

## CHAPTER I INTRODUCTION

### A. Background

Human Rights issues have been a popular issue fought by countries/states that have just enjoyed democracy. For many years, the democracy system was known as the political system that mainly focuses on upholding human rights. Developing and newly independent states would usually be the countries that have just enjoyed democracies. These countries face big challenges in enforcing human rights in accordance with the standard made by developed countries.

Since the end of the second world war on 1980s<sup>1</sup>, the subject of human rights become into debate in the global politics. National and international security issues are dominating world politics, thus the country becomes the main actor and the unit of analysis. Since 1948 the world has had a Declaration of Human Rights as a reference and guide for the whole country to respect human rights. However, the Declaration of Human Rights does not guarantee human rights abuses also perished in total. Examples of human rights violations in the form of mass killings, torture, rape, kidnapping, terrorism, and detention without trial are a common symptom occurs in various States of conflict-torn separatist or

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<sup>1</sup>The cold war ended in 1989-1990 was marked by the collapse of Berlin Wall on November 9th, 1989 as well as the Union of East Germany and West Germany on October 3rd, 1990. The development was followed by the dissolution of the Uni Soviet on December 25th, 1991 in conjunction with the retirement of Mikhail Gorbachev as head of State. Juwono Sudarsono, "State of Art International Relations : Reviewing the International Relations Theory," in the development of International Relations Study and Challenges of the future, (Jakarta : Pustaka Jaya, 1996). P.3.

the like.

The most well-known topic that violate human rights is death penalty. The death penalty or capital punishment has been commonly applied for centuries. The death penalty can be dated back to ancient history although no one can pinpoint where such an idea actually originated from. This draconian code once haunted society on a global scale and is well rooted in the national law. The death penalty is a punishment applied to a wide variety of offences spanning from the most severe cases to even petty theft. Capital punishment has been carried out through various methods and include, amongst others, the guillotine, crucifixion, boiling in oil, death by hanging, lethal injection, electric chair, shooting, and stoning to death.

In the last 50 years, however, the global society has started to move away from a pro-execution mindset to a new revolution of abolishing death sentencing. Over the years, more activists and jurists around the world have voiced concerns against this brutal, ruthless, and senseless sentencing and method of punishment. The main reason behind the success of abolishing the death sentence is when the citizens around the globe become more aware of the importance of their constitutional rights in the country they reside in. Most of this constitution have provisions such as 'right to life' and other provisions that discourage death sentencing.

In order to obey the regulation, Criminal Law usually defined as sanctions of exceptional punishment. This comprises all regarding actions

which threatened by criminal and where those criminal threats being created.<sup>2</sup> Based on records from international institution of human rights. Indonesia included as one of the country that implement death penalty threat in accordance to its criminal law system. Their figures of those death penalty such quite high after China, United States, Congo, Saudi Arabia, and Iran.<sup>3</sup>

On 10 December 1948, the General Assembly of the United Nations (United Nations MU) issued the Universal Declaration of Human Rights (UDHR). Universal Declaration of Human Rights (UDHR) contains the main points of human rights and fundamental freedoms, including the ideals of human beings enjoying the civil and political freedom. This can be achieved by creating the conditions whereby everyone may enjoy his civil rights and politics governed by international regulations.

After a long debate, in the 1951 session, the General Assembly requested the commission to design a Covenant of Civil and Political Rights, which contains the provisions of Article stating that all people have the right to determine their own lives. The United Nations Human Rights had successfully completed the drafted Covenant in accordance to the decision made in the United Nations General Assembly in 1951. After the article by article discussion, the United Nations General Assembly

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<sup>2</sup>Andi Hamzah and A. Sumangelipu, *The Criminal Death in Indonesia for past time, now, and future*. (Jakarta : Ghalia Indonesia, 1984). P.12.

<sup>3</sup>Imparsial Press Statement, *The Indonesian Human Rights Watch*, about A Must to Reject Death Penalty, (Jakarta : Kompas Cyber Media, 13 February 2003).

ratifies both the International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant on Civil and Political Rights on 16 December 1966 and entered into force on March 23, 1976 through Resolution No. 2200 A (XXI).

ICCPR has had considerable influence in shaping modern human rights: with its universal reach, the Covenant has been rightly described as ‘probably the most important human rights treaty in the world’.<sup>4</sup> As at the end of April 2009, 163 States had ratified the Covenant – over three-quarters of the States. These include States from all continents, with varying constitutional, political, and religious affiliations and developmental stages. For these States, the ICCPR presents a binding document requiring implementation of the rights as established in the text of the treaty.<sup>5</sup> Even for the those States which have refused to become parties to this treaty, it is no longer possible to evade the provisions – the Covenant is frequently used as evidence of customary international law or general principles of international law. The standards set out in the treaty provide a barometer for measuring State records.

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<sup>4</sup>*K.L. v. Denmark*, Communication No. 59/1979 (26 March 1980), UN Doc. CCPR/C/OP/1 at 24 (1984). The Committee found that the author’s submission an abuse of the right to petition. K.L.’s communication related to the author’s taxable income with the author claiming violation of Articles 14 and 26 of ICCPR. He had previously submitted a similar communication, which had been held inadmissible because of lack of factual evidence and substantiation of the actual violation of the rights. In the present instance there was a similar lack of substantiation. It was held inadmissible and an abuse of the right to petition. Although this is becoming increasingly so, regarding communications submitted a significant period of time after the violation with little or no justification for such a delay. *Ernst Zundel v. Canada*, Communication No. 1341/2005, UN Doc. CCPR/C/89/D/1341/2005 (2007), para 6.5.

<sup>5</sup>Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights* (United Kingdom : Clarendon Press, 1991). P.4.

Since the first Optional Protocol procedure came into effect in March 1979, as of 9 January 2009 the HRC had found 489 violations of various rights contained in the ICCPR. An analysis of the jurisprudence of HRC provides an impressive exhibition of the manner in which a body with limited resources and powers could nevertheless exert influence to protect the rights of individuals. The Committee has over the past two decades emerged as the most important organ striving for the universal enforcement of human rights within the framework of the United Nations. Imaginative and ambitious ideas have been taken up. Reference could be made to the provisions for informing the respondent State of desirable interim measures ‘to avoid irreparable damage to the victim’<sup>6</sup> (which is especially important in death penalty cases) and the publication of its final decision without abridgement in spite of Article 6 of the Protocol providing merely for a ‘summary of its activities’.<sup>7</sup> In contrast to the ECHR, the grounds for rejecting individual communications are restrictively applied. There is no time limit as compared to the ECHR’s six-month rule. While the Committee has utilised concepts of other human rights systems such as the ECHR’s doctrine of ‘margin of appreciation’,<sup>8</sup> it has been very restrictive in granting discretionary powers which are likely

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<sup>6</sup>Rule 92 [formerly Rule 86] of the Rules of Procedure provides authority to the Committee before forwarding its final views on the communication to the relevant State party to inform that State ‘of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation’.

<sup>7</sup>Article 6 Optional Protocol

<sup>8</sup>Leo R- Hertzberg, *Uit Mansson, Astrid Nikula and Marko and Tuovi Putkonen, represented by SETA (Organization for Sexual Equality) v. Finland*, Communication No. R.14/61 (7 August 1979), UN Doc. Supp No.40 (A/37/40) at 161 (1982), para 10.3.

to be misused.<sup>9</sup> In addition to finding violations, HRC has reiterated calls for providing an effective remedy as required under Article 2(3) of the ICCPR. Significantly, there is an elaboration of what constitutes an effective remedy, e.g. the release of victims, commutation of death penalty and provisions for compensation. HRC has reused imaginative policies to enhance consultative processes. In March 2003, HRC was briefed by a member of UN Security Council on issues relating to the significance of human rights law.<sup>10</sup> For the purpose of submitting communications, costs to be spent on petitioning are relatively small and there are no specific requirements relating to the language in which communications ought to be made. Despite these positive features, there are significant difficulties faced by the Committee.

Indonesia has been ratified the ICCPR into the Law No. 12 of 2005 which the ICCPR was regulated regarding the rights to life of human rights. Although Indonesia has ratified the ICCPR, yet they are still apply the death penalty in their Criminal Code System. Different from Indonesia, Malaysia was not ratified the ICCPR and yet they were implementing the death penalty in their Criminal Code System.

Based on the reasons above, the researcher uses to examine as to whether Indonesia and Malaysia have implemented international legal instruments (ICCPR) regarding human rights and death penalty in theirs

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<sup>9</sup>Javaid Rehman, *Second Edition International Human Rights*, (England : Pearson Education Limited, 2010). P.138.

<sup>10</sup>*Ibid*, P.113.

national law. Therefore the title of this research is **“The Implementation of The International Covenant on Civil and Political Rights (ICCPR) in Indonesia and Malaysia : Human Rights VS Death Penalty.”**

#### **B. Research Questions**

The researcher has identified some core problems and the questions arise in this regard are as follows:

1. Does Indonesia still permitted to conduct death penalty as they had ratified the ICCPR into National Law No. 12 of 2005?
2. Does Malaysia permitted to conduct the Death Penalty since they haven't ratified the ICCPR?
3. What is the similarities and differences of imposing the death penalty in Indonesia and Malaysia?

#### **C. Research Objectives and Benefits**

##### **Research Objectives**

The purposes of the research are:

1. To analyze the execution concept of death penalty in Indonesia whether violate human rights according to its National Law which ratified from ICCPR.
2. To explain whether Malaysia has ratified ICCPR or not and analyze the execution concept of death penalty in Malaysia whether violate human rights according to its National Law which *jus cogens* from ICCPR

3. To compare between both countries to know more the similarities and differences of imposing the death penalty in Indonesia and Malaysia.

#### **Research Benefits**

This research is expected to give benefits such as:

1. To promote and protect the human rights of the death penalty according to ICCPR.
2. To gain a better understanding regarding the issues on the human rights especially regarding the death penalty.