-benny-harman-sekjen-ppp-korupsi-itu-serious-crime>>, accessed on 12 December 2017.

⁶⁰⁶ Inay/Apr, loc.cit.

⁶⁰⁷ Interview with Romli Atmasasmita, 18 September 2017.

⁶⁰⁸ Indonesia, Law No. 35 of 2009 on Narcotic, General Elucidation.

government has affirmed that death penalty is necessary as narcotic-related crime is considered as crimes against humanity that has the purpose to exterminate mankind slowly but surely.⁶⁰⁹ These several reasons that became the basis of death penalty for narcotic-related crimes, are not in line with the development of international law, which no longer categorize drug trafficking as the most serious crimes, and therefore cannot be imposed with death penalty.

The latest legislation that formulates death penalty is Law No. 17 of 2016 on the Determination of Government Regulation in Lieu of Law No. 1 of 2016 on the Second Amendment to Law No. 23 of 2002 on Child Protection into a Law, which sources from the argument of the situation of “sexual violence emergency” towards children. Other arguments including the increase of cases pertaining to sexual crimes towards children must be stopped immediately, by formulating a tougher punishment, one of which is death penalty,⁶¹⁰ and sexual violence towards children is already beyond the humanity and religious principles.⁶¹¹ In addition, there is also argument that death penalty as a punishment option for the perpetrator of sexual violence towards children, with the consideration that death penalty is still allowed under Indonesian laws and regulations.⁶¹² These various arguments showed the lack of proper debates, on whether those crimes are actually the most serious crimes or not, and moreover the government approves the implementation of death penalty because it is still allowed under the national laws and regulations. The government should evaluate on whether or not implementing death penalty is pursuant to international human rights norms that have been recognized by Indonesia.

4.5. Indonesian Legislation and Death Penalty : Not in Accordance with Human Rights

a. Half-Hearted Human Rights Protection

As one of many countries that currently experiencing a transition in democracy, Indonesia is amongst the countries that are still preserving death penalty as a part to undergo the transition. The momentum of justice transition after the fall of Soeharto regime on 21 May 1998, which was assumed as a political capital to promote and enforce human rights universal values, later negated in the reform of criminal legal system and criminal justice system. The direction of the politics of criminal law shows a deviation from the global trends to abolish death penalty.

This tendency cannot be separated from the paradox of democracy after the fall of New Order authoritarian regime. While the democratic process and institutions have resulted in regime changes, death penalty is still the choice of political expression and the instrumentation of power in every administration. The effort to preserve death penalty as a criminal punishment for certain crimes show that the politics of human rights have not been changed since the New Order authoritarian regime. Even after the Reformasi era, the execution towards the death convicts showed the retentionist politics is getting stronger. The legislation reform that became the part of reform agenda does not eliminate death penalty from the main punishment, while on the other side the political system seems more democratic.

The abovementioned elaboration confirms two indication that are conflicting each other, between the political intention and desire to establish an institution that becomes the prerequisite of democracy,

⁶⁰⁹ Constitutional Court, *Decision No. 2/PUU-V/2007*, pg. 131.

⁶¹⁰ Sip/Ndr, *loc.cit.*.

⁶¹¹ Sumantri, *loc.cit.*

⁶¹² Sa'diyah, *loc.cit.*

while at the same time the democratic institution that has been established with great effort is getting challenged.⁶¹³ In other words, the effort to abolish death penalty is constantly facing the politization of law by many political elites in the policymakers realm that adopt the orthodox legal perspective.

This situation shows a deviation from the ideal depiction that used as the assumption of Mahfud that legislation that made from a democratic political configuration will lead to a responsive law. In contrast, authoritarian political configuration will lead to orthodox or conservative law.⁶¹⁴ What further materialized, the democratic political configuration after the fall of the New Order creates orthodox legislation, because it still formulates death penalty as the main punishment.

The formulation of death penalty in various laws that made from the democratic political configuration shows the failure of the statue to conduct human rights-based approach to legislative reform. The human rights-based approach to legislative reform can be defined as the framework to ensure full conformity of national laws towards international human rights norms and actual realization of human rights.⁶¹⁵

The use of human rights-based approach to legislative reform is one of the characteristics of responsive legislation. The characteristics of responsive legislation is marked with the following indicators: firstly, the legislation that reflects justice and satisfies the expectation from the society. Secondly, the drafting process of such legislation gives a significant involvement and full participation of social groups and individuals within the society. Thirdly, from the result aspect, the legislation is responsive to the demands of social groups or individuals within the society.⁶¹⁶ Therefore, a responsive legislation will give attention and consider human rights universal values, and also considering the universal trend to abolish death penalty. The UN Resolution No. 2857 (1971) and UN Resolution 32/61 (1977) have taken a firm stance to the abolishment of death penalty as an universal objective.⁶¹⁷

When looking into Indonesia historical aspect, the implementation of death penalty conducted by the state authority was not only pertaining to the business of punishing the perpetrator of law enforcement, but also to serve other agenda. Death penalty becomes the instrument in every regime is depending on the subjectivity of the man in power, such as choosing the type of crimes, the priority of execution and how to conduct such execution, including political campaign.

Legislation that produced by every administration shows that the law can be the instrument and becomes the legitimate tool for the purposes and interests of those who are in power.⁶¹⁸ Legal

⁶¹³ The institutionalism of democracy is marked with the establishment of most of the political installation that were visioned during the authoritarian regime such as free and diverse political parties, free press, human rights, and independent state commissions. On the other side, some parties are advising the limitation of democracy that is viewed as crossing the line, re-introducing GBHN, and using the 1945 Constitution before the Amendment. See Robet, *Politik...*, *op.cit.*, pg. 14.

⁶¹⁴ Moh. Mahfud. MD., *Politik Hukum di Indonesia*, (Jakarta: PT Raja Grafindo Persada 2012), pg. 31 - 32

⁶¹⁵ Beatrice Duncan, dkk., *Handbook on Legislative Reform: Realising Children's Rights, Vol.1* (New York: Gender, Rights and Civic Engagement, Division of Policy and Practice, United Nations Children's Fund (UNICEF), 2008), pg. 3.

⁶¹⁶ Mahfud, *op.cit.*, pg. 31-32.

⁶¹⁷ Todung Mulya Lubis, *Inkonstitusionalitas Hukuman Mati*, Suara Pembaruan, 7 November 2006,

<http://lsmlaw.co.id/index.php?option=com_content&view=article&id=206%3Ainkonstitusionalitas-hukuman-mati&catid=49%3Aarticles&Itemid=18>, accessed on 17 September 2017.

⁶¹⁸ Haryatmoko, *Etika Politik dan Kekuasaan*, (Jakarta: Kompas, 2014), pg. 223.

positivism that is always assumed to ensure legal certainty becomes the basis and dominates how the authority, de facto, using the law to serve the interests and purposes of those who are in power.⁶¹⁹

b. Death Penalty and Indonesian Legislation

As elaborated under Chapter III, Indonesia is still implementing death penalty provisions that are spreading in various laws and regulations. International obligation in the human rights field, as the consequence of Indonesia's membership in many international treaties are yet to be the important part of drafting laws and regulations or as the mean to conduct correction towards the laws that are inherited from the colonial time, as well as the laws that were issued before the Reformasi era.

The 1945 Constitution, with four amendments, has given the reinforcement of human rights in Indonesia, including the guarantee towards the right to life. Human rights as mentioned under the 1945 Constitution, of which most of the provisions are adopted from various international treaties, is still not able to give a real guarantees towards the rights, in this context is the preservation of death penalty. This situation is further compounded with the constitutional interpretation as the source of law that gives the interpretation towards the right to life seems referred inherently by the law as *mutatis mutandis* with the recognition of the right to life. As a consequence, all laws that are still formulating death penalty are getting legitimacy pursuant to constitutional interpretation and the lawmakers are still preserving and proposing laws that are still formulating death penalty.

There are several analyses related to the implementation of death penalty in Indonesia.

First of all, the right to life has been recognized under the Indonesian Consitution, specifically mentioned in Article 28I (1) of the 1945 Consitution, as the rights that cannot be derogated in any circumstances (non-derogable rights). The provisions under the Constitution is in line with many international norms, especially the ICCPR. However, the interpretation towards the right to life that cannot be derogated in any circumstances can be violated or limited as stipulated under Article 28J (2) of the 1945 Constitution. Decisions from MK that are not consistent towards the guarantees of right that cannot be derogated in any circumstances, strengthening the legitimacy of death penalty implementation in Indonesia.

Second of all, many laws and regulations in Indonesia that are still using death penalty as a legacy from colonial time and issued during the early independency era until the New Order, have not been corrected properly. Correction only conducted towards the laws that are reviewed at MK. Whereas various provisions on death penalty in these laws have lost their legitimacy, in line with the development of global human rights norms and Indonesia's recognitio towards rights that acknowledged universally. Serveral laws in this context are the Criminal Code, Military Criminal Code, Law No. 4 of 1976 on Civil Aviation, Law No. 9 of 1976 on Narcotic, and Law No. 5 of 1997 on Psychotropic. The basis of the argumentation for death penalty punishment in these laws must be reviewed to ensure the human rights protection is in line with the Indonesia's commitment on human rights.

Third, in the Reformasi period since 1998 in line with the commitment for respect, protection, fulfillment, and advancement of human rights in Indonesia, more laws are using death penalty, even without a clear argumentation. The development of international human rights norms, for instance the ICCPR that has been ratified by Indonesia, which should be the guideline to adjust the national laws with

⁶¹⁹ *Ibid.*, pg. 208.

human rights norms is not being used. This is evident from the abandonment of strict requirements for the implementation of death penalty under international human rights law, are not automatically lead the lawmakers in Indonesia to consider it properly over the crimes that can be subject to death penalty. Several laws that show this situation including Law No. 31 of 1999 on Eradication of the Crime of Corruption, Law No. 26 of 2000 on Human Rights Court, Law No. 15 of 2003 on the Eradication of the Crime of Terrorism, and Law No. 35 of 2009 on Narcotic.

Fourth, by looking further into the substance of the provisions regarding death penalty in Indonesia, various crimes that subject to death penalty do not have the argumentation that is in line with human rights norms. That the implementation of death penalty for countries that yet to abolish such punishment must be imposed towards the most serious crimes, as stipulated under Article 6 of the ICCPR, is constantly used. This is evident from the provisions pertaining to death penalty under Law No. 35 of 2009 on Narcotic and the Psychotropic Law, in which the crimes are not categorized under the most serious crimes. Similar situation can also be seen from Law No. 26 of 2000 on Human Rights Court that has the jurisdiction over genocide and crimes against humanity, indeed satisfies the qualification as the most erious crimes, even though in the development of international law and international criminal justive, those crimes are not charged with death penalty. While for the crime of terrorism, under international law, referring to the 1998 Rome Statute on International Criminal Court, is not categorized as the most serious crime.

Fifth, the emergency reasons over issues, for instance the campaign on narcotic emergency and sexual crime emergency, become the reason to implement and draft new legislation with death penalty. Whereas, the provision in regards to emergency situation has been firmly stated under Article 4 of the ICCPR, both substantive reason on the nature of the emergency situation and formal reason for the use of emergency measures. The narcotic emergency, for instance, was used as the basis to conduct execution towards the death convicts. Similar situation can be seen from the new regulation under the Government Regulation in Lieu of Law, which was later formalized under Law No. 17 of 20167 on the Determination of Government Regulation in Lieu of Law No. 1 of 2016 on the Second Amendment to law No. 23 of 2002 on Child Protection into Law, was drafted with the reason to overcome the emergency situation caused by sexual violence towards children that are getting worse.

CHAPTER V

Contemporary Issue: The Use of Death Penalty for Eradication of Narcotic in Indonesia

5.1. Introduction

On 18 January 2015, Indonesia experienced the first death execution under the administration of President Joko Widodo, who took the oath of office on October 2014. Six individuals were executed due to narcotic-related crimes (narcotic and dangerous drugs/substances). From these six individuals, one was Indonesian citizen, Rani Andriani a.k.a. Melisa Aprilia, and five foreign citizens: Daniel Enemuo (Nigeria), Ang Kim Soei (Netherlands), Tran Thi Bich Hanh (Vietnam), Namaona Denis (Nigeria), and Marco Archer Cardoso Moreira (Brazil).⁶²⁰ President Joko Widodo and other authorities announced that the continuation of death execution was due to the fact that Indonesia was under “emergency situation” in regards to substance abuse and there were approximately 50 youths died every day from drug addiction.⁶²¹ The President also informed the public that the government will reject all clemency requests from the death convicts that were related to narcotic, by saying “no more tolerance, for this matter”.⁶²²

The execution attracted outcry from many human rights organizations, both at national and international law. President Joko Widodo said that “International community is calling and pressuring, heads of state, prime ministers, presidents, also the UN, also the Amnesty [International]...I think this is understandable...but as of now this is our legal sovereignty, our political sovereignty”.⁶²³

Regardless the outcry, three months later on 29 April, eight more individuals that are charged due to narcotic crime were executed again. They were Andrew Chan and Myuran Sukumaran (both were Australians), Raheem Agbaje Salami (Nigeria, also known as Jamiu Owolabi Abashin), Zainal Abidin (Indonesia), Martin Anderson (Ghana, a.k.a Belo), Rodrigo Gualarte (Brazil), Sylvester Obiekwe Nwoli

⁶²⁰ Amnesty International, *Indonesia: First executions under new president retrograde step for rights*, Amnesty Internasional, 17 January 2015, <<https://www.amnesty.org/en/press-releases/2015/01/indonesia-first-executions-under-new-president-retrograde-step-rights/>>, accessed on 13 Decemb2017.

⁶²¹ Sekretariat Kabinet Republik Indonesia, *Sambutan Presiden Joko Widodo dalam pembukaan Rapat Koordinasi Penanggulangan Narkoba di Jakarta*, 4 February 2015, <http://www.setneg.go.id/index.php?option=com_content&task=view&id=8712&Itemid=26>, accessed on 13 December 2017.

⁶²² Heru Purwanto, *No mercy for drug dealers: President*, Antara, 9 December 2014, <<http://www.antaranews.com/en/news/96848/no-mercy-for-drug-dealers-president%20/>>, accessed on 13 December 2017.

⁶²³ Interview of Elshinta Radio with President Joko Widodo at the State Palace, Elshinta, 17 March 2015, <<http://elshinta.com/news/5203/2015/03/17/wawancara-eksklusif-elshinta-dengan-presiden-jokowi>>, accessed on 13 December 2017.

(Nigeria) and Okwudili Oyatanze (Nigeria).⁶²⁴ Two more individuals were awarded temporary postponement for the execution.⁶²⁵

All of 14 execution showed setbacks for human rights in Indonesia, it was worse as the execution was conducted by the new administration that recently took the oath of office after promised to prioritize human rights during his campaign. The execution was also violating the international law and the UN Rules to ensure protection of those that are charged with death penalty.⁶²⁶ Amnesty International also asserted its concerns over several human rights violations on the 14 cases that were executed during 2015, for instance violation towards the right to fair trial; execution was taken when legal effort still ongoing; consideration and rejection in a rush towards clemency requests; and execution towards an individual who was diagnosed with severe mental illness. Furthermore, as stated by many international organizations, drug trafficking does not satisfy the minimum criteria of “most serious crime” that can be charged with death penalty, pursuant to the international law.

The death execution was a setback from the Indonesian government, after many years indicating that the state will abandon death penalty. Between 2009 and 2012, there was no death penalty and the authorities established a so-called “de facto death penalty moratorium”.⁶²⁷ When death sentence imposed towards a woman and a boy, due to drug trafficking, was reduced into life imprisonment in 2011 and 2012, the Ministry of Foreign affairs at that time, Mr. Marty Natalegawa, said that such policy was part of a wider effort to abandon the use of death penalty in Indonesia.⁶²⁸ In the same month, the Supreme Court reduced the death penalty sentence of a man who was sentenced to death for drug trafficking crime, and said that death penalty is violating human rights and Indonesian constitution.⁶²⁹ On December 2012, during the 67th session of the UN General Assembly, Indonesia changed its position from “against” to “abstain” for a resolution that called all UN member states to implement a moratorium towards death penalty, as an initiation to abolish death penalty.

In the past few years, the government was also proactively took action to prevent death execution towards Indonesian citizens in overseas. In 2011, the current president, Mr. Susilo Bambang Yudhoyono, established a task force to provide legal and consular assistance for Indonesian citizens that are charged

⁶²⁴ Amnesty International, *Indonesia: 'Reprehensible' executions show complete disregard for human rights safeguards*, 28 April 2015, <<https://www.amnesty.org/en/latest/news/2015/04/indonesia-reprehensible-executions-show-complete-disregard-for-human-rights-safeguards/>>, accessed on 13 December 2017.

⁶²⁵ Death execution towards a Philippines Filipina Mary Jane Veloso was halted in the last minute. The postponement was given after a request from the President of the Philippines to spare her life, as she was required to give testimony in a trial of a person who was allegedly deceived Mary Jane Veloso into becoming narcotic courier. Another person that also sentenced to death, was a French, Serge Atlaoui, was also given a postponement, because an appeal was ongoing at the State Administrative Court.

⁶²⁶ UN Economic and Social Council, *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, 25 May 1984.

⁶²⁷ See *Statement by the delegation of the Republic of Indonesia high-level panel discussion on the question of the death penalty 'regional efforts aiming at the abolition of the death penalty and challenges faced in that regard' at the 28th session of the Human Rights Council*, <<http://www.mission-indonesia.org/article/516/statement-by-the-delegation-of-the-republic-of-indonesia---high-level-panel-discussion-on-the-question-of-the-death-penalty---regional-efforts-aiming-at-the-abolition-of-the-death-penalty-and-challenges-faced-in-that-regard---at-the-28th-session-of-the-human-rights-council>>, accessed on 13 December 2017.

⁶²⁸ Dessy Sagita, *Indonesia not Alone in Death Penalty Reticence: Ministers*, The Jakarta Globe, 17 October 2012, <<http://www.thejakartaglobe.com/archive/indonesia-not-alone-in-death-penalty-reticenceministers/550602/>>, accessed on 13 December 2017.

⁶²⁹ Mahkamah Agung, *Decision on Case Review of Hanky Gunawan No. 39 PK/Pid.Sus/2011*, pg. 53-54.

with death sentence in foreign countries. Between 2011 and 2014, 240 Indonesian citizens that were facing death penalty in foreign countries succeeded to have their sentence reduced, including 46 citizens in 2014.⁶³⁰

The death execution data for narcotic crime from 2005 until 2015 can be seen on the following table.⁶³¹

Tabel 5.1 Execution for Narcotic Crimes during 2005-2015

Number of Death Execution per annum											
Year	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Total of death execution	Unknown	Unknown	1	10	0	0	0	0	5	0	14
Death execution for narcotic	Unknown	Unknown	0	2	0	0	0	0	2	0	15

In comparison, the amount of court decision with death penalty is elaborated below.⁶³²

Tabel 5.2 Court Decision on Death Penalty

Number of Court Decisions on Death Penalty per annum											
Tahun	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Total death execution	Unknown	Unknown	11+	10+	Unknown	7+	6+	12+	16+	6+	Unknown
Death execution for narcotic	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown

5.2. The Concept of Most Serious Crime for Narcotic

While the international trend to abolish death penalty is increasing,⁶³³ the number of countries that implement death penalty for narcotic crimes keep increasing in the last 20 years.⁶³⁴ Twenty years ago,

⁶³⁰ Antara, *Government saves 190 Indonesians from death sentence: Yudhoyono*, 16 August 2014, <<http://www.antaranews.com/en/news/95328/government-saves-190-indonesians-from-death-sentence-yudhoyono>>, accessed on 13 December 2017.

⁶³¹ International Federation for Human Rights (*Federation Internationale des Ligues des Droit De L'Hommes/FIDH*) dan World Coalition Against the Death Penalty, *The Death Penalty for Drug Crimes in Asia, Report*, (FIDH dan World Coalition Against the Death Penalty, 2015), pg. 27.

⁶³² *Ibid.*

⁶³³ William A. Schabas, *The Abolition...*, op.cit., pg. 20.

⁶³⁴ Rick Lines, *A "Most Serious Crime"? – The Death Penalty for Drug Offences and International Human Rights Law*, Amicus Journal Issue, 12, 2010, pg. 1.

only 22 countries that implemented death penalty for narcotic crimes. Ten years later in 1995, the number was increased to 26 countries that were implementing death penalty for narcotic crimes. In the late 2000s, there were at least 34 countries that had regulation/legislation that incorporated death penalty for narcotic crimes. Most of the 34 countries were located in the Middle East, North Africa, and Asia-Pacific.

Countries that are still preserving death penalty argued that narcotic crimes can be categorized as most serious crime, and therefore it is valid to be imposed with death penalty. In addition to Indonesia, one of many retentionist countries is Singapore, in which the Government of Singapore opined that:⁶³⁵

“drug trafficking is considered by the international community as a most serious crime”

Question then arised that on whether narcotic crime can be categorized as most serious crime and therefore satisfied the elements under Article 6 (2) of the ICCPR to be charged with death sentence. As explained in the previous chapter, ever since the ICCPR entered into force in 1976, the interpretation of the concept of most serious crime has been elaborated by various human rights institutions under the UN, especially for narcotic crimes.

Specific to narcotic cases, the UN Human Rights Committee in its conclusion in Thailand in 2005, stated their concerns because death penalty is imposed to drug trafficking cases and not limited to crimes categorized as most serious crime according to Article 6 (2) of the ICCPR.⁶³⁶ In addition, the UN Human Rights Committee asserted their interpretation in 2007 in Sudan, stating that:⁶³⁷

“the imposition in the state party of the death penalty for offences which cannot be characterized as the most serious, including embezzlement by officials, robbery with violence and drug trafficking.”

Furthermore, the conclusion from the observation conducted by The Human Rights Committee, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in 1996 said that narcotic crimes do not satisfy the criteria of the most serious crime and death penalty must be immediately abolished for economic and narcotic crimes, and explained that:⁶³⁸

“the death penalty should be eliminated for crime such as economic crime and drug-related offences. In this regard, the Special Rapporteur wishes to express his concern that certain countries, namely China, the Islamic Republic of Iran, Malaysia, Singapore, Thailand and the United States of America, maintain in their national legislation the option to impose the death penalty for economic and/or drug-related offences”

Moreover, the UN Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment in 2009 also reported to the Human Rights Council that narcotic crime does not satisfy the

⁶³⁵ UN Economic and Social Council, *Letter from the Permanent Mission of Singapore to the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/1998/113, 5 December 1997.

⁶³⁶ UN Human Rights Committee, *Concluding observations...*, CCPR/CO/84/THA.

⁶³⁷ UN Human Rights Committee, *Concluding observations of the Human Rights Committee, Sudan*, CCPR/C/SDN/CO/3, 29 August 2007.

⁶³⁸ UN Human Rights Committee, *Report of the Special Rapporteur on the extrajudicial, summary or arbitrary executions*, E/CN.4/1997/60, 24 December 1996.

criteria to be categorized as the most serious crime.⁶³⁹ Affirming the similar position, the UN High Commissioner for Human Rights also echoed the report from the UN Special Rapporteur by saying that the implementation of death penalty for those who are charged with narcotic crime has caused a serious concerns over human rights issue.⁶⁴⁰

Even the domestic legislation report also showed inconsistency in the imposition of death penalty towards narcotic crimes. In 1995, from the fifth report of the UN Secretary General, it was explained that the limit of narcotic crime that can be imposed with death penalty is the possession around 2 until 20.000 grams of heroin.⁶⁴¹ It is evident from the very broad range, it will be very difficult to determine a consistent definition towards most serious crime for narcotic crime

To affirm the abovementioned cases, we can compare the laws in four neighboring countries, namely Thailand, Sri Lanka, Bangladesh, and India. These four countries, according to Bangladesh Minister of Interior Affairs, are the transit location for two largest opium producers. Under the Law of Poisons, Opium, and Dangerous Drugs No. 13 of 1984 in Sri Lanka, it is mentioned that death penalty will be imposed to a party who smuggle, import, export heroin in the amount of 2 grams. In Bangladesh, the limit is 25 grams,⁶⁴² in Pakistan 100 grams,⁶⁴³ and India 1000 grams.⁶⁴⁴ Different amount, even for neighboring countries. The lack of uniformity between countries in interpreting most serious crime showed that the imposition of death penalty for narcotic crime has the tendency to be “arbitrary” by each country.

Without disregarding the fact that narcotic crime is a serious crime, however we need to compare the level of “seriousness” in narcotic crimes with other serious crimes under international law. The first comparison is with the crimes mentioned under the Rome Statute. The ICC’s Rome Statute has determined its jurisdiction towards serious crimes that become concerns for the international community. As of now, the crimes that fall under the ICC’s jurisdiction are crimes against humanity, war crimes, the crime of genocide, and crime of aggression.

For another comparison of seriousness level in narcotic crimes, the International Criminal Tribunal for Rwanda, in the case of Akayesu, stated that the cruelest crime is genocide, and in the case of Kambanda it was stated that genocide is the “crime of crime”. It is evident from the two cases of the international tribunal, narcotic crimes cannot be considered as most serious crime.

Some parties are using the 1998 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances to assert that narcotic is a particular serious crime. Under Article 3.5 of the UN Convention, it is stated that:

⁶³⁹ UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Manfred Nowak, A/HRC/10/44, 14 January 2009.

⁶⁴⁰ Office of the UN High Commissioner for Human Rights, *High Commissioner calls for focus on human rights and harm reduction in international drug policy*, Press Release, 10 March 2009.

⁶⁴¹ UN Economic and Social Council, *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, E/CN.15/2001/10, 29 March 2001.

⁶⁴² Bangladesh, *The Narcotic Control Act*, 1990, Article 19.

⁶⁴³ Pakistan, *Ordinance No. XLVII*, 1995, Article 9.

⁶⁴⁴ India, *Narcotic Drugs and Psychotropics Substances Act*, 1999, Article 9.

“The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article particularly serious, such as:

- a) The involvement in the offence of an organized criminal group to which the offender belongs;*
- b) The involvement of the offender in other international organized criminal activities;*
- c) The involvement of the offender in other illegal activities facilitated by commission of the offence;*
- d) The use of violence or arms by the offender;*
- e) The fact that the offender holds a public office and that the offence is connected with the office in question;*
- f) The victimization or use of minors;*
- g) The fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities;*
- h) Prior conviction, particularly for similar offences, whether foreign or domestic, to the extent permitted under the domestic law of a Party.”*

This approach is also used by the Supreme Court in the case of Rani Andriani, Myuran Sukumaran, and Andrew Chan. The Supreme Court said that the trafficking activities or the purchase of narcotic as stated under Article 3 of the Convention can be classified as particularly serious crime compared to most serious crimes that are acknowledged, such as genocide and crimes against humanity, therefore there should not be a differentiation between the two—particularly serious crime dan most serious crime.

Nevertheless, particularly serious crime is not similar to most serious crime. Even though narcotic smuggling into a country is a serious crime, it does not necessarily mean that narcotic crime can be categorized as most serious crime under international law. Therefore, there is lack of evidence to support that narcotic crime falls under the most serious crime. With the preservation of death penalty practice, it is fair to say that Indonesia is not in line with Article 6 (2) of the ICCPR that has been ratified by Indonesia itself. With the ratification of the ICCPR and considering the *pacta sunt servanda* principle, Indonesia should always try to realize its commitment in protecting the international human rights without decreasing its effort in eradicating narcotic crimes nationally.

The crime of genocide and crimes against humanity have a special status under the international law. These crimes are the most serious crime of international concern as a whole. Additionally, these crimes are also violating *jus cogens* and *erga omnes*, both of which are the highest norms under international that override other norms and it becomes obligation of all countries.

5.3. The Use of Public Perception in Anti Narcotic Policy

The politics of death penalty under the President Joko Widodo regime, with the emergency argument, has negated the very basic humanity value. The national emergency argument towards narcotic that becomes the power expression legitimation instrument of President Joko Widodo was showed when the President rejected 64 pardons for death convicts of narcotic crime. Afterwards, the President ordered the General Attorney to immediately organize the execution, when the President Joko Widodo administration was yet to reach 100 days. During the hearing with Gadjah Mada University, in Yogyakarta, the President asserted that the crime cannot be pardoned because most of them are large drug dealers that for their own personal and group interests have damaged the future of this nation's

generation. The rejection of pardons, according to President Joko Widodo, was important as shock therapy for many drug dealers, and even users.⁶⁴⁵

On 21 July 2017, President Joko Widodo announced his firm statement on narcotic emergency. Appeared before many members of United Development Party (*Partai Persatuan Pembangunan*), the President said that he already asked the police to shoow drug dealers that will not cooperate with the law enforcement officials.⁶⁴⁶ This statement was re-asserted when President Joko Widodo attended the National Action to Eradicate Illegal and Abuse of Drugs, at Bumi Perkemahan Cibubur, East Jakarta on 3 September 2017. President Joko Widodo asked the police and National Narcotic Agency (*Badan Narkotika Nasional* – “BNN”) to act decisively towards drug dealers. When it is necessary, the President asked the law enforcement officials to not hesitate to shoot them.⁶⁴⁷

Two years earlier, when President Joko Widodo gave an opening remarks in the national coordination meeting of narcotic eradication on 4 February 2015, he also said similar message recited his concerns that the distribution of and the use of narcotic in Indonesia became worse. The President even said that the condition has reached an emergency situation. Furthermore, President said that based on the data as his reference, there were 50 Indonesians died everyday due to drug abuse. If that figure calculated into a year, there were 18.000 individuals died due to narcotic. This figure excluded 4,2 drug users in rehab and 1,2 users that cannot be rehabilitated. The President also assured that he will reject clemency if it is related to drug dealing.⁶⁴⁸

Referring to the World Drug Report 2014, prepared by the UN Office on Drugs and Crime (UNODC), there are 180.000 deaths caused by narcotic. The highest death rate is in Asia, with 78.600 people died because of narcotic in 2013. This figure was indeed the highest narcotic casualties in the world.⁶⁴⁹ However, it is clear that Asia is the most dense continent in world, as evident from the diagram below,⁶⁵⁰ the ratio of deaths due to narcotic in Asia is the smallest, compared to the ratio in other continents, such as America or Oceania.

⁶⁴⁵ Daniel Pascoe, *Tiga Tantangan Hukum yang akan Dihadapi Rezim Hukuman Mati di Indonesia* dalam Robet dan Lubis, *Politik...*, pg. 103.

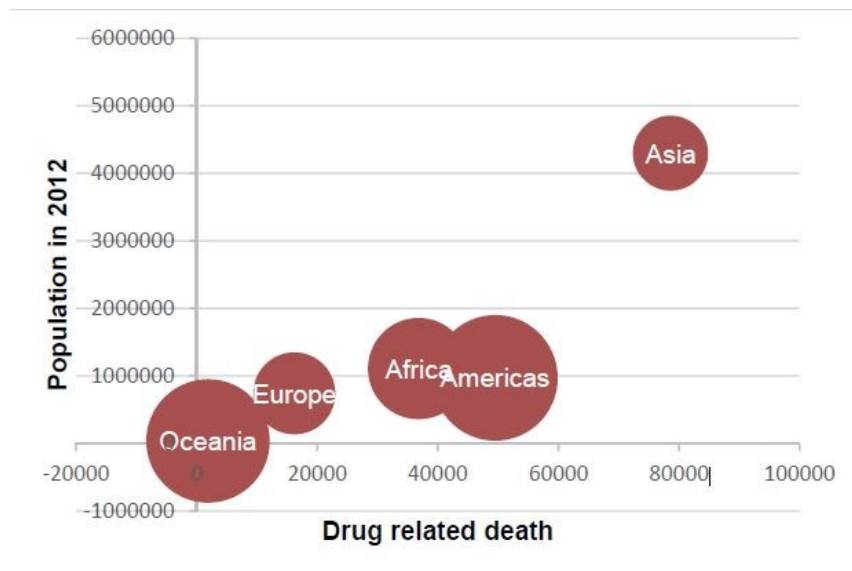
⁶⁴⁶ Itsman MP, *Jokowi Minta Pengedar Narkoba Ditembak, Ini Syaratnya*, Tempo, 21 July 2017, <<https://nasional.tempo.co/read/893421/jokowi-minta-pengedar-narkoba-ditembak-ini-syaratnya>>, accessed on 13 December 2017.

⁶⁴⁷ Ihsanuddin, *Jokowi Instruksikan Tembak di Tempat jika Bandar Narkoba Melawan*, Kompas, 10 March 2017, <<http://nasional.kompas.com/read/2017/10/03/13551201/jokowi-instruksikan-tembak-di-tempat-jika-bandar-narkoba-melawan>>, accessed on 13 December 2017.

⁶⁴⁸ Indra Akuntono, *Presiden Jokowi: Indonesia Gawat Darurat Narkoba*, Kompas, 2 April 2015, <<http://nasional.kompas.com/read/2015/02/04/10331931/Presiden.Jokowi.Indonesia.Gawat.Darurat.Narkoba>>, accessed on 13 December 2017.

⁶⁴⁹ UN Office on Drugs and Crimes, *World Drug Report 2014*, pg. 4.

⁶⁵⁰ UN, Department of Economic and Social Affairs, Population Division, *World Population 2012*, <www.un.org/en/development/desa/population/publications/pdf/trends/WPP2012_Wallchart.pdf>, accessed on 13 December 2017.



Imposing death penalty is always based with the argument that such sentence was rendered to create deterrent effect towards narcotic dealers, in order to prevent them from repeating the crime and consequently reducing the crime rate. In the execution of two Australian citizens, namely Andrew Chan and Myuran Sukumaran, Minister of Foreign Affairs Retno LP Marsudi repeated the arguments that always asserted by President Joko Widodo. The Foreign Minister said that in imposing death penalty, there are no rules violated by Indonesia, and therefore Indonesia will be consistent in implementing death penalty. Further, there is an international rule that Indonesia refers to when imposing death penalty.⁶⁵¹

The belief that death penalty can control the crime rate is the justification from the government to preserve death penalty. Whereas, death penalty as deterrent effect is only myth. Such myth as deterrent effect is an argumentative belief that can be used by the government or society leaders that death penalty is part of the effort to strengthen social ties, having deterrent prospect, giving political gain, and as a revenge from the victims. This myth is only justifying the argument to achieve certain objective, while at the same time disregarding the truth of such myth. According to Michael L. Radelet and Ronald L. Akers, the implementation of death penalty that is assumed to have a deterrent effect is an empirical problem,⁶⁵² and therefore it cannot be answered by moral or political base.⁶⁵³

⁶⁵¹ The Foreign Minister referred to Article 6 of the ICCPR, which states that death penalty can be imposed to serious crimes. According to the Foreign Minister, narcotic is considered as serious crime in Indonesia. See Feri Kisihandi, *Penetapan Hukuman Mati Punya Alasan Kuat*, *Republika*, 17 February 2015, <<http://www.republika.co.id/berita/koran/halaman-1/15/02/17/njwnx95-penetapan-hukuman-mati-punya-alasan-kuat>>, accessed on 13 December 2017.

⁶⁵² Research in regards to deterrent effect argument, shows hesitation as to prove such opinion empirically requires an experimentative research that is really difficult. Therefore, death penalty cannot be the single factor that causes the decrease in crime rate. The effort to isolate death penalty factor from other factors is too difficult. Hence, there is another factor that affect the decrease of crime rate, beside the deterrent effect. One factor to be considered is the predominant fear that can also decrease the crime rate as mentioned by Ernest vand den Haag. This predominant fear factor covers the fear over the labelling from society, fear towards family situation after the crime is comitted, fear of personal reputation damage or loss of job, fear of sin, and other reasons. While Ernest vand den Haag supported death penalty, he later accepted the fact that death penalty never been proved to give a greater deterrent effect compared to life imprisonment. See Sulhin, in Robet and Lubis, *Politik.., op.cit.* pg. 86.

While deterrent effect always used as the basis to impose death penalty, especially in narcotic cases, the validity of the argument is still questionable. The research report prepared by the National Narcotic Agency (*Badan Narkotika Nasional* – “BNN”) showed the significant increase of narcotic users. In 2013 BNN recorded that narcotic users were 3,3 million people, and this number was drastically increased in 2015 to 5,1 million. This record also affirmed many of survey results conducted by the UN and the US National Research Council—both on separate occasion. Both surveys affirmed that there is no scientific evidence that can support the implementation of death penalty may give deterrent effect.⁶⁵⁴

The next question being, to whom the deterrent effect is addressed? Most of the offenders in the narcotic crimes that imposed with death penalty are only the small league players and were not the leaders or the ones in the top of drug trafficking chain. Most of them are only victims and underprivileged, therefore they are vulnerable to exploitation and being used by more powerful people.⁶⁵⁵ Therefore, if death penalty is said to have deterrent effect, the bigger players will not be affected by the deterrent effect, as the ones who get caught were only the small distributors.

In addition, the argument of deterrent effect is based on the idea that those who were involved in the crime will aware of the possible punishment, if they get caught and thought that the risk is too high if they are facing execution. The problem lies in the fact that this situation is not always the case, as is evident from the case in Nusakambangan. The Warden at Nusakambangan was detained for narcotic crime in May 2014, while only months earlier (January and April 2014), death execution took place in the same area. This shows that some people do not aware of the level of the punishment when they get caught. We can see from this case that deterrent effect cannot always be used as benchmark by the government.⁶⁵⁶

Other arguments in addition to deterrent effect that are always used by the government and the supporters of death penalty are as follows:⁶⁵⁷

1. Implemenation of death penalty is an effort to protect citizens who become the victims or experiencing loss due to a crime;
2. Implementation of death penalty is viewed as the state assertiveness in fighting crime or in other words the state cannot lose to crime;
3. Implementation of death penalty is in accordance with the constitution and prevailing laws and regulations, therefore it must be complied with;
4. Implementation of death penalty is a matter of national legal and political sovereignty;

In this context, Roger Hood said that if death penalty is still assumed as a preventive instrument that is more effective than alternative punishment, such as life imprisonment, the evidence stated otherwise. Roger Hood concluded that the econometric analysis fails to give solid evidence that death penalty has

⁶⁵³ *Ibid.*

⁶⁵⁴ Lembaga Studi dan Advokasi Masyarakat (ELSAM), *Hari Hukuman Mati Sedunia: Momentum Penghapusan Kritik Hukuman Mati di Indonesia*, Press Release, 10 October 2015, <<http://elsam.or.id/2015/10/hari-anti-hukuman-mati-sedunia-momentum-penghapusan-praktik-hukuman-mati-di-indonesia/>>, accessed on 13 December 2017.

⁶⁵⁵ International Federation for Human Rights (*Federation Internationale des Ligues des Droit De L’Hommes/FIDH*) dan World Coalition Against the Death Penalty, *op.cit.*, pg. 18.

⁶⁵⁶ *Ibid.*, pg. 19.

⁶⁵⁷ Hendrik Boli Tobi, *Peta Diskursus Hukuman Mati di Awal Masa Pemerintahan Joko Widodo*, on Robet and Lubis, *Politik...*, pg. 112

more significant deterrent effect compared to alternative punishment. In other words, it would be useless, if countries still preserving death penalty based on the argument that it is justified as an effective preventive measures.⁶⁵⁸

Furthermore, President Joko Widodo often echoed public opinion as the instrument to legitimize his action in executing narcotic dealers. When decided the death execution, the President gained many support, from inside and outside the government. Vice President Jusuf Kalla said that President Joko Widodo executed his authority to reject or approve the submission of clemencies by 64 convicted in narcotic cases. While the court imposed death penalty towards those people during the trial. The view of the President and Vice President was strengthened by the views of several ministers, the Attorney General Office, and the National Police. Minister of State Secretariat Pratikno denied the assumption that the rejection of pardons by the President was not based on proper consideration. Before decided to reject the pardon, the President received inputs from the Supreme Court, the National Police, Attorney General, and Ministry of Law and Human Rights. Similar view also shared by Coordinating Minister for Political, Law, and Security who said that the government will not give pardon or remission for narcotic dealers that have been sentenced to death by the court. Support is also given by the Chief of National Police General Sutarman who said that the implementation of death penalty will give deterrent effect to the offenders.⁶⁵⁹

Outside the government, several parties also supported President Joko Widodo decision, such as Nahdathul Ulama (NU), Muhammadiyah, and Indonesia Democratic Party of Struggle (*Partai Demokrasi Indonesia Perjuangan* – “PDIP”). The General Chairman of PDIP Megawati Soekarnoputri talked directly to the President, delivering her input not to pardon the death convicts. Similar support also came from NU Chairman Said Agil Siradj, who, on behalf of NU, said to reject clemency for the convicts that about to be executed. The NU figure, who also served as the Vice Chairman II of Komnas HAM during 2002-2007, Salahuddin Wahid also appreciated President’s effort, asserted that if narcotic dealers were not executed to death, they will run their business from the prison. Vice General Chairman of Muhammadiyah Abdul Malik Fadjar also said his support towards President’s firm move. Even former Chairman of President Advisory Council Emil Salim disagreed with the comments from human rights activists who said that the rejection of clemency as human rights violation.⁶⁶⁰ The Indonesian Ulama Council also issued a fatwa in late December 2014, asserted its support towards death penalty for narcotic producers, dealers, and sellers.⁶⁶¹

According to national survey conducted by Indo Barometer on 15-25 March 2015, the majority of Indonesian public, or approximately 84,1 percent gave their support to death penalty for narcotic dealers. The public that support death penalty for narcotic dealers based their argument that narcotic ruins the youth, is 60,8 percent and could give deterrent effect is 23,7 percent. Meanwhile, the public who opposed the death penalty for narcotic dealers because there are other more humane punishment is 36,2 percent and viewed death penalty as human rights violation is 28,4 percent. In the context of

⁶⁵⁸ Hodgkinson, *op.cit.*, pg. 9.

⁶⁵⁹ Tobi, *op.cit.*, pg. 103-105.

⁶⁶⁰ *Ibid.*

⁶⁶¹ Ndr/Mad, *Fatwa MUI Dukung Pemerintah Beri Hukuman Mati ke Bandar dan Pengedar Narkoba*, Detik, 17 January 2015, <<https://news.detik.com/berita/2806216/fatwa-mui-dukung-pemerintah-beri-hukuman-mati-ke-bandar-dan-pengedar-narkoba>>, accessed on 13 December 2017.

President's action in imposing death penalty for narcotic dealers, most of the public or 84,6 percent of respondent supported the President. Those who opposed only 10,3 percent.⁶⁶²

Public opinion is often used as an argument to justify a political decision made by a regime to conduct death execution. According to Peter Hodgkinson, there are several main reasons of why a country preserve or abandon death penalty. The reasons differ from one country to another, but in general covering the issue of prevention, public opinion, and victim's rights. These issues are related with the concerns over the increase of crime rate that will follow after the policy in abandoning death penalty.⁶⁶³ In other words, the government and other parties that are in influential position often referring to the strong public support to justify and preserve death penalty.⁶⁶⁴

Lawmakers and legal experts usually said that they are, in personal, leaning to the idea of abandoning death penalty, even though public opinion drives their point of view and is used as a justification when they change their opinion to support death penalty. In other words, they cannot shift too far away from the public opinion. Sometimes the implementation of death penalty is said to be the consequence of legislation that is made from a democratic society. Every legislation that still incorporates death penalty is assumed as the manifestation of majority interests.⁶⁶⁵ Public opinion is attached to the proposition that the majority supports the death penalty. Whereas the position and the opinion of the public should not be the only factor for the support, but other factors must also taken into account, including the basic factors that were the background of a certain opinion. There are several basic factors that can influence the public perception over the implementation of death penalty, such as religious, moral, practical, scientific, and economics reason. Individual opinion is likely to be based upon the combination of those factors.⁶⁶⁶

In this context, there are at least two reasons to question on why the public supports death penalty, especially when the public opinion contradicts the standards of international human rights.

Firstly, some critical analysis must be made from the significance of public opinion. The nature of public opinion can be explained from its relation with the various level of public social knowledge. One of the factors is the society's access to credible information regarding death penalty. In most Asian countries, trusted information regarding death penalty are not available for public, either because the respective government is reluctant to issue such information/data (such as China and Vietnam), or the information published by the government are not complete or incorrect (the case in Iran). As a consequence, the public does not have valid sources on how death penalty is implemented in their respective countries, and therefore cannot establish a correct opinion.⁶⁶⁷

⁶⁶² The public is of the view that in addition to narcotic dealers, death penalty can also be imposed to other crimes, such as corruption (50,3%), murder (16,3%), and sexual crime (4,2%). Meanwhile, death penalty for terrorism is only supported by 2,3% of respondent. See Gusti Lesek, *Survei: 86% Rakyat Dukung Hukuman Mati Pongedar Narkoba*, Berita Satu, 27 April 2015, <<http://www.beritasatu.com/nasional/268928-survei-86-rakyat-dukung-hukuman-mati-pengedar-narkoba.html>>, accessed on 13 December 2017.

⁶⁶³ Hodgkinson, *loc.cit.*

⁶⁶⁴ *Ibid.*, pg. 18.

⁶⁶⁵ William Schabas, *Public opinion and the death penalty*, dalam Peter Hodgkinson and William A. Schabas, *Capital Punishment: Strategies for Abolition*, (Cambridge: Cambridge University Press, 2004), pg. 309.

⁶⁶⁶ *Ibid.*, pg. 311.

⁶⁶⁷ International Federation for Human Rights (*Federation Internationale des Ligues des Droit De L'Hommes/FIDH*) and World Coalition Against the Death Penalty, *op.cit.*, pg. 12.

Secondly, close related with the survey methodology in regards to death penalty. Roger Hood explained that public opinion that is used by the government as one of main justification to preserve death penalty should be reviewed, considering the survey can be a misleading indicator, if it disregards both arguments.⁶⁶⁸

In addition, another factor that can affect the public opinion is the level of freedom of expression within a country. If an individual within a country that punish those who criticize the government and suppress the freedom of expression, public will be hesitant to share their view on sensitive subject such as death penalty, especially when they disagree with the government position. At the end of the day, this situation will reduce the prevalency of divergent perspective within the society, and as a consequence limits the society's capability to develop an opinion that is based on valid and credible information.⁶⁶⁹

Pertaining to the effort in handling public opinion issue, judges must consider that the deterrent hypotheses does not have scientific ground, as many courts rejected the relevancy of public opinion because the society is not given proper information. Based on legal perspective, any defendant cannot be imposed with death penalty, particularly when the imposition is based on public opinion. Furthermore, international human rights law prohibits crime based on *ex post facto*, because no one can be considered guilty in committing a crime due to an action or negligence that is not a crime.⁶⁷⁰ Therefore, public opinion must be further reviewed every time an individual's human rights is threatened—based on human rights guarantee. The *raison d'être* of human rights law is preventing or neutralizing the power of public opinion that potentially threatening human rights.⁶⁷¹

5.4. MK Decision on Death Penalty and Narcotic: Narcotic as *the Most Serious Crime*?

In 2007, a judicial review regarding death penalty provisions under Law No. 22 of 1997 on Narcotic ("Narcotic Law") was conducted. The request for judicial review was submitted by Edith Yunita Sianturi, Rani Andriani (Melisa Aprilia), Myuran Sukumaran and Andrew Chan as Applicant I (Case Register: 2/PUU-V/2007) and Scott Anthony Rush as Applicant II (Case Register: 3/PUU-V/2007). Since the plenary session on 15 March 2007, both cases were merged by MK and jointly tried under the Case Register 2-3/PUU-V/2007.⁶⁷² Edith was involved in heroin distribution in the amount of a thousand grams, while Rani was sentenced in the heroin distribution in the amount of 3.500 grams. They were sentenced to death by the Tangerang District Court. While the Australian citizens were sentenced to death by Denpasar District Court, as they were proved to smuggle 8,2 kilograms of heroin from Australia to Bali.

They submitted a judicial review request towards Article 80 (1) (a), Article 80 (2) (a), Article 80 (3) (a), Article 81 (3) (a), Article 82 (1) (a), Article 82 (2) (a), and Article 82 (2) (a) under the Narcotic Law. These articles stipulate death penalty for producers and dealers of narcotic that are organized. However, only Edith and Rani's submission that went into trial at MK, while the Australian citizens' requests did not go to trial, as as foreign citizens they were not eligible to file judicial review to MK.

⁶⁶⁸ Aleksandras Dobryninas, *The experience of Lithuania's journey to abolition*, on Hodgkinson and Schabas, *Capital...*, *op.cit.*, pg. 238.

⁶⁶⁹ International Federation for Human Rights (*Federation Internationale des Ligues des Droit De L'Hommes/FIDH*) dan World Coalition Against the Death Penalty, *op.cit.*, pg. 12.

⁶⁷⁰ Schabas, *op.cit.*, pg. 326

⁶⁷¹ *Ibid.*, pg. 328

⁶⁷² Lubis dan Lay, *Kontroversi...*, pg. 1.

The applicant argument to submit a judicial review on the Narcotic Law is that death penalty contradicts the right to life, which is guaranteed by Article 28A (1) and Article 28I (1) of the 1945 Constitution. Article 28I (1) of the 1945 Constitution should be the end of death penalty in Indonesia, however the debate over this issue is still ongoing. Death penalty keeps imposed towards crime offender. The judicial review request was made based on constitutional guarantee towards the right to life under the 1945 Constitution, especially Article 28A and 28I (1).⁶⁷³

Several arguments rejecting death penalty were addressed during the judicial review. MK, however, with several justices gave dissenting opinion, rejected the judicial review and affirmed that death penalty does not contradict the 1945 Constitution, due to the fact that the constitution does not adopt the absoluteness of human rights. Some arguments that are common to be delivered to support death penalty were victims protection, normative argument, crime prevention, and so forth.

Supporters of death penalty said that the law should not only protect the human rights of the crime offender, but also the rights of the victims. The victim's right to life that has been deprived by the offender (for instance in terrorism and premeditated murder cases) must be taken into consideration. When some parties deplored and asked Indonesia to stop death penalty, other parties rejected this idea with the normative argument, which is death penalty is still incorporated under the prevailing and when a convicted is imposed with death penalty by the court, such decision must be executed to ensure legal certainty. Indonesia should not comply to pressures from other countries, due to the importance of enforcing legal certainty. Another argument from parties that support death penalty is for crime prevention. The worrying level of crime rate, with more brutal action, causing the public to consider that death penalty is still necessary.⁶⁷⁴

MK Consideration on Case No. 2-3/PUU-V/2007

After reviewing the submission, MK affirmed its position that death penalty for the narcotic producers and dealers is legal, and therefore the effort from five death convicts in narcotic case to erase death penalty is vanished. Death penalty, according to MK, does not contradict with the right to life under the 1945 Constitution, as the Indonesian constitution does not adopt the absoluteness of human rights. With the implementation of death penalty to serious crimes such as narcotic, MK is of the view that Indonesia does not violate any international treaty, including the ICCPR that advises to abandon death penalty. MK further said that Article 6 (2) of the ICCPR still allows death penalty to be carried on in the signatory states for the most serious crime.

MK's consideration pertaining to narcotic crime as the most serious crime:

[3.24]The Court is of the view that: Article 6 (2) of the ICCPR mentioned above cannot be read separately from the sentence that follows it, which is

- a. *"in accordance with the law in force at the time of the commission of the crime"*. This submission is the request to review the Narcotic Law to the 1945 Constitution. Therefore, whether the crimes under paragraph 1) to 7) above fall under the definition of *"the most serious crimes"*, this

⁶⁷³ *Ibid.*, pg. 9.

⁶⁷⁴ Topo Santoso, *Menyoal Hukuman Mati*, Metrotv News, 2 August 2016, <<http://news.metrotvnews.com/opini/GNljmO2k-menyoal-hukuman-mati>>, accessed on 19 October 2017.

should be connected to the *“prevailing laws towards the narcotic crimes when it was committed, both national and international law”*.

- b. When the applicants committed narcotic crime, which lead to the imposition of death penalty to the applicants, the prevailing law at the national level is the Narcotic Law, while at the international level is the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (Narcotic and Psychotropic Convention), in which Indonesia is a state party through the ratification of Law No. 7 of 1997.
- c. The Narcotic Law is the implementation of international law obligation that is occurred from an international treaty, in this case the Narcotic and Psychotropic Convention, as affirmed under the Consideration, paragraph 5 and General Elucidation paragraph 4 of the Narcotic Law. One of the international obligation that occurs from the Indonesia’s participation in the Narcotic and Psychotropic Convention is affirmed under Article 3 (6) of the Narcotic and Psychotropic Convention, which states that *“The Parties shall endeavour to ensure that any discretionary legal power under their domestic law relating to the prosecution of persons for offences in accordance with this article are exercised **to maximize the effectiveness of law enforcement measures in respect of those offences, and with due regard to the need to deter the commission of such offences**”*. The crimes that mentioned under Article 3 (6) of the Narcotic and Psychotropic Convention are defined under Article 3 (5), which states that *“The parties shall ensure that their domestic courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of **the offences established in accordance with paragraph 1** of this article **particularly serious**, such as:*
 - a) the involvement in the offence of an organized criminal group to which the offender belongs;
 - b) the involvement of the offender in other international organized activities;
 - c) the involvement of the offender in other illegal activities facilitated by commission of the offence;
 - d) the use of violence or arms by the offender;
 - e) the fact that the offender holds a public office and that the offence is connected with the office in question;
 - f) the victimization or use of minors;
 - g) the fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities
 - h) prior conviction, particularly for similar offences, whether foreign or domestic, to the extent permitted under domestic law of a Party”

Meanwhile, paragraph 1 as referred to under Article 3 (5) stated that, “Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

- a) i) the production, manufacture, extraction, offering, offering for sale, distribution, sale, delivery, on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;
- ii) the cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;

- iii) the possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in i) above; iv) the manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
- v) the organization, management or financing of any offences enumerated in i), ii), iii) or iv) above; b) c) “
- d. Therefore, by using systematic interpretation towards the provisions under Article 3 91), (5), and (6), as well as relating these provisions to the articles under the Narcotic Law that is reviewed by the Applicant in this submission, it is evident that the provisions under the Narcotic Law in this judicial review is the national implementation of international law obligation, in this case the Narcotic and Psychotropic Convention, in which the said convention classifies such crimes under as particularly serious crimes.
- e. The interpretation as mentioned under paragraph (d) above is in accordance with the general rule of interpretation of international treaty, as stipulated under Article 31 of Vienna Convention 1969, which states under paragraph (1) that, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of a treaty in their context and in the light of its object and purpose”. The context of the Narcotic and Psychotropic Convention is evident from the Preamble of the said convention, first and second paragraph, which states that, “Deeply concerned by the magnitude of and rising trend in the illicit production of, demand for and traffic in narcotic drugs and psychotropicsubstances, which **pose a serious threat to the health and welfare of human beings and adversely affect the economic, cultural and political foundation of society**, Deeply concerned also by the steadily increasing inroads into various social groups made by illicit traffic in narcotic drugs and psychotropic substances, and particularly by the fact that **children are used in many parts of the world as an illicit drug consumers market and for the purposes of illicit production, distribution and trade in narcotic drugs and psychotropic substances, which entails a danger of incalculable gravity**”.
- f. If the crimes under the Narcotic and Psychotropic Convention are classified as particularly serious crimes compared to the crimes that have been generally considered as the most serious crimes, such as the crime of genocide and crimes against humanity, then there are no substantial differences between the two groups of crimes. It is due to the fact that the crimes under “the most serious crimes”, and crimes under the Narcotic and Psychotropic Convention that are categorized as “particularly serious” crime, are collectively called as **“adversarily affect the economic, cultural and political foundation of society”** and also bring **“a danger of incalculable gravity”**.
- g. Based on the elaboration under paragraph (a) to (f) mentioned above, provisions under Article 80 (1) (a), (2) (a), and (3) (a); Article 81 (3) (a); as well as Article 82 (1) (a), (2) (a), dan and (3) (a) of the Narcotic Law are categorized as the most serious crime, both according to the Narcotic Law or the prevailing international law provisions when the crime is committed. Therefore, the qualification of crime under the Narcotic Law articles is similar to the “most serious crime” according to Article 6 of the ICCPR. Based on the elaboration of (a) to (g) above, there are no international obligations occurred from the international treaty violated by Indonesia by imposing death penalty to crimes under Article 80 (1) (a), (2) (a),

and (3) (a); Article 81 (3) (a); as well as Article 82 (1) (a), (2) (a), dan and (3) (a) of the Narcotic Law. In contrast, the imposition of death penalty to the said crimes is one of the consequences of Indonesia's participation in the Narcotic and Psychotropic Convention as stipulated under Article (6) of the said convention, which in essence, the state party can maximize the effectiveness of law enforcement measures in respect of those offences, and with due regard to the need to deter the commission of such offences, as explained under paragraph (c) anove. The imposition of death penalty towards the crimes under the Narcotic Law articles that requested to be reviewed, in addition to the consequence as Indonesia's status as the state party explained under paragraph (h), is also supported by Article 24 of the Narcotic and Psychotropic Convention, which states that "A party may adopt **more strict of severe measures** than those provided by this Convention if, **in its opinion**, such measures are desirable or necessary for the prevention or suppression of illicit traffic". In other words, in regards to this request, if according to Indonesia as the state party to the convention that harder measures, in this case the death penalty, is deemed necessary to prevent and eradicate such crimes, therefore the measures do not contradict the said convention and even justified as well as advised. Indonesia as the state party that adopts death penalty for narcotic crime offender has the right to impose death penalty to the narcotic crime offender. Such is the case if Indonesia will adopt the idea of life sentence without parole as argued by the Applicant, this method does not contradict the Convention

- h. The consequence that must be borne by Indonesia through its participation on the Narcotic and Psychotropic Convention, in order to take a firmer national action for eradicating narcotic crimes, by law is a higher binding power from the perspective of international law sources qualification, as stipulated under Article 38 (1) of the Statute of the International Court of Justice, compared to the opinion from UN Human Rights Commission who argued that crimes related to narcotic are not the most serious crime.

[3.25] Considering that all the abovementioned elaboration shows that the implementation of death penalty to certain crimes under the Narcotic Law does not contradict the 1945 Constitution, the Court argues that it is necessary to give an important note that is:

- According to Article 3 of the Universal Declaration of Human Rights in conjunction with Article 6 of the ICCPR in conjunction with the Human Rights Law and the 1945 Constitution, and various international conventions related to narcotic, in particular 1960 UN Convention on Narcotic and 1988 UN Convention on Eradication of Illegal Distribution of Narcotic and Psychotropic, the death penalty charge under the Narcotic Law has been formulated properly and cannot be charged to all narcotic crimes under the law, but only to the following:
 - a. Producers and dealers (including the producers that are the investors) who are conducting the activities illicitly, not to the abuser or violator of the Narcotic/Psychotropic Law that conducted through official channel (licit), for instance drugs/pharmaceutical factories, pharmaceutical wholesalers, hospitals, public health centers, and drug stores;
 - b. Offender mentioned under paragraph (a) above that commit the crime related to Schedule 1 Narcotic (Cannabis and Heroin);
- Death penalty charge under the Narcotic Law articles also given with specific minimum charges. In other words, when imposing death penalty to an offender of articles pertaining to Schedule I Narcotic, judges, based on evidences and their belief, may sentence the offender with the maximum charge, which is death penalty. Otherwise, when the judges believe that according to the evidences, intentional and unintentional elements, offenders that are minors, offenders that

are pregnant woman, and so forth, and therefore have no reason to sentence maximum charge, the offender (even though related to Schedule I Narcotic) can be imposed with death penalty. Hence, it is clear that the implementation of death penalty in narcotic crimes cannot be arbitrarily implemented by judges and this is already in accordance with the provisions under the ICCPR.

[3.26] Also considering that the irrevocable nature of death penalty, regardless the opinion of the Court pertaining to the consistency of death penalty with the 1945 Constitution for certain crimes under the Narcotic Law requested under this submission, the Court is of the view that for future references, for the purpose of national criminal law reform and harmonization of laws and regulations pertaining to death penalty, therefore the formulation, imposition, and implementation of death penalty under the criminal justice system in Indonesia must considering the following aspects properly:

- a. Death penalty is no longer main punishment, but a special and alternative punishment in nature;
- b. Death penalty can be imposed with 10-year probation period, in which during those time the convicted show a good manner, the sentence can be converted into a life imprisonment or 20 years of imprisonment;
- c. Death penalty cannot be imposed to minors;
- d. Death execution towards pregnant woman and mentally-ill person is postponed until the woman gives birth and the mentally-ill person is cured.

[3.27] Considering that regardless of legal reform as mentioned above, for the purpose of a just legal certainty, the Court advises that all death sentences that have binding power (*in kracht van gewijsde*) to be executed immediately;

[3.28] Pursuant to all elaboration mentioned above, it is clear that Article 80 (1) (a), Article 80 (2) (a), Article 80 (3) (a), Article 81 (3) (a), Article 82 (1) (a), Article 82 (2) (a), and Article 82 (2) (a) under the Narcotic Law do not contradict the 1945 Constitution and do not violate Indonesia's international law obligation under international treaty. Therefore, it can be concluded that the request from the Applicants has no ground.

In essence, MK declares that Indonesia has the obligation to comply with international convention on narcotic and psychotropic that has been ratified by Indonesia under the Narcotic Law. The convention mandates all the state parties to maximize effective law enforcement towards all narcotic crimes offenders. The convention also mandates the state parties to prevent and eradicate narcotic crimes that deemed as most serious crime, and involving international network. Therefore, the implementation of death penalty under the Narcotic Law is in line with the 1945 Constitution, and further allowed by international convention, according to Justice Hardjono.⁶⁷⁵

Indonesia clearly states that death penalty does not violate human rights nor the ICCPR. This argument is affirmed by MK in the judicial review submitted by Rani Andriyani. The consideration of MK Decision No. 2-3/PUU-V/2007 states that "The qualification of crime under the Narcotic Law articles mentioned above are similar to the most serious crime according to Article 6 of the ICCPR". The phrase "the most

⁶⁷⁵ *Keputusan MK Pupuskan Harapan Terpidana hukuman Mati Kasus Narkoba*, Antara News, <<http://www.antaranews.com/print/82265/keputusan-mk-pupuskan-harapan-terpidana-hukuman-mati-kasus-narkoba>>, accessed on 20 October 2017.

serious crimes” under Article 6 (2) of the ICCPR cannot be read separately with the following phrase, which is, “in accordance with the law in force at the time of the commission of the crime”.

The submission in this case is a judicial review request of the Narcotic Law against the 1945 Constitution. Therefore, whether the crime can be categorized under the definition of the most serious crime, this argument must be attributed to “the law in force at the time of the commission of the crime, both national or international law”. The Narcotic Law is an implementation of international law obligation from international treaty, in this case the Narcotic and Psychotropic Convention, according to MK.

MK further argues that there is no international law obligation from international treaty that is violated by Indonesia when imposing death penalty under the Narcotic Law. In contrast, the imposition of death penalty to the said crimes is a consequence of Indonesia’s involvement in the Narcotic and Psychotropic Convention as stipulated under Article 3 (6) of the Convention, which in essence said that a state party can maximize the law enforcement effectiveness when it comes to crimes related to narcotic and psychotropic, by considering the need to prevent the said crimes. This is also supported by Article 24 of the Narcotic and Psychotropic Convention, which states that “a party may adopt more strict or severe measures than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic”.⁶⁷⁶

The Speaker of the House at that time, Agung Laksono, argued that MK decision on death penalty is correct, and therefore the execution towards death convicts that already have binding power, can be immediately executed. MK Decision also makes Australian Government hope to cancel the death penalty towards its six citizens becomes pointless. From the six Australian citizens, three of them submitted the judicial review of the Narcotic Law to MK. When MK about to read the decision, Australian Foreign Minister Alexander Downer asked Indonesian Government to give a chance to live for six Australians that already convicted to death. He said that, if the legal remedies fail, he will discuss the best follow up with Prime Minister John Howard. In contrast, the Executive Head of BNN Made Mangku Pastika, asserted that the legal remedies to challenge the legality of death penalty in narcotic cases are no longer available. Pastika ensured that there are no more remedies to abandon death penalty in drug cases, both narcotic or psychotropic.⁶⁷⁷

In the decision, MK argued that death penalty is necessary as a form of power towards a sentence. If the judicial review is approved, MK opined that other laws cannot incorporate death penalty articles. MK Decision No. 2-3/PUU-V/2007 asserted that “If that is the case, the death penalty article under the Narcotic Law will not have binding power, and as consequence all laws and regulations in Indonesia that stipulate death penalty should be declared null and void”.

MK is also of the view that if the request from the death convicts is granted, narcotic crimes and other crimes will rise in Indonesia. The implication of rejection towards death penalty will also affect other crimes, such as terrorism and corruption. MK Decision stated further, “Where is the responsibility of all state and nation elements, and the Indonesian people for the purpose of maintaining sovereignty,

⁶⁷⁶ Mahkamah Konstitusi, *MK : Hukuman Mati Tak Langgar Kovenan Internasional Hak Sipil dan Politik*, 20 January 2015, <<http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=10521#.Wez0Y2iCzIU>>, accessed on 20 October 2017.

⁶⁷⁷ *Keputusan MK Pupuskan Harapan Terpidana hukuman Mati Kasus Narkoba*, Antara News, <<http://www.antaranews.com/print/82265/keputusan-mk-pupuskan-harapan-terpidana-hukuman-mati-kasus-narkoba>>, accessed on 20 October 2017.

future generation, the survival of the nation, statehood and society, when narcotic cases are rising in Indonesia. It is also the case with spreading terrorism, with very weak imprisonment charges".⁶⁷⁸

⁶⁷⁸ Rvk/Bpn, *Ini Alasan MK Nyatakan Hukuman Mati Sesuai Konstitusi*, Detik, 18 January 2015, <<https://news.detik.com/berita/2806321/ini-alasan-mk-nyatakan-hukuman-mati-sesuai-konstitusi>>, accessed on 20 October 2017.

CHAPTER VI

Conclusion

Understanding legal texts should be conducted by having the knowledge of the prevailing social-politics aspects and conditions that accompany the implementation of a certain law. Without considering the social-politics condition, legal texts are no longer meaningful and have the tendency to be unresponsive to the current development.

Death penalty as one of many forms or types of punishment has been practiced for so many times during the civilization and history of mankind. The campaign to abandon death penalty was introduced in 1764, when Cesare Beccaria wrote *On Crimes and Punishment*. It took 84 years for Beccaria's idea to be adopted in San Marino—a relatively small country in Europe—that became the first country to abandon death penalty for ordinary crimes. Fifteen years later, similar campaign was promoted in South America. This idea was adopted by Venezuela, which abandoned death penalty for all types of crimes. Outside Europe and Latin America, the development to abandon death penalty needs a longer timeline.

These dynamics cannot only be seen from merely the available legal texts, but must also consider the dynamics and overall society condition within a country or a region. The dynamics in many countries were also reflected when the UN was established and when this institution was planning to issue a resolution titled the Universal Declaration of Human Rights (UDHR). Article 3 of the UDHR states that “*Everyone has the right to life, liberty and security of person*”. However, there is no explanation regarding death penalty under the UDHR. While there was a discussion pertaining to death penalty in the draft of UDHR, the UN General Assembly decided not to discuss death penalty, due to the reason to not hamper the practice in many countries to abandon death penalty. In the discussion for finalizing the International Covenant on Civil and Political Rights (ICCPR), the Article 3 of the UDHR is more elaborated. Such elaboration can be seen under Article 6 of the ICCPR. This Article reflects the conflicts between two groups, which were the argument to ensure the right of life that is in line with human rights mission under the ICCPR and the consideration that death penalty is still implemented in many countries in that time. Therefore, Article 6 of the ICCPR is not independent from the social-politics context when the ICCPR was formulated and signed afterwards. This is the reason why Article 6 (2) of the ICCPR is not common for an international treaty, and therefore as a single comprehensive text, the ICCPR is an international treaty that has a strong tendency to abandon death penalty.

As a part of punishment type, death penalty in Indonesia actually was not introduced by the government of the Netherlands Indies. Prior to the European colonial period, Kings and Sultans that were in power in the Nusantara region have practiced death penalty towards their slaves/subordinates.

In the context of Indonesia, a consolidation of death penalty policy happened in 1808 under the order of Governor General Herman Willem Daendels, who regulated the imposition of death penalty as the authority of Netherlands Indies Governor General. During this period, death penalty was used as a strategy to silence the colonies and to defend Java from the British attack. Without this effort, the mission of French Government that controlled the Netherlands to defend Java from the British was too difficult.

The second policy consolidation and arguably the most important was the enactment of *Wetboek van Strafrecht voor Inlanders (Indonesiers)* on 1 January 1873. Afterwards, in 1915, the *Wetboek van Strafrecht voor Indonesie (WvSI)* was passed into a law and entered into force on 1 January 1918. Even though the Netherlands have abandoned death penalty in 1870, their government was still imposing death penalty for the Netherlands Indies and other colonial regions. The motive of racial prejudice and maintaining the public order were still the main objectives to impose death penalty in Indonesia. The Netherlands viewed that the natives of Netherlands Indies cannot be trusted, had the tendency to lie, gave perjury before the Court, and attitude problems. This is a typical superior preconception of an occupier.

After Indonesia's independence, death penalty was still incorporated in many laws and regulations. Indeed, the inclusion of death penalty at that time had different motive and reason, adjusted with the political system and social-politics condition that applied when the legislation was passed. The enactment of WvS as part of national criminal law, did not automatically abandon death penalty. At that time, death penalty was maintained by the Government of the Republic of Indonesia, with the reason similar to the motives and nature of the colonial government of the Netherlands Indies. In the context of military criminal law, the reason why death penalty was still maintained was a response to strengthen state defense from certain situation and to support the independence struggle during 1945-1949. During the liberal democracy era, death penalty was still maintained to banish insurgencies in most Indonesian region. Meanwhile, during the guided democracy era, death penalty was still preserved to maintain national stability for the purpose of securing the Revolution and economic and development programs by the government.

During the New Order regime, the highlight of the government is political stability to secure development agenda. As the development activities required the inflow of foreign investment, the reputation and trust of the international community towards the government ability in keeping the state security became the main reason for death penalty. Even some crimes such as narcotic were considered as a form to conduct subversive action. While during this time corruption was not one of the crimes that can be charged with death penalty, in some cases, corruption was charged with Law No. 11/PNPS/1963 on Subversive, which was of course used death penalty.

During the Reformasi era, death penalty mantra was changed into emergency and the scale of crime victims. The economic crisis in Indonesia during 1997-1998 marked the emergency reason as the rationale to preserve death penalty. During this period as well, the government created many emergency reason either disaster emergency, child protection emergency, and the scale of crime victims to be the most important rationale in responding to the situation for the purpose of national stability. The responses were manifested into death penalty.

From many motives and reasons that surfaced regarding death penalty under Indonesian laws, the relevancy of death penalty should be re-evaluated, or at least being questioned, due to the acknowledgement of human rights as part of constitutional rights and also the adoption of the ICCPR into Indonesia legal system.

Based on the basic lawmaking process, the discussion of the right to life was really minimum. It was significantly different with the right to free speech, which was the most highlighted issue from the drafters of Indonesia constitution. Looking into Indonesia's constitution landscape, the minimum attention towards the right to life was understandable, even the rights of detainees and persons that are troubled with the criminal law were not under lawmakers attention, which is why the rights of the

suffering individuals was not appeared as part of guaranteed constitutional rights under Indonesia constitution.

Opposition towards death penalty was proposed during the Konstituante session in 1955-1959. Asmara Hadi, member of Konstituante from the Pancasila Defender Movement (*Gerakan Pembela Pancasila*), on 14 August 1958, Second Session in 1958, 27th meeting of Konstituante, proposed the necessity to include a norm under the constitution regarding right to life and the right not to be charged with death penalty. Asmara Hadi protested the work of the drafting team that did not include his proposal in regards to right to life and death penalty prohibition, under the Drafter Committee Report on Human Rights/Rights and Obligations of Citizens, during the Second Session, 29th Meeting, 19 August 1958. Unfortunately, this perspective was a minor opinion at that time and therefore did not get serious attention.

The effort to ensure the right to life and death penalty prohibition was on the table once again during the discussion to amend the 1945 Constitution. Taufiqurrohman Ruki, Valina Singka Subekti, and Slamet Efendy Yusuf were the members of People's Consultative Assembly, who urged that the right to life is part of human rights that cannot be diminished in any situation or by any person. Similar to what happened in the 1950s, the discussion regarding the right to life was not elaborated further and leaves untouched. This situation continued and evident from the consideration of MK that allows the limitation towards the right to life, based on systematic interpretation towards human rights provisions under the 1945 Constitution. Human rights provisions stipulated under Article 28A to Article 28O of the 1945 Constitution, according to MK, are subject to limitation under Article 28J of the 1945 Constitution. The inconsistency of MK towards the 1945 Constitution interpretation added problems into the untangled issues of Indonesian legislation that incorporate death penalty.

While the ICCPR still “allows” countries that adopt death penalty, it only allows death penalty for very serious crimes. Article 6 (2) of the ICCPR asserts that protection principles towards the “arbitrary” reduction against the right to life, with an exception explicitly stated regarding death penalty in countries that yet to abandon such policy. However, the exception is subject to certain requirements, such as death penalty should be limited to “most serious crimes”, in which the development sees that it cannot be imposed towards pregnant woman or teenage offenders. The concept of the most serious crimes in the international law is limited to the crimes with the following characteristics:

- a. The crime that is committed is a vicious and cruel, and deeply shock the conscience of humanity;
- b. Conducted deliberately, organized, systematic, and widespread to cause death or other extremely grave consequences;
- c. The cause resulted from the crime has very serious effect towards the state or general public, such as interfering the public order, involving a large sum of money such as economic crime, conducted with extremely heinous methods, and cruelty against humanity, and causing threats or endanger state security.

Referring to that concept, some laws in Indonesia that impose death penalty should be reviewed, on whether these laws are still in conformity with the characteristics as the most serious crimes. The problem lies in the concept of “the most serious crimes”, which is further mixed up with other crimes that required extraordinary measures. Various reasons that underlied the preservation of death penalty post-independence era, showed the lack of proper debate regarding the most serious crimes. The government, on the other hand, approved the imposition of death penalty as it is still allowed pursuant to the national laws.

During the Reformasi era, the legal reform campaign by using human rights-based approach and evidence-based policy, became the most important effort to create a responsive legislation. The human rights-based approach within the legal reform is in line with the Indonesian government commitment to create an opportunity to respect, protect, fulfill, and advance human rights in Indonesia. However, the political configuration during the Reformasi era reflecting a democracy paradox, in which the democratic process and institution have resulted in the change of governance, while death penalty still became the choice for political expression and the most important instrument in each administration. The effort to preserve death penalty as a criminal punishment for certain crimes, showed the character of Indonesia's politics of law (legal policy) that is not moving from retentionist criminal law policy, and it is getting stronger and more conservative. In other words, the effort to eliminate death penalty is having a face-to-face conflict with the politization of law by the policymakers that adopting a more conservative legal perspective. Law became the instrument to legitimate the government in serving the interest for those in power.

The effort from President Joko Widodo administration in regards to legal reform campaign does not reach the legislation issue that keeps disregarding human rights-based and evidence-based approach. As a result, RKUHP still incorporates death penalty, even though the provision thereunder is still considered as a compromise and agreed upon as the Indonesian way. The global trend and the interpretation of the most serious crimes in the context of death penalty are not getting proper attention from the lawmakers. The government and parliament believe that death penalty is required under the Indonesia national criminal law.

The road towards legal reform that respects human rights in Indonesia is still abrupt and lengthy.

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ICJR PROFILE

Institute for Criminal Justice Reform, abbreviated as ICJR, is an independent research institution focusing on criminal law reform, criminal justice system reform, and legal reform in general in Indonesia.

One of the most crucial issues that is experienced by Indonesia during this transition period is reforming the legal system and criminal justice system into a more democratic direction. In the past, criminal law and criminal justice system were used as a tool to support the governing authoritarian power, in addition to be used as social engineering tools. Now is the time for the orientation and instrumentation of criminal law as a tool power to be shifted as a tool to support the work of democratic political system and respecting human rights. This is the challenge in the path to restore criminal law and criminal justice system during the transition period.

To answer the abovementioned challenge, it is necessary to make a planned and systematic measures to resolve such situation. A grand design for criminal justice system reform and legal reform must be initiated. The criminal justice system as been known is placed in the strategic place for the framework to build the Rule of Law and respect towards human rights. Democracy can only functioned well with the concept of Rule of Law is institutionalized. Criminal justice system reform that is human rights-oriented is a “*conditio sine quo non*” with the process of democratization institutionalization during the transition period as of now.

The measures in conducting legal transformation and criminal justice system to be more effective are currently ongoing right now. However, the measures must generate a wider support. The Institute for Criminal Justice Reform is taking the initiative to support those measures. Providing support in the context of building respect towards the Rule of Law and at the same time building human rights culture within the criminal justice system. This is the reason of ICJR’s existence.

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