CHAPTER I

INTRODUCTION

1.1 Background

Death penalty is the heaviest punishment in criminal law. It is said as the heaviest because it takes away someone from the right to life. Right to life is an inherent right of a person since the person is born. Since we are born, we are determined with the right to life, therefore it is said as inherent right. However, death penalty is vested with power to take away those inherent rights of human under special circumstances. Death penalty is imposed to crime offenders which are assumed to be dangerous and a threat to social safety of a society, unless put to death.

The death penalty can provide for perfect revenge. For example, it punishes equally the criminal act of pre-meditated murder with the punishment of the same weight as mandated in the Article 340 of *Kitab Undang-Undang Hukum Pidana* or Indonesian Penal Code ("**KUHP**"). Such punishment is fulfilling if looked from the lens of retributivism. However, from the viewpoint of utilitarianism, death penalty is rather useless. Beccaria, Italian legal philosophy expert, says that death penalty is a total futility that has modernized human malignancy and has legalized barbarity.[1] National Commission on Human Rights (KOMNAS HAM) has encouraged to abolish

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[1] Cesare Beccaria, *Of Crime and Punishment*, Translated by Jane Grigson (New York: Marsilio Publisher, 1996), p. 16.

death penalty as it is seen as a violation to Human Rights.

Death penalty by itself has numerous problems and has become a subject of the debate of many discourses for many years. The death penalty is susceptible to wrong judgement. Prof Sahetapy, Criminal Law Expert from Airlangga University, says that death penalty is unique from any other forms of punishment. It is unique because once it is committed, the punishment can not be undone even in the case of erroneous decisions or in the case of new facts or evidence (novum). In other words, once the death penalty is executed, the person cannot be brought back to life even by the most sophisticated medical science.[2] It is different with imprisonment where the guilty person can be freed anytime the verdict is changed. In other words, death penalty is irreversible and prone to mistakes.

Andrew Chan and Myuran Sukumuran were arrested in 2005. They were involved in the "Bali Nine" case. On 14 February 2006, both of them were sentenced with death penalty on the consideration that they facilitated drug smugglers with money, plane tickets and hotel. The death penalty decision for Andrew Chan and Myuran Sukumaran has not changed after Bali District Court refused their appeals. In August 2008, they submitted an appeal with the utter request to be absolved from death penalty. In the appeal-level trial process, they confessed regret and begged for forgiveness. The warden of Kerobokan (the penitentiary venue for Andrew and Myuran) had given witness that both of them has contributed when in prison by holding

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[2] Prof. J E. Sahetapy, *Pidana Mati dalam Negara Pancasila* (Surabaya: Citra Aditya Bakti, 2007), p. 67.

computer and art training.[3] Both has asked for clemency from President Susilo Bambang Yudhoyono in 2012 and the Attorney General gave a year postponement to their execution. Both were executed in 2015 after President Joko Widodo refused to give clemency.

The case of Andrew Chan and Myuran Sukumaran gives us an overview of how death penalty can be counterproductive in fulfilling the aims of punishment. According to Andi Hamzah, Indonesian Criminal Law Legal expert, there are two main aims for criminal punishment, and it is typically dichotomized into the type of crimes committed.[4] The first aim is to rectify the offenders in hope that they will be able to associate back to the normal society.[5] The second aim is to create a deterrent effect and functionalize criminal sanction as a revenge according to the second precept of our *Reghstbeginsel* namely Pancasila.[6] Both the first aim and the second aim have been closed in the case of Andrew and Myuran as they have been put to an eternal sleep in the name of punishment. They could not fulfill the first aim which is to go back as a normal person to society. And also, the second aim which is to deter them from repeating the same crime (recidivist) and eventually self-improve. In other words, death penalty's main issue is that it works counterproductive to the essence of punishment which is to self-improve.

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[3] https://regional.kompas.com/read/2015/04/29/06330021/Ini.Kronologi.Kasus.Narkoba.Kelompok.Bali.Nine.?page=all, accessed on 9 June 2021.
[4] Andi Hamzah and Sumangelipu, *Pidana Mati Di Indonesia: Di Masa Lalu, Kini Dan Di Masa Depan* (Jakarta: Ghalia Indonesia, 1983), p. 14.
[5] Andi Hamzah and Sumangelipu, *Op.Cit.,* p. 15.
[6] Andi Hamzah and Sumangelipu, *Op.Cit.,* p. 69.

Despite, death penalty has been controversy and it often divides legal experts of this interest into two categories (pro-death penalty and against-death penalty), it is still a positivism in Indonesia. In fact, Indonesia is among the 56 (fifty-six) States which is de jure retentionist (country that upholds death penalty in law and in practice).[7] The positivism is shown in our positive laws, such as in the anti-terrorism law (Law No. 5 of 2018) and in Narcotics law (Law No. 35 of 2009). It is also accommodated in Indonesian Penal Code for grave crimes such as pre-meditated murder.

However, the overall trend universally is moving towards an abolitionist; countries that are retentionist start to be outnumbered by abolitionists. Out of 193 (one hundred and ninety-three) sovereign state members in the United Nations, 107 (one hundred and seven) countries are recorded to have abolished death penalty in law for all types of crimes (de jure abolitionist), 54 (fifty-four) countries still maintain death penalty in the positive law (de jure retentionist). 7 (seven) countries have turned to become abolitionist in ordinary crime (except for extraordinary crime such as terrorism) such as: Brazil, Peru, Chile, etc.[8] Besides the abolitionist for ordinary crime, there are countries who have been an abolitionist in practice (de facto abolitionist) – retain death penalty in the positive law but has not executed in recent 10 years – which include Russian Federation, Brunei Darussalam, South Korea, Ghana, Laos, Myanmar, Sri Lanka, and many more.[9] Two-thirds of total states have become an abolitionist.

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[7] Amnesty International, *Abolitionist and Retentionist Countries as of July 2018* (UN Secretary-General, 2015)

[8] Amnesty International, "Death Penalty" (22 August 2016).

[9] *Ibid.*

These abolitionist states think that death penalty would not give to the offender opportunity to improve and repent.[10]

The Author thinks that there is another side of the coin about death penalty to tell, despite it has defects which can be debated endlessly. For example, someone who commits pre-meditated murder has deserved to be put on the same gravity which is death. Imagine the effect of that murder to the family, to the parents, to the children of the victim. It would have left them with great scars that are so hard to be healed. They would have to go through sleepless nights with a great desire for revenge. Think of those criminals who have caused widespread terror and public fear and destroyed public amenities. Those who have supplied weapons and nuclear for terrorist to kill myriads of blameless civilian lives including newly born children with their mothers. How can such act be tolerated and pardoned from death penalty? How can such act that has outrageously blemished humanity be compromised with the hope that they can change?

The ultimate revenge for these vicious crimes is death penalty. However, the ultimate dilemma is between the susceptibility and irreversibility of death penalty and the great revengeful effect it can give to the victim. The issue such as principle of fair trial and the guarantee of accurate due process of law within the trial process of death convict is also important to be considered. For example, in the case of Mary Jane in

[10] Ridwan, "*Mewujudkan Karakter Hukum Progresif dari Asas-Asas Umum Pemerintahan yang Baik Solusi Pencarian dan Penemuan Keadilan yang Substantif"* (Jurnal Hukum Pro Justicia, Vol. 26, No. 2, 2008), p. 170.

2010. In the case, despite Mary Jane could only speak Tagalog, she was only assisted and provided with an Indonesian-English translator. The translator was reported to be only a college student (not professional) in her trial during July to October in 2010. Similarly, in the case of Raheem Agbaje, he was never accompanied with translator during the process of police investigation. In the court proceeding, Raheem Agbaje was only assisted with broken English, language which he did not speak well. Can the fair trial principle be upheld if language barrier exists?

The debate of the death penalty was intense since long. In the Sixth International Congress on the Prevention of Crime and Treatment of Offenders in Caracas, Venezuela from 25 August to 5 September 1980, the debate was already escalated between those supporting death penalty and those against it. Those supporting death penalty argue that the death penalty was hardly able to be removed because it has been engrained within the legal system. Additionally, the supporting delegation said that death penalty can prevent more violations of law and protect the victims.[11] T.B. Simatupang, a retired general and former chairman of Dewan Gereja Indonesia, argues that it is time to revoke death penalty from the positive law. But we must also concern that death penalty is an instrument to protect public safety and peace. He argues that death penalty must be discussed from the lens of public interest, so similar to killing in war, it is a self-defense to the public safety.[12]

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[11] Andi Hamzah and Sumangelipu, "*Pidana Mati di Indonesia: Di Masa Lalu, Kini Dan Di Masa Depan*" (Jakarta: Ghalia Indonesia, 1983), p. 35.
[12] Ibid.

Important to note that the death penalty in Indonesia was first legalized by Indonesian Penal Code (*Wetboek van Strafrecht Voor Nederlandsch-Indie*) which came into effect since 1 January 1918.[13] The death penalty was initiated by admittedly a law product of colonization. However, the Netherlands itself has abolished the death penalty (*doodstraf*) since 1870 for ordinary offenses and 1983 for all offenses.[14] The Netherlands has gone further by prohibiting death penalty in the Constitution (*grondwet*). Article 114 says "*De doodstraf kan niet worden opgelegd*", which means "the death penalty cannot be imposed". As a result, the death penalty does not exist in the Netherlands and will not exist in the future because the constitution forbids. Despite that, The Reformed Political Party (*Staatkundig Gereformeerde Partij*), a Christian right party, suggests and support the reinstitution of the death penalty in the Netherlands. They referred to Genesis 9:6 as the justification, "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man".[15] Another verse claimed to justify is Exodus 21:12, "He that smiteth a man, so that he dies, shall be surely put to death".[16]

Lemaire gave a comparative analysis between Indonesia and the Netherlands on why death penalty still applies in Indonesia despite the originator (the Netherlands) has turned into a complete abolitionist. He elaborated that the drafter (*ontwerper*) of

[13] Andi Hamzah and Sumangelipu, "*Pidana Mati di Indonesia: Di Masa Lalu, Kini, dan Di Masa Depan*" (Jakarta: Ghalia Indonesia, 1983), p. 23.
[14] Annemarieke Beijer, "The Debate on Capital Punishment in the Netherlands and Germany" (Atlanta: International Criminal Justice Review Volume 10, 2000), p. 98.
[15] Genesis 9:6 (King James Version)
[16] Exodus 21:12 (King James Version)

W.v.S (KUHP) had a strong reason to keep death penalty namely that Indonesia (at the time was "Dutch East Indies") as a colonialized land had an extremely wide scope in terms of diversity within the composition of the society (*een koloniaal gebied van groten met uit zeerverschillende bestanddelen samen gestelde bevolking*).[17] Schravendijk argued that in such region like Indonesia that is extremely large, inhabited by heterogeneous population (varies in character, culture, religion, races, beliefs, etc.), state apparatus such as police cannot guarantee safety unlike in West Europe.[18]

Differently today, the reason of death penalty positivism is not merely and restrictively on that our land is way too large, and the population is way too diverse. Rather, it goes less universal and more focused on each purpose of the law. For example, Indonesia applies death penalty for narcotic crimes as it is considered as a danger to national security. This emanates and can be seen from the preamble of Law No. 35 of 2009 regarding Narcotics (Indonesian Narcotics Act) which says, "the import, export, production, distribution of narcotics […] are very detrimental and imposes a grave danger to human life, society, nation, and state as well as the national security of Indonesia." The level of danger that narcotic crimes pose against Indonesia was also brought up and highlighted by President Joko Widodo when he declared Indonesia to be in a 'state of emergency' due to the ever-increasing crime of narcotics. The slogan '*Indonesia darurat narkoba*' which was at couple occasions echoed in

[17] Andi Hamzah and Sumangelipu, "*Pidana Mati di Indonesia: Di Masa Lalu, Kini, dan Di Masa Depan*" (Jakarta: Ghalia Indonesia, 1983), p. 24.
[18] Mr. Drs. H.J. Van Schravendijk, "Buku Pelajaran tentang Hukum Pidana Indonesia" (Jakarta: 1956), p. 224.

Jokowi Presidential term shows the graveness of the issue. The data from National Narcotics Agency (BNN) shows that there were more than 4 (four) millions drug addicts in Indonesia in 2011. The number must have had grown substantially by now (2021).

In the development, numerous crimes are threatened with death penalty. Besides narcotic crimes, crimes such as terrorism and supply for terrorism weapons, or the crimes of assault to head of the state are threatened with death penalty. At the same time, Indonesia recognizes International Covenant on Civil and Political Rights (ICCPR) through Law No. 12 of 2005. In the Article 6 of ICCPR, it recognizes right to life as inherent right. It further explains that the right shall be protected by law as it is a right which cannot be derogated under whatever circumstances.

The international standard of death penalty was initially declared in the International Bill of Human Rights, more specifically is Universal Declaration of Human Rights (UDHR) and International Convention on Civil and Political Rights (ICCPR). Historically, through UDHR, the United Nations has declared and called a stoppage to death penalty globally in 1948. Having said that, the debate was also intense within the formulation of UDHR in the UN Third Committee itself. The drafter of the UDHR fully understood that the abolition of death penalty needs long time and within the Human Rights development timeline, death punishment has received great

spotlight on the Human Rights discourse and debate.[19] The most basic principle is often claimed from Article 3 of UDHR which says, "Everyone has the right to life, liberty and security of person".[20]

Common stipulation accommodated in the UDHR when compared with ICCPR, clearly shows similarity, especially in regard to the historical debate on how this article is formulated. When the UDHR was formulated, discussion on ICCPR had been underway in 1947, yet has not met a point of compromise between States in terms of how death penalty should be treated.[21] Because of that, initially the formulation in UDHR appeared to be very general and normative, with the positive affirmation of the importance of right to life for everyone and has not specifically addressed the matter of death penalty positivism in detail. This grown awareness of how difficult it is to persuade total abolitions of death penalty was also reflected in the Human Rights instruments that were formulated and drafted in 1950 and 1960. The formulation of ICCPR was successfully completed in 1954 after gaining support from majority number of states who wished to abolish death penalty. The negotiation process, however, was not simple and rather a complicated one since the United States, as a superpower state has brought another complication to the negotiation between the states who wish for total abolitions and states who still wish to legalize death penalty.

[19] William A. Schabas, "International Law and the Death Penalty: Reflecting of Promoting Change?", in Peter Hodgkinson and William A. Schabas, ed., Capital Punishment: Strategies for Abolition, (Cambridge: Cambridge University Press, 2004), p. 37.

[20] Accepted and announced by the UN General Assembly on 10 December 1948 in the form of Resolution 217 A (III)

[21] William A. Schabas, "The Abolition of the Death Penalty in International Law" (Cambridge: Cambridge University Press, 2002), p. 47.

As we know, the United States is a retentionist and stays so until today, although the law may differ from one state to another state.

ICCPR as the first treaty to address the issue of death penalty has been ratified by Indonesia through Law No. 12 of 2005 on Ratification of International Covenant on Civil and Political Rights. In the formulation of International Covenant on Civil and Political Rights (ICCPR), the death penalty is limited to be imposed only for crimes that are the "most serious" one and the convention explicitly forbids death penalty imposition for specific group such as: minority below the age of 18 and pregnant woman.[22] Article 6 paragraph 2 of ICCPR says "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." The standard for death penalty positivism and enforcement has been set by Article 6 in the second paragraph which is for the "most serious crimes".

If we examine the background in formulating this provision, we can understand that the main initial goal of ICCPR was to reach a total abolition of death penalty. However, the drafters of the convention knew exactly at the time that the imminent challenges and hindrances, especially from the countries which wished to stay as a retentionist, were intense and hard to be solved at the near future. Therefore, in the process of formulating the provisions, the drafter came up with a point of compromise providing the possibility for retentionist state to still legalize death penalty within their

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[22] Article 6 Paragraph 5 of ICCPR.

positive law, but only for the “most serious crime”.

The most intense and complicated debate that was present at the formulation of the Article 6 of ICCPR is regarding the paragraph 2 and 6. Uruguay and Colombia – which was supported by Finland, Panama, Peru and Ecuador – suggested that death penalty should be explicitly forbidden by the Article 6 paragraph 2 of ICCPR, arguing that it is subject to misappropriation of law, therefore immoral and inaccurate. Yet, this suggestion is questioned by France who was concerned with the excessively strict formulation of paragraph 2 which may render states reluctant in ratifying the Convention. Therefore, a negotiating position must be found to realize the Convention therefore can have a say on the limitation of death penalty. Meanwhile, ensuring that the states who were a retentionist would not feel discredited by the clauses in the provisions of the Convention.

Despite that, there was a silent hope that the formulation of the Covenant will bring all states into progressive reduction of death penalty. In other words, there must be a progressive effort and approach which the State Parties are hoped to concretize through their legislation process to minimize and even abolish death penalty completely from their national legal system. French Delegation said at the time:

> “He said that a possible compromise solution would be to express the wish of the Committee to abolish the death penalty with a provision to the effect that States Parties would undertake to develop their national penal legislation in such a way as to more

progressively towards abolition of capital punishment”.[23]

France’s suggestion gained numerous supports from the State Parties and eventually agrees that the Article 6 paragraph 2 must accommodate two interests, namely: the provision should be of the interest to prioritize death penalty abolition with the target of bringing evolution to criminal justice system, and the provision must become the basic purpose of the State Parties which became signatory and ratified the Covenant.[24] Article 6 (2) of ICCPR has stipulated the principle of “limitation” towards death penalty legalization by encouraging states to abolish death penalty by attaching the term “most serious crime” in the provision and has also prevented the currently abolitionist state from reviving the positivism of death penalty.[25]

Having said that, the term “most serious crime” poses a room of ambiguity. William Schabas, Canadian International Criminal Law expert, says that the small room of openness to death penalty positivism within ICCPR is hardly applicable, because of the ambiguity in the interpretation of “most serious crime”, and who and how will the seriousness (the gravity) of the crime or the delict can be determined.[26] The “most serious crime” is not clearly categorized and specified within any other provisions in the International Covenant on Civil and Political Rights (ICCPR).

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[23] William A. Schabas, “The Abolition of the Death Penalty in International Law” (Cambridge: Cambridge University Press, 2002), p. 66.
[24] William A. Schabas, *Op.Cit.,* p. 66.
[25] William A. Schabas, “International Law and the Death Penalty: Reflecting of Promoting Change?”, in Peter Hodgkinson and William A. Schabas, ed., *Capital Punishment: Strategies for Abolition*, (Cambridge: Cambridge University Press, 2004), p. 51.
[26] William A. Schabas, *International Law and the Death Penalty* (Cambridge: Cambridge University Press, 2004), p. 41.

Additionally, Indonesia has also ratified ICCPR through Law No. 12 of 2005 resulting Indonesia to be bound with the conception of "most serious crime" for death penalty. Therefore, in this thesis, the Author aims to find the closest and most relevant interpretation of what those serious crimes are and whether the death penalty practice in Indonesia conforms to that "most serious crimes" or not yet.

1.2 Formulation of Issues

In regards to the topic of this thesis, the Author will discuss the following formulation of issues:

1. How is the term "most serious crime" stipulated by Article 6 (2) of ICCPR defined under international law?
2. Is the positive law legalizing death penalty in Indonesia already in accordance with the concept of "most serious crime" as stipulated in Article 6 (2) of ICCPR?

1.3 Research Purposes

The Author's purpose of writing this thesis is to answer the formulation of issues which have been stipulated above, namely:

1. To find out how is the term "most serious crime" under Article 6 (2) of ICCPR defined under international law.
2. To find out whether the positive law in Indonesia which legalizes death

penalty is in line with the definition of “most serious crimes” as stipulated in the Article 6 (2) of ICCPR.

1.4 Research Benefits

1.4.1 Theoretical Benefits

Theoretically, the Author hopes that the research conducted will provide knowledge the death penalty acceptability from the viewpoint of International Bill of Human Rights such as UDHR and ICCPR. The Author hopes to give insight on what is the threshold of “most serious crime” which allows for resorting into death penalty according to the Article 6 of ICCPR, the Covenant which has gained national forcibility as it has been ratified through Law No. 12 of 2005.

In addition to that, the Author hopes that the research conducted will theoretically cover a thorough insight of the current situation of death penalty in Indonesia and whether the positivism is consistent with the Article 6 of ICCPR. The Author hopes to draw comparative analysis with death penalty enforcement in other countries’ cases, so that the research can provide informational discourse on the obeyance of the death penalty implementation in Indonesia with International Bill of Human Rights whom Indonesia has become the State Party of.

1.4.2 Practical Benefits

Practically, the Author hopes that this research can provide a new

insight for the reader in looking at the current landscape of death penalty in Indonesia (both law and practices). In addition to that, the Author hopes that the readers can understand and gain new insight on the circumstances to impose death penalty which are allowed by ICCPR. Therefore, in this thesis, the Author hopes to give readers and any related stakeholders greater and deeper insight on what may be deviating currently in Indonesia death penalty positivism from internationally regulated set of standards in death penalty.

The Author hopes that this thesis can provide a contextual understanding on what is needed for the lawmaker as well as the government in correcting the current system of death penalty imposition if there is a deviation from universally accepted principles (such as principle of fair trial and principle of equal treatment before the law) as well as the principle such as in Article 5 of UDHR namely the principle of not being subjected to cruel punishment.

Lastly, the Author sincerely hopes that the research conducted can be useful and insightful for the general public, judges, governments, researchers, law students, policy makers, and other stakeholders who might directly and/or indirectly being in concern to death penalty in Indonesia, its effect to both offenders and victims amidst the challenge of death penalty being susceptible to wrong accusation in the trial process and unwatched violation of “fair trial” principle.

1.5 Framework of Writing

This thesis is arranged into five main chapters that will ease the readers to understand the discussion of this thesis.

CHAPTER I: INTRODUCTION

This chapter consist of the introduction, which is further divided into five parts, which are background, research question, research purpose and research benefits.

CHAPTER II: LITERATURE REVIEW

In the literature review chapter, the Author will divide this chapter into six sub-chapters: three of which are theoretical framework and the other three are conceptual framework. First, the Author will cover the theory of retributivism (the absolute theory of punishment). Second, the Author will elaborate on the theory of Relativism (Utilitarianism theory of Punishment) as the counterpart view of absolute theory of punishment. These two theories are important as it gives two different spectrums of point of views in looking at death penalty. Third, the Author will address the theories of pro-death penalty vis a vis those against it. In the conceptual framework, the Author will be addressing the main concepts which are important to address in the writing

of this thesis. First, the Author will address the concept of right to life. Second, the Author will address the concept of national jurisdiction. Third, the Author will consummate with the concept of most serious crimes as the gravity of this thesis.

CHAPTER III: RESEARCH METHODS

This chapter will discuss in general about the type of research, the type of data, data analysis technique and the type of research approach. Followed by the types of research, data, data analysis technique and research approach that the Author use to discuss the issues in this thesis.

CHAPTER IV: DISCUSSION AND ANALYSIS

The fourth chapter will discuss the research problems along with its solution. This chapter will be divided into two further sub-chapters in which each sub-chapter will answer respective research questions as raised in the formulation of issues. The first sub-chapter will consist of analysis on the boundaries of the most serious crimes and how it is really defined under international law. The second sub-chapter will analyze the consistency of national law in formulating death penalty with the concept of the most serious crime as stipulated in Article 6

of ICCPR.

CHAPTER V: CLOSING

In this last chapter, the Author will explain the conclusion as an answer to the issues that have been analyzed in chapter four. Aside from giving a conclusion, the Author will also give suggestions and recommendations towards these issues after spotting accurately the issue within Indonesian death penalty system.