

## CHAPTER IV RESEARCH FINDINGS AND DISCUSSIONS

### A. Research Findings

#### 1. Basic Human Rights Norms and Principles of Human Rights and Death Penalty

There are some basic human rights norms and principles, such are:

##### a. Non-discrimination

The Sub-Commission on the Prevention of Discrimination and Protection of Human Rights was created by United Nations specially to deal with questions of discrimination. The ICCPR and ICESCR neither define the term ‘discrimination’ nor indicate what constitutes discrimination as any distinction, exclusion, restriction, or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on the equal footing, of human rights and fundamental freedoms in economic, political, social and cultural or any other field of public life.

##### b. Equality

UDHR Article 7 reads : “All are equal before the law and are entitled without any discrimination to equal protection of the law.”

Almost identical language is found in the first sentence of Article 26 of the ICCPR. From the beginning, the words “equal protection of the

law” caused confusion.<sup>110</sup> Quoting the famous phrase from Article 1 of the 1789 French Declaration of Rights : “Men are born equal and remain free and equal before the law.” According to international human rights standards, even humans all human beings, are entitled to enjoy all human rights and fundamental freedoms including both civil and political rights and economic, social and cultural rights, such as the rights to health and education. They have the right to equal treatment and to benefits, as any other citizen of the State in which they live, from economic development and other progress. These rights apply to men and women, children and adults alike.

c. Gender Equality

A gender equality perspective centre on understanding the cause and consequences of gender discrimination and the unequal power relations between men and women in a specific context, whether rooted in prevailing social attitudes and customary practices or discriminatory laws and policies, among other factors. Compounded forms of discrimination need to be taken into account based on age, race, ethnicity, educational and income level, residence, religion, marital, HIV or other status. These factors serve as critical inputs to inform what the best program strategies are for working towards

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<sup>110</sup>Richard B. Lillich, A Paper of Virginia University “*Civil Rights*”, (United States : Arthur J. Morris Law Library, 1984) . P. 132.

gender equality perspective implies looking at ways to change gender relations by questioning and responding to the underlying values and factors for unequal status and treatment.

d. Self-determination

Every human have the right to self-determination.<sup>111</sup> The United Nations Declaration on the Rights of Death Penalty Peoples states in its third article that “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. This article is based on common article one of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

e. Collective Rights

The core international human rights instruments protect the rights of the individual and establish obligations by States to guarantee protect and respect such rights.<sup>112</sup> The rights related to indigenous peoples seek to protect, in addition to individual rights, their collective rights, because recognition of such rights is necessary to ensure the

<sup>111</sup>The Committee on the Elimination of Racial Discrimination’s General Recommendation No. 21: *The right to self-determination* makes special references to the self-determination of indigenous peoples available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/dc598941c9e68a1a8025651e004d31d0?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/dc598941c9e68a1a8025651e004d31d0?Opendocument), downloaded 30 June 2013

<sup>112</sup>The human rights treaty bodies have adopted several general comments and recommendations interpreting the contents of the covenants and treaties. In some of them they have made specific N

continuing existence, development and well-being of indigenous peoples as distinct collectivities. Through international declarations, and in some cases national laws and regulations, all States are committed to the promotion of cultural diversity.

f. Death Penalty and the right to life

The United Nations introduced a resolution during the General Assembly's 62nd sessions in 2007 calling for a universal ban.<sup>113</sup> The approval of a draft resolution by the Assembly's third committee, which deals with human rights issues, voted 99 to 52, with 33 abstentions, in favor of the resolution on 15 November 2007 and was put to a vote in the Assembly on 18 December.<sup>114</sup>

Again in 2008, a large majority of states from all regions adopted a second resolution calling for a moratorium on the use of the death penalty in the UN General Assembly (Third Committee) on 20 November. 105 countries voted in favor of the draft resolution, 48 voted against and 31 abstained.

A range of amendments proposed by a small minority of pro-death penalty countries were overwhelmingly defeated. It had in 2007 passed a non-binding resolution (by 104 to 54, with 29 abstentions) by

<sup>113</sup> Thomas Hubert (29 June 2007), *Death Penalty*, <http://www.worldcoalition.org/?storyid=10> downloaded 18 May 2013; Amnesty International, *Death Penalty*, <http://www.amnesty.org/en/death-penalty> downloaded 18 May 2013.

<sup>114</sup> Amnesty International, *Death Penalty*, <http://www.amnesty.org/en/news-and-updates/news/un-set-key-death-penalty-vote-20071209> downloaded 19 May 2013.

asking its member states for "a moratorium on executions with a view to abolishing the death penalty".<sup>115</sup>

Article 2 of the Charter of Fundamental Rights of the European Union affirms the prohibition on capital punishment in the EU. A number of regional conventions prohibit the death penalty, most notably, the Sixth Protocol (abolition in time of peace) and the 13th Protocol (abolition in all circumstances) to the European Convention on Human Rights. The same is also stated under the Second Protocol in the American Convention on Human Rights, which, however has not been ratified by all countries in the Americas, most notably Canada and the United States. Most relevant operative international treaties do not require its prohibition for cases of serious crime, most notably, the International Covenant on Civil and Political Rights. This instead has, in common with several other treaties, an optional protocol prohibiting capital punishment and promoting its wider abolition.<sup>116</sup>

Several international organizations have made the abolition of the death penalty (during time of peace) a requirement of membership, most notably the European Union (EU) and the Council of Europe.

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<sup>115</sup>United Nations, *United States and Death Penalty*, <http://www.reuters.com/article/2007/12/18/us-un-deathpenalty-idUSN1849885920071218>, downloaded 19 May 2013.

<sup>116</sup> Second Optional Protocol of ICCPR

The EU and the Council of Europe are willing to accept a moratorium as an interim measure. Thus, while Russia is a member of the Council of Europe, and practices the death penalty in law, it has not made public use of it since becoming a member of the Council.

Other states, while having abolished *de jure* the death penalty in time of peace and *de facto* in all circumstances, have not ratified Protocol no.13 yet and therefore have no international obligation to refrain from using the death penalty in time of war or imminent threat of war (Armenia, Latvia, Poland and Spain).<sup>117</sup> Italy is the most recent to ratify it, on 3 March 2009.<sup>118</sup>

Turkey has recently, as a move towards EU membership, undergone a reform of its legal system. Previously there was a *de facto* moratorium on the death penalty in Turkey as the last execution took place in 1984. The death penalty was removed from peacetime law in August 2002, and in May 2004 Turkey amended its constitution in order to remove capital punishment in all circumstances. It ratified Protocol no. 13 to the European Convention on Human Rights in February 2006. As a result, Europe is a continent free of the death penalty in practice, all states but Russia, which has entered a

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<sup>117</sup> Amnesty International, *Death Penalty : Ratification of International Treaties*, <http://www.amnesty.org/en/death-penalty/ratification-of-international-treaties>, downloaded 19 May 2013.

<sup>118</sup>United Nations, *Children of People sentenced to Death*, <http://www.worldcoalition.org/?itemid=328>, downloaded 19 May 2013

moratorium, having ratified the Sixth Protocol to the European Convention on Human Rights, with the sole exception of Belarus, which is not a member of the Council of Europe. The Parliamentary Assembly of the Council of Europe has been lobbying for Council of Europe observer states who practice the death penalty, the U.S. and Japan, to abolish it or lose their observer status. In addition to banning capital punishment for EU member states, the EU has also banned detainee transfers in cases where the receiving party may seek the death penalty.<sup>119</sup>

Among non-governmental organizations (NGOs), Amnesty International and Human Rights Watch are noted for their opposition to capital punishment. A number of such NGOs, as well as trade unions, local councils and bar associations formed a World Coalition Against the Death Penalty in 2002.

## 2. The Death Penalty in International Law

The international Human Rights started from the Universal Declaration of Human Rights (UDHR). UDHR is a legal document of Human Rights which adopted by all organizations over the world. This

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<sup>119</sup>New Zealand, South Africa, and most European nations except Belarus, Includes Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Israel, Kazakhstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and Vatican City (Belarus is excluded).

Declaration was adopted by United Nations on December 10, 1948. The right to life in this Declaration regulated in Article 3 which stated “Every Human has the right to life, liberty and private security”. However, this declaration does not explain about the death penalty itself, whether they are favor or oppose the death penalty as capital punishment.

For the next step, the international instrument law regarding the death penalty improve increasingly. In 1966, United Nations made the protection of human rights into the structural formulation of law. The using instrument is ICCPR<sup>120</sup> and ICESCR<sup>121</sup>. Article 6 Point 1 of ICCPR stated that “Every human being has the right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.<sup>122</sup> In the Article 6 of ICCPR point 2, the right to life has been defined and vast with the restriction of death penalty.<sup>123</sup> This convention also stated that in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes.

Issue of the Death Penalty has been gaining attention internationally. On April 3 1997, a Resolution about Death Penalty from

<sup>120</sup>United Nations, *International Covenant on Civil and Political Rights*, New York : 1966. And then ratified become : Indonesia, The Law Number 12 of 2005 regarding ratified of ICCPR, Paper of Indonesia 2005 Number 119, Additional Paper of Indonesia Number 4558.

<sup>121</sup>United Nations, *International Covenant on Civil and Political Rights*, New York : 1966. And then ratified become : Indonesia, The Law Number 11 of 2005 regarding ratified of ICESCR, Paper of Indonesia 2005 Number 118, Additional Paper of Indonesia Number 4557.

<sup>122</sup>International Covenant on Civil and Political Rights, Article 6 Point 1.

<sup>123</sup>*Ibid.*, Article 6 Point 2.

the United Nations was approved by a National Committee of Human Rights (KOMNASHAM). The resolution was about asking the nation members that have not taken out the death penalty system from their law, to consider the deferment of the execution with the viewpoint of aiming for progressive abolition of the death penalty system to urge the nations that are still imposing the death penalty system in their law to implement a moratorium.

Now withstanding, the International Human Rights Law has been an orientation source for the Constitution Court in each countries to define their constitution themselves. Two third from each countries from the world have been abolished the death penalty both in law and practice.

Below is the table of the practice of capital punishment in the world related to the number of states that do not carry the death penalty and some that still carry of it.

**Table 3 : Practice of Death Penalty of Countries Over The World**

(Source : Amnesty International, March 2011)<sup>124</sup>

<b>Classification Practice of Death Penalty</b>	<b>Total Country</b>
Countries that abolish the capital punishment for all crimes (countries which is in the law does not include the	96

<sup>124</sup> Amnesty International, *Death Sentences and Executions 2010*, <http://www.amnesty.org/en/library/asset/ACT50/001/2011/en/ea1b6b25-a62a-4074-927dba51e-88df2e9/act500012011en.pdf> downloaded on 1 July 2013.

death penalty for any crime)	
Countries that abolished the death penalty for a criminal offense regular category (countries that sets the death penalty in legal only for certain offenses criminal or criminal offenses done in the certain circumstances)	9
Countries that still sets the death penalty for common crimes as murder but can be regarded as a country that practice to abolish the death penalty if they do not perform executions against a person for at least last 10 years and believed has a policy or practice for not to do the execution)	34
Total states that do the abolition (removal) of the death penalty	139
Country that still practice and apply the death penalty apply to ordinary criminal	58

### 3. Restricting the death penalty to “most serious crime”

The legal basis for judicial executions in international law is found in Article 6 of the ICCPR, which addresses the right to life. Paragraph 2 introduces the formulation “most serious crimes” :

*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.*

The concept of “most serious crimes” emerged as a compromise during the drafting process in 1954 only a minority of states had taken an abolitionist stand. The formulation of Article 6 is open to wide interpretation. The notion of “seriousness” may vary according to the national culture, religion, tradition and political context. However, a relativist approach is problematic as it potentially undermines the concept of universally applicable normative principles in international law. In the spirit of universality, Article 6 sets the direction towards abolition of the death penalty by establishing state obligations to progressively restrict its use.

According to the ECOSOC Resolution 1984/50, the scope of death penalty “should not go beyond intentional crimes with lethal or other extremely grave consequences”. In 2006, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions further narrowed the interpretation of “most serious crimes” by defining them as **“cases where it can be shown that there was an intention to kill, which resulted in the loss of life”**.

Jurisprudence from a wide range of sources has brought some clarity to the question of which crimes can legitimately be classified as the “most serious”. This document uses the definition of “most serious crimes” proposed by the UN Special Rapporteur above – namely offences with intent to kill resulting in loss of life.

The UN and other international human rights bodies have advocated a progressively restrictive interpretation of offences which meet the threshold for “most serious crimes” and have sought to clarify the nature of offences which do not do so, such as :

a. Crime against the state and military codes

Most retentionist and a few other states that have abolished the death penalty for ordinary crimes, retain the death penalty for certain political offences, including offences against the state and public order, violations of military law in time of war, and for “terrorist” acts and acts of treason. Some of these offences may involve loss of life and could therefore be construed as intentional murder, but many are so broadly defined that the death penalty can be imposed for a range of offences that do not meet the threshold for “most serious crimes” identified above. Some could be described as political offences.

b. Crimes resulting in death

In some retentionist countries, serious crimes (or felonies) like arson, aggravated assault, burglary or robbery resulting in loss of life are

punishable by death. Felony murder – where a killing was unintentionally committed during the commission of another crime – is also defined as a capital offence by some states. These crimes do not necessarily meet the “most serious crimes” threshold since loss of life may occur without actual intent to kill.

c. Drugs offences

Drugs – related crimes for which the death penalty can be imposed possession, production, trafficking or use of illicit narcotics. Generally, whether a person is sentenced to death or not depends on the type and quantity of drugs involved. In some countries possession of even a small amount of an illegal substance is punishable by death while in other countries drug possession is not a capital offence but may be construed as drug trafficking and hence subject to the death penalty.

**4. Analysis of the Protection for the Right to Life and The Right to Justice under the ICCPR aimed at the Abolition of the Death Penalty in the Process of Criminal Law**

In 1966, the United Nations protect the human rights against the death penalty in a binding legal formula that is designed into the two draft treaties ICCPR and ICESCR which are as follows:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentenced of death may be imposed only for the most serious crimes in accordance with the law in force at the time of commission of the crime and not contrary of the provisions of the present Covenant and to the Convention on the Prevention and Punishment for 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 authorizes 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 the 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.

In its development, the ICCPR plays an important role in the world of international human rights. Especially in efforts to protect the right to life and the abolition of the death penalty. Article 6 of the Convention does not directly prohibit the death penalty, however, imposes limits on the use of capital punishment is still used as punishment in some countries, including Indonesia and Malaysia.

Both of Indonesia and Malaysia are applying the executions of death penalty, not only to its citizens, but also to foreign national who commit the most serious crimes of criminal offenses in accordance with the national laws of each country. But in the end, the law enforcement themselves will use the opportunity to impose the death penalty.

The first limitation is given by the ICCPR is that the application of the death penalty can only be imposed in the most serious crimes. The United Nations Human Rights Committee has stated that the 'most serious crimes' must be interpreted in a limited and recognizes the application of the death penalty as a special move. The death penalty can not be imposed for economic crimes, political crimes, property crimes and violent crimes are not using. Decision of the United Nations Human Rights Committee stated that in accordance with Article 6 of the ICCPR, the most serious crimes are limited to acts of premeditated murder or causing other grievous bodily suffering.

## **5. Arguments Against the Death Penalty in Indonesia**

In 2005, Indonesia has ratified the ICCPR which has been constitution in Law Number 12 of 2005 regarding the approval of ICCPR. There is also explained the reason for Indonesia to consider to ratify this Convention which is Indonesia is a Law Country and since His birth in 1945, Indonesia has been upheld the Human Rights.

The threat of death penalty in Indonesia originates from the *Wetboek van Strafrecht* that was passed as Criminal Code Book (Kitab Undang-Undang Hukum Pidana (KUHP) *known as CRIMINAL CODE*) by the Dutch Colonial Government on January 1<sup>st</sup>, 1918. Enforcement of the Criminal Code is based on the provisions of Article 1 of the rules of transitional Constitution 1945 (UUD 1945) that declared all laws which shall remain valid as long as there hasn't held a new rules<sup>125</sup> and strengthened with the Law No.1 of 1946 regarding the *Wetboek van Strafrecht* become Criminal Code Book (KUHP).<sup>126</sup>

In 1964, the government has issued the Law No. 2/PNPS/1964 regarding the Procedure of implement the Death Penalty. The Law also mentioned that the execution of the Death Row inmates is done by being shot to death. Since previously, there was never have any regulation how the execution must be carried out.

<sup>125</sup>Indonesia, *Undang-Undang Dasar Negara Republik Indonesia 1945*.

<sup>126</sup>Indonesia, *Constitution No. 1 of 1946 regarding the Criminal Rules Law, Additional Paper of Indonesia Year of 1958 Number 127*.

In the post-1998 reform, the Indonesian Courts still impose criminal death penalty. The Death Penalty was threatened on 6 (six) felony. This is due to some of various legislations that still carry in the death penalty which actually the death penalty is part of pra-reform policies but still apply in the post-reform, such as :

1. Criminal acts of terrorism was regulated by Law No. 15 of 2003 concerning the Stipulation Government Regulation 1 of 2002 on the Eradication of Terrorism Jo Perpu No 1 of 2002 on Combating Criminal Acts of Terrorism Jo Law 16 of 2003 concerning Stipulation of Government Regulation<sup>2</sup> of 2002 on the Application of Government Regulation<sup>1</sup> of 2002 on the Eradication of Terrorism in the event Blasting Bali bomb in October 12, 2002 Date Jo Interim Law 2/2002 on Enactment of Government Regulation<sup>1</sup>/2002 on the Eradication the events of terrorism on Bali Bombing in October 12 2002.
2. Narcotics criminal acts which was regulated by Law No. 35 of 2009 regarding the Narcotics Jo Law No. 22 of 1997 regarding Narcotics.
3. Psychotropic which was regulated by Law No. 5 of 1997 regarding the Psychotropic .
4. Crime Planned/Bere Murder which was regulated in Criminal Code.
5. Criminal to National Security which was regulated by Criminal Code.
6. The spread of hating crimes and led to the war which was regulated by Criminal Code.

7. Crime of Treason which was regulated by Criminal Code.
8. Crime of Theft offences that caused the death of others which was regulated by Criminal Code.

As the result for still enactment of the Death Penalty in Indonesian Legal Instrument of Law, then the execution of the death penalty is still continue and occur until now. Practice of capital punishment in Indonesia is still considered as discrimination since they were not reaching the elite group actors from committing criminal activities which could be categorized as a serious crime / outstanding, for example : corruption.

The second amendment of UUD 1945 stated explicitly that 'Every person have the rights to life and defend their life'. And the next paragraph stated that Every person also have the right to life, the right to not being tortured, the rights to have freedom of thought, conscience, the rights to have their own religion and the right not to be protected base on retroactive law. All of these is the basic human rights that inviolable.<sup>127</sup>

#### **6. Arguments Against the Death Penalty in Malaysia**

In Malaysia, the death penalty applies to various offences. The statistics are staggering where between 1979 till 2001, 359 peoples have been executed in Malaysia. As the countries around the globe have done

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<sup>127</sup>The second amandment of UUD 1945.

away with the death punishment, Malaysia cling vehemently to capital punishment.

The decision on discretionary death sentence will normally rely on the different circumstances of the case. One of the most important considerations is the seriousness of the offence. However, the Malaysian court would adhere to the “beyond reasonable doubt” rule when it comes to the ruling on death sentencing as the liberty and life of the accused is at stake. The prosecution officer will have to prove that the committal of the said crime was beyond reasonable doubt or else the courts will not bring about a conviction.

There are insufficient statistics provided by government agencies to the public regarding the number of death sentences in this country. The best representation are the statistics provided by the National Human Rights Commission (Suhakam). The statistics appear to show that since 2001, approximately 159 peoples are on death row. Another statistics is that provided by the Deputy Home Minister, Zainal Abidin Zin, that 359 death sentences have already been carried out within the period of 31 years from 1970 to October 2001. The findings were that the majority of cases were convictions for drug trafficking offences.

An example regarding the death penalty in Malaysia is the case ss 302 and 376 of the Penal Code, murder and rape. The convict is

Kartigeyan a/l Krishnan (2013)<sup>128</sup> MLJ 278 regarding appeal dismissed, affirming the conviction and sentence of death for the murder and 20 years imprisonment and fifteen strokes of the rotan for rape by the High Court. In the light of the trial judge's finding that the prosecution had successfully proven a prima facie case and upon the accused electing to remain silent the court was put in a situation where it had no choice but to convict the accused on the charges as he had failed to rebut the evidence adduced by the prosecution. The record absolved any error on the part of the trial judge. Apart from the above, the fact the appellant was aged approximately 18 years and 11 months at the time of commission of the offence was a ground that could be dismissed outright as the age factor did not exculpate or dismiss the accused's culpability for the offences with which he was charged.

Since time immemorial, the death sentence serves as retribution for the death that was caused. It is common rooted opinion that the victim's family and friends will have extreme hatred towards the convict that they would definitely wish for a death sentence in return for the life taken. Since ancient times there has been the application of the saying, "an eye for an eye, a tooth for a tooth."

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<sup>128</sup>Malaysian Journal Law, 2013

Hence, the phrase 'in accordance to law' should be also scrutinized as it gives very wide arbitrary powers to the court to decide when it is appropriate to have removed the rights of people even in the most drastic situations that involve the taking of another's life. When judges are asked why they act so arbitrarily, their response is usually always that they are not in the position to answer to the reasonability and morality of the laws they are required to abide by the laws that have been passed by Parliament.

Hence, by acknowledging that judges are humans and there are many factors beyond the control of humans that could cause wrongful execution, the public should protect their rights to life by supporting the abolition of the death penalty so as to reduce the risk to nothing.

## **B. Discussions**

### **1. Indonesia is Permitted to Conduct the Death Penalty As Ratified the ICCPR into National Law No. 12 of 2005**

Indonesia's law system is a mixture law from Europe law, Religion law and Ethic law. Most of the professed law is originated from Europe especially Netherlands (Civil Law). This is based on the fact that Indonesian was colonized by Netherlands. Religion law is one of Indonesia law system because most of Indonesian citizen embraced the Moslem religion thus Moslem law system is the most applied law especially on marriage, kinship and heritage. On the other hand, ethic law is based on the citizen's culture from archipelago and was inheritaged

from generations. Generally, Indonesia law was divided into Private Law and Public Law.

Indonesia is one of the United Nations' member that ratified ICCPR. As we know, ICCPR content is international agreement that was published by the United Nations on 1966. ICCPR was applied since 1976 after the ratifications of 35 country. Well noted, ICCPR was only followed by members of the ratification Country. The main point of ICCPR's content is to tribute Human Rights and transformed it to National Law.

Part of ICCPR Content was adopted by Indonesia law system on subsection of UUD 1945 Article 28 that was amendment and other Indonesian's regulation regarding the Human Rights problem are Code of Criminal Procedure (KUHAP) and Human Rights Regulation Law Number 39 of 1999.

Thus, even though Indonesia has not ratified ICCPR, it still has equilibrated Regulations. It has to be acknowledge that when Indonesia was ruled without democracy, the ratified ICCPR is an important things in pushing and forcing Country organizer to honor Human Rights and minimize violation.

However, in the new Indonesia era that is more democracy, Human rights esteem was not obeyed is not because of unwillingness but inability. Government has the responsibility to ensure that ICCPR

standard that was transformed into law and regulation can be prevail evenly in all of Indonesia.

There is two clarification on Rights in ICCPR which is Non-Derogable Rights ( Absolute Rights that its fulfillment can not be loosen even in the most critical State condition) and Derogable Rights (Rights that its fulfillment could be loosen By the States). Rights that was included in Non – Derogable Rights are :

- Rights of Life, Article 3
- Rights to be free from torture, article 5
- Rights to be free from slavery, article 4
- Rights to be free from prison due to agreement unfulfillment, article 9
- Right to be free from retroactive punishment
- Right to be Subject of legal rights
- Rights of thought and Religion, article 200

Rights that was included in Derogable Rights are :

- Rights to Gathering in peace
- Rights to create an association including Labor Rights
- Rights to give opinion and expression including freedom to search, receive and to give information.

## **2. Malaysia is Permitted to Conduct the Death Penalty by Its Own National Law**

Malaysia is a former British Colony State, which have adopted the British Common Law tradition of the Common Law System (well known as Anglo Saxon). Tradition stands in the middle of Islamic Legal System (which is held by a Court or Syariah Court) and various indigenous population group.

The principle of the rule of law that was practiced in Malaysia generally follow the British administrative law which is developed in the Malaysian courts. Malaysia also has a federal system of government that divides power into the federal government and state governments. This division of powers contained in the federal constitution. Although the statute uses the federal system, but the lasw system is running with the great authority power from the central government.

Unlike Indonesia, Malaysia is a UN member state, but they are not ratified the ICCPR. For the death penalty, Malaysia enact national laws to regulate the country's own serious crime that the death penalty can be imposed. As an example of a relatively serious crime and the death penalty can be imposed are as follows:

- Waging war against the Yang Dipertuan Agung – Section 121 A Penal Code
- Offences against a Ruler – Section 121 A Penal Code
- Abetting Mutiny (Armed Forces) – Section 132 Penal Code
- Murder – Section 302 Penal Code (Mandatory)

- Abetment of suicide – Section 302 Penal Code (Mandatory)
- Attempt by Life Convict to murder, if hurt is caused – Section 307 Penal Code
- Kidnapping or abducting in order to Murder – Section 364 Penal Code
- Hostage Taking – Section 374 A Penal Code
- Gang Robbery with murder – Section 396 Penal Code
- Drug Trafficking – Section 39B Dangerous Drugs Act 1952
- Possession of fire arm as – Section 57 Internal Security Act 1960

Death Penalty is indeed one of the most controversial ICCPR issues, which had been ratified by Indonesian Government, but not ratified by the Malaysian Government. Although it has been acknowledged that the right to life is something that cannot be disregarded (non-derogable rights), however, in Article 6 Paragraph 2, textually it has been stated that death penalty on criminal acts that are regarded as serious offences is allowed to be imposed.

To understand the Death Penalty articles in ICCPR, the United Nations had also emitted guidelines, titled as “Safeguards Guaranteeing Protection of The Rights of Those Facing the death Penalty” through the Social Economic Council of United Nations Resolutions 1984/50, dated May 25, 1984. These guidelines enlighten the restrictions of death penalty practice according to ICCPR. The restrictions of death penalty are :

1. In countries, which the death penalty has not been removed, the sentence can only be imposed on the most serious offences, which the category belongs to, or equal to the high level of cruelty consequences.
2. The death penalty is only applicable for the criminal acts that are stated in the written law that are not considered as retroactive during the occurrence. Furthermore, if there is any lighter penalty available in the law, then the latter will be imposed.
3. The death penalty is not to be imposed to a minor, or to a child below 18 years old when he commits the criminal act. The death penalty is not to be imposed to pregnant women or to women whom have just given birth. The death penalty is not to be imposed to people with mental disabilities.
4. The death penalty can only be imposed when the criminal act of the person has reached a point where the case has no more room of uncertainty.
5. The death penalty can only be imposed according to the final court decision which had gone through a competent court trial which the fairness of the trial is guaranteed, or at least according to the ICCPR Article 14, included in all court cases related with death sentence, the accused has to be given a decent and proper court trial.
6. An accused that had been given a death sentence has the right to appeal to the higher court and the appeal is imperative.

7. An accused that had been given a death sentence has the right to appeal for remissions, or the change of sentence.
8. The death penalty is not to be imposed to cancel the means of appeal or the change of sentence.

When the death penalty is to be executed, the method of execution has to be able to cause minimum sufferings.

### **3. The Similarities and Differences of Imposing the Death Penalty in Indonesia and Malaysia**

#### **a. Death Penalty in Law of Indonesia**

The right to life for everyone in Indonesia is guaranteed by the Human Rights National Instrument such as The Constitution of 1945 (UUD 1945) and the Law No. 39 of 1999 regarding the Human Rights.

In the Constitution of Republic Indonesia of 1945 (UUD 1945), the rights to life was known as non-derogable rights (the rights that can't be reduced under any circumstances) in the Article 28I point (1) and Article 4 of Law No. 39 of 1999 regarding the Human Rights :

“The rights to life, the rights for not to torture, the rights to freedom of thought and conscience, the rights to freedom of religion, the rights for not to be enslaved, the rights to recognize as a person in front of law and the rights for not to be prosecuted based on retroactive law is s a human right that cannot be reduced in any circumstances.”

Although the Constitution of Republic Indonesia 1945 has been stated that the right to life can't be reduced, but still the other constitution or law in Indonesia still impose the death penalty.

The administration of death penalty is contrary to Article 28I Point (1) of The 1945 Constitution which was accommodated by the existence of Article 28J of The 1945 Constitution that stated :

“By carrying out the rights and freedoms, everyone shall be subject to the restrictions set forth in the Act solely for the purpose of securing due recognition and respect the rights and freedoms of others and to meet the demands of a fair base on the morality consideration, religious values, security and public order in a democratic society.”

Thus, there are many parties believed that the application of death penalty can be applied in Indonesia and not contrary to the constitution during the set and allowed the applicable laws.

Controversy regarding the application of death penalty in a decade, related to the protection of the right to life has become very interesting. Especially if traced that within the last ten years was born a few legislation that upholds the protection of the rights to life. There are at least 3 (three) important periods from 2000 to 2010. Third period include :

- The period of 2000-2002, i.e after the enactment of Law No. 39 of 1999 regarding the Human Rights until the passage of the Fourth Amendment The Constitution of 1945.
- The period of 2003-2005, i.e after passing the Fourth Amendment The Constitution of 1945 to the enactment of Law No. 12 of 2005 regarding the ratification of ICCPR.
- The period of 2006-2010, i.e after the enactment of Law No. 12 of 2005 regarding the ratification of ICCPR.

Capital offences for common crimes in Indonesia include : drugs offences, economic crimes (including some acts of corruption detrimental to the finance or economy of the state), aggravated gang robbery resulting in death or serious injury, hijacking and piracy resulting in death and murder. The semi-autonomous province of Aceh has enacted an Islamic criminal code that reportedly includes the punishment of stoning for adultery.

Treasonous acts include : assisting the enemy or prejudicing the state in time of war (such as by betrayal, destruction or demoralization), collusion with foreign powers intended to cause and resulting in hostilities, espionage (for example officers of atomic installations and other organizations using atomic energy are punishable by death if they intentionally breach confidentially), ethnocide, genocide, and serious violations of humanitarian law.

Terrorist offences which carry the death penalty include creating, planning or inciting others to create a widespread atmosphere of terror by taking liberty or property damaging state, environmental or public resources, or facilitating or attempting to facilitate terrorism, developing, producing, obtaining, transferring or using chemical weapons, or involvement in or incitement of the aforementioned, endangering food and housing, and serious violations of humanitarian law. Numerous military offences carry the death penalty under Indonesian military law.

Death Penalty in practice in Indonesia was reportedly over 100 persons on death row in June 2012. At least 58 death row inmates were sentenced for drugs offences. Application of the death penalty has been sporadic, with almost half of executions over the last decade occurring in 2008, alongside periods in which no executions occurred. The rate of executions depended heavily upon the executive in power, with 16 of the 21 executions over the last decade being carried out under President Yudhoyono (2004 to 2009). There have been no executions since November 2008.

Reports indicate that in practice the death penalty is mainly imposed for drugs trafficking offences, aggravated murder and terrorist acts. Drugs offences relating to narcotics and psychotropic

drugs have accounted for most death sentences and executions since 1998.

Death penalty has been justified by Article 6 point 2 of ICCPR. This case is also stated in Article 9, Paragraph 1 Law No. 39 of 1999 about human rights which stated that “Everyone has the right to life, to sustain life and improve his or her standard of living.” Further explanation of Article 9 Paragraph 1, it explained that the right to life is also attached to the unborn and people who have been sentenced to death. In special cases, for instance, to execute an abortion to save the life of the mother or based on the court’s decisions to execute death penalties, the act of abortion and death sentence in these said conditions, are therefore, allowed. The human rights can only be restricted in regards to these two conditions.

#### **b. Death Penalty in Law of Malaysia**

The Malaysian constitution refers implicitly to the death penalty. The death penalty is mandatory for drugs trafficking, kidnapping, murder, aggravated robbery, terrorist offences, and offences against the person of any Malaysian federal or federated head of state. Sharia Law is in force for some offences but capital crimes are tried by the High Court under criminal law.

Capital crimes include : drugs-related offences, bearing false witness resulting in the conviction and execution of an innocent

defendant, kidnapping for ransom or with intended murder, murder and felony murder, participating in an intended murder or intent to cause harm during robbery or extortion by using firearms and illegal possession or trafficking of firearms or explosives in a designated security area, or supplying, receiving, or preparing to supply or receive firearms in a designated security area, or consorting with individuals who perform such acts and treason. Under military law abetting mutiny if mutiny is carried out is punishable by death.

Death penalty in practice in Malaysia is according to official figures there were approximately 503 prisoners on death row mainly for drugs related offences in June 2012.

As in Malaysia, the following is a list of criminal offenses that carry the death penalty :

- Waging war against the Yang Dipertuan Agung – Section 121 A Penal Code
- Offences against a Ruler – Section 121 A Penal Code
- Abetting Mutiny (Armed Forces) – Section 132 Penal Code
- Murder – Section 302 Penal Code (Mandatory)
- Abetment of suicide – Section 302 Penal Code (Mandatory)
- Attempt by Life Convict to murder, if hurt is caused – Section 307 Penal Code

- Kidnapping or abducting in order to Murder – Section 364 Penal Code
- Hostage Taking – Section 374 A Penal Code
- Gang Robbery with murder – Section 396 Penal Code
- Drug Trafficking – Section 39B Dangerous Drugs Act 1952
- Possession of firearms – Section 57 Internal Security Act 1960

The above formulations conclude that death sentence is a penalty that ought to be executed for certain criminal categories, in which the criminal acts resulted in the loss of a person's life. This case has been stated in the legislations of each country.

### c. Similarities

Since Article 6 point 2 of ICCPR has stated as below :

*“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.”*

Well, both Indonesia and Malaysia have implemented the death penalty for the most serious crimes indeed. For the similarities identification purposes, the author reviews the death penalty practices from the viewpoint where both Indonesia and Malaysia implement death penalty system in their law.

While both in Indonesia and Malaysia themselves, the death penalty imposed for corruption and illegal drugs. Enactment of the death penalty against economic crime can be seen with the penalty of death against corruption in both countries. Although in reality, there is no corruptor in Indonesia and Malaysia are really the death penalty imposed.

In terms of the death penalty implementation, both Indonesia and Malaysia adopt the death sentence that 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. Base on Article 6 ICCPR, death penalty may be imposed for serious crimes only. Thus, the similarities for both Indonesia and Malaysia of imposing the Death Penalty only in the Most Serious Crimes which this regulation was appropriate with The Article 6 (2) ICCPR. Both of Indonesia and Malaysia were not violated this Human Rights' Convention.

#### **d. Differences**

From the overall of discussions above, the authors do not see any difference in the implementation of the death penalty category for both Indonesia and Malaysia, except the differences in the ratification of international conventions, International Covenant on Civil and Political Rights. Indonesia has ratified this Convention in 2005, yet Malaysia was never ratified this Human Rights Convention. But

however, both of Indonesia and Malaysia have implemented the death penalty for the “**most serious crimes**” and this was not violated the Article 6 (2) ICCPR.

However, ratification assures the people of a country that current and future administrations will be subject to a continuing international obligation to guarantee specific fundamental human rights, no matter who is in power. Ratification helps to strengthen domestic human rights protection by providing standards and benchmarks for national law and practice, engaging the expertise of United Nations monitoring and specialist mechanisms, providing a system of international accountability and, in some instances, an external channel for individual complaints. The ratification of international standards by all member states of the United Nations is an essential bulwark in the promotion of universality and indivisibility of all human rights and the international rules-based order as a whole. The implication is that, whatever the signatory’s intentions or ultimate success in achieving those standards, the standards have been acknowledged publicly as a goal, and will remain as a public reminder and basis for comparison with the actual record of the state. Clearly, while ratification is only the first step in the process towards upholding human rights, it has some significance in itself. The goal contained in the instruments represent more than ideals held up by a

minority of developed states. Thus, this is what ratification is important for Malaysia regarding the State of Malaysia had not ratified yet the ICCPR.

#### **4. Advantage of Imposing Death Penalty in Indonesia and Malaysia**

By imposing the Death Penalty in both countries, Indonesia and Malaysia have some advantage of it such as :

- Imposing the Death Penalty will be an advantage because there will decrease of no other serious criminal mind as try to murder anyone.
- Imposing the Death Penalty also will stop the criminals for re-offending and the tax-payer doesn't have to pay for imprisonment. It could also stop other criminals from offending because if you get caught there is the prospect of death penalty.
- Imposing the Death Penalty will lessen the crimes that are happening.
- Imposing the Death Penalty also will help both countries, Indonesia and Malaysia to solve their problems about the over population by means of preventing or lessen the number of population.
- Justice, and the sense of societal retribution that the murderer has met the same fate they save to their victim Deterrence cuts the cost to society of imprisoning the guilty party for a lifetime.

#### **5. Disadvantage of Imposing Death Penalty in Indonesia and Malaysia**

Not only have the advantage, imposing the Death Penalty also have some disadvantage. The Disadvantages are below :

- Both countries, Indonesia and Malaysia are doing again what the criminal already did.
- Both countries, Indonesia and Malaysia will never get any answers anymore from the criminal once he is dead. Better to use heinous criminals for scientific experimentation.
- Only one if it is not done quick enough.
- Capital Punishment generally seen as inappropriate and many countries no longer use it.
- The argument is that the length of stay on death row, its endless appeals, delays, technicalities, and retrials, keep a person waiting for death for years on end. It is both mentally cruel (to BOTH the guilty party and the victim's family).
- The most disadvantage of imposing the Death Penalty is highly cost to society countries.
- Death is Final. If someone is innocent, they can never be revived. Does not discourage crime. The death penalty costs the State Government millions of dollars for each person put to death, making it absolute compared to keep the person in prison for life. Religion can also play a part in this, as many religions disregard and don't believe in putting a persons to their deaths.

## 6. **Oppose The Death Penalty**

However, the Death Penalty was prohibited in the Optional Protocol II of ICCPR. Since every Human has the rights to life base on the Article 6 (1) ICCPR. Thus, The Human Rights Committee issued the Optional Protocol II of ICCPR which prohibited the death penalty. Both of Indonesia and Malaysia were not ratified this convention into their National's Law. There are some reasons to oppose the Death Penalty in the International Law such as :

- Innocence and the Death Penalty

The wrongful execution of an innocent person is an injustice that can never be rectified. Since the reinstatement of the death penalty, 139 men and women have been released from death row nationally.

- The High Cost of the Death Penalty

It costs far more to execute a person than to keep him or her in prison for life.

- Death Penalty can Prolong Suffering for Victims' Families

Many family members who have lost love ones to murder feel that the death penalty will not heal their wounds nor will it end their pain; the extended legal process prior to executions can prolong the agony experienced by the victims' families.

- International Views on Death Penalty

The vast majority of countries in Western Europe, North America and South America - more than 139 nations worldwide - have abandoned capital punishment in law or in practice.

- Inadequate Legal Representation

Perhaps the most important factor in determining whether a defendant will receive the death penalty is the quality of the representation he or she is provided.

- Deterrence

Scientific studies have consistently failed to demonstrate that executions deter people from committing crime anymore than long prison sentences.

- Arbitrariness in the Application of the Death Penalty

Politics, quality of legal counsel and the jurisdiction where a crime is committed are more often the determining factors in a death penalty case than the facts of the crime itself.

- Religious Perspectives on the Death Penalty

Although isolated passages of religious scripture have been quoted in support of the death penalty, almost all religious groups in the United States regard executions as immoral.

- Racial Disparities

The race of the victim and the race of the defendant in capital cases are major factors in determining who is sentenced to die in this country. In

1990 a report from the General Accounting Office concluded that "in 82 percent of the studies [reviewed], race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e. those who murdered whites were more likely to be sentenced to death than those who murdered blacks."

- Alternatives to the Death Penalty

In every state that retains the death penalty, jurors have the option of sentencing convicted capital murderers to life in prison without the possibility of parole. The sentence is cheaper to tax-payers and keeps violent offenders off the streets for good.