TIRTAYASA JOURNAL OF INTERNATIONAL LAW
Volume 4 Nomor 1, June 2025, pp. (70-87)
Fakultas Hukum, Universitas Sultan Ageng Tirtayasa, Serang-Banten, Indonesia
P-ISSN: 2961-8355 | e-ISSN: 2961-8061
https://jurnal.untirta.ac.id/index.php/tirtayasatjil

LEGALITY AND CONTROVERSY: THE DEATH PENALTY IN INDONESIA FROM THE PERSPECTIVES OF ISLAMIC LAW, CRIMINAL LAW AND HUMAN RIGHTS

Muhyi Mohas
University of Sultan Ageng Tirtayasa, Banten, Indonesia
Jl. Raya Jakarta, KM. 4, Pakupatan, Serang City, Banten Province
muhyimohas@untirta.ac.id

Reine Rofiana
University of Sultan Ageng Tirtayasa, Banten, Indonesia
Jl. Raya Jakarta, KM. 4, Pakupatan, Serang City, Banten Province
Reine@untirta.ac.id

Mentari Jastisia
Jl. Ir. H Juanda KM. 03, Karanganyar, Indramayu, Karanganyar, Kec. Indramayu
mjastisia@gmail.com

Jarkasi Anwar
University of Sultan Ageng Tirtayasa, Banten, Indonesia
Jl. Raya Jakarta, KM. 4, Pakupatan, Serang City, Banten Province
mjastisia@gmail.com

Alief Risyawan
Erciyes University, Talas/ Kayseri, Turkiye
Yenidoğan, Turhan Baytop Sokak No:1, 38280
1020311070@erciyes.edu.tr

Info Artikel
|**Submitted**: 19-05-2025 |**Revised**: 24-06-2025 |**Accepted**: 30-06-2025

How to cite: Muhyi Mohas, Reine Rofiana, Benny Irawan, and Alief Risyawan "Legality And Controversy: The Death Penalty in Indonesia From the Perspectives of Islamic Law, Criminal Law, and Human Rights", *Tirtayasa Journal of International Law*, Vol. 4 No. 1, (June, 2025)", pp. 70-87.

ABSTRACT:

The legality of the death penalty remains controversial as it often conflicts with the right to life. Therefore, this study examined the legality of imposing the death penalty from Criminal Law, International Human Rights, and National Human Rights perspectives. We employed a normative juridical approach as the method. The findings suggest that beheading, as a form of the death penalty, is viewed as a means of upholding absolute justice and deterrence, following Islamic Sharia. This practice reflects a deep respect for human rights and justice, embodying the 'an eye for an eye' principle. It is encapsulated in the Quranic verse: 'The law of death for those who kill, and the law of cutting off hands for those who steal.' (QS Al-Maidah: 45). According to the criminal law perspective, the death penalty is legal as it is regulated under Article 10 of the Indonesian Criminal Code as a principal punishment under certain circumstances, and in Article 100 of the Indonesian Criminal Code No. 1 of 2023, the death penalty is included as a special punishment with an alternative probation period of 10 years. According to International Human Rights perspectives, the death penalty is not absolute. There are two theories regarding the death penalty in International Human Rights: Universalism, and Cultural Relativism.

Keywords: Legality; Death Penalty; Criminal Law; Islamic Law; Human Rights.

TIRTAYASA JOURNAL OF INTERNATIONAL LAW
Volume 4 Nomor 1, June 2025, pp. (70-87)
Fakultas Hukum, Universitas Sultan Ageng Tirtayasa, Serang-Banten, Indonesia
P-ISSN: 2961-8355 | e-ISSN: 2961-8061
https://jurnal.untirta.ac.id/index.php/tirtayasatjil

A. Introduction

If the death penalty is reviewed from the perspective of penal history, it emerged alongside the advent of humanity on earth, characterized by a retaliatory legal culture akin to "*wolf eating wolf*."[1] Criminal law expert Setya Indra Arifin explains that the death penalty has been around since colonial times. The death penalty is a punishment or sentence imposed by the court, or without trial, as the harshest punishment for an individual's actions.[2] The imposition of the death penalty, both within the scope of proponents and opponents, has equally strong arguments, ultimately rendering the legal certainty of the death penalty ambiguous. The existence of the death penalty is maintained when observing the views of experts who support its implementation, generally based on conventional reasoning. The benefit of the death penalty is that it serves as a deterrent to others, aiming to prevent similar actions or actions deemed to violate the constitution and infringe on an individual's absolute rights. The death penalty can be applied and is even necessary to eliminate individuals considered dangerous to public or state interests and perceived as irreparable. On the other hand, the implementation of the death penalty contradicts human rights and represents an irreversible form of punishment, especially if errors in the verdict are discovered after the execution.[3]

According to Hutapea, the death penalty can be carried out. Still, it should be applied only in cases of truly fatal errors that threaten many lives, as such crimes have already infringed upon the human rights of others, thereby justifying the death penalty. This statement clearly shows that Hutapea agrees with implementing the death penalty, but with specific conditions and caution in its imposition. This opinion is reinforced by a statement made during the commemoration of Indonesian Independence Day, August 17, 1945, on a private television program at Cipinang Penitentiary, Jakarta, on August 17, 2004, by the Minister of Justice and Human Rights. Yusril Ihza Mahendra stated, "*The death penalty in Indonesia does not contradict Pancasila and Religion.*"[4]

---

[1] Jacob. R.T. Efryan. "Pelaksanaan Pidana Mati Menurut Undang-undang Nomor 2/PNPS/1964". *Lex Crime*, Vol. 6, No.1, 2017, p. 98.

[2] NU Online, "Begini Proses Hukuman Mati Menurut Ahli Pidana", (2023), can be accessed at https://www.nu.or.id/nasional/begini-proses-hukuman-mati-menurut-ahli-pidana-ucwBI.

[3] Bangun, Nata Sukam. "Eksistensi Pidana Mati Dalam Sistem Hukum Indonesia". (2014), can be accessed at http://e-journal.uajy.ac.id/5236/1/JURNAL%20ILMIAH.pdf

[4] Sumanto Atet. "Kontradiksi Hukuman Mati Di Indonesia Dipandang Dari Aspek Hak Asasi Manusia, Agama dan Para Ahli Hukum", *Perspektif*. Vol. IX, No.3. P. 192-192.

However, opposing views come from Roeslan Saleh, who believes that the death penalty should not be implemented in Indonesia because: 1) If there is a judicial error, it cannot be corrected; 2) Based on the philosophical foundation of the state, Pancasila, the death penalty is considered contrary to humanity. Additionally, Soedarto argues against the death penalty in Indonesia for the following reasons: 1) Humans do not have the right to take another person's life, especially considering that judges can make mistakes in sentencing; 2) The death penalty is not an effective deterrent against crime, threats cannot curb human impulses.[5] This is also in line with international law regulations concerning the right to life, as enshrined in Article 3 of the Universal Declaration of Human Rights (UDHR) by the United Nations, which states that everyone has the right to life, liberty, and security of person. This provision guarantees the right to life. Another international instrument that explicitly articulates the right to life is Article 6 of the International Covenant on Civil and Political Rights (ICCPR). Article 6, paragraph 1 of the ICCPR states: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of their life.[6]

In national law, the provisions of Law No. 39 of 1999 on Human Rights state that Human Rights are inherent in beings created by God Almighty, and these rights are a gift that must be respected and protected to ensure human dignity. However, human rights are not absolute because their limits are tied to those of others. Therefore, in societal life, special attention must be given, and there must be a balance between fulfilling obligations and asserting rights.[7] Referring to the above explanation, it can be seen that the death penalty is a controversial and debatable form of punishment. From an Islamic perspective, the death penalty is viewed as an absolute law, rooted in divine justice.

However, compared with human rights frameworks, which emphasize relativism and individual rights, Islamic law may appear outdated, and its strict application could be perceived as orthodox or cruel. Therefore, this study aims to examine the legality of the death penalty from the perspectives of Criminal Law and both International and National Human Rights, highlighting the tension between absolutist and relativist legal frameworks. It is important to note that religion is often seen as a closed systemic law, grounded in fixed

[5] *Ibid.* p. 211.

[6] Eva Achjani Zulfa, "Menelaah Arti Hak Untuk Hidup Sebagai Hak Asasi Manusia", *Lex Jurnalica*, Vol. 3, No. 1. p. 13-14.

[7] Cholida Hanum. *Hukum dan Hak Asasi Manusia: Perkembangan dan Perdebatan Masa Kini*, (Salatiga: Lembaga Penelitian dan Pengabdian Kepada Masyaraka (LP2M) IAIN Salatiga: 2020), p. 34.

principles. At the same time, human rights are viewed as a more open, relativist systemic law, adaptable to evolving social and cultural contexts.

B. Research Method

This research used normative legal research. This is mainly because legal research should be either normative or empirical. [8] There is no other reason why normative legal research is being chosen. It focuses on examining the law as its primary subject, excluding any non-legal materials from its analysis. The main characteristics of normative legal research in conducting legal studies lie in the data source, namely, secondary data sources. Normative legal research consisted of primary legal materials, secondary legal materials, and tertiary legal materials.[9] Various international provisions or regulations and statutory regulations are primary legal materials. Normative legal research focuses on legal norms within global and national laws, employing a statutory approach.[10] Secondary legal materials include literature in articles, journals, papers, books, and related data, while tertiary legal materials involve online resources.[11]

The theory used in this study is first, the theory of Marginal Deterrence, which is the stage where crime prevention efforts are at a minimal stage due to the decrease in crime rates due to increasingly effective prevention and public awareness. Second, the Precention of Crime (prevention of crime) is conventional which focuses on the approach of punishment.

C. Results and Discussion

1. The Legality of the Death Penalty from the Perspectives of Islamic Law and Criminal Law

The death penalty is one of the most severe punishments in the realm of criminal sentencing. It is a form of retribution for a person's unlawful actions. It is inherently tied to

[8] Theresia Anita Christiani, *Normative and Empirical Research Methods: Their Usefulness and Relevance in the Study of Law as an Object*, Procedia - Social and Behavioral Sciences, Vol. 219 (May 2016), pp. 201-207.

[9] Belardo Prasetya Mega Jaya, Agus Prihartono P.S., Mohamad Fasyehhudin, M., & Nuryati Solapari, "Republic of Indonesia Sovereign Right in North Natuna Sea according to United Nations Convention on the Law of the Sea 1982." *Australian Journal of Maritime & Ocean Affairs* 16 no. 1 (2024), pp. 127–140.

[10] Belardo Prasetya Mega Jaya, Ridwan, Rully Syahrul Mucharom etc, "Criticising the Implementation of the ACTIP in Southeast Asia", *Sriwijaya Law Review* 7 no. 2 (2023), pp. 355-373.

[11] Benny Irawan, Firdaus, Belardo Prasetya Mega Jaya, dkk, "State Responsibility and Strategy in Preventing and Protecting Indonesian Fisheries Crews Working on Foreign Fishing Vessels from Modern Slavery." *Australian Journal of Maritime and Ocean Affairs* (2024), pp. 1-21.

the concept of legality, which ensures that punishments are under established legal principles. The application of the death penalty is closely linked to the idea of criminal law reform. The meaning and essence of criminal law reform, as written by Barda Nawawi Arief, are closely related to its background and urgency, which can be viewed from socio-political, socio-philosophical, socio-cultural aspects, or various policy aspects (particularly social policy, criminal policy, and law enforcement policy). In other words, its meaning and essence are manifestations of changes and reforms aimed at reorienting and reforming criminal law following the central socio-political, socio-philosophical, and socio-cultural values of Indonesian society, which underpin social policy, criminal policy, and law enforcement policy in Indonesia.[12]

In the Quran, the death penalty is prescribed for certain serious crimes as a means of ensuring justice and maintaining social order. It is primarily applied in cases of murder (qisas), where the perpetrator may face a death sentence as retribution for taking a life, though forgiveness or compensation is also allowed (QS. 2: 178). The Quran also sanctions severe punishments for major sins such as adultery for married individuals (QS. 24:2), and for crimes like apostasy or rebellion (hirabah), which threaten societal stability (QS. 5:33). These punishments are seen as a deterrent and a means of upholding moral and legal standards. However, Islamic law also emphasizes mercy, forgiveness, and the possibility of repentance, allowing the offender to seek redemption or for the victim's family to forgive the perpetrator.

Before positive law was enacted and regulated crimes punishable by the death penalty, Indonesia had already recognized the death penalty, which was applied in various regions of the country. Specifically, the province of Aceh has been known to implement the death penalty for perpetrators of murder. The Aceh province has regulations to minimize crime within its territory, in the form of laws for implementing Islamic Sharia in Aceh. The implementation of Islamic Sharia in Aceh is stipulated in Law No. 44 of 1999 on the Implementation of the Privileges of the Province of the Special Region of Aceh and Law No. 11 of 2006 on the Government of Aceh.[13] These two regulations are part of the government regulations enforced in Aceh, prioritizing Islamic Sharia.

[12] Barda Nawawi Arief, Bunga Rampai Kebijakan Hukum Pidana. Bandung: Penerbit PT. Citra Aditya Bakti, Second Revision, 2002, p. 27

[13] Izadi Fariz Farrih. "Penerapan Hukum Pancung Bagi Terpidana Mati Di Provinsi Aceh Dalam Perspektif Hukum Positif dan Hukum Islam", *Jurnal Peradaban dan Hukum Islam*. Vol. 2, No. 1. p. 113.

The death penalty in Aceh is known as "*hukum pancung*" (beheading). Beheading for those sentenced to death is considered a sanction that tends to be more in line with Islamic Sharia, as during the time of the Prophet Muhammad the death penalty was implemented by beheading. Similarly, in Saudi Arabia today, executions are carried out by beheading. Based on this, there has been discourse on the implementation of beheading in Aceh to minimize the crime of murder.[14] Aside from Aceh, the death penalty is implemented in other provinces across Indonesia as part of the national legal system, as regulated by national legislation. The legal basis for applying the death penalty within Indonesia's legal framework is outlined in several provisions of the Criminal Code. These provisions include Article 340 concerning premeditated murder, Article 104 regarding conspiracy to assassinate the president and vice president, Article 111 paragraph (2) regarding acts that lead to war with a foreign state, Article 124 paragraph (3) regarding treason by disclosing or handing over information to the enemy during wartime, as well as inciting and facilitating riots or rebellion among the armed forces, Article 365 paragraph (4) concerning aggravated theft resulting in serious injury or death, Article 444 concerning piracy at sea resulting in death, Article 149 K paragraph (2) and Article 149 O paragraph (2) concerning aviation crimes and aiding aviation crimes.

Article 10 of the Criminal Code governs two types of penalties: principal penalties and additional penalties. Principal penalties include the death penalty, imprisonment, detention, and a fine, while additional penalties involve specific rights revocation, asset confiscation, and judicial decision publication. Practically, the implementation of the death penalty is regulated by Law No. 2/PNPS/1964 concerning the Procedures for Imposing the Death Penalty by Courts in the General and Military Judiciary, which remains in effect to date.[15] The latest legal instrument concerning the death penalty to be implemented in Indonesia is the Criminal Code, which was ratified on December 6, 202. It will commence enforcement three years after ratification, in 2026. The new KUHP introduces three types of penalties: principal penalties, additional penalties, and special penalties.[16] The death penalty falls under the category of special penalties, which are subject to alternatives, while other types of penalties include life imprisonment or a maximum of 20 years of imprisonment.

[14] *Ibid*. p. 107.

[15] Izad, Rohmatul. "Pidana Hukuman Mati Di Indonesia Dalam Perspektif Etika Deontologi". Al Syakhsiyyah, IAIN Ponorogo 1 no 1, (2019), p.8.

[16] Hukum Online, "Mengenali Beragam Jenis Pidana Tambahan Dalam KUHP Baru", can be accessed at https://www.hukumonline.com/berita/a/mengenali-beragam-jenis-pidanatambahan-dalam-kuhp-baru-lt6391ba6667
3ce/.

Explicitly, Article 10 of KUHP No. 1 of 2023 stipulates that judges, when imposing the death penalty, apply a probation period of 10 years, considering the defendant's conduct and role in the crime. This probation period must be stated in the judge's decision, with the 10 years beginning the day after the judge's ruling. Suppose the defendant demonstrates good behavior during the probationary period. In that case, the death penalty may be commuted to life imprisonment, subject to the President's decision and the consideration of the Supreme Court. Life imprisonment is enforced upon obtaining a judge's decision. At the same time, if the defendant fails to show good faith during the probationary period, the death penalty may be executed upon the Attorney General's order.[17]

The death penalty is also regulated in the latest version of the Criminal Code, No. 1 of 2023, as a special sanction with alternatives to protect society (social defense). Additionally, it may not be imposed on individuals under 18 years of age, and the execution of the death penalty for pregnant women is postponed until after childbirth, with execution only proceeding upon approval or rejection by the President.[18] This policy towards the implementation of the death penalty reflects a trend towards its elimination, ranging from restrictions and reductions to its eventual abolition.[19]

Apart from the Criminal Code, other legislative regulations in Indonesia still impose the death penalty, including:[20]

1. Emergency Law No. 12 of 1951 on Firearms
2. Law No. 5 of 1997 on Psychotropic Substances
3. Law No. 26 of 2000 on Human Rights Courts
4. Law No. 15 of 2003 on the Eradication of Criminal Acts of Terrorism
5. Law No. 35 of 2009 on Narcotics

The death penalty remains in Indonesia because it is seen as an effective way to deter serious crimes like drug trafficking and terrorism, while also ensuring justice for victims through punishment that fits the crime. This approach is further supported by Indonesia's cultural and religious values, particularly Islamic law, which permits the death penalty for

[17] Criminal Code (KUHP) Number. 1 of 2023.v

[18] Arief Amelia. "Problematika Penjatuhan Hukuman Pidana Mati Dalam Perspektif Hak Asasi Manuusia Dan Hukum Pidana", *Jurnal Kosmik Hukum*. Vol. 19, No. 1. p. 14.

[19] *Ibid*. P. 14

[20] Veive Large Hamenda, "Tinjauan Hak Asasi Manusia Terhadap Penerapan Hukuman Mati Di Indonesia", *Lex Crimen*, Vol. II, No. 1. p. 114.

certain offenses. Despite facing criticism from international human rights organizations, Indonesia continues to uphold the death penalty, arguing that it is crucial for maintaining public safety and upholding the country's legal rights. This stance is grounded in Indonesia's legal traditions, emphasizing fair punishment to preserve social order. Based on the above points, it is clear that the death penalty is legally permitted, but it must always prioritize justice and truth, with a cautious approach in sentencing. This principle requires law enforcement officials to consider the perspectives of the Judex Facti (the judge of fact) and the Judex Juris (the judge of law) when deciding cases involving the death penalty. Ultimately, criminal law should be humane towards victims and firm with offenders, applying retribution for the harm caused by criminal acts. This aligns with the theory of retribution, which views punishment as a just response to wrongdoing. The theory emphasizes that punishment should be proportional to the seriousness of the crime and based on the concept of "desert," meaning offenders should receive a punishment that fits the severity of their offense.[21]

In criminal law, the perspective also considers the victim, who is not merely material but must also be viewed as immaterial. This means that criminal law seeks to achieve justice for both victims and offenders through established procedures, correlating with the function of criminal law. The function of criminal law is to maintain tranquility, welfare, and security for the wider society, thus not only addressing those who are victims but also accounting for immaterial victims. This represents criminal law's effort to prevent and address crimes under criminal law, severe criminal acts. The death penalty cannot reduce crime. Law is closely related to social, political, legal, and economic aspects. Law must function effectively; for example, in the theory of punishment, if it operates well, such punishment is unnecessary, known as the marginal deterrence effect theory. This theory can be applied under the condition of awareness in law, politics, social, cultural, and economic aspects. Considering this complexity, its application still involves the prevention of crime, including the death penalty. This theory is also in line with the theory of Precention of Crime (prevention of crime) which focuses on the punishment approach.

Referring to the theory of Marginal Deterrence, which is quite ideal, people do not commit crimes not because they are afraid of the threat of severe crime, but with a high legal awareness that committing the crime does not torture others, and is not praiseworthy in terms

[21] *Ibid*. pp. 301-302.

of religion and conscience. In the theory of Functional Law, the legal way of thinking works in problems *(problemadenken)* and is not solely based on a system, which tends to favor the status quo.

Peters's critique, in the view of critical law, is that the functional legal theory is considered modern because it focuses on the legal goal of social benefit and does not have legitimacy measures, meaning that it does not provide a basis for justice. In critical legal theory, as in the theory of Sociological Jurisprudence, looking at law as part of society (law in society), seeing in law on the one hand the sediment of the comparison of absolute power and dominant interests. Meanwhile, there is also an aspiration for justice and legitimacy. Therefore, the true nature of the law can be understood from the aspirations towards an optimal law, which is inherent in the principles of law, which reduces the arbitrariness of the ruler and protects human rights. The above description if referring to the increasing development of crimes not only in general criminal acts, such as murder with the intention of even mutilation, but also special criminal acts, such as corruption, narcotics which are increasingly massive, illustrates that the legality of the Death Penalty is based on the aspect of crime prevention in the theory of Prevention of Crime, as a burden of punishment as the function of criminal law as a control and prevention of crime to protect the community and protect human rights.

Despite the controversy surrounding the death penalty, its imposition is closely related to the objectives of punishment. The formulation of these objectives is intended as a "control function" and simultaneously provides a clear and directed philosophical foundation, rational basis, and motivation for punishment.[22] Aside from conflicting with the right to life, the death penalty also contradicts the philosophy of punishment. The philosophy of punishment in Indonesia emphasizes educational, corrective, and preventive aspects. The educational aspect of punishment aims to teach or rehabilitate the offender to ensure they are aware and refrain from repeating their actions.

Moreover, the death penalty philosophically aims to prioritize the greater good, preventing others from committing similar crimes, and alleviating societal unrest caused by rampant criminal cases. The Indonesian government's firm stance on maintaining the death penalty aligns with the regulations enacted. The Indonesian public is familiar with this form

[22] Mubarok Nafi. "Tujuan Pemidanaan Dalam Hukum Pidana Nasional Dan Fiqh Jinayah." *Al-Qanun*, Vol. 1, No. 2. p. 299.

of punishment, and disagreements about the death penalty in Indonesian law usually pertain to the various types and applications of capital punishment.[23]

Reviewed from a sociological perspective, the death penalty raises several issues: (a) It can create injustice as crime is not merely a legal issue but also a sociological one, intertwined with economic, political, and psychological factors; (b) It contradicts the right to life; (c) The criminal justice system is not flawless; (d) The death penalty does not deter crime or produce a deterrent effect; (e) There are alternative severe punishments that do not involve taking the offender's life, which should be promoted; (f) The death penalty is inconsistent with the rehabilitative goal of punishment (education and resocialization of prisoners). The objectives of punishment include the concept of deterrence, achieved through general prevention *(algemene preventie theorien)* and specific prevention *(bijzondere preventie theorien)*. General prevention aims to deter others outside the offender from committing crimes.[24]

2. The Legality of Death Penalty in the Perspective of Human Rights

In the context of International Human Rights, there are two primary schools of thought: Universalism and Cultural Relativism.[25] Universalism holds that human rights are inherent to individuals, not because they are granted by society or established by positive law, but due to the intrinsic dignity of being human.[26] Human rights are natural rights inherent to individuals simply because they are human.[27] Human rights are viewed as rights that are naturally inherent naturally inherent rights, meaning they have been embedded in humans since their existence. Without these rights, humans cannot live as human beings. "*Human rights could be generally defined as those inherent in our nature and without which we cannot live as human beings*."

Proponents of universalism argue that every person possesses absolute human rights

[23] Alima Tsusyaddya, Suryaningsi, "Hukuman Mati Pelaku Tindak Korupsi dalam Perspektif Hukum dan Hak Asasi Manusia", *Jurnal Penelitian Ilmu Hukum* Vol. 2, No. 4, pp. 144-145.

[24] Widya Pranata, "Hukum Kebijakan Hukuman Mati Bagi Pelaku Tindak Pidana Korupsi Dikaji Dalam Perspektif Sosiologi Hukum", *Widya Pranata Hukum* Vol. 4, No.1, pp. 30-31.

[25] Jaya, B.P.M, Nurikah, Fajrin, Ahadi. "Limitation in The Right to Freedom of Thought, Conscience, and Religion (Forum Externum): Study of Ahmadiyya Muslim Community Case". *Jurnal Ilmu Syari'ah dan Hukum* 55, no. 1 (2021).

[26] Jack Donnelly. *Universal Human Rights in Theory and Practice*, Ithaca and London: Cornell University Press. p. 7-21. Lihat juga Maurice Cranston, 1973, *What are Human Rights*?, New York: Taplinger. p. 70.

[27] Matompo Osgar S, dkk. "*Hukum Hak Asasi Manusia*" Intrans Publishing: Malang, Jatim. p. 27.

and fundamental freedoms. Therefore, human rights universally apply to all individuals and should be applied equally everywhere. This suggests that although individuals are born with different skin colors, genders, languages, cultures, and nationalities, they still possess these rights. This is the universal nature of these rights, where human rights are considered natural rights (natural rights theory). In line with this natural rights theory, John Locke, in his book "*The Second Treatise of Civil Government and a Letter Concerning Toleration,*" proposed the idea that all individuals are endowed by nature with inherent rights to life, liberty, and property, which belong to them and cannot be revoked or taken by the state. Through a 'social contract,' the protection of these inalienable rights is entrusted to the state.[28] No one can revoke these rights, nor can they be transferred from one person to another.[29]

Universalism regards human rights as universal values, as formulated in various forms of the International Bills of Human Rights, without considering the social, cultural factors, and the spatial and temporal contexts specific to each country or nation. Human rights are positioned as values and norms that transcend national jurisdictions.[30] Article 3 of the Universal Declaration of Human Rights (UDHR) states that "*Everyone has the right to life, liberty, and security of person.*" Explicitly, applying punishment from an international human rights perspective is strictly prohibited because it contradicts the right to life. Essentially, the spiritual life and death of a person are determined solely by God Almighty. Muladi states that human rights are inherent rights naturally attached to individuals since birth, and without these rights, humans cannot grow and develop as whole individuals.[31]

In the international judicial system, including the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR), punishments are limited to imprisonment. Thus, no crime can be punished with the death penalty, even if the perpetrator has committed crimes resulting in the loss of life or extraordinarily heinous crimes.[32] as stipulated in Article 5 of

[28] John Locke. 1964. The Second Treatise of Civil Government and a Letter Concerning Toleration, disunting oleh J.W. Gough, Oxford, Blackwell, sebagaimana dikutip oleh Parluhutan Siregar, Etika Politik Global: Isu Hak-Hak Asasi Manusia, *Jurnal Medan Agama*, Vol. 6, No. 1, 2014, p. 2

[29] Mega Jaya, B.P., Arafat, M.R. 2017. "Universalism Vs. Cultural relativism dan Implementasinya dalam hak Kebebasan beragama Di Indonesia". *Jurnal Pena Justisia: Media Komunikasi dan Kajian Hukum.* Vol. 17. No. 2. p. 58.

[30] *Ibid.*

[31] Aji, Ramdan and Mei, Susanto. "Kebijakan Moderasi Pidana Mati", *Jurnal Yudisial*, 10 No. 2, (2017). p. 198.

[32] Siswanto, Arie. "Pidana Mati Dalam Perspektif Hukum Internasional", Refleksi Hukum : Jurnal Ilmu Hukum, (2009), 7-20.

the Rome Statute,[33] Causing the deaths of thousands, including children and women.[34] This situation inevitably raises a sense of injustice because if the abolition of the death penalty is perceived as protecting the "right to life" of international criminals, it ironically grants a privilege to individuals who have violated the "right to life" of thousands of victims.[35]

According to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, it is the only international treaty of worldwide scope that prohibits executions and provides for the total abolition of the death penalty. This text, annexed to the UN International Covenant on Civil and Political Rights in 1989, requires ratifying countries the death penalty definitively. The treaty also establishes several protections for those facing the death penalty, which have been reiterated and subsequently extended by non-binding UN resolutions.[36]

Referring to Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2002), several member states of the Council of Europe generally preferred abolishing the death penalty. This position is reinforced by Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2002), which affirms the belief that everyone's right to life is a fundamental value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings.[37]

In contrast to universalism, Cultural Relativism is a concept of cultural absolutism that asserts the culture of a society as the highest ethical value. Human rights cannot be upheld if their implementation leads to changes within a culture itself; therefore, the implementation of human rights must be adapted to the culture of each country. The idea of cultural relativism posits that culture is the sole source of the legitimacy of rights or moral norms.[38] Relying on this understanding, the application of the death penalty can be left to

---

[33] Article 5 Rome Statute of The International Criminal Court can be accessed at https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf

[34] *the most serious crime* are (i) aggression, (ii) genocide, (iii) crimes against humanity, (iv) crimes against United Nations and associated personnel and (v) war crimes (William Thomas Worster, 2012, "The Exercise of Jurisdiction By The International Criminal Court Over Palestine", *American University International Law Review*, Vol. 26, No. 5, p. 1159 as quoted by Belardo Prasetya Mega Jaya and Ariesta Wibisono Anditya, Effectiveness Of The International Criminal Court's Jurisdiction In Impunity Prevention, *Justitia Et Pax,* Volume 36, Nomor 1 Juni 2020, pp. 1-22.

[35] Arie Siswanto, *Loc.Cit.*

[36] Novelinda S. G. Sembel, dkk. Menakar Penerapan Pidana Mati Bagi Pengedar Narkotika: Dimensi Hak Asasi Manusia, *Tumou Tou Law Review*, Vol 1 N0. 02, 2022, p. 104

[37] *Ibid*, p. 104

[38] Jaya, B.P. m, Arafat, M.R. *Op.Cit.,* p. 59.

the national provisions of each country, adapted to its culture or values.

The idea of cultural relativism states that culture is the only source of the truth of rights or moral norms, as culture possesses the right to life and dignity, which must be respected. Thus, culture must be placed within the ~~context that follows each country's culture~~. "*There is no such thing as universal rights*," which rejects the view that there are universal rights, especially if a particular culture dominates those rights.[39]

Howard posits that cultural relativism is a concept of cultural absolutism, which asserts that the culture of a society is the highest ethical value in any region. Human rights cannot be supported if their implementation results in changes within a culture; thus, the implementation of human rights must align with the culture practiced in that country. Proponents of cultural relativism tend to accept and even advocate ~~for using~~ social realities in a society to implement human rights. This perspective also accepts the legal products of a country to implement human rights because national law is always related to the values that develop in its society.[40] Indonesia has explicitly stated that the death penalty does not violate human rights or the International Covenant on Civil and Political Rights (ICCPR).[41] The Constitutional Court proclaimed this in its decision No. 2-3/PUU-V/2007, which rejected the petition to annul the death penalty for narcotics cases under Law No. 22 of 1997 on Narcotics. The qualification of crimes in the articles of the Narcotics Law can be equated with "the most serious crimes" according to Article 6 of the ICCPR.[42]

In Law No. 39 of 1999 on Human Rights, the death penalty is also regulated, and its implementation is justified, except for children. Article 66 states that the death penalty or life imprisonment cannot be imposed on offenders who are still children.[43] Experts who support the retention of the death penalty generally base their arguments on conventional reasons, namely that the death penalty is necessary to eliminate individuals deemed dangerous to public or state interests and who are considered beyond rehabilitation. Conversely, those opposed to the death penalty typically argue that it violates human rights

[39] Sylvia Dwi Andini, Universalisme Dan Relativisme Budaya Dalam Penegakan Ham Terhadap Kasus Kerangkeng Manusia Dan Perbudakan Modern, *Widya Yuridika: Jurnal Hukum*, Vol 05, No. 02, 2022, p. 336.

[40] *Ibid*, p. 337

[41] Constitutional Court, *MK: Hukuman Mati Tak Melanggar Konvenan Internasional Hak Sipil dan Politik*. accessed at https://www.mkri.id/index.php?page=web.Berita&id=10521

[42] Constitutional Court Verdict Number 2-3/PUU-V/2007 accessed at https://www.mkri.id/public/content /persidangan/putusan/putusan_sidang_Putusan%202-3%20PUUV2007ttgPidana%20Mati30Oktober2007.pdf

[43] Izad Rohmatul., *Loc.Cit*

and is a form of punishment that cannot be corrected if, after execution, an error in the judge's verdict is discovered.[44]

Regarding human rights violations, proponents of the death penalty argue that the right to life is indeed guaranteed in the Indonesian constitution, but, which can limit this right.[45] This regulation is outlined in Article 28A of the 1945 Constitution, which states, "*Every person has the right to live and to defend his/her life and existence*."[46] This is also stipulated in Article 28I, paragraph 1, which reads, "*The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to recognition as a person before the law, and the right not to be prosecuted based on retroactive law are human rights that cannot be diminished under any circumstances*."[47]

Human rights must be respected by others, as stated in Article 28J, paragraph 1 of the 1945 Constitution, which reads, "*Every person must respect the human rights of others in the orderly life of the community, nation, and state*."[48] Human rights are protected by various laws and regulations based on the absolute rights of every individual. However, a contradiction arises when a person's rights are deliberately taken away and their actions are deemed unlawful by law. In such cases, that person is also deemed deserving of the death penalty for taking another person's right to life.

As a result, when it comes to national law regarding the application of the death penalty, Indonesia follows a system known as cultural relativism, which means that the country bases its legal framework on its own cultural, social, and historical context, rather than aligning strictly with global standards. This approach gives the government and law enforcement authorities the right and authority to regulate and enforce the death penalty within their jurisdiction, according to the values and norms they uphold. Despite facing significant global opposition and criticism from international human rights organizations, Indonesia continues to maintain the death penalty. The government defends this practice by arguing that it serves as an effective deterrent to crime, particularly in combating the growing

[44] Rukman Auliah Andika, "Pidana Mati Ditinjau Dari Perspektif Sosiologi dan Penegakan HAM", *Jurnal Equilibrium*. Vol. IV, No. 1. p. 118.

[45] *Ibid*. p. 124.

[46] Bambang Heri Supriyanto, "Penegakan Hukum Mengenai Hak Asasi Manusia (Ham) Menurut Hukum Positif Di Indonesia", *Jurrnal Al-Azhar Indonesia Seri Pranata Sosial*, Vol. 2, No. 3, p. 155.

[47] S. Lon Yohanes. Penerapan Hukuman Mati di Indonesia dan Implikasi Pedagogisnya, *Kertha Wicaksana: Sarana Komunikasi Dosen dan Mahasiswa*, Vol. 14, No. 1. p 51.

[48] Bambang Heri Supriyanto, *Loc.Cit.*

problem of drug-related offenses. Furthermore, they believe the death penalty is a necessary tool to protect public safety, deter serious criminal activity, and ensure that justice is served for the victims and their families.[49]

D. Conclusion

Upon reviewing various sources, it can be concluded that the legality of the death penalty, particularly in the context of Islamic Shari'a, is rooted in historical practices, where the sanction of death was implemented as a form of retribution. During the time of Prophet Muhammad (SAW), the death penalty was legally carried out through beheading, which was viewed as a lawful and just method in line with the principles of Islamic law. The legality of the death penalty in criminal law is still upheld today, as enshrined in Article 10 of the Indonesian Criminal Code (KUHP), where it remains a principal punishment under certain circumstances. The death penalty in national law has been categorized and can be imposed for crimes such as premeditated murder, inviting foreign countries to attack Indonesia, treason, terrorism, and narcotics. Additionally, the death penalty is outlined in Article 100 of the Indonesian Criminal Code Number 1 of 2023, as a special penalty that can be imposed alternatively, subject to the judge's discretion. If the convict's behavior is deemed good during a 10-year probation period, the convict may be spared the death penalty, based on the president's decision and the attorney general's consideration.

In the perspective of international human rights, the application of the death penalty encompasses two theories: 1) Universalism, which posits that human rights are inherent rights possessed not because they are granted by society or based on positive law, but solely based on human dignity; 2) Cultural Relativism, a concept of cultural absolutism that asserts that the culture of a society is the highest ethical value. Human rights cannot be supported if their implementation leads to changes within a culture itself; thus, the implementation of human rights must be adjusted to the needs and culture of each country. To be clear, from the perspective of national human rights, Indonesia adopts a system of cultural relativism, where. Law enforcement officers can impose the death penalty, provided that the case or act falls within the category of severe crimes and violations**.**

[49] Carolyn Hoyle, 2021, *Investigating Attitudes to the Death Penalty in Indonesia, Part II: Public Opinion: No. Barrier to Abolition*, London, p. 21 accessed at https://www.deathpenaltyproject.org/wp-content/uploads/2021/06/DPP-Indonesia-Public-Opinion-Report_Web.pdf.

References

Books

Hoyle, Carolyn. 2021. *Investigating Attitudes to the Death Penalty in Indonesia, Part II: Public Opinion: No. Barrier to Abolition*. Edisi ke-2. Newman Street London: W1T 3EY.Hanum, Cholida. 2020 "Hukum dan Hak Asasi Manusia: Perkembangan dan Perdebatan Masa Kini". Salatiga: Lembaga Penelitian dan Pengabdian Kepada Masyaraka (LP2M) IAIN Salatiga).

Jack Donnelly. 2013. *Universal Human Rights in Theory and Practice*, Ithaca and London: Cornell University Press, 2013.

Matompo, Osgar S. 2018. *Hukum dan HAK Asasi Manusia*. Malang Jatim: Intrans Publishing.

Soekanto, Soerjono. 2006. Mamudji, Sri. *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*. Jakarta: Rajawali Press.

Arief, Barda Nawawi. 2002. *Bunga Rampai Kebijakan Hukum Pidana*. Bandung: Penerbit PT. Citra Aditya Bakti, Second Revision.

Maurice, Cranston. 1973. *What are Human Rights?* New York: Taplinger.

Journal

Aji, Ramdan and Mei, Susanto. "Kebijakan Moderasi Pidana Mati", *Jurnal Yudisial,* 10 No. 2, (2017).

Andini, Sylvia Dwi. "Universalisme Dan Relativisme Budaya Dalam Penegakan Ham Terhadap Kasus Kerangkeng Manusia Dan Perbudakan Modern". *Widya Yuridika: Jurnal Hukum* 5, no. 2 (2022).

Arief, Amelia "Problematika Penjatuhan Hukuman Pidana Mati Dalam Perspektif Hak Asasi Manuusia Dan Hukum Pidana". *Jurnal Kosmik Hukum* 19, no. 1 (2019).

Auliah, Andika Rukman "Pidana Mati Ditinjau Dari Perspektif Sosiologi dan Penegakan HAM". *Jurnal Equilibrium* 4, no. 1 (2016).

Efryan, Jacob R.T. "Pelaksanaan Pidana Mati Menurut Undang-undang Nomor 2/PNPS/1964". *Lex Crime* 6, no. 1 (2017).

Farrih, Izadi Fariz. "Penerapan Hukum Pancung Bagi Terpidana Mati Di Provinsi Aceh Dalam Perspektif Hukum Positif Dan Hukum Islam". *Jurnal Peradaban dan Hukum Islam* 2, no. 1 (2019).

Hamenda, Veive Large. "Tinjauan Hak Asasi Manusia Terhadap Penerapan Hukuman Mati di Indonesia". *Lex Crimen* 2, no. 1 (2013).

Irawan, Benny. Firdaus. Jaya, Belardo Prasetya Mega etc, "State Responsibility and Strategy in Preventing and Protecting Indonesian Fisheries Crews Working on Foreign Fishing Vessels from Modern Slavery." *Australian Journal of Maritime and Ocean Affairs* (2024).

Izad, Rohmatul. "Pidana Hukuman Mati Di Indonesia Dalam Perspektif Etika Deontologi". *Al Syakhsiyyah*, IAIN Ponorogo 1 no 1, (2019).

Jaya, B.P.M. and Anditya, Ariesta Wibisono. "Effectiveness Of The International Criminal Court's Jurisdiction In Impunity Prevention", *Justitia Et Pax,* 36, No 1 (2020)

Jaya, B.P.M. Prihartono, Agus. etc. "Republic of Indonesia Sovereign Right in North Natuna Sea according to United Nations Convention on the Law of the Sea 1982". *Australian Journal of Maritime & Ocean Affairs* 16, no. 1 (2024).

Jaya, B.P.M. Ridwan. Mucharom, Rully Syahrul, etc. Criticising the Implementation of the ACTIP in Southeast Asia", *Sriwijaya Law Review,* 7, no. 2 (2023).

Jaya, B.P.M. Rusli, Muhhamad. "Universalism VS. Cultural Relativism dan Implementasinya Dalam Hak Kebebasan Beragama Di Indonesia". *Pena Justisia: Media Komunikasi dan Kajian Hukum* 17, no. 1 (2017).

Jaya, B.P.M, Nurikah, Fajrin, Ahadi. "Limitation in The Right to Freedom of Thought, Conscience, and Religion (Forum Externum): Study of Ahmadiyya Muslim Community Case". *Jurnal Ilmu Syari'ah dan Hukum* 55, no. 1 (2021).

Lon, Yohanes S. "Penerapan Hukuman Mati di Indonesia dan Implikasi Pedagogisnya". *Kertha Wicaksana: Sarana Komunikasi Dosen dan Mahasiswa*, 14 no. 1 (2020).

Nafi, Mubarok. "Tujuan Pemidanaan Dalam Hukum Pidana Nasional Dan Fiqh Jinaya." *Al-Qanun* 18, no. 2 (2015).

Pranata, Widya. "Hukum Kebijakan Hukuman Mati Bagi Pelaku Tindak Pidana Korupsi Dikaji Dalam Perspektif Sosiologi Hukum". *Widya Pranata Hukum* 4, no. 1 (2022).

Sembel, Novelinda S. G. dkk. "Menakar Penerapan Pidana Mati Bagi Pengedar Narkotika: Dimensi Hak Asasi Manusia". *Tumou Tou Law Review* 01, no. 02 (2022).

Siregar, Parluhutan. Etika Politik Global: Isu Hak-Hak Asasi Manusia, *Jurnal Medan Agama*, 6, No. 1, (2014)

Siswanto, Arie. "Pidana Mati Dalam Perspektif Hukum Internasional", *Refleksi Hukum: Jurnal Ilmu Hukum*, (2009)

Sumanto, Atet. "Kontradiksi Hukuman Mati Di Indonesia Dipandang Dari Aspek Hak Asasi Manusia, Agama dan Para Ahli Hukum". *Perspektif* 9, no. 3 (2004).

Supriyanto, Heri., Bambang "Penegakan Hukum Mengenai Hak Asasi Manusia(Ham) Menurut Hukum Positif Di Indonesia". *Jurrnal Al-Azhar Indonesia Seri Pranata Sosial* 2, no. 3 (2014).

Zulfa. Eva Achjani. "Menelaah Arti Hak Untuk Hidup Sebagai Hak Asasi Manusia". *Lex Jurnalica* 3, no. 1 (2005).

Tsusyaddya, Alima. Suryaningsi. "Hukuman Mati Pelaku Tindak Korupsi dalam Perspektif Hukum dan Hak Asasi Manusia". *Jurnal Penelitian Ilmu Hukum* 2, no. 4 (2022).

Website

Bangun, Nata Sukam. "Eksistensi Pidana Mati Dalam Sistem Hukum Indonesia". (2014), can be accessed at http://e-journal.uajy.ac.id/5236/1/JURNAL%20ILMIAH.pdf.

Constitutional Court Verdict Number 2-3/PUU-V/2007 accessed at https://www.mkri.id|/public/content/persidangan/putusan/putusan_sidang_Putusan%202-3%20PUUV2007ttgPidana%20Mati30Oktober2007.pdf.

Constitutional Court, MK: Hukuman Mati Tak Melanggar Konvenan Internasional Hak Sipil dan Politik. accessed at https://www.mkri.id/index.php?page=web.Berita&id=10521.

Criminal Code (KUHP) Number 1 Year 2023. Can be accessed at https://jdih.mahkama hagung.go.id/legal-product/kitab-undang-undang-hukum-pidana/detail.

Hukum Online, "Mengenali Beragam Jenis Pidana Tambahan Dalam KUHP Baru", can be accessed at https://www.hukumonline.com/berita/a/mengenali-beragam-jenis-pidana tamb
ahan-dalam-kuhp-baru-lt6391ba66673ce/.

NU Online, "Begini Proses Hukuman Mati Menurut Ahli Pidana", (2023), can be accessed at https://www.nu.or.id/nasional/begini-proses-hukuman-mati-menurut-ahli-pidana-ucwBI.

Rome Statute of The International Criminal Court can be accessed at https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf.