

## CHAPTER II

### LITERATURE REVIEW

#### A. The Universal Declaration of Human Right

##### 1. Definition of the Universal Declaration of Human Right

Based on Black's Law Dictionary, human right as the freedom, immunities, and benefits that, according to modern values, especially at international level, all human being should be able to claim as a matter of right in the society in which they live.<sup>5</sup>

The first step in the field of human right was attempt by the United Nation to draw up an international document acceptable to all members of the international community, to State upholding differing ideologies, political, economic system and religious conviction. Agreement was reached only after lengthy discussion. The result was the adoption by The General Assembly of the Universal Declaration of Human Rights on December 10, 1948.<sup>6</sup>

The Universal Declaration of Human Right as The Universal Declaration of Human Rights (Universal Declaration) is an international document that states basic rights and fundamental freedoms to which all human beings are entitled.<sup>7</sup>The General Assembly proclaims that The

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<sup>5</sup> Henry Campbell Black, 2004, *Black's Law Dictionary*, West Publishing Co: Minnesota, p. 758.

<sup>6</sup> Abdul Ghafur Hamid, *Op. Cit* p. 303

<sup>7</sup> What is The Universal Declaration of Human Right? Taken from <http://www.humanrights.gov.au/publications/what-universal-declaration-human-rights> accessed on Tuesday, July 30, 2013 at 1:57 pm.

Universal Declaration of Human as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.<sup>8</sup>

There are several articles that support of Euthanasia as the one of the violation practice of human right based on the Universal Declaration of Human Right. As follows:

#### Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

#### Article 2

Everyone is entitled to all the rights and freedoms set forth in this declaration, 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. We are all equally entitled to our human rights

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<sup>8</sup> <http://www.un.org/en/documents/udhr> accessed on Tuesday, July 30, 2013 at 2:52 PM

without discrimination. These rights are all interrelated, interdependent, and indivisible.

### Article 3

*Everyone has the right to life, liberty, and security of person.*<sup>9</sup>

In international human rights, there are several sources, namely soft law and hard law. Soft law is The Universal Declaration of Human Rights which is a United Nations resolution that results in its nature, the Universal Declaration of Human Rights is binding on states. Although The Universal Declaration of Human Right is soft law, but The Universal Declaration of Human Right consider binding on state member of United Nation today. In Indonesia, several Acts related with Human Right adopted The Universal Declaration as a reference of human right protection on their legislation.<sup>10</sup>

The Universal Declaration of Human Rights is the first comprehensive human rights instrument to be proclaimed by a global international organization, because of its moral status and the legal and political importance it has acquired over the years, the Declaration ranks with the Magna Charta, the French Declaration of the Rights of Man and the American Declaration of Independence as milestone in mankind struggle for freedom and human dignity.<sup>11</sup>

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<sup>9</sup> <http://www.un.org/en/documents/udhr/index.shtml#a1> accessed on Tuesday April 02, 2013 at 07.11 am

<sup>10</sup> The example of this statement stated on "uphold and implement the Universal Declaration of Human Right that regulated by United Nation" on Act No 39 year 1999 about Human Right.

<sup>11</sup> Thomas Buergenthal, 2004, *International Human Rights in a Nutshell*, West Publishing: United States of America, p. 36.

Based on Article 28 of Universal Declaration of Human Right, “everyone is entitled to a social and international order in which rights and freedoms set forth in this declaration can be realized”.<sup>12</sup>

There are three theory of the legally binding of Universal Declaration of Human Right as the formulated of United Nation. As follows as:

a) Natural Law.

This theory suggests that the rules set out in the UDHR, which is one of the binding international treaties because it is a natural law that is applied by the member states of the United Nations.

b) Positive Law

The reason for this theory is the strength of binding international agreements is the will of the State. Although it is more concrete than the laws of nature, but who put forward this theory has the disadvantage that not all international law binding strength because of the will of a State.

c) Sociological Approach

Based on this theory, the United Charter has to require of interaction with the states member in order to fulfill the regulation regarding with human right.<sup>13</sup>

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<sup>12</sup> *Ibid.*

<sup>13</sup> Sefriani, 2010, *Hukum Internasional Suatu pengantar*, PT Rajagrafindo Persada: Jakarta, P. 112

The Netherlands and Indonesia as the members of United Nation have to obey all of the principles stated in The Universal Declaration of Human Right because it is one of the duties as United Nation member.

## **2. The History and The Definition of Euthanasia**

- a) Around the year 400 BC, an oath which is known as The Hippocratic Oath expressed by a physicist Hippocratic Greek.
- b) Around the 14th century until the 20th century, learned English Customary Law by the Supreme Court in 1997 America in his speech: -More specifically, for more than 700 years, the North American Indigenous punished or not approve the action of an individual or assisted suicide.
- c) In 1920, the publication of a book entitled-Permitting the Destruction of Life not Worthy of Life
- d) In 1935, The Euthanasia Society of England, or the British Euthanasia Group, formed as a measure approving euthanasia.
- e) In 1939, Nazi Germany imposed a non-voluntary euthanasia.
- f) In 1955, the Netherlands as the first country to issue a law approving euthanasia, and followed by Australia, which legalized it in the same year.<sup>14</sup>

After the two countries issued a legitimate law on euthanasia, some

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<sup>14</sup> *History of Euthanasia*, taken from <http://www.euthanasia.com/historyeuthanasia.html> accessed on Saturday, August 3, 2013.

countries still regard it as a conflict, but there is also participating passed similar legislation.

Euthanasia come from *eu* = good, and *thanatos* = death or a good death and called "mercy killing", murder on the basis of compassion, it cannot be separated from what is called the right to self determination of the patient. This right is a basic element of human rights and in line with the new awareness of these rights.<sup>15</sup> Based on Oxford English Dictionary, euthanasia is an action to facilitate the death of someone easily and quietly.

Euthanasia is the intentional killing by act or omission of a dependant human being for his or her alleged benefit. Somehow, the meaning of Euthanasia is explained in light of suicide while suicide is, many agree, considered as murder except that it is the victim who is the author himself. One of its kinds is assisted suicide which happens when someone provides an individual with the information, guidance, and means to take his or her own life with the intention that they will be used for this purpose. When it is a doctor who helps another person to kill themselves it is called "physician assisted suicide."<sup>16</sup>

In the medical ethics, euthanasia literally means "good death". In the book Greek writer named Suetonius describes the meaning of euthanasia as like as die quickly without suffering. Euthanasia Study Group of KNMG Holland (Dutch Medical Association) stated: "Euthanasia is a

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<sup>15</sup> Vaibhav Goel, 2008, Euthanasia – A dignified end of life!, *International Academic Journal*, Vol. 3, NGO Academic Journals: Ethiopia, P. 1

<sup>16</sup> *Ibid*

deliberate act to not do something to prolong the life of a patient or intentionally do something to shorten or end the life of patient, and was done specifically for the benefit of the patient's own ".<sup>17</sup>

Euthanasia has a motive and a wider sense, but the goal was the same. The goal of euthanasia is to accelerate the arrival time of death in order to avoid prolonged suffering for patient, so the definition of euthanasia used to help and not to be interpreted as the destruction of useless life.

In line with that, viewed from medical aspect, euthanasia divided into three categories based on the process, there are:

a) Orthothanasia

The death happened due to natural process.

b) Dysthanasia

The death happened due to proper process.

c) Euthanasia

The death happened due to with or without medical practice.<sup>18</sup>

Euthanasia according to whether a person gives informed consent into two classification, active euthanasia and passive euthanasia. According to Suparovic, the classifications of euthanasia are:

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<sup>17</sup> Hanafiah Jusuf, 2009, *Etika Kedokteran & Hukum Kesehatan*, Buku Kedokteran : Jakarta, p.118

<sup>18</sup> Djoko Prakoso, *Euthanasia Hak Asasi Manusia dan Hukum Pidana*. Ghalia Indonesia, Jakarta. P. 8

a) Passive euthanasia

Passive euthanasia means hastened the death by refusing to provide medical help or stop the ongoing medical care. For example, by giving antibiotic to pneumonia patient, the provision of medicines at high doses to accelerate the process of termination of anatomical functions that support human life.

b) Active Euthanasia.

Active euthanasia hastened the death by taking action directly or indirectly leads to death, for example by providing cyanide tablets or injecting a lethal substance to the patient. This action is directed to kill the patient, it seems as the lethal injection law, and these actions seem to treat the patient as a criminal actor.<sup>19</sup>

Active Euthanasia as the one of classification of euthanasia has two methods. There are:

a. Direct Euthanasia

To end up the patient's life or shorten the patient's life, the doctor should take calculated medical action directionally.

b. Indirect Euthanasia

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<sup>19</sup> *Ibid.*, p. 120



Doctor perform of medical action in order to alleviate the suffering of patients only, however, the doctor knowing the risk of the action could shorten or end up the life of patients.<sup>20</sup>

Euthanasia action viewed by the request of patient or family classified into two, there are:

a. Voluntary euthanasia.

Voluntary euthanasia means hasten by the consent or request of the patient. For example is patient who could not stand the suffering, request of euthanasia action to the doctor.

b. Involuntary euthanasia.

Involuntary euthanasia means hasten death without the consent or request of the patient.<sup>21</sup>

There are the main purposes of euthanasia, such as:

- a) Euthanasia based on bearing
- b) Euthanasia for animal
- c) Euthanasia based on medical assistance, it is categorized of voluntary active euthanasia.

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<sup>20</sup> George Zdenkowski, 1996, Human Right and Euthanasia, *Occasional Paper of the Human Rights and Equal Opportunity Commission*: Sidney, Australia, p. 2.

<sup>21</sup> Hanafiah Jusuf, *Op. Cit.* p. 120

According to Dr. Sam Vaknin, there are four possible situations, As follows as:

1. The patient's life is not at risk if she is not medicated with painkillers.
2. The patient's life is not at risk either way, medicated or not
3. The patient's life is at risk either way, medicated or not
4. The patient's life is at risk if she is not medicated with painkillers

In all four cases, the decisions our doctor has to make are ethically clear cut. He should administer pain-alleviating drugs, except when the patient risk dying the possible shortening of the patient's life which is guesswork is immaterial.<sup>22</sup>

Some patients are unable to determine the treatment options for them and that is should be someone else who decides what the best course of action, others are meant family and doctors themselves, but according to some experts, there are several rights for the patient euthanasia:

- a) The right to be treated as any other living human being until death.
- b) The right to keep they hopes alive, no matter what the changes that happen.

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<sup>22</sup> *Euthanasia and the right to die*, Sam Vaknin, taken from <http://samvak.tripod.com/euthanasia.html> accessed on Monday, July 29, 2013 at 09:04 p.m.

- c) The right to express feelings and emotions because of the death that will be faced by a religion that embraced.
- d) The right to participate in decisions relating to the care of these patients.
- e) The right to receive care and continuity of care, although the goal is only to provide comfort.
- f) The right not to die in solitude.
- g) The right to be free from pain.
- h) The right to get answers to questions about fair condition.
- i) The right to obtain medical assistance for abandoned.
- j) The right to be able to die in peace and dignity.
- k) The right to remain in the faith and not taken decisions contrary to religion and deepen their religious beliefs.

Based on Brian Pollard, a retired Anesthetist and Palliative Care Physician, euthanasia cannot be considered without reference to human rights, but all relevant rights should be included. These will include the rights of every person to their life and to the standards of health care appropriate to their illness and, where the provision or quality of that care is demonstrably uneven, to the right to distributive justice to protect the equal rights of all the sick. No right should be included unless its existence has been validated beyond question.<sup>23</sup>

There are two factors which caused of Euthanasia actions happened:

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<sup>23</sup> Brian pollard, *Human Right and Euthanasia*, 1998, [www.bioethics.org.au/Resources/OnlineArticles/Other Articles/Human rights and euthanasia.pdf](http://www.bioethics.org.au/Resources/OnlineArticles/OtherArticles/Human%20rights%20and%20euthanasia.pdf) accessed on April 15, 2013 at 10:37 a.m.

### 1) Humanity Factor

This factor is carried out by a doctor either at the request of the patient or the family doctor or the will itself. This is done by a doctor because they felt pity for the suffering of patients who medically difficult to cure. Thus, a doctor granted the request by the patient.

### 2) Economic Factor

The second factor is recognized by the vice-chairman of the General Executive Board of the Indonesian Doctors Association (IDI) Dr.Kartono Muhammad, that the Passive euthanasia is mostly done by the request of patient families who cannot bear to see the patient lying in the hospital for a long time and it make the hospital cost very high.

Euthanasia is an aid to the patients who are suffering from an illness at the time of approaching death, so, euthanasia brings a relief and mitigates the suffering of the patient. Based on the meaning above can be concluded the notions of euthanasia that the principle contains:

- a. There is an action taken either actively resulting in loss of lives of others;
- b. It was committed as motivated by a desire to liberate others from suffering they experienced, for example, pain that could not be cured, where this can be demonstrated by a doctor;
- c. The act was done by the request of the person concerned or his family who expressed with sincerity.

Based on the explanation above, it could be elaborate with the Article 3 of Law No. 39 Year 1999 on Human Rights as follows as:

1. Everyone is born free with the human dignity of the same and equal and endowed with reason and heart to live in a society, nation and state in a spirit of brotherhood.
2. Everyone has the right to recognition, security, legal protection and fair treatment and to obtain legal certainty and equal treatment before the law.
3. Everyone is entitled to the protection of human rights and fundamental human freedoms, without any discrimination.

#### **B. Sovereignty Theory**

The relation between international law and national law has been the subject of much doctrinal debate. At opposing extremes are the monist and dualist theory. The monist theory views international and national law as part of a single legal order. According to monism, rules of international law can be directly applied in domestic sphere of states. International law is automatically part of the national legal system without the necessity of any domestic implementing legislation. If there is conflict between two systems, international law prevails. To monist, international law is superior to national law.

On the other hand, the dualist theory assumes that international law and national law are two separate legal systems which exist independently of each

other. International law regulates the relationship between states whereas national law regulates the right and duties of individuals within a state.<sup>24</sup>

In the dualism theory stated that, between international law and national law are different. As follows as:

### 1. Subject

The subject of International law is state members, although the subject of National law is individual.

### 2. The source of Law

The source of law is the agreement among the states, but the source of National law is the will of the state.

### 3. National Law

National law has a perfect integrity than International law

The differences between International law and national law based on Anzilotti divided into two fundamental principles. National law based on the principle that state legislation has to obey, in the other hand international law based on the principle that the agreement among the state has to respect based on *pacta sunt servanda*.<sup>25</sup>

An independent country automatically becomes a sovereign state to define, manage, and run a state goal to be achieved as an independent and sovereign country under United Nation protection, including the Netherlands and Indonesia as the UN members.

<sup>24</sup> Abdul Ghafur Hamid, *Op. Cit* p. 50

<sup>25</sup> Sefriani, *Op. Cit* P. 87

In The UN Charter there was such term of self determination, direct or indirect. There are several sections that stated about self determination. Such as:

1. Section 1 (2) stated that...."to develop friendly relations among nations based on respect for the principle of equal rights and self determination"
2. Section 55 stated that...."to creation of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal right and self determination of people..."<sup>26</sup>

Based on the principles, it can be concluded that self determination on UN Charter as a right of people to create stability condition and well being which is the foundation is basic for the establishment of peace and creation of state reconciliation and state relationship.

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<sup>26</sup> Sefriani, 2010, Hukum Internasional Suatu Pengantar, PT Rajagrafindo Persada: Jakarta, p. 115.