



## **The Right to Life Based on Human Rights Principles: A Normative Study of the Death Penalty in Indonesia**

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### **ABSTRACT**

The right to life is the absolute right of every person and is included in the category of rights that cannot be reduced. Indonesia is one of the countries that still maintains and recognizes the legality of the death penalty as a way to punish the perpetrators of certain criminal acts such as narcotics, terrorism, and murder crimes despite the pros and cons. This study aims to investigate the regulation of the right to life against the death penalty in Indonesia, the construction of the death penalty law from human rights viewpoint, and the judge's consideration in imposing the death penalty associated with the principles of human rights. This study used a qualitative normative juridical approach by referring to the legal norms in statutory regulations and norms of the society. The findings highlight that the early existence of the death penalty in Indonesia is legally regulated in the Criminal Code, most of which are from the Netherlands, namely *WvS (Wetboek van Strafrecht)*.

**Keywords:** Death Penalty, Human Rights

### **INTRODUCTION**

Indonesia is one of the countries that carry out plenty of death penalties raising pros and cons with the implementation. Even the General Assembly of the United Nations has enacted non-binding resolutions in 2007, 2008, 2010, 2012, and 2014 to call for the abolition of the death penalty worldwide. Nearly half of the countries in the world (118 countries) have abolished the death penalty in their legal systems.

The right to life is an absolute right of every person and is included in the category of rights that cannot be reduced, as in Article 28I of the 1945 Constitution paragraph (1). 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 the law with retrospective effect are all human rights that cannot be limited under any circumstances.

The right includes the right to live, to maintain life, and to improve its standard of living, including the right to live a peaceful, safe, happy life, physically and spiritually, and the right to a good and healthy environment. Article 6 of the International Covenant on Civil and Political Rights (ICCPR) states that the right to life must be protected by the law and should not be treated arbitrarily. It has been contained in the 1945 Constitution,



specifically Article 27 paragraph (2), Article 28A, Article 28D paragraph (2), and Article 28H.

Indonesia remains to maintain and recognize the the death penalty legality for certain criminal acts such as narcotics, terrorism, and murder crimes amid the pros and cons. The implementation of the the death penalty has become a fairly actual topic of discussion and a prolonged polemic for civilized countries. Some believe that the application is not consistent with the philosophy of the state ideology, Pancasila, upholding fair and civilized humanity.

Indonesia became the world's spotlight after executing death row inmates. They have been executed by the Attorney General's Office as the executor. The executions of the Australian death row inmates, Myuran Sukumaran and Andrew Chan, was due to the case of drug smuggling, which the clemency they had requested was rejected by President Joko Widodo after receiving considerations from the Supreme Court and the Attorney General's Office.

The debate on the the death penalty has been going on for a long time in the discourse of criminal law in Indonesia. From historical and theoretical approaches, the penalty is the development of an absolute theory in criminal law. This theory teaches the importance of the deterrence effect in punishment. The penalty is given to punish criminals who are deemed unable to return to society since the crimes they committed are classified as highly serious crimes. Being the most severe punishment, the the death penalty is terrifying, especially for those who are awaiting execution. In the history of criminal law, the the death penalty has long been debated. Some believe that it is commensurate with the crime committed by the perpetrator and provides a deterrent effect.

State law is etymologically derived from a combination of "state" and "law". As in international law, something is said to be a state if it consists of the basic elements of a multitude or a group of people, certain areas, and an authoritative and sovereign government, whilst the complementary element is the recognition of the international community or other states.

This legal thought develops in various schools with characteristics and mutual dialectics in solving legal problems at different times and places, the following analysis/commentary describes the various schools or isms that developed in Philosophy and Theory of Law.

The theory of natural law is arguably the oldest paradigm and has the greatest influence on the development of legal science to this day. Legal theories developed after the period of natural law are the development/refinement of the natural law paradigm. In the natural law theory, a law is a universal value and lives in every person, society, and country.

This is because the law must obey moral superiors as its guidelines. It is even stated that above the positive legal system of the country, there is a higher legal system (*lex divina*), which is divine in nature that is based on reason or natural law itself, thus natural law is superior to state law. This happens because of the validity of norms



which are not the meaning of acts of human will; therefore the values they form are in no way arbitrary, subjective or relative. Natural law appears as a law of human reason and channels the investigation of the willful actions of a person as a legal moral legislator.

Justice is the main goal of the school of natural law, since the empirical experience of a famous ancient Greek philosopher named Socrates. It is said that in 399 BC when he turned 70 years old, Socrates was brought before the Court of Heliasts which consisted of 501 Athenians, who simultaneously acted as a judge of the law, facts, and evidence. The prosecutors of Socrates were Anytus, a democratic politician, Melitus, a poet of tragedy, and Lykon, an orator; the three of them accused Socrates of having committed two crimes, blatantly refusing to worship the official Greek gods (impiety), and poisoning the minds of young Athenians with critical and rational philosophical thoughts (corrupting the youth).

The Athenian judges, most of whom were Socrates' enemies, unanimously sentenced Socrates to death by being forced to drink a glass of poisoned cypress wine. The judges argued that this was justice and truth because the decision was the result of the most votes from the assembly, in other words, the Athenian judges used the law that was drawn from the most votes as a shield for their crime. The tyrannical law has clearly not only killed Socrates but has also killed the sense of justice and truth itself.

Based on this, Plato (427-347 BC) left Athens to wander in search of and contemplate law and justice, which was an inexorable package that must exist in one country and must occupy a central position in state politics. Plato in his major work *Republic*, calls his ideal country "The City of Justice" in which every group of society must contribute to the establishment of the republic of justice by consistently carrying out their respective duties and with full of discipline.

Aristotle, a pupil of Plato, has a slightly different view from Plato. Aristotle's law is a "cage" that domesticates humans. State law aims not only to obtain justice but also to obtain happiness (*eudaimonia*) for all citizens. Aristotle rejects the notion that law is merely a practical means of convention, such as a formal procedural bureaucratic system, controlling traffic, punishing criminals, or forcing citizens to pay taxes. The fulfillment of the objectives of the law as a tool of practical convention cannot make the community happy, but instead making it "wild". Aristotle argues that justice must be shared by the state to every resident/citizen. Good law maintains justice to all people without exception and is non-discriminatory. He explicitly stated that justice is a political policy whose rules form the basis of state regulations as the measure of what is right.

Algra divided the theory of conviction purpose into 1) the absolute theory (retaliation theory), 2) Relative theory or goal theory (*doel theorie*), and 3) combined theory (*gemengde theorie*). L.J. van Apeldoorn divided it into 1) absolute theory (*absolute theorieen*), 2). relative theory (*doel theorieen*), and 3) the theory of unity (*vereenegings theorie*).

John Locke and Jan Jaques Rousseau theorize that humans in their natural state (*naturalist status*) have had human rights they privately own. Human rights include the



right to life, the right to freedom and independence, as well as property rights (the right to own something).

Montesquieu with the concept of separation of powers or *Trias Politico* by Immanuel Kant, was motivated by the desire to prevent tyranny, which essentially separated the legislative, executive, and judicial powers so that the king would no longer act arbitrarily outside his constitutionally determined authority.

Franklin D. Roosevelt formulated four basic freedoms, commonly called The Four Freedoms. It comprises freedom of speech and expression, freedom of religion, freedom from fear, and freedom from want.

Thomas Jefferson said that all humans are created equal. The Creator has granted humans the right to live, have freedom, and pursue happiness. Jan Materson defined human rights as inherent rights in humans, without which, it is impossible for humans to live as humans.

It is often claimed that a "right" is primarily a legal idea, that law enforcement practices are central to the existence of rights, and that non-legal rights are false rights. For Bentham in Schofield (2003), for example, the idea of rights not created by positive law is nonsense. He stated that the granting of rights indeed exists as conclusions to utilitarian arguments and as a basis for desire, for the corresponding legal rights. However, he argued that the granting of such rights is not a right just as "hunger is not bread".

Bentham was of the view that discussing moral and natural rights is politically dangerous and utterly incomprehensible. A proponent of Bentham's view might point out that when, for example, a person's right to leave their country is not recognized, respected, or legally enforced in a particular country. We can sometimes say that people in that country do not have the right to go abroad or that this right does not exist there. However, this pattern of conversation proves nothing. On the other hand, one can argue that the right to go abroad is not a legal right or that is effectively enforced in that country, without any intention of denying that this right exists as an accepted or justified moral right. In fact, it is really by demanding that the remedies of such cases are called for moral or human rights that exist independently of the law enforcement. Wherever possible so as not to be ambiguous, it should be emphasized that we have made a distinction between accepted moral rights, justified moral rights, and legal rights, and between the existence, recognition, and effective implementation of rights.

Bentham considered the suggestion of non-legal rights as a mere rhetorical tactic without a court to decide who has rights and what is meant by rights. The discussion of rights is nothing more than "sound for debate" as it discusses arguments from untenable premises. However, a suggestion of rights does not have to be like that. This actually can and should be accompanied by further arguments, especially if the recommended status of the right is challenged. Bentham desired to solve political questions by calling for what is thought to be able to maximize utility, however, no court system with a single judge can answer the question of whether a particular policy will maximize the utility or not. Thus, if we accept Bentham's premise that normative concepts without a judicial decision procedure, it will only give us debatable sounds.





We must also conclude that such sounds are all that the principle of utility can provide. From Bentham's exaggerated claims regarding the certainty of his preferred standard, it is clear that Bentham's attack on the treasures of his opponents would, if successful, undermine his own suggestion of utility.

The theory of legal protection is highly important to study since its focus is on the legal protection provided to society. Society, based on this theory, is in a weak position, economically and from a juridical aspect. The term legal protection theory comes from English, in Dutch, it is *theorie van de wettelijke bescherming*, and in German it is *theorie der rechtliche schutz*. Grammatically, protection is a place of refuge, or it (action) protects.

A sound understanding of the general nature of rights does not in itself enable people to understand human rights. At best, the analysis identifies the number of questions that need to be asked and provides a framework from which to construct answers.

Human rights are often thought to exist independently of their acceptance or enforcement as law. The attractiveness of this position is that it allows criticism of repressive regimes through human rights advocacy, regardless of whether those regimes accept human rights or recognize them in their legal systems, or vice versa. However, the stance that human rights exist independently of acceptance or enactment has always provoked skepticism. If human rights were nothing more than desires or aspirations, we can say that human rights exist only in people's minds. To become a norm that binds everyone, human rights must mean far more than mere wishes or aspirations.

In the reform era, the *DPR* (People's Representatives Council) as the high state institution on July 8, 1998 used the right of initiative to draft the Bill on the Ratification of Anti Torture. On September 28, 1998 the convention was ratified thus becoming part of approximately eight laws and regulations as positive law in effect in Indonesia.

According to Nusantara (1988), Chairman of the Indonesian National Human Rights Commission, there are at least five important things as implicated in the anti-torture ratification. They are:

- 1) Indonesia has a more concrete commitment to preventing, overcoming and ending torture.
- 2) Indonesia must complete the Criminal Code by adjusting itself to the results of the ratification.
- 3) Indonesia provides more adequate legal legitimacy to prevent, overcome and end torture involving state apparatuses, either directly or indirectly.
- 4) Indonesia realizes that efforts to end torture must be carried out multilaterally.
- 5) Indonesia recognizes the authority of the UN committee against torture to ensure the effectiveness of every effort to prevent, overcome and end torture.

Apart from the renowned world leaders mentioned above, there are also contributions to human rights ideas according to Indonesia's national figures. In the era of the Indonesian independence struggle, in the context of the debate about whether or not human rights should be included in the 1945 Constitution, there was a disagreement between the founding figures of the Republic of Indonesia.



Ir. Soekarno was against human rights being included in the 1945 Constitution because the concept of human rights was based on individualism in the ideology of liberalism thus it had to be completely eroded from Indonesia. Soepomo argued that human rights are individualistic in nature thus they contradict the understanding of the familial state (integral state) that was being developed.

Mohammad Hatta argued that human rights needed to be included in the 1945 Constitution to avoid the abuse of power by the state against citizens if one day a state of law (*rechtsstaat*) turns into a state of power (*machtsstaat*).

Mohammad Yamin argued that human rights needed to be included in the 1945 Constitution as a form of protection for the independence of citizens which must be recognized by the Constitution.

The Universal Declaration of Human Rights makes claims that strongly advocate for one's idealism and hope for mankind, and offers a long and interesting list of specific rights. However, the true meaning of these claims is often unclear, and their long list of rights is problematic in terms of consistency and affordability. In this respect, understanding the Universal Declaration of Human Rights is not an easy task. There is no reason to keep the declaration sacred, and parts that seem untenable need revision. However, to save the remainder, it requires good answers to the following questions.

- 1) What are the definitions of the rights in real rights of the aforementioned Declaration?
- 2) How can such rights exist independently of their enforcement as law in a number of countries?
- 3) Who is responsible for the Declaration; for whom are the obligations and other burdens they result in?
- 4) How should we interpret the Declaration's claim that human rights are "universal" and "inalienable"?
- 5) Since the Declaration did not resolve most issues of priority, scope, and exchange, what are the practical implications?
- 6) Does the long list of rights in the Declaration make sense? Are the rights on the list consistent and defensible? In particular, is the idea of economic rights understandable?

If the acceptance of human rights is to be maintained and increased worldwide in the future, the logical social and political vision it carries is crucial. The vision of the Universal Declaration of Human Rights of a society without oppression or lack of basic necessities has gained traction in recent decades. The problem is, however, that the rights in the Declaration have many demands, and raise questions about coherence and feasibility or affordability. These rights can conflict with one another, and fulfilling all of these rights is a difficult matter in many countries. These rights limit the freedom of governments to act as they wish and also incur large implementation costs.

A system is a unit consisting of factors or elements that interact with each other. It does not want conflicts between elements in the system. When a conflict arises, the system will resolve it immediately.



There is an open legal system, meaning that the elements of the system affect the system, on the other hand, the elements in the system affect the elements outside the system. However, some are closed, which cannot be influenced by the elements outside.

Friedman (1975) suggested four functions of the legal system. First, as part of a social control system that regulates human behavior. Second, as a means of dispute settlement. Third, the legal system has a social engineering function. Fourth, the law as social maintenance, which is a function that emphasizes the role of law as maintenance of the "status quo" that does not want change.

Religion is the source of life for every human being. Every human being who is religious will definitely use the standards of religious values as a guide for life. The guidelines for life that are regulated in religion are formulated in the holy books of each religion and also come from religious interpretations (without shifting from the substance of the teachings carried by the holy books in question).

Islam as a religion that regulates every aspect of human life recognizes the existence of capital punishment. The the death penalty in the context of Islam is regulated in the Quran, such as for murder, adultery (stoning), and claiming to be a prophet. In particular, in Islam, those who are sentenced to death are those committing murders without any *syar'i* reason. The the death penalty for murder is called *qishos*. It is regulated in the Book Surah Al-Maidah verse 45 which reads " And We prescribed to them in it that (Torah) life for a life, and eye for an eye, and nose for a nose, and ear for an ear and tooth for a tooth, and reprisal in wounds. But he who forgives it (remits the retaliation); it shall be expiation for him (for his sins). And whoever does not judge by what Allah has sent down, such are the wrongdoers."

In Christianity, punishment is not retaliation, although it is needed to balance the circumstances resulting from the crime. Furthermore, Christianity teaches that people can forgive because God has forgiven them.

According to the Catechism of the Catholic Church, the the death penalty is permitted in cases where the crimes are serious. However, if there are other ways to protect society from inhuman attackers, these other methods are preferable to the death penalty because those methods are considered to have more respect for human dignity and are in line with the common good. As taught by Pope John Paul II, that as far as possible, other methods of punishment should be used besides the death penalty, because amid the 'culture of death' that is rife in the world today, it is necessary to affirm the importance of the meaning of human life, including the life the convicts. The Pope said, in this day and age, "Modern society has many ways to reduce the crime rate effectively by making prisoners harmless, without needing to refuse to give them the opportunity to improve themselves."

Granting amnesty, rehabilitation, abolition, and clemency is the authority of the President by taking into account the considerations of the Supreme Court (MA) or the People's Representative Council (DPR) as regulated in Article 14 of the 1945 Constitution (UUD 1945), which reads: 1) The President grants clemency and



rehabilitation by taking into account the considerations of the Supreme Court, 2) The President grants amnesty and abolition by taking into account the considerations of the People's Representative Council.

## RESEARCH METHOD

This study used a qualitative normative juridical approach. It refers to the legal norms in statutory regulations and norms in society. The qualitative nature is to analyze in depth from all aspects comprehensively.

The term normative legal research comes from English; in Dutch it is called *normative juridische recherche*. The notion of normative research can be examined from the views of the following experts.

Soekanto and Mamudji (2004) present the meaning of normative legal research. Normative legal research or also known as legal literature research is legal research that is carried out by examining library materials or mere secondary data. Mukti Fajar and Ahmad (2010) present the meaning of normative legal research as legal research that places law as a system of norms. The system of norms in question is in regards to the principles, norms, rules of legislation, court decisions, agreements, and doctrine (teachings).

Primary data sources are data obtained directly from the community to be studied. Primary data sources are also called principle data or empirical data, but the commentaries are in descriptive form. Secondary data sources are data obtained from library research or literature that relate to the object of research. In normative legal research, the main data source comes from library data.

The main data source in normative legal research is library data. In legal literature, the data source is called legal material, those that can be used or needed for the purpose of analyzing applicable law. They comprise primary legal materials, secondary legal materials, and tertiary legal materials.

Primary legal materials are those that have binding strength. They are obtained from various laws and regulations, such as from Act No. 31 of 1999 concerning the Eradication of Corruption Crimes as amended by Act No. 20 of 2001 concerning Amendments to Act No. 31 of 1999 concerning Eradication of Corruption Crime, Act No. 35 of 2009 concerning Narcotics, Act No. 15 of 2003 concerning the Eradication of Criminal Acts of Terrorism, Act No. 26 of 2000 concerning Human Rights Courts, and Act No. 39 of 1999 concerning Human Rights.

Secondary legal materials are those that can explain primary legal materials. These materials were obtained from various literature, court decisions, and electronic media sources (online). Tertiary legal materials are those that can provide an explanation both etymologically and terminologically for primary and secondary legal materials. These are obtained from the Indonesian Dictionary, English Dictionary, Law Dictionary, and Encyclopedia.





The library research is to study and read books, literature, journals, articles, laws, and regulations related to this research topic in order to obtain a legal theoretical basis as a basis for writing and researching this thesis. The data collected was then analyzed using several methods of interpretation, namely grammatical interpretation and systematic interpretation. Mertokusumo (2002) explained that the grammatical interpretation method is the simplest way of interpretation or explanation to find out the meaning of statutory provisions by describing them according to language, wording, or sound.

The systematic interpretation explains that law is always linked and related to other statutory regulations, and there is no independent law that is completely independent of the entire statutory regulation. The data analysis is to answer the problems raised in this paper, where after data collection and sorting, the analysis is carried out to draw temporary conclusions.

## **RESULTS AND DISCUSSION**

### **A. Regulation of the The death penalty in Indonesia's Positive Law**

#### **Prospects of Human Rights Enforcement in Indonesia**

The Human Rights Court is a national court that has the authority to try serious human rights crimes in Indonesia, namely genocide and crimes against humanity as forms of international crimes. However, from the point of view of the substance of the laws and regulations and the implementation of the judicial process, there are still difficulties faced by the Human Rights Court. Based on these weaknesses, it is deemed necessary to immediately improve a number of laws and regulations.

#### **Human Rights Post 1993 Vienna Congress**

To affirm human rights around the world, in 1993 a World Conference on Human Rights was held due to the efforts of the Secretary General of the United Nations. During the conference, the Secretary General of the United Nations, Boutros-Boutros Ghali, gave hope at the conclusion of his remarks.

"May human rights create a special climate for all of us here for solidarity and a sense of responsibility! May human rights unite the congregation of states and human societies! And, finally, may human rights become the common language of humanity! "

#### **Criminalization in the Context of the Law**

The beginning of the existence of the death penalty in Indonesia is legally regulated in the Criminal Code, which is mostly from the Netherlands, namely *WvS (Wetboek van Strafrecht)*. Even though it comes from the Netherlands, it turns out that in its development, the application in the Netherlands and Indonesia is highly different. In the Netherlands, the death penalty has been abolished, except in a state of war. The Indonesian Criminal Code, which has been in effect since January 1, 1918, is indeed a legacy from the Netherlands, a country that has abolished the the death penalty for ordinary crimes since 1870, then abolished the the death penalty for all crimes in 1982. Meanwhile, Indonesia still recognizes and maintains the existence of the death penalty in several laws.



Outside of the Criminal Code, the the death penalty is often imposed against the perpetrators of criminal acts of subversion (Law Number 11/PnPs/1963) and perpetrators of narcotics crimes (Act Number 9 of 176). The existence of the the death penalty in Indonesia will continue in the future because, in the Draft Criminal Code, the the death penalty is still one of the retained criminal sanctions to punish the perpetrator of a crime.

#### **B. The The death penalty Seen from a Human Rights Point of View**

The discourse on human rights continues to develop in line with the increasing awareness of humans about their rights and obligations. However, the discourse on human rights has become actual because it has often been abused in human history from its inception to the present period. The human rights movement continues even by penetrating the territorial boundaries of a country. Human rights are basic rights that every individual has since birth, and these rights have been recognized by the world and their religion.

#### **The Upholding of Human Rights in Indonesia**

When the draft of the 1945 Constitution was discussed in 1945, the idea of human rights was seen as a reflection of the Western perspective which was individualistic and liberal, which at that time was strongly opposed by the founders of this republic because it was considered synonymous with colonialism and imperialism. Therefore, originally the draft of the 1945 Constitution did not contain any provisions regarding human rights. The reason is that the 1945 Constitution was prepared on the basis of kinship principles, namely principles that strongly oppose liberalism and individualism.

#### **The Human Rights View of The Death Penalty**

The existence of the the death penalty in Indonesia is pro and contra because experts question it based on different views. Legal experts underline the juridical dogmatic point of view and the development of criminal law that is oriented towards various aspects of social science, including objectives in terms of religion, human rights, and belief in life.

#### **The death penalty in Human Rights Regulations**

The discourse on human rights continues to develop in line with the increasing awareness of humans about their rights and obligations. However, the discourse on human rights has become actual because it has often been abused in human history from its inception to the present period. The human rights movement continues even by penetrating the territorial boundaries of a country. One of the heaviest types of punishment is the the death penalty which is deemed contrary to human rights. The the death penalty applies to serious crimes which are mentioned in a limited manner within the law.

### **CONCLUSIONS**

Humans have the right to life which is a right that cannot be ruled out. The right to life is a highly protected right. Article 3 of the Declaration of Human Rights of 10 December 1948 defines "everyone has the right to livelihood, liberty and individual safety". This formulation outlines the main principle in human rights that no one can be deprived of the right to their life arbitrarily.



This suggests that the method of implementing the the death penalty in Indonesia is in accordance with the prevailing laws and regulations, in which the firing squad provides a long-suffering to the defendant even though the shooting method is painful. However, the possibility of an "error" of this method is minor, thus it needs updating.

The right to life in Indonesian national law is part of protected human rights. The the death penalty is irrelevant even though it is an alternative punishment in the future, for example for the crime of terrorism giving extraordinary impacts, causing loss of life and property and threatening national security.

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