

CHAPTER II LITERATURE REVIEW

A. Conceptual and Legal Framework

I. The Review of Death Sentence

a. The Definition of Death Sentence

Death sentence or capital punishment is an execution of an offender sentenced to death after conviction by a court of law of a criminal offense. Capital punishment should be distinguished from extrajudicial executions carried out without due process of law.²⁰

Thirty six countries actively practice capital punishment, 103 countries have completely abolished it de jure for all crimes, 6 have abolished it for ordinary crimes only (while maintaining it for special circumstances such as war crimes), and 50 have abolished it de facto (have not used it for at least ten years and/or are under moratorium).

The United Nations General Assembly has adopted, in 2007, 2008, 2010, 2012 and 2014²¹ non-binding resolutions aiming for a global moratorium on executions, with a view to absolute abolition.

Although many nations have abolished capital punishment, over 60

²⁰ Roger Hood, “Capital Punishment” Britannica, <http://www.britannica.com/EBchecked/topic/93902/capital-punishment>, Retrieved on April 25, 2015

²¹ “United Nations Resolution Moratorium Death Penalty Executions General Assembly”, <http://www.worldcoalition.org/united-nations-resolution-moratorium-death-penalty-executions-general-assembly.html>, Retrieved on April 25, 2015

percent of the world's population live in countries where executions take place, such as China, India, the United States²² and Indonesia, the four most-populous countries in the world, which continue to apply the death penalty (although in India and in many US states it is rarely employed). Each of these four nations has consistently voted against the General Assembly resolutions.²³

b. Practice of Death Sentence per Country

1. Africa

Of the 54 independent states in Africa that are UN members:

- 1) 19 countries (35%) have abolished it, which include the following:

Table 2.1. African Abolitionist Countries

Country	Year Abolished
Angola	1992
Benin	2012
Burundi	2009 ²⁴
Cape Verde	1981
Chad	2014
Ivory Coast	2000

²² "Death penalty is not likely to end soon in US". (New York : International Herald Tribune, 2009). Retrieved on April 25, 2015

²³ "No serious chance of repeal in those states that are actually using the death penalty". www.egovmonitor.com. Retrieved April 25, 2015.

²⁴ Amnesty International. "Burundi abolishes the death penalty but bans homosexuality". 27 April 2009.

Country	Year Abolished
Djibouti	1995
Gabon	2010 ²⁵
Guinea-Bissau	1993
Madagascar	2012
Mauritius	1995
Mozambique	1990
Namibia	1990
Rwanda	2007
São Tomé and Príncipe	1990
Senegal	2004
Seychelles	1993
South Africa	1995
Togo	2009 ²⁶

Source: Amnesty International, Countries, <https://www.amnesty.org/en/countries/>. Retrieved on May 8, 2015.

- 2) 25 countries (46%) permit its use for ordinary crimes, but have not used it for at least 10 years and are believed to have a policy or established practice of not carrying out executions, or it is under a moratorium, which includes the following:

Table 2.2. African Moratorium Countries

²⁵ Hands Off Cain. "Death Penalty: Hands Off Cain Announces Abolition in Gabon". Retrieved on 14 February 2011.

²⁶ BBC News. "Togo abolishes the death penalty". 24 June 2009.

Country	Year of Last Execution
Algeria	1993
Burkina Faso	1988
Cameroon	1997
Central African Republic	1981
Comoros	1997 ²⁷
Democratic Republic of the Congo	2003
Congo	1982
Eritrea	1989
Ghana	1993
Guinea	2001 ²⁸
Kenya	1987
Lesotho	1984
Liberia	1995 ²⁹
Malawi	1992 ³⁰
Mali	1980
Mauritania	1987
Morocco	1993
Niger	1976
Sierra Leone	1998
Swaziland	1983
Country	Year of Last Execution
Tanzania	1994

²⁷Amnesty International. *"The death penalty: List of abolitionist and retentionist countries (October 1996)"*.

²⁸Amnesty International. *"Guinea: Death Penalty/Fear of Imminent Execution"*. (14 October 2001)

²⁹Amnesty International. *"West Africa: Time to abolish the death penalty"*. 9 October 2003.

³⁰Amnesty International. *"The death penalty worldwide: developments in 2004"*. 4 April 2005.

Tunisia	1991
Uganda	2005 ³¹
Zambia	1997
Zimbabwe	2005

Source: Amnesty International, Countries, <https://www.amnesty.org/en/countries/>. Retrieved on May 8, 2015.

- 3) 10 countries (19%) maintain the death penalty in both law and practice, which includes the following:

Table 2.3. African Retainer Countries

Country	Year of Last Execution
Botswana	2013
Egypt	2015
Equatorial Guinea	2014
Ethiopia	2007
Gambia	2012
Libya	2010 ³²
Nigeria	2013
Somalia	2015
South Sudan	2013
Sudan	2014

Source: Amnesty International, Countries, <https://www.amnesty.org/en/countries/>. Retrieved on May 8, 2015.

2. Americas

³¹ Evelyn Kiapi. *Death Penalty: Uganda's Laws Favour Execution*. (Inter Press, 2006)

³² Hands Off Cain. "Libya: 18 People Executed By Firing Squad". 30 May 2010.

Of the 35 independent states in the Americas that are UN members:

- 1) 16 countries (46%) have abolished it, which includes the following:

Table 2.4. American Abolitionist Countries

Country	Year Abolished
Argentina	2009 (military) 1853(civilian)
Bolivia	2013
Canada	1998
Colombia	1910
Costa Rica	1877
Dominican Republic	1966
Ecuador	1906
Haiti	1987
Honduras	1956
Mexico	1976
Nicaragua	1979
Panama	1903
Paraguay	1992
Suriname	1982
Uruguay	1907
Venezuela	1863

Source: Amnesty International, *Countries*, <https://www.amnesty.org/en/countries/>. Retrieved on May 8, 2015.

- 2) 4 countries (11%) retain it for crimes committed in exceptional circumstances (such as in time of war), which includes the following:

Table 2.5. American Retainer for Exceptional Circumstances Countries

Country	Year of Last Execution
Brazil	1876
Chile	1985
El Salvador	1973
Peru	1979

Source: Amnesty International, Countries, <https://www.amnesty.org/en/countries/>. Retrieved on May 8, 2015.

- 3) 13 countries (37%) permit its use for ordinary crimes, but have not used it for at least 10 years and are believed to have a policy or established practice of not carrying out executions, or it is under a moratorium, which includes the following:

Table 2.6. American Moratorium Countries

Country	Last Year of Execution
Antigua and Barbuda	1991
Bahamas	2000
Barbados	1984
Belize	1985
Cuba	2003
Dominica	1986

Country	Last Year of Execution
Grenada	1978
Guatemala	2000
Guyana	1997
Jamaica	1988
Saint Lucia	1995
Saint Vincent and the Grenadines	1995
Trinidad and Tobago	1999

Source: Amnesty International, Countries, <https://www.amnesty.org/en/countries/>. Retrieved on May 8, 2015.

- 4) 2 countries (6%) maintain the death penalty in both law and practice, which includes the following:

Table 2.7. American Retainer Countries

Country	Last Year of Execution
Saint Kitts and Nevis	2008 ³³
United States	2015

Source: Amnesty International, Countries, <https://www.amnesty.org/en/countries/>. Retrieved on May 8, 2015.

3. Asia-Pacific

Of the 57 independent countries in the Asia-Pacific region that are UN member or observer states:

- 1) 20 countries (35%) have abolished it, which includes the following:

³³ Amnesty International. "St Kitts and Nevis: Execution is a shameless act". 22 December 2008.

Table 2.8. Asia-Pacific Abolitionist Countries

Country	Year Abolished
Australia	1985
Bhutan	2004
Cambodia	1989
F.S. Micronesia	1986
Fiji	2015
Kiribati	1979
Kyrgyzstan	2007
Marshall Islands	1986
Mongolia	2012
Nepal	1997
New Zealand	2007
Palau	1994
Philippines	2006
Samoa	2004 ³⁴
Solomon Islands	1978
Timor-Leste	2002 ³⁵
Turkmenistan	1999
Tuvalu	1978
Uzbekistan	2008 ³⁶
Country	Year Abolished
Vanuatu	1980

³⁴ Samoan Crimes (Abolition of Death Penalty) Amendment Act 2004.

³⁵ "Constitution of the Democratic Republic of Timor-Leste"

³⁶ Amnesty International. "Uzbekistan: Further information on: Fear of imminent execution/torture and ill-treatment". 7 April 2005.

Source: Amnesty International, Countries, <https://www.amnesty.org/en/countries/>. Retrieved on May 8, 2015.

- 2) 2 countries (4%) retain it for crimes committed in exceptional circumstances (such as in time of war), which includes the following:

Table 2.9. Asia-Pacific Retainer for Exceptional Crimes
Countries

Country	Year of Last Execution
Israel	1962
Kazakhstan	2003 ³⁷

Source: Amnesty International, Countries, <https://www.amnesty.org/en/countries/>. Retrieved on May 8, 2015.

- 3) 12 countries (21%) permit its use for ordinary crimes, but have not used it for at least 10 years and are believed to have a policy or established practice of not carrying out executions, or it is under a moratorium, which includes the following:

Table 2.10: Asia-Pacific Moratorium Countries

Country	Year of Last Execution
Brunei	1957 ³⁸
Country	Year of Last Execution
Laos	1989

³⁷ Amnesty International. "The Death Penalty Worldwide: Developments in 2003". 5 April 2004.

³⁸ United States Bureau of Consular Affairs. "Brunei – Country Specific Information".

Lebanon	2004 ³⁹
Maldives	1952 ⁴⁰
Myanmar	1993
Nauru	Never Executed
Papua New Guinea	1954
Qatar	2003 ⁴¹
South Korea	1997 ⁴²
Sri Lanka	1976
Tajikistan	2004
Tonga	1982

Source: Amnesty International, Countries, <https://www.amnesty.org/en/countries/>. Retrieved on May 8, 2015.

- 4) 23 countries (40%) maintain the death penalty in both law and practice, which includes the following:

Table 2.11. Asia-Pacific Retainer Countries

Country	Year of Last Execution
Afghanistan	2015
Bahrain	2010 ⁴³
Bangladesh	2015
China	2015
Country	Year of Last Execution
India	2013

³⁹ "Lebanon resumes executions after 5-year lull". Sunday Observer. (18 January 2004).

⁴⁰ Adam Haleem. "Family demands death penalty". (Mali: Maldives Culture. 2002). P. 54

⁴¹ "Indian executed in Qatar". The Hindu, (12 March 2003), P. 1

⁴² Amnesty International. "Death Penalty News: December 2002". 1 January 2003.

⁴³ Amnesty International. "Bahrain: Bangladeshi man executed in Bahrain". 9 July 2010.

Indonesia	2015 ⁴⁴
Iran	2015
Iraq	2015
Japan	2014
Jordan	2015 ⁴⁵
Kuwait	2013
Malaysia	2014
North Korea	2015 ⁴⁶
Oman	2007
Pakistan	2015
Palestine	2014 ⁴⁷
Saudi Arabia	2015
Singapore	2015
Syria	2013 ⁴⁸
Thailand	2009 ⁴⁹
United Arab Emirate	2014
Vietnam	2014

Source: Amnesty International, Countries, <https://www.amnesty.org/en/countries/>. Retrieved on May 8, 2015.

4. Europe

⁴⁴ "Six drug convicts be executed Sunday: AGO". The Jakarta Post. 16 January 2015.

⁴⁵ BBC News. "Jordan executes convicted jihadists after pilot's death" <http://www.bbc.com/news/world-middle-east-31124900>, Retrieved on April 30, 2015

⁴⁶ Sam Kim, "North Korea leader Kim Jong Un executes army general in latest purge of senior officials: reports" <http://news.nationalpost.com/news/world/north-korea-leader-kim-jong-un-executes-army-general-in-latest-purge-of-senior-officials-reports>. Retrieved on April 30, 2015

⁴⁷ Human Rights Watch, "Gaza: Halt Executions" <http://www.hrw.org/news/2014/08/25/gaza-halt-executions>. Retrieved on April 30, 2015

⁴⁸ The Guardian. Syrian regime document trove shows evidence of 'industrial scale' killing of detainees <http://www.theguardian.com/world/2014/jan/20/evidence-industrial-scale-killing-syria-war-crimes>. Retrieved on April 30, 2015

⁴⁹ Amnesty International. "Thailand carries out first executions in six years". 26 August 2009.

Of the 49 independent states in Europe that are UN members or have UN Observer status:

1) 47 countries (96%) have abolished it, which includes the following:

Table 2.12. European Abolitionist Countries

Country	Year Abolished
Albania	2007
Andorra	1990
Armenia	1998
Austria	1968
Azerbaijan	1998
Belgium	1996
Bosnia and Herzegovina	1998
Bulgaria	1998
Cyprus	2002
Croatia	1991
Czech Republic	1990
Denmark	1978
Estonia	1998
Finland	1972
France	1981
Georgia	2006
Germany	1949 (West Germany) 1987 (East Germany)

Country	Year Abolished
Greece	2001
Hungary	1990
Iceland	1928 ⁵⁰
Ireland	1990
Italy	1948
Latvia	2012
Liechtenstein	1987
Lithuania	1998
Macedonia	1991
Malta	2000
Moldova	2005
Monaco	1962
Montenegro	1995
Netherlands	2010
Norway	1979
Poland	1997
Portugal	1867
Romania	1990 ⁵¹
San Marino	1865
Serbia	1995
Slovakia	1990

⁵⁰ Ragnheidur Bragadottir. "Dauðarefsingar á Íslandi" [Death penalties in Iceland] (in Icelandic). Akureyri, Iceland: Akureyri Art Museum. Retrieved 5 April 2013. *Árið 1928 var til meðferðar á Alþingi frumvarp til breytinga á almennum hegningarlögum. Þingmaður Dalamanna, Sigurður Eggerz, setti þá fram tillögu um afnám líflátsrefsinga. Var hún samþykkt án teljandi umræðna og var dauðarefsing þar með afnumin á Íslandi.*

⁵¹Romanian National Salvation Front Council. Decree-Law No. 6".

Country	Year Abolished
Slovenia	1991
Spain	1995
Sweden	1973
Switzerland	1992
Turkey	2004
Ukraine	2000
United Kingdom	2006 (Jersey) 1998 (United Kingdom)
Vatican City	1969

Source: Amnesty International, Countries, <https://www.amnesty.org/en/countries/>. Retrieved on May 8, 2015.

- 2) 1 country (2%) permit its use for ordinary crimes, but have not used it for at least 10 years and are believed to have a policy or established practice of not carrying out executions, or it is under a moratorium, which includes the following:

Table 2.13: European Moratorium Country

Country	Year of Last Execution
Russia	1996

Source: Amnesty International, Countries, <https://www.amnesty.org/en/countries/>. Retrieved on May 8, 2015.

- 3) 1 country (2%) maintains the death penalty in both law and

practice, which includes the following:

Table 2.14. European Retainer Country

Country	Year of Last Execution
Belarus	2014 ⁵²

Source: Amnesty International, Countries, <https://www.amnesty.org/en/countries/>. Retrieved on May 8, 2015.

II. Universal Declaration on Human Rights (UDHR)

Human rights are moral principles or norms⁵³ that describe certain standards of human behavior, and are regularly protected as legal rights in municipal and international law. Human rights "inherent in all human beings"⁵⁴ regardless of their nation, location, language, religion, ethnic origin or any other status.⁵⁵ They are applicable everywhere and at every time in the sense of being universal.⁵⁶ They should not be taken away except as a result

⁵² Hands off Cain. "BELARUS: CONVICTED MURDERER EXECUTED". 18 April 2014.

⁵³ James Nickel, with assistance from Thomas Pogge, M.B.E. Smith, and Leif Wenar, *Stanford Encyclopedia of Philosophy* (Stanford : 2003)

⁵⁴ Burns H. Weston, *Encyclopedia Britannica*, (United States : 2014) pg. 79

⁵⁵ The United Nations, Office of the High Commissioner of Human Rights, What are human rights?

⁵⁶ James Nickel, with assistance from Thomas Pogge, M.B.E. Smith, and Leif Wenar, *loc. cit*

of due process based on specific circumstances,⁵⁷ and require freedom from unlawful imprisonment, torture, and execution.⁵⁸

Human rights is seen as an important issue ever since. United Nations had proof it by holding Universal Declarations on Human Rights on 10 December 1948 at the Palais de Chaillot, Paris. The Declaration arose directly from the experience of the Second World War and represents the first global expression of rights to which all human beings are inherently entitled.

UDHR consists of 30 articles,⁵⁹ which could be summarized that all human being are entitled to have 18 rights that cannot be denied, that are:⁶⁰

- 1) Life;
- 2) independence and security;
- 3) recognized personality;
- 4) the same recognition to others under the law to obtain legal guarantees in criminal cases, as examined in public, presumed innocent unless there is valid evidence;
- 5) enter and exit the territory of a State;
- 6) getting asylum;
- 7) getting a nationality;

⁵⁷ The United Nations, *loc. cit*

⁵⁸ Merriam-Webster dictionary, "rights (as freedom from unlawful imprisonment, torture, and execution) regarded as belonging fundamentally to all persons"

⁵⁹ United Nations, "The Universal Declarations of Human Rights" <http://www.un.org/en/documents/udhr/index.shtml#a18>, Retrieved on 29 April 2015

⁶⁰ Ibid.

- 8) obtain property rights to objects;
- 9) free to express their thoughts and feelings;
- 10) free religion;
- 11) remark;
- 12) convene and assemble;
- 13) social security;
- 14) getting a job;
- 15) trade;
- 16) education;
- 17) participated in the cultural movement in society;
- 18) Enjoy the arts and participate in the advancement of science.

Brazil, is one of the country in the world that voted in favor of the declaration and ratified it.⁶¹ Unfortunately, Indonesia did not take part on this declaration of human rights. However, Indonesia itself have their own human rights law, as has been enacted on Act. No. 39/2009 regarding Human Rights. Both Act No. 39 /2009 and UDHR admit that human rights is a set of rights attached to nature and human existence.⁶² Another crucial similarity between Act No. 39/2009 and UDHR is both acknowledge the right to live of a human being.

⁶¹ United Nations, "Yearbook of the United Nations 1948–1949". P. 535

⁶² Indonesian Human Rights Law Act No. 39/2009. Art. 1 Para.1

III. International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966, and in force from 23 March 1976. It commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial. As of April 2014, the Covenant has 74 signatories and 168 parties.⁶³

The ICCPR is monitored by the United Nations Human Rights Committee (a separate body to the United Nations Human Rights Council), which reviews regular reports of States parties on how the rights are being implemented. States must report initially one year after acceding to the Covenant and then whenever the Committee requests (usually every four years). The Committee normally meets in Geneva and normally holds three sessions per year.

The contents of the convention can be summarized as the following:

⁶³ United Nations. "UN Treaty Collection: International Covenant on Civil and Political Rights". 6 March 2012.

1) Part 1 (Article 1) recognizes the right of all peoples to self-determination, including the right to "freely determine their political status",⁶⁴ pursue their economic, social and cultural goals, and manage and dispose of their own resources. It recognizes a negative right of a people not to be deprived of its means of subsistence,⁶⁵ and imposes an obligation on those parties still responsible for non-self-governing and trust territories (colonies) to encourage and respect their self-determination.⁶⁶

2) Part 2 (Articles 2 – 5) obliges parties to legislate where necessary to give effect to the rights recognized in the Covenant, and to provide an effective legal remedy for any violation of those rights.⁶⁷ It also requires the rights be recognized "without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,"⁶⁸ and to ensure that they are enjoyed equally by women.⁶⁹ The rights can only be limited "in time of public emergency which threatens the life of the nation,"⁷⁰ and even then no derogation is permitted from the rights to life, freedom from torture and

⁶⁴ ICCPR, Article 1.1.

⁶⁵ Ibid, Article 1.2.

⁶⁶ Ibid, Article 1.3.

⁶⁷ Ibid, Article 2.2, 2.3

⁶⁸ Ibid, Article 2.1

⁶⁹ Ibid, Article 3

⁷⁰ Ibid, Article 4.1

slavery, the freedom from retrospective law, the right to personhood, and freedom of thought, conscience and religion.⁷¹

- 3) Part 3 (Articles 6 – 27) lists the rights themselves. These include rights to: physical integrity, in the form of the right to life and freedom from torture and slavery.⁷² Liberty and security of the person, in the form of freedom from arbitrary arrest and detention and the right to habeas corpus.⁷³ Procedural fairness in law, in the form of rights to due process, a fair and impartial trial, the presumption of innocence, and recognition as a person before the law.⁷⁴ Individual liberty, in the form of the freedoms of movement, thought, conscience and religion, speech, association and assembly, family rights, the right to a nationality, and the right to privacy.⁷⁵ Prohibition of any propaganda for war as well as any advocacy of national or religious hatred that constitutes incitement to discrimination, hostility or violence by law.⁷⁶ Political participation, including the right to the right to vote.⁷⁷ Non-discrimination, minority rights and equality before the law.⁷⁸

⁷¹ Ibid, Article 4.2

⁷² Ibid, Article 6, 7, 8

⁷³ Ibid, Article 9, 10, 11

⁷⁴ Ibid, Article 14, 15, 16

⁷⁵ Ibid, Articles 12, 13, 17 – 24

⁷⁶ Ibid, Article 20

⁷⁷ Ibid, Article 25

⁷⁸ Ibid, Article 26, 27

- 4) Part 4 (Articles 28 – 45) governs the establishment and operation of the Human Rights Committee and the reporting and monitoring of the Covenant. It also allows parties to recognize the competence of the Committee to resolve disputes between parties on the implementation of the Covenant.⁷⁹
- 5) Part 5 (Articles 46 – 47) clarifies that the Covenant shall not be interpreted as interfering with the operation of the United Nations or "the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources".⁸⁰
- 6) Part 6 (Articles 48 – 53) governs ratification, entry into force, and amendment of the Covenant.

Article 6 does not prohibit the death penalty, it restricts its application to the "most serious crimes" and forbids it to be used on children and pregnant women or in a manner contrary to the Convention on the Prevention and Punishment of the Crime of Genocide. The UN Human Rights Committee interprets the Article as "strongly suggesting that abolition is desirable", and regards any progress towards abolition of the death penalty as advancing this right. Abolishing death sentence is decision of each country, where any country that in favor to become an abolitionist country can sign and ratified the Second Optional Protocol to the International Covenant on

⁷⁹ Ibid, Article 41, 42

⁸⁰ Ibid, Article 47

Civil and Political Rights, aiming at the abolition of the death penalty which is a side agreement to the International Covenant on Civil and Political Rights.

Both Indonesia and Brazil had ratified this convention a while ago. Indonesia had ratified by Act No. 12/2005 regarding the ICCPR. On the other hand, Brazil, signed the convention on 12 December 1991 and ratified it on 24 January 1992.

IV. Vienna Convention on Diplomatic Relations 1961

The Vienna Convention on Diplomatic Relations of 1961 is an international treaty that defines a framework for diplomatic relations between independent countries. It specifies the privileges of a diplomatic mission that enable diplomats to perform their function without fear of coercion or harassment by the host country. This forms the legal basis for diplomatic immunity. Its articles are considered a cornerstone of modern international relations. As of April 2014, it has been ratified by 190 states.⁸¹ See appendix for the list of countries.

The Vienna Convention on Diplomatic Relation 1961 consists of 53 articles. Following is a basic overview of its key provisions:

⁸¹ United Nations, "Vienna Convention on Diplomatic Relations". United Nations Treaty Collection.

- 1) Article 9. The host nation at any time and for any reason can declare a particular member of the diplomatic staff to be *persona non grata*. The sending state must recall this person within a reasonable period of time, or otherwise this person may lose their diplomatic immunity.
- 2) Article 22. The premises of a diplomatic mission, such as an embassy, are inviolate and must not be entered by the host country except by permission of the head of the mission. Furthermore, the host country must protect the mission from intrusion or damage. The host country must never search the premises, nor seize its documents or property. Article 30 extends this provision to the private residence of the diplomats.
- 3) Article 27. The host country must permit and protect free communication between the diplomats of the mission and their home country. A diplomatic bag must never be opened even on suspicion of abuse. A diplomatic courier must never be arrested or detained.
- 4) Article 29. Diplomats must not be liable to any form of arrest or detention. They are immune from civil or criminal prosecution, though the sending country may waive this right under Article 32. Under Article 34, they are exempt from most taxes, and under Article 36 they are exempt from most customs duties.
- 5) Article 31.1c Actions not covered by diplomatic immunity: professional activity outside diplomat's official functions.

- 6) Article 37. The family members of a diplomat that are living in the host country enjoy most of the same protections as the diplomats themselves.

V. Indonesia

1. Indonesia's Legal System

Law of Indonesia is based on a civil law system from the Roman Dutch law, intermixed with customary law and Islamic law. Before the Dutch colonization in the sixteenth century, indigenous kingdoms ruled the archipelago independently with their own custom laws, known as *adat*. Foreign influences from India, China and Arabia have not only affected the culture, but also weighed in the customary *adat* laws.

Islamic law or "*sharia*", has also played some part in Indonesian law. Aceh is the only part of Indonesia to apply Sharia in full. Islamic courts in Aceh had long handled cases of marriage, divorce and inheritance. After special autonomy legislation was passed in 2001, the reach of courts extend to criminal justice.⁸² In 2014, the provincial government of Aceh extended sharia's reach, enacting and

⁸² Crisis Group, "Islamic Law and Criminal Law in Aceh", http://www.crisisgroup.org/~media/Files/asia/south-east-asia/indonesia/117_islamic_law_and_criminal_justice_in_aceh.ashx. Retrieved on July 4, 2015.

enforcing sharia to apply it to non-Muslims as well.⁸³ In other parts of Indonesia, religious courts have jurisdiction over civil cases between Muslim spouses on matters concerning marriage, divorce, reconciliation, and alimony. Some banks in Indonesia even uses *sharia* in operating their banks.

Dutch presence and subsequent occupation of Indonesia for 350 years has left a legacy of Dutch colonial law, largely in the Indonesia civil code. Following the independence in 1945, Indonesia began to form its own modern Indonesian law, not developing it from scratch, but modifying precepts of existing laws. Dutch legal decisions maintain some authority in Indonesia through application of the concordance principle. The four components of *adat*, or customary law; Dutch-Roman law; Islamic law; and modern Indonesian law co-exist in the current law of Indonesia. For example, commercial law is grounded upon the Commercial Code 1847 (*Kitab Undang-Undang Hukum Dagang* or *Wetboek van Koophandel*), a relic of the colonial period. However, commercial law is also supplemented by a large number of new laws enacted since independence. They include the Banking Law 1992 (amended in 1998), Company Law 1995, Capital Market Law 1995, Antimonopoly Law 1999 and the Oil & Natural

⁸³ Hotli Simanjuntak, "Aceh Fully Enforces Sharia", <http://www.thejakartapost.com/news/2014/02/07/aceh-fully-enforces-sharia.html>. Retrieved on July 4, 2015.

Gas Law 2001. *Adat* law is less conspicuous. However, some *adat* principles such as “consensus through decision making” (*musyawarah untuk mufakat*) appear in modern Indonesian legislation.⁸⁴

Civil law is a legal system originating in Europe, intellectualized within the framework of late Roman law, and whose most prevalent feature is that its core principles are codified into a referable system which serves as the primary source of law.⁸⁵

Conceptually, civil law proceeds from abstractions, formulates general principles, and distinguishes substantive rules from procedural rules.⁸⁶

It holds case law to be secondary and subordinate to statutory law.

When discussing civil law, one should keep in mind the conceptual difference between a statute and a code article. The marked feature of civilian systems is that they use codes with brief text that tend to avoid factually specific scenarios.⁸⁷

The Indonesian judicial system comprises several types of courts under the oversight of the Supreme Court (*Mahkamah Agung*).

Following the civil law tradition of The Netherlands, Indonesian

⁸⁴ Benny Tabalujan, “The Indonesian Legal System: An Overview”, <http://www.llrx.com/features/indonesia.htm>, Retrieved on April 25, 2015.

⁸⁵ Washington Probate, “Estate Planning & Probate Glossary”, (Washington : Probate, 2008). P. 19

⁸⁶ Michel Fromont, “Grands systèmes de droit étrangers”, 4th edn. (Paris : Dalloz, 2001), P.8

⁸⁷ “The role of legislation is to set, by taking a broad approach, the general propositions of the law, to establish principles which will be fertile in application, and not to get down to the details. . . .” Alain Levasseur, *Code Napoleon or Code Portalis?*, (Paris: Tul Rev, 1969).

courts do not apply the principle of precedent which is so familiar among common law jurisdictions.

Most disputes appear before the courts of general jurisdiction, with the court of first instance being the State Court (*Pengadilan Negeri*). There are about 250 State Courts throughout Indonesia, each with its own territorial jurisdiction. Appeals from the State Court are heard before the High Court (*Pengadilan Tinggi*), of which there are around 20 throughout Indonesia. The High Court is a district court of appeal. Appeals from the High Court and, in some instances from the State Court, may be made to the Supreme Court located in Jakarta. The Supreme Court can hear a cassation appeal (*kasasi*) which is a final appeal from lower courts. It can also conduct a case review (*peninjauan kembali*) if, for example, new evidence is found which justifies a re-hearing.⁸⁸

In 1998, the Indonesian authorities established the Commercial Court (*Pengadilan Niaga*). Initially, the Commercial Court is tasked to handle bankruptcy and insolvency applications. Its jurisdiction can be extended to other commercial matters. Appeals from the Commercial Court proceed direct to the Supreme Court. There is also a State

⁸⁸ Benny Tabalujan, op.cit.

Administrative Court (*Pengadilan Tata Usaha Negara*) which hears administrative law cases filed against the government.⁸⁹

In the 2001 constitutional amendments, provision was made for the creation of the Constitutional Court (*Mahkamah Konstitusi*). Among other matters, the Constitutional Court has the jurisdiction to hear cases involving the constitutionality of particular legislation, results of a general election, as well as actions to dismiss a President from office.⁹⁰

2. Death Sentence in Indonesia

As one of the most populous country in the world, Indonesia still practices death sentence. The first death sentence for the very first time happen in Indonesia on 1973.⁹¹ Till today, Indonesia had put people from 18 foreign countries in death row. This 18 foreign countries consist of Australia, Brazil, China, France, Ghana, Great Britain, India, Iran, Malawi, Malaysia, Netherlands, Nigeria, Pakistan, Senegal, Sierra Leone, the United States, Vietnam, and Zimbabwe that all had been dealing with drugs case in Indonesia.⁹² Although

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Roger Hood, *The Death Penalty: A Worldwide Perspective*. (New York : Oxford University Pres, 2003). P. 48

⁹² Commission for the Disappeared and Victims of Violence (KontraS), *The Death Penalty (Hukuman Mati)* . 2013.

aggressively impose the death penalty, but Indonesia is the country that aggressively to defend its citizens in a death sentence abroad.

Death-sentenced inmates are executed by firing squad.⁹³ The prisoner blindfolded is led to a grassy area where they have an option to sit or stand.⁹⁴ Firing squads are made up of 12 people, three of whose rifles are loaded with live ammunition, while the other nine are loaded with blanks. The squad fires from a distance of between five and ten meters.⁹⁵ If the prisoner does not die, the Commander is required to issue a final bullet to the prisoner's head.⁹⁶ A prisoner only learns of his impending execution 72 hours in advance.⁹⁷

The following is a list of the criminal offenses that carry the death penalty in Indonesia:⁹⁸

1. Attempt with intent to deprive the President or Vice-President of his or her life or liberty or to render him or her unfit to govern

⁹³ Penal Code of Indonesia, art. 11, 1915, as amended through to Feb. 27, 1982, translated by: Ministry of Justice. For current status, see Impartial, Inveighing Against the Death Penalty in Indonesia, p. 30, 2010. Amnesty International, Death Penalty/Fear of Imminent Execution, ASA 21/011/2008, July 10, 2008. Amnesty Intl., Indonesia: First execution in four years “shocking and regressive”, <http://www.amnesty.org/en/news/indonesia-first-execution-four-years-shocking-and-regressive-2013-03-15>

⁹⁴ Lucy Cormack . "Drug traffickers in Indonesia face firing squad of 12 in first executions of 2015". *Sydney Morning Herald*. (January 17, 2015)

⁹⁵ Ibid.

⁹⁶ "Indonesia widens use of executions". *New York Times*. (July 11, 2008)

⁹⁷ Emily Crane, Nelson Groom and Candace Sutton. "Bali Nine drug smuggler could be given just 72 HOURS notice before he faces a firing squad after Indonesian President rejects his plea to be spared execution". *Dailymail*. (January 7, 2015)

⁹⁸ Commission for the Disappeared and Victims of Violence (KontraS), *op. cit.*

(Indonesian Criminal Code (*Kitab UU Hukum Pidana* – KUHP)
Art. 104)

2. Aiding or protecting Indonesia's enemies at war (KUHP Art. 123 & 124)
3. Fraud in delivery of military materials in time of war (KUHP Art. 127)
4. Killing the head of state of a friendly state (KUHP Art. 140)
5. Premeditated murder (KUHP Art. 340)
6. Robbery or theft resulting in grave injury or death (KUHP Art. 365)
7. Piracy resulting in death (KUHP Art. 444)
8. Instigating or inciting rebellion or riot against a state defense company during times of war (KUHP)
9. Extortion with violence (KUHP)
10. Possession and misuse of firearm and/or other explosive (Emergency Law No. 12/1951)
11. Criminal acts during air flights or against aviation infrastructure (Law No. 4/1976)
- 12. Production, transit, import and possession of psychotropic drugs (Law No. 5/1997 on Psychotropic Drugs)**
 - 1) Article 59: Whoever:

a) use of psychotropic Group 1 other than referred to in Article 4 paragraph (2); or

b) produce and / or use in the production process psychotropic Group 1 as referred to in Article 6; or

c) distributing psychotropic Group 1 does not comply with the provisions referred to in Article 12 paragraph (3); or

d) import psychotropic Group 1 in addition to the benefit of Sciences; or

e) unlawfully possessing, storing and / or brought psychotropic Group 1 shall be punished with a minimum imprisonment of 4 (four) years, a maximum of 15 (fifteen) years and fined at least Rp. 150,000,000.00 (one hundred and fifty million rupiah), and at most Rp.750.000 000,00 (seven hundred and fifty million rupiah).

2) Article 59 Paragraph 2: If the criminal offense referred to in paragraph (1) shall be organized shall be punished with death or imprisonment for life or imprisonment for 20 (twenty) years of imprisonment and a fine of Rp. 750,000,000.00 (seven hundred and fifty million rupiah).

13. Production, transit, import and possession of narcotics (Law No. 22/1997 on Narcotics)

- 1) Article 80 Paragraph 1: Whoever without authority and unlawfully manufacture, process, extract, convert, assemble, or provide narcotics Category I, shall be punished with death or imprisonment for life, or imprisonment maximum of 20 (twenty) years and a maximum fine of Rp.1,000,000.000,00 (one billion rupiah);
- 2) Article 80 Paragraph 2: When the offenses referred to in paragraph (1) letter a prior conspiracy, punishable by the death penalty or imprisonment for life or imprisonment of 4 (four) years old insolent twenty (20) years and a fine of at least Rp 200,000. 000,00 (two hundred million rupiah) and maximum Rp 2,000,000,000.00 (two billion rupiah);
- 3) Article 80 Paragraph 3: When the offenses referred to in paragraph (1) letter a is executed organized manner, shall be punished with death or imprisonment for life or a term of imprisonment of five (5) years and a maximum of 20 (twenty) years and a fine of at least Rp 500,000. 000,00 (five hundred million rupiah) and maximum Rp 5,000,000,000.00 (five billion dollars);
- 4) Article 81 Paragraph 3: When the offenses referred to in paragraph (1) letter a is executed organized manner, shall be punished with death or imprisonment for life, or imprisonment

for a minimum of 4 (four) years and a maximum of 20 (twenty) years and a fine of at least Rp 500,000,000.00 (five hundred million rupiah) and maximum Rp 4,000,000,000.00 (four billion rupiah).

5) Article 82 Paragraph 1: Whoever without authority and unlawfully importing, exporting, offering for sale, distribute, sell, buy, deliver, receive, be an intermediary in the sale and purchase, or exchange narcotics Category I, shall be punished with death or imprisonment for life, or imprisonment a maximum of 20 (twenty) years and a fine of at most Rp 1,000,000,000.00 (one billion rupiah);

6) Article 82 Paragraph 2: When the offenses referred to in paragraph (1) is preceded by a conspiracy, then the offenses referred to in paragraph (1) letter a, shall be punished with death or imprisonment for life or imprisonment of 4 (four) years and a maximum of twenty (20) years and a fine of Rp 200,000,000.00 (two hundred million rupiah) and a maximum fine of Rp 2,000,000,000.00 (two billion rupiah);

7) Article 82 Paragraph 3: When the offenses referred to in paragraph (1) is executed in an organized manner, shall be punished with death or imprisonment for life, or imprisonment minimum 5 (five) years and a maximum of 20 (twenty) years

and a fine of at least Rp. 500,000,000.00 (five hundred million rupiah) and maximum Rp. 3,000,000,000.00 (three billion rupiah).

8) Article 96: Whoever within a period of five (5) years to repeat the criminal offense referred to in Article 78, 79, 80, 81, 82, 83, 84, 85 and 87 of the criminal can be coupled with one-third of the principal criminal, except that shall be punished dead, for life or imprisonment of 20 (twenty) years.

14. Corruption under “certain circumstances,” including repeat offenders and corruption committed during times of national emergency/disaster (Law No. 31/1999 on Corruption)

15. Gross violations of human rights, including genocide and crimes against humanity (Law No. 26/2000 on Human Rights Courts)

16. Acts of terrorism (Law No. 15/2003 on Combating Criminal Acts of Terrorism).

VI. Brazil

1. Brazil Legal System

Brazil is a civil law country and its legal system, which has its origin in Roman law, was implemented by the Portuguese during the colonization

period. The system is based on codes and legislation enacted primarily by the federal legislature power, and also by the legislatures from the states and municipalities. Brazil is a federative republic formed by the indissoluble union of the states, municipalities, and the Federal District.⁹⁹ The legislative, executive, and judicial branches compose the Brazilian government.¹⁰⁰

The National Congress is composed of the Chamber of Deputies and the Federal Senate¹⁰¹ and it exercises its legislative power through the legislative process.¹⁰² The executive branch encompasses the President of the Republic and the Ministers of State.¹⁰³ The judiciary consists of the Federal Supreme Court; National Council of Justice; Superior Tribunal of Justice; Federal Justice; Labor Justice; Electoral Justice; Military Justice; and State Justice.¹⁰⁴

The state judiciary of Brazil includes the following:

a. Trial Courts

Each state territory is divided into judicial districts named *comarcas*, which are composed of one or more municipalities. The 27 Courts of Justice have their headquarters in the capital of each State and have jurisdiction only over their State territories. The Federal District only

⁹⁹ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL [C.F.], promulgada em 5 de Outubro de 1988, art. 1

¹⁰⁰ Ibid, art. 2

¹⁰¹ Ibid, art. 44

¹⁰² Ibid, art. 59

¹⁰³ Ibid, art. 76

¹⁰⁴ Ibid, art. 92

presents the federal-level judicial branch. Each *comarca* has at least one trial court, a court of first instance. Each court of first instance has a law judge and a substitute judge. The judge decides alone in all civil cases and in most criminal cases. Only intentional crimes against life are judged by jury. The judges of the courts are nominated after a selection process. There are specialized courts of first instance for family litigation or bankruptcy in some *comarcas*. Judgments from these district courts can be the subject of judicial review following appeals to the courts of second instance.

b. Justice Tribunals

The highest court of a state judicial system is its court of second instance, the Courts of Justice. In each Brazilian State there is one Court of Justice (*Tribunal de Justiça in Portuguese*). Courts of Justice are courts of appeal, meaning they can review any decisions taken by the trial courts, and have the final word on decisions at state level, though their decisions may be overturned by the federal courts. Some states, as São Paulo and Minas Gerais, used to have Court of Appeals (*Tribunal de Alçada in Portuguese*) which had different jurisdiction. But the 45th Constitutional Amendment to the Brazilian Constitution,¹⁰⁵

¹⁰⁵ 45th Brazil Constitutional Amendment text

2. Death Sentence in Brazil

Capital punishment is a long unused form of punishment in Brazil, last reported in 1876, not having been officially used since the proclamation of the Republic in 1889. The last execution determined by the civil justice was of the black slave Francisco, in Pilar, Alagoas on April 28, 1876, and the last execution of a free man was, according to official records, of José Pereira de Sousa, in Santa Luzia, Goiás. He was hanged October 30, 1861. The last execution of women, as far as could be established for the time being, has most likely the one of slaves Rosa Cassange - innocent, as found out after - and Peregrina in Sabará, MG, executed by hanging April 14, 1858 (some sources quote April 13, 1858) by the Province of Minas Gerais executioner, a slave called Fortunato José. However, the death sentence was only fully abolished for common crimes after the proclamation of the Republic in 1889.

It was not abolished for certain military offenses in wartime.¹⁰⁶

Capital punishment for all non-military offences was abolished in Brazil by the 1988 Constitution. Currently, the death penalty may be applicable in Brazil only for military offences such as treason, murder, genocide, crimes against humanity, war crimes, and terrorism during

¹⁰⁶ Luís Francisco. *Impunidade no Brasil - Colônia e Império*. in: *Estudos Avançados* - V. 18. São Paulo, 2004; RIBEIRO, João Luiz. *No meio das galinhas as baratas não têm razão. A Lei de 10 de junho de 1835. Os escravos e a pena de morte no Império do Brasil (1822 - 1889)*. Rio de Janeiro, Editora Renovar, 2005; RIBEIRO, João Luiz. *A Violência Homicida diante do Tribunal do Júri da Corte Imperial do Rio de Janeiro* UFRJ, 2008.

wartime.¹⁰⁷ The sole method prescribed by law is death by firing squad.¹⁰⁸ The Military Penal Code advises that this penalty should be sentenced only in extreme cases, and that the President may grant a pardon for the convicted officer. However, Brazil has not engaged in any major armed conflict since the end of the World War II. Brazil is the only Portuguese-speaking country that still maintains the death penalty for some offenses. It also prohibits, in the same article that refers to the death penalty, the usage of life sentences, making Brazil one of the few countries which has abolished both life imprisonment and death penalty. According to the Brazilian Penal Code, a citizen cannot spend more than 30 continuous years incarcerated.

VII. *Persona non Grata*

In diplomacy, the term *persona non grata*, literally meaning "an unwelcome person," refers to a foreign person whose entering or remaining in a particular country is prohibited by that country's government. It is the most serious form of censure which one country can apply to foreign diplomats, who are otherwise protected by diplomatic immunity from arrest and other normal kinds of prosecution.

Under Article 9 of the Vienna Convention on Diplomatic Relations, a receiving State may "at any time and without having to explain its decision"

¹⁰⁷ The Brazilian Constitution 1998. Article 84, paragraph 19

¹⁰⁸ Military Penal Code of Brazil. Article 56

declare any member of a diplomatic staff persona non grata. A person so declared is considered unacceptable and is usually recalled to his or her home nation. If not recalled, the receiving State "may refuse to recognize the person concerned as a member of the mission."¹⁰⁹

With the protection of mission staff from prosecution for violating civil and criminal laws, depending on rank, under Articles 41 and 42 of the Vienna Convention, they are bound to respect national laws and regulations. Breaches of these articles can lead to a persona non grata declaration being used to punish erring staff. It is also used to expel diplomats suspected of espionage (described as "activities incompatible with diplomatic status") or any overt criminal act such as drug trafficking. The declaration may also be a symbolic indication of displeasure.

B. Operational Framework

1. Definition of Death Penalty

Literally, the terms of "death penalty" consists of two words: death and penalty.

- a. Death means "dying, end of life; being dead; cause of death; destruction."¹¹⁰

¹⁰⁹ Vienna Convention on Diplomatic Relations.

¹¹⁰ The Little Oxford Dictionary (Revised Seventh Edition, 2008), P. 160

- b. Penalty means “fine or other punishment; disadvantage, loss, etc., especially as result of one’s own actions;”¹¹¹

Based on the meanings mentioned above, it can be concluded that “death penalty” may be defined as “punishment to dead as a result of one’s action”.

2. Definition of Diplomatic Relation

Literally, the terms of “diplomatic relation” consists of two words: diplomatic and relation.

- a. Diplomatic means “involving the work of maintaining good relations between the governments of different countries; of or relating to diplomats or their work”.¹¹²
- b. Relation means “connection between people or things”.¹¹³

Based on the meanings mentioned above, it can be concluded that “diplomatic relation” may be defined as “connection between people or things involving the work of maintaining good relations between the governments of different countries; of or relating to diplomats or their work”

¹¹¹ *Ibid.* P. 466

¹¹² Merriam-Webster’s, “*diplomatic*” <http://www.merriam-webster.com/dictionary/diplomatic>. Retrieved on April 30, 2015.

¹¹³ The Little Oxford Dictionary, *op. cit.* P. 543

C. Theoretical Framework

I. Theory of Punishment

Mainly there are three philosophies on theory of punishment: utilitarian, retributive, and denouncing.¹¹⁴ The utilitarian side of the punishment coin states that when someone is punished for committing a crime, the good of the punishment should be greater than the total bad of the crime, and that a punishment shouldn't be unlimited.¹¹⁵ For example, a gravely ill criminal's incarceration no longer benefits society because he is unable to commit more crimes, so he may be released. Utilitarian punishment is meant to deter future crimes, while at the same time assuring the public that crime is not tolerated, and is swiftly punished.

The retributive side of punishment is meant, simply stated, to keep society happy. A happy society is one without crime, or at least low crime, and the threat of punishment is what keeps most people from committing crimes.¹¹⁶ In other words, punishment helps to keep society balanced. As opposed to the utilitarian side, which bases the severity of punishment upon how much it will benefit society as a whole, the retributive side instead looks at the actual illegal act,

¹¹⁴ Matthew Johnson, "Theories of Punishment: 5 Ways to Keep Society Together", <https://blog.udemy.com/theories-of-punishment/>, Retrieved on May 8, 2015.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

executing a punishment that fits the act. A large part of the retributive idea is that we have free will, and we choose to act out, but those without free will, such as people that are insane, or otherwise deemed incompetent, shall not be punished under this philosophy. If you'd like to learn more about mental health and the law, this course on the Mental Health Reform Act will get you caught up.

Finally, denouncement claims that a punishment should be an expression of society's condemnation of an act. It is a hybrid of the other two concepts: it is utilitarian in that the person fears public embarrassment and hence, deterred from committing the crime, and it is retributive in that it promotes the concept that criminals deserve to be punished.¹¹⁷ Retributive in that it promotes the concept that criminals deserve to be punished.

The following theories of punishment explain how and why justice is doled out to those that deserve it:¹¹⁸

a. Deterrence Theory

This theory of punishment refers to two different types of deterrence: general and specific. General deterrence focuses on society, and wishes to make an example out of a criminal so that everyone else will know that if they commit that particular crime,

¹¹⁷ Ibid

¹¹⁸ PSA Pillai's Criminal Law, Tenth Edition, 2008

they will have to go through what he or she went through. Specific deterrence is when the punishment is designed to make the specific criminal think twice about committing that crime again. Deterrence relies on the concept of fear, and is generally effective, but only when the punishment is meted out in a fashion that is severe, certain, and swift. One of the criticisms of specific deterrence theory is the high rates at which some people relapse back into crime (recidivism). Other faults of this theory are that certain crimes, such as crimes of passion, and those committed by those under the influence, will never be deterred.

b. Expiate Theory

Expiatory punishment theory plays a large part of the paroling process, and operates under the idea that if a criminal repents, or expiates, then he or she must be forgiven. Also part of the repenting process is the idea of atonement and reparations, or making up somehow for your crime to either the victim or their family. The idea behind expiation theory is that the current justice system forgets about the victim, and just focuses on punishing the criminal. Ideally, expiation would help do away with crimes that revolve around revenge, with reparations to the victim eradicating any monetary benefit the criminal may have realized as a result of the crime.

c. Incapacitation Theory

With the U.S. having more of their population in jail than any other country (.94%), this theory seems to be the most widely practiced in America. The idea is simple: if someone commits a crime, they must be taken off the streets and isolated from the general public. The idea is to not only protect others from these people, but to prevent them from committing any more crimes. Incapacitation is effective, and may result in lowered crime rates, but it is also quite expensive, with most of the associated costs going to building and operating prisons. Also worth noting is the emotional toll that it takes when it breaks apart families.

d. Rehabilitation/Reformation Theory

The idea behind the rehabilitation punishment theory is that no one is born a criminal, and that anyone can be reformed. The reasoning behind any criminal actions was that social, environmental, or economic forces acted on the perpetrator (or “nurture” in the nature vs. nurture argument), causing an otherwise productive and law-abiding member of society to act out, and that training, education, and other rehabilitation can transform them. This theory is especially successful with younger offenders.

e. Retribution Theory

The concepts of “just desserts” and “let the punishment fit the crime” are other ways to describe this theory, in which justice is seen in terms of fairness and proportionality. Proponents of retribution believe that the harshness of the punishment should fit the harshness of the crimes they are convicted of. Retribution is backward-looking in that past precedents must be referenced in order to find an appropriate punishment, but its major fault is that both the severity of the crimes and matching punishments rely too heavily upon subjective opinion, making a proper punishment difficult to agree upon.

II. Theory of Legal Protection

Legal protection is an act giving protection to human rights are harmed by others and the protection given to the public so that they can enjoy all the rights granted by law.¹¹⁹ There are two kinds of legal theory protection, namely:¹²⁰

¹¹⁹ Satjipto Raharjo, 1993. “Penyelenggaraan Keadilan dalam Masyarakat yang Sedang Berubah”. Jurnal Masalah Hukum.

¹²⁰ Philipus Hadjon, “*Perlindungan Hukum Bagi Rakyat Indonesia*”. (Surabaya: Bina Ilmu, 1987), P. 18

a. Preventive Legal Protection

At this preventive legal protection, legal subjects are given the opportunity to file an objection or opinion before a decision the government received a definitive form. The aim is to prevent disputes. Preventive legal protection is of great significance for the acts of government that is based on freedom of action because of the presence of preventive legal protection compelled the government to be cautious in making decisions based on discretion. In Indonesia there are no special arrangements regarding preventive legal protection.

b. Repressive Legal Protection

Protection of repressive laws aimed at resolving the dispute. Handling of legal protection by the General Court and Judicial Administration in Indonesia, including legal protection of this category. The principle of legal protection against government action is based and derived from the concept of the recognition and protection of human rights because according to the history of the west, the birth of concepts concerning the recognition and protection of human rights directed to the restrictions and obligations laying community and government. The second principle underlying the legal protection against acts of governance

is the rule of law. Associated with the recognition and protection of human rights, the recognition and protection of human rights a prominent place and can be associated with the purpose of state law.