

Reformulating Death Penalty: Dynamics and Polemic of International Human Rights Standard and Indonesian Position

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The death penalty is a controversial topic due to its implications for human rights, particularly the right to life, considered a fundamental right. Some argue that the death penalty violates this right, while others believe it is a form of justice for severe crimes. This research explores the debate between the death penalty and human rights using a normative, juridical method and literature review. Some countries still practice the death penalty, while others have abolished it, citing concerns about justice and fairness. The criminal justice system often exhibits disparities, with marginalized groups facing higher rates of execution than wealthier or majority individuals. These inequalities challenge the principle of equality before the law and the integrity of justice. Efforts to reform include restricting or abolishing the death penalty due to concerns about law enforcement abuse, judicial errors, and ineffectiveness in deterring crime. The debate over its place in justice systems remains ongoing.

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1. Introduction

The topic regarding death penalty and human right is controversial in the contemporary world.¹ They would have two different views on the capital punishment, namely the supporters and the opposers.² Since the international protection of human right became a fundamental principle under the UN system,³ death penalty has been a topic of debate in various forms. Death penalty is sometimes seen as a method of enforcing justice to those who believe that the guilty must face the consequences of actions. Such an idea has a retributive effect that can provide a sense of justice, especially to victims and families affected by crime.⁴ However, another groups and individuals believe that death penalty is inhumane and violates human right.

Death penalty has been executed for thousands of years as a form of punishment against the most serious crimes such as murder, treason, drug trafficking, etc, although the form and method have changed from hanging to guillotine, bullets, beheading, torture, and burning. One of the most dreadful death penalty cases in history is the Salem⁵ witch trials in the seventeenth century, where individuals accused of being witches were sentenced to death by hanging or burning.⁶ In England, it had been in place since the 10th century and was maintained until 1965, when death penalty was abolished for all crimes except treason during wartime.⁷ In the US, it was widely

¹ PENAL POPULISM AND PUBLIC OPINION: LESSONS FROM FIVE COUNTRIES 35-60 (Julian Roberts et. al. eds., 2023).

² TODUNG LUBIS & ALEXANDER LAY, THE DEATH PENALTY CONTROVERSY: DIVERGING OPINIONS OF CONSTITUTIONAL JUDGES [Kontroversi Hukuman Mati: Perbedaan Pendapat Hakim Konstitusi] 21 (2009)

³ A. MASYHUR EFFENDI, *THE DEVELOPMENT OF HUMAN RIGHTS (HAM) DIMENSIONS AND THE DYNAMIC PROCESS OF DRAFTING HUMAN RIGHTS LAW (HAKHAM)* [Dimensi HAM dan Proses Dinamika Perumusan Hukum Hak Asasi Manusia] 44 (2005).

⁴ Adam Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63(2) VAND. L. REV. 307-59 (2010).

⁵ In the Salem witch trials, individuals were accused of being witches in the Counties of Essex, Suffolk, and Middlesex, in the colony of Massachusetts between February 1692 and May 1693. It has been described as a danger of religious extremism and false accusations. See Connor Thomson, *Fearful Tension: The Salem Witch Trials*, 1(1) MYSTÉRION: THEOLOGY J. BOS. COLL. 20-40 (2021).

⁶ GRETCHEN ADAMS, THE SPECTER OF SALEM: REMEMBERING THE WITCH TRIALS IN NINETEENTH-CENTURY AMERICA 81 (2009).

⁷ Daniel Pascoe, *Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective* by Andrew Novak, 11(2) ASIAN J. COMP. L. 334 (2016).

enforced in the early days, but nationally regulated in 1976 by the Supreme Court's decision in *Gregg v. Georgia*.⁸ Currently, death penalty still exists in some states in the US and several other countries worldwide.

The goal of this research is to examine the current debates surrounding the death penalty in the international legal and comparative context of human rights, analyzing both the arguments for and against its use, and to explore reform efforts aimed at its restriction or abolition. This article is composed of five parts, including a short Introduction and Conclusion. Part two will discuss the Practice of Death Penalty. Part three will examine the arguments and controversies regarding the death penalty's compatibility with human rights, focusing on issues of justice, fairness, and inequality within the legal system. Part four will explore current reform efforts towards restricting or abolishing the death penalty.

2. Practice of Death Penalty

A. General

Death penalty is inconsistent with the principles of fundamental human rights to protect the right to life.⁹ Some countries have limited the types of crimes for death penalty or changed it to life imprisonment. However, others widely apply death penalty and even increase the use.¹⁰ A debate is going on in the international community whether or not death penalty is part of fair criminal justice system respecting human right.¹¹ Some countries, such as the US and China, still widely apply death penalty,¹² while the EU and Australia have banned this form of punishment,¹³ as shown in Figure 1.

⁸ *Gregg v. Georgia*, 428 U.S. 153 (1976). The United States Supreme Court ruled that death penalty should not violate the US Constitution if imposed in a fair and proportionate manner. See Juan Méndez, *The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment*, 20(1) HUM. RTS. BRIEF 2-6 (2012).

⁹ John Blume & Emily Paavola, *The Death Penalty and the Eighth Amendment after Hurst*, 132(2) HARV. L. REV. 13-5 (2019).

¹⁰ Hugo Bedau, *The Case Against the Death Penalty*, 51(3) J. CRIM. L. & CRIMINOLOGY 377-94 (1960).

¹¹ T Galappathige, *Death Penalty: An International Human Right Perspective*, 17(4) SE. ASIA J. CONTEMP. BUS. ECON. & L. 19-23 (2018).

¹² Shanhe Jiang et al., *Death Penalty Views in China, Japan and the U.S.: An Empirical Comparison*, 38(5) J. CRIMINAL JUSTICE 862-9 (2012).

¹³ Death Penalty Information Center [DPIC], Countries That Have Abolished the Death Penalty since 1976, <https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976>.

Figure 1: Countries by Existence and Practice of Death Penalty Laws (2023)¹⁴



Following Amnesty International, death penalty is generally applied in Asia, Middle East and East Africa but rarely in Europe. A total of 110 countries and territories throughout the world have abolished the capital punishment, but 87 countries still enforce the concept. There are 24 abolitionist countries, which have not carried out death penalty in the last ten years.¹⁵ Actually, the number of executions in the world increased in 2021. According to recent data from the Death Penalty Information Center and Human Rights Watch, the global landscape regarding the death penalty remains complex and diverse. While some countries have made moves toward abolition or have not carried out executions for several years, others continue to enforce capital punishment. As of 2022, approximately 112 countries have abolished the death penalty for all crimes, while 55 retain it but are considered abolitionist in practice (meaning they have not executed anyone in the last decade). However, 38 countries still actively carry out executions.¹⁶

In 2022, the number of executions globally increased compared to 2021. This rise was largely due to a surge in executions in the Middle East and Asia, particularly in countries like Iran and Saudi Arabia, where the application of the death penalty

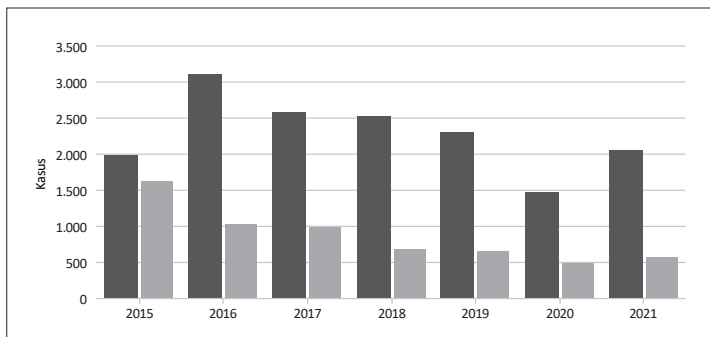
¹⁴ Katharina Buchholz, Where the Death Penalty Exists, Statista (May 16, 2023), <https://www.statista.com/chart/25211/death-penalty-world-map>.

¹⁵ *Id.*

¹⁶ *Id.*

remains prevalent for a range of offenses. The global increase in executions during 2022 underscores ongoing challenges and debates about the use of capital punishment in the context of human rights.¹⁷ In 2023, trends indicate a continuation of this pattern, with some countries enforcing death sentences while others are showing signs of moving toward abolition. Efforts to limit the scope of the death penalty, such as restricting it to only the most serious crimes or commuting sentences, are ongoing in various regions.¹⁸ The number of executions increased by 39% from 2022, reaching a total of 1,477 executions globally. This rise reflects a significant surge in the use of the death penalty, particularly in regions such as the Middle East and Asia, where countries like Iran and Saudi Arabia have intensified their enforcement of capital punishment for various crimes. This increase highlights the ongoing complexities and debates surrounding the death penalty's application in the context of human rights and justice.¹⁹ In 2021, 579 individuals were executed across 18 countries, marking a 20% increase from the 483 executions recorded in 2020. The number of executions in 2020 was the lowest recorded since 2010,²⁰ as reported in Figure 2.

Figure 2: The Number of Death Penalty and Executions in the World²¹



The image is a bar chart showing the number of death penalty cases and executions worldwide from 2015 to 2021. The y-axis represents the number of cases (labeled as

¹⁷ DPIC, *supra* note 13.

¹⁸ HUMAN RIGHTS WATCH [HRW], WORLD REPORT 2023, 39-56 (2023), https://www.hrw.org/sites/default/files/media_2023/01/World_Report_2023_WEBSPREADS_0.pdf.

¹⁹ *Id.*

²⁰ Erlina Santika, Number of Death Sentences and Executions Worldwide Increased in 2021 [Jumlah Vonis Mati dan Eksekusinya di Dunia Meningkat pada 2021], Databoks (Feb. 14, 2023), <https://databoks.katadata.co.id/demografi/statistik/6f1da7a67e5a622/jumlah-vonis-mati-dan-eksekusinya-di-dunia-meningkat-pada-2021>.

²¹ *Id.*

“Kasus” in the chart), while the x-axis shows the years from 2015 to 2021. The chart uses two different colors for the bars:

1. Grey Bars: Represent the number of executions carried out (eksekusi) in each year.
2. Black Bars: Represent the number of death penalty sentences (vonis mati) given in each year.

From the chart, the number of death penalty sentences peaked in 2016, while the number of executions also increased but did not always correspond directly with the sentences in the same year. There was a notable decrease in executions in 2020, which was the lowest since 2015, followed by an increase in both sentences and executions in 2021.

B. The Death Penalty Debate in Indonesia

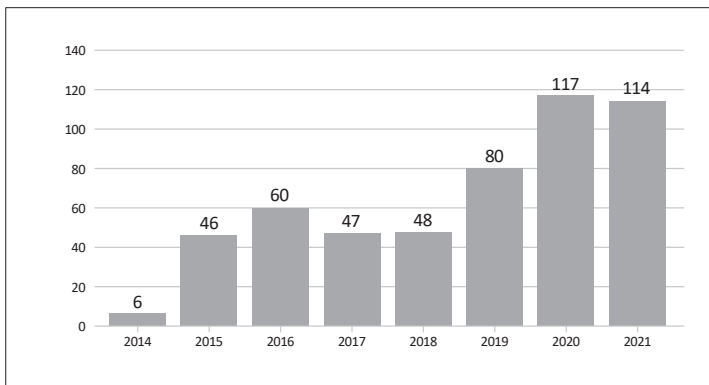
Death penalty is also a topical issue in Indonesia.²² In the past, death penalty was justified in Indonesia. This can be traced from several articles in the Indonesia Criminal Code (KUHP). In addition to Criminal Code, Terrorist Laws, Corruption Laws, Money Laundering Laws lay down the capital punishment.²³ However, the existence of death penalty is not necessarily approved by all community groups in Indonesia. For example, activists for Human Right (HAM) and the National Human Right Commission (Komnas HAM) deny death penalty in Indonesia.²⁴ Notwithstanding, death penalty in Indonesia still occur frequently. According to Amnesty International Indonesia, the number of death penalty in Indonesia is increasing every year as shown in Figure 3.²⁵

²² ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 19-38 (2008).

²³ Raymond Paternoster, *Capital Punishment in America: A New Empirical Analysis of the Deterrent Effects of the Death Penalty*, 85(2) *J. CRIM. L. & CRIMINOLOGY* 327-75 (1994).

²⁴ Agus Purwanto, *Death Penalty and Human Rights in Indonesia*, 9(1) *INT’L J. CRIMINOLOGY & SOCIO.* 1356-62 (2020).

²⁵ Amnesty International Indonesia, *Number of Cases with Death Penalty in Indonesia (2014-21)*, <https://amnesty.org/en/location/asia-and-the-pacific/south-east-asia-and-the-pacific/indonesia>.

Figure 3: Number of Cases with Death Penalty in Indonesia (2014-21)²⁶

A recent death penalty was sentenced to Ferdy Sambo by District Court (PN) on February 13 2023,²⁷ but some criticize death penalty against Ferdy Sambo. For example, the Indonesian Commission for Missing Persons and Victims of Violence (KontraS) argues that death penalty is not in line with the spirit of the moratorium on executions. The KontraS coordinator also said that the criticism did not only apply to the case but also to other individuals. Komnas HAM expressed disagreement with death penalty of Ferdy Sambo, stating that the punishment should be removed from the legal system.²⁸ In this course, different ideas have been developing for reformulating death penalty in view of human right protection and the quality of judicial process. The Indonesian government considers such options as parole or other humane punishments in cases previously threatened with death penalty.

²⁶ Erlina Santika, *The Shock of Ferdy Sambo's Verdict: How Many Death Sentences are there in Indonesia?* [Geger Putusan Ferdy Sambo, Berapa Banyak Kasus Vonis Mati di Indonesia?], Databoks (Feb. 14, 2023), <https://databoks.katadata.co.id/demografi/statistik/3ba8615ce0e5457/geger-putusan-ferdy-sambo-berapa-banyak-kasus-vonis-mati-di-indonesia>.

²⁷ *Ferdy Sambo Sentenced to Death in the Brigadier J Case: Here Are the Stages of the Death Penalty According to Indonesian Law* [Ferdy Sambo Dihukum Mati Atas Kasus Brigadir J, Ini Tahapan Hukuman Mati yang Akan Dilalui Sesuai Hukum di Indonesia], TV ONE (June 9, 2023), <https://www.tvonenews.com/berita/nasional/128457-ferdy-sambo-dihukum-mati-atas-kasus-brigadir-j-ini-tahapan-hukuman-mati-yang-akan-dilalui-sesuai-hukum-di-indonesia>.

²⁸ Melinda Ningrum, *The Pro and Contra of the Death Penalty: The Case of Ferdy Sambo* [Rentetan Pro-Kontra Hukuman Mati Ferdy Sambo], TEMPO (Feb. 15, 2023), <https://nasional.tempo.co/read/1691587/rentetan-pro-kontra-hukuman-mati-ferdy-sambo>.

3. Whether Death Penalty Violates Human Right? The Controversies

Death penalty is the most extreme and controversial form of criminal punishment.²⁹ The Universal Declaration of Human Right (UDHR) disallows death penalty, e.g., in Article 3 which stipulates: “Everyone has right to life, liberty and security of person.”³⁰ This article is pivotal in the global discourse surrounding the death penalty, as it enshrines the right to life as a fundamental human right. Critics of the death penalty argue that it fundamentally contradicts this right.³¹

The argument that the state can take a life as punishment raises profound ethical questions. As noted by various human rights advocates, including figures like Desmond Tutu, the act of executing a person is often viewed as an act of revenge rather than a pursuit of justice.³² This perspective emphasizes that the death penalty does not align with the principles of rehabilitation and restorative justice, which aim to reintegrate offenders into society as productive members. Moreover, the application of the death penalty is fraught with the issues of injustice and discrimination. There are numerous documented cases of wrongful convictions, where innocent individuals have been sentenced to death. Such reality underscores the inherent risks associated with capital punishment, particularly in legal systems that may be influenced by biases related to race, socioeconomic status, or political affiliation.³³

The potential for irreversible error in the judicial process raises significant concerns about the morality and efficacy of the death penalty as a form of punishment. Internationally, the trend has been moving towards the abolition of the death penalty. Many countries have recognized that the death penalty is incompatible with the right to life and have taken steps to eliminate it from their legal systems. The UN has consistently advocated for the abolition of capital punishment, viewing it as a violation of human rights. The Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), adopted in 1989, further reinforces this stance by calling for the abolition of the death penalty.³⁴

²⁹ Waspihah Waspihah et al., *Student Edited Law Journals: Strengthening the Creativity of Law Students in a Challenging Era*, 7(2) J. CREATIVITY STUDENT 133-54 (2022).

³⁰ UDHR art. 3.

³¹ WILLIAM SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 60-2 (2002).

³² Michael Radelet & Ronald Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87(1) J. CRIM. L. & CRIMINOLOGY 1-16 (1996).

³³ Hugo Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40(1) STAN. L. REV. 21-179 (1987).

³⁴ Franklin Zimring & Gordon Hawkins, *Capital Punishment and the American Agenda*, 77(3) J. CRIM. L. & CRIMINOLOGY

Death penalty seriously violates the right to life for humans as god's creature.³⁵ It is often criticized as an inhumane, cruel, and uncivilized form of punishment since the implementation includes the use of violence and causes unnecessary pain to the convicted criminal.³⁶ Moreover, there have been serious issues in the implementation, such as court errors, injustice in the legal system, and cases of executing innocent individuals.³⁷ Death penalty is also unacceptable in terms of racial discrimination. Several research shows that there is a form of systemic discrimination that violates human right.³⁸ Therefore, the implementation of death penalty is contrary to the principle of rehabilitation in the criminal justice system, which states that the primary purpose of criminal punishment is to help the offender change behavior and return to society as productive citizen.³⁹

Death penalty advocates argue that it is necessary to uphold justice in society. They argue that the most serious crimes, such as mass murder, crimes against children, and terrorism, deserve death as the most appropriate form of punishment.⁴⁰ According to some proponents, death penalty can prevent serious crimes because the potential to be sentenced can be a factor in having second thoughts before committing a crime.⁴¹ However, others argue that death penalty cannot prevent serious crimes but only create more problems. They claim that death penalty is not effective in deterring crime and may lead to an increase in violence and revenge in society.⁴² These opposers state that death penalty is unjust and can lead to abuse of power by the criminal justice system.⁴³ In the vein, innocent people can be victims for judicial errors or racial discrimination in the criminal justice system. According to Article 6 (1) of the ICCPR,

1-192 (1986).

³⁵ DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 141-60 (1999).

³⁶ Michael Radelet and Traci Lacoock, *Do Executions Lower Homicide Rates: The Views of Leading Criminologists*, 99(2) J. CRIM. L. & CRIMINOLOGY 489 (2009).

³⁷ Syahrudin Husein, *The Death Penalty According to Indonesian Criminal Law [Pidana Mati Menurut Hukum Pidana Indonesia]*, 11(1) KOMUNIK 164-82 (2019).

³⁸ Isaac Unah, *Choosing Those Who Will Die: The Effect of Race, Gender, and Law in Prosecutorial Decision to Seek the Death Penalty in Durham County, North Carolina*, 15(1) MICH. J. RACE & L. 135-75 (2009).

³⁹ MICHAEL MELLO, DEAD WRONG: A DEATH ROW LAWYER SPEAKS OUT AGAINST CAPITAL PUNISHMENT 1-50 (1997).

⁴⁰ Research and Development Agency for Human Rights [Badan Penelitian dan Pengembangan Hak Asasi Manusia], *The Right to Life vs. the Death Penalty [Hak untuk Hidup vs. Hukuman Mati]*, 10(2) HUM. RTS. BULL. [Warta Hak Asasi Manusia Humanis] 1-44 (2014).

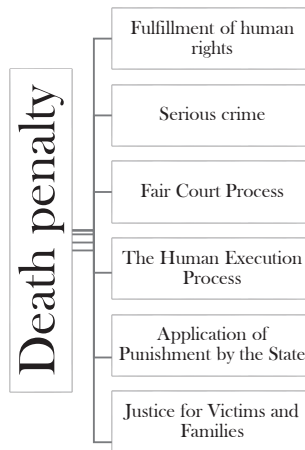
⁴¹ John Bessler, *The Inequality of America's Death Penalty: A Cross-Cultural Perspective*, 34(1) HUM. RTS. J. 1-50 (2012).

⁴² Kealeboga Bojosi, *The Death Row Phenomenon and the Prohibition Against Torture and Cruel, Inhuman or Degrading Treatment*, 4(2) AFR. HUM. RTS. L. J. 303-26 (2004).

⁴³ Rodes Pardosi & Yuliana Primawardani, *The Legitimacy Death Penalty Application of Certain Conditions in the Anti-Corruption Law*, 19(3) JURNAL KONSTITUSI 673-92 (2022).

everyone has the inherent right to life protected by law.⁴⁴ Death penalty thus violates Article 6 (1) since it essentially causes physical pain and deprives the right to life. Even though death penalty is recognized as a tool for implementing criminal justice in several countries including Indonesia, China, Iraq, etc., it must be enforced under the following conditions.⁴⁵

Figure 4: Elements of Death Penalty⁴⁶



1. Serious crime: Death penalty is imposed only for serious and cruel crimes, such as premeditated murder, rape with violence, and betrayal of the state.⁴⁷
2. Fair trial process: Individuals are subjected to fair trial process before sentencing to death. This process includes right to have an attorney, presumed innocent until proven guilty, and present a defense.⁴⁸
3. Application of punishment by the state: Death penalty can only be imposed by the state through a legitimate and authorized justice system. The state must ensure that the concept is imposed fairly and not discriminatively.⁴⁹

⁴⁴ David Johnson, *Asia's Declining Death Penalty*, 10(1) PUNISHMENT & SOC'Y 25-49 (2008).

⁴⁵ GUI HUANG, ON THE ALTERNATIVE PUNISHMENT TO THE DEATH PENALTY IN CHINA 93-129 (2024).

⁴⁶ The flowchart summarizes the key elements of the death penalty, drawing insights from various academic journals. It highlights the legal, ethical, and social aspects surrounding capital punishment. Each element addresses critical issues such as human rights, fair trial processes, and the state's role in administering justice. Overall, it aims to provide a comprehensive overview of the complexities involved in the death penalty debate.

⁴⁷ Amnesty International, *Death Penalty: The Facts*, <https://www.amnesty.org/en/what-we-do/death-penalty>.

⁴⁸ HRW, *Iraq: Tribunal's Flaws Raise Fair Trial Concerns* (2004), <https://www.hrw.org/news/2004/12/16/iraq-tribunals-flaws-raise-fair-trial-concerns>.

⁴⁹ Bedau, *supra* note 10.

4. Human execution process: After the imposition, the state must ensure the execution process is carried out humanely without torture, excessive pain, and degrading treatment.⁵⁰
5. Justice for victims and families: Death penalty must consider justice for the victim and family. This includes giving the victim's family right to attend the trial and opportunity to express views before the sentence is handed down.

Even though the elements are considered reasonable and humane, death penalty has been criticized by human right groups and international organizations advocating for the abolition.⁵¹ The controversies related to death penalty and the violation of human right are presented as follows.⁵²

1. Right to Life: Death penalty violates the most fundamental human right - the right to life. Every human being has right to live without fear of being sentenced by the state.
2. Risk of Error: The justice system is not perfect, and there is a high possibility of sentencing innocent individuals to death. Judicial error and false confessions have occurred in the past, leading to the execution of innocent individuals.
3. Psychological Impact on the Convicted and Family: Death penalty has a severe psychological impact on the convicted and families. The process of waiting for execution can cause stress, fear, and anxiety, which can lead to lifelong trauma.
4. Ineffectiveness in Preventing Crime: There is no clear evidence that death penalty prevents crimes.
5. Violation of right to Protection from Cruel, Inhumane, and Degrading Treatment: Death penalty is accompanied by the use of cruel methods, such as hanging, torture, or lethal injection. This is a violation of right to protection from cruel, inhumane, and degrading treatment.

In Indonesia, No.2/Pnps/1964 and Law No.5 of 1969 regulate the procedures for implementing death penalty. Several laws relating to narcotics have been strengthened by the Constitutional Court's decision as explained previously. Article 98 of the latest Criminal Code states that death penalty is imposed alternatively as a last resort to prevent the commission of criminal acts. Article 100 paragraph (1) stipulates that judges can impose death penalty with a probation period of 10 years.⁵³

⁵⁰ Radelet & Akers, *supra* note 32.

⁵¹ Hugo Bedau, *An Abolitionist's Survey of the Death Penalty in America Today*, 52(4) L. & CONTEMP. PROBS. 125-45 (1989).

⁵² SCHABAS, *supra* note 31, at 113-50.

⁵³ Sandra Babcock, *International Law and the Death Penalty: Evolving Standards of Decency*, 33(4) HUM. RTS. Q. 201-33

4. Reformulating Death Penalty

The recent discourse surrounding the reformulation of the death penalty reflects a growing concern for human rights and the pursuit of a more humane justice system. This reformulation seeks to either replace the existing death penalty framework with alternative forms of punishment or to abolish it entirely, aiming for a system that is fair, proportional, and respectful of human dignity. Proponents of the death penalty argue that it serves as the most severe form of punishment and acts as a deterrent against serious crimes. They further assert that it is not merely an act of revenge but is grounded in a moral belief that justice must be served.⁵⁴ This moral belief often stems from the idea that certain crimes are so heinous that they warrant the most severe form of punishment - capital punishment. Advocates argue that the death penalty serves as a form of retributive justice, where the punishment is proportionate to the gravity of the crime committed, particularly in cases of murder, terrorism, or other violent offenses. This belief is rooted in several key moral principles as follows.

1. Retribution: Many supporters of the death penalty hold that offenders deserve to face consequences that reflect the severity of their actions. The notion of “an eye for an eye” is often cited, suggesting that the death penalty is a just response to the loss of life caused by the offender.⁵⁵
2. Deterrence: Some proponents argue that the death penalty acts as a deterrent to potential criminals, instilling fear of the ultimate punishment and thereby preventing future crimes. This belief is based on the idea that the threat of execution may lead individuals to reconsider committing serious offenses.
3. Justice for Victims: There is a strong sentiment among supporters that the death penalty provides a sense of closure and justice for the victims and their families. They believe that executing a perpetrator can help restore a sense of balance and moral order after a violent crime.⁵⁶
4. Social Contract: Some argue that society has a moral obligation to protect its citizens from the most dangerous individuals. In this view, the state’s use of the death penalty is justified as a means of safeguarding the community and upholding the rule of law.⁵⁷

(2011).

⁵⁴ Chad Flanders, *The Case Against the Case Against the Death Penalty*, 16(4) NEW CRIM. L. REV. 596-620 (2013).

⁵⁵ ANDREW HIRSCH, CENSURE AND SANCTIONS 31-80 (1993).

⁵⁶ Michael Radelet & Marian Borg, *The Future of the Death Penalty in the United States*, 88(4) J. CRIM. L. & CRIMINOLOGY 25-49 (1998).

⁵⁷ THOMAS HOBBS, LEVIATHAN 31-69 (1651).

While these moral beliefs provide a framework for justifying the death penalty, they are also the subject of significant ethical debate. Critics argue that the death penalty is not morally justified due to the potential for wrongful convictions, the lack of evidence supporting its deterrent effect, and the inherent value of human life.⁵⁸ Thus, the discussion around the moral justification of the death penalty remains complex and contentious, with strong arguments on both sides. This concept still applies in Indonesia as is formally stated in Article 10 of the Criminal Code.⁵⁹

In the global context, some countries have conducted a reformation by removing death penalty from the legal system, while others still enforce it in practice during wartime situations. Historically, some nations have undertaken substantial reforms by abolishing the death penalty from their legal systems.⁶⁰ For instance, countries like Portugal and Norway eliminated capital punishment in the 19th century, influenced by evolving human rights norms and a growing belief in rehabilitation over retribution.⁶¹ Recently, nations such as Canada and New Zealand have also abolished the death penalty, reflecting a broader trend toward humane justice practices.⁶² Conversely, there are countries that still enforce the death penalty, particularly in wartime situations, where it is often justified as a means to maintain national security and order. During periods of conflict, for example, despotic countries like Syria and North Korea have been known to utilize capital punishment as a tool to suppress dissent and instill fear among the populace. These practices highlight the stark contrasts in how the death penalty is perceived and implemented globally.⁶³

Moreover, the ongoing debates in countries that retain the death penalty often revolve around such issues as deterrence, retribution, and public safety. In the US, for example, death penalty remains legitimate in several states, with proponents arguing that it serves as a necessary deterrent against violent crime, while opponents cite concerns over wrongful convictions and racial disparities in sentencing.⁶⁴ This

⁵⁸ ANTONY DUFF, *CENSURE AND SANCTIONS* 31-80 (1993).

⁵⁹ I Ketut Eka Saputra, I Ketut Mertha & A.A. Ngurah Wirasila, *The Death Penalty, Human Rights, and Judicial Considerations*, 1(1) *KERTHA SEMAYA: J. LEGAL STUD.* 1-6 (2019).

⁶⁰ Michael Radelet, *The Global Spread of the Death Penalty: The Case for Abolition*, Death Penalty Information Center (2020), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/the-global-spread-of-the-death-penalty-the-case-for-abolition>.

⁶¹ Council of Europe, *Abolition of the Death Penalty in Europe*, <https://www.coe.int/en/web/abolition-death-penalty/abolition-of-death-penalty-in-europe>.

⁶² World Coalition Against the Death Penalty, *22nd World Day Against the Death Penalty*, <https://worldcoalition.org/campagne/22nd-world-day-against-the-death-penalty>.

⁶³ HRW, *The Death Penalty in Time of War* (2016), at 8-9, https://cdn.penalreform.org/wp-content/uploads/2014/11/PRI-Death-penalty-info-pack_2017-3rd-edition_WEB.pdf.

⁶⁴ Charles Doyle, *Federal Capital Offenses: An Overview of Substantive and Procedural Law*, CRS Report (R42095), <https://crsreports.congress.gov/product/pdf/R/R42095>.

complex landscape underscores the multifaceted nature of death penalty and the varied historical and practical contexts that shape its existence around the world.⁶⁵

Wrongful decisions can occur due to various factors such as identification errors, false evidence, as well as political and racial influence. Therefore, reformulation can minimize the risk of unfair death penalty decisions.⁶⁶ In the Netherlands, for example, the death penalty system has changed in line with state policy. The Netherlands abolished its death penalty system under a significant state policy shift that occurred in the late 19th century. Specifically, in 1870, the Dutch Parliament, influenced by evolving humanitarian perspectives, recognized capital punishment as “cruel and uncivilized.”⁶⁷ This reform was championed by liberal-catholic Minister of Justice Franciscus van Lilaar, who introduced a bill that was debated for seven days before being approved by the States General. Following this abolition, life imprisonment was established as an official punishment in 1878, marking a clear transition towards a more humane justice system. In the following years, the Netherlands further solidified its stance against capital punishment. By 1991, all references to the death penalty were removed from Dutch law, reinforcing the country’s commitment to human rights.⁶⁸ Today, the Netherlands operates under a clear policy that prohibits participation in extradition if there is a risk that the suspect could face execution in the requesting state. This comprehensive approach reflects the Netherlands’ dedication to upholding human rights and ensuring that the death penalty cannot be reinstated in any future legal framework.⁶⁹ Scandinavian countries have a long history of opposing the death penalty, with Sweden abolishing it in 1921, Norway in 1979, Denmark in 1978.⁷⁰ The reformulation of death penalty covers the following stage. [Figure 5]

⁶⁵ Zimring & Hawkins, *supra* note 34..

⁶⁶ David Baldus et al., *Race, Poverty, and the Death Penalty: A Study of the Effect of Race and Poverty on the Disposition of Death Penalty Cases*, 77(4) J. CRIM. L. & CRIMINOLOGY 1075-126 (1986).

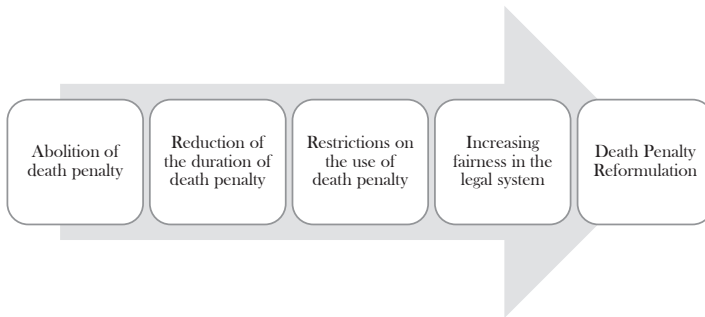
⁶⁷ Jeroen van der Linden, *The Abolition of the Death Penalty in the Netherlands: A Historical Perspective*, 92(3) J. CRIM. L. & CRIMINOLOGY 25-49 (2002).

⁶⁸ EU Agency for Fundamental Rights, *Abolition of the Death Penalty in the Netherlands* (2015), <https://fra.europa.eu/en/publication/2015/abolition-death-penalty-netherlands>.

⁶⁹ Amnesty International, *The Death Penalty in the Netherlands: A Historical Overview* (2019), <https://www.amnesty.org/en/latest/research/2019/06/death-penalty-netherlands-historical-overview>.

⁷⁰ Amnesty International, *Death Sentences and Executions 2022* (2023), <https://www.amnesty.org.au/wp-content/uploads/2023/05/Amnesty-International-Death-Sentences-and-Executions-2022-Report.pdf>.

Figure 5: Reformulating Stages of Death Penalty Source



Source: Compiled by the author

1. Abolition: Some countries have abolished death penalty from their legal system and replaced it with life imprisonment. The abolition is based on the belief that there is no moral or ethical justification for killing as punishment.
2. Reduction of the duration: The reduction of the duration can be achieved by reducing the period of detention before the execution, replacing it with life imprisonment without the possibility of parole, or providing options after the defendant has served a portion of sentence.
3. Limiting the use: Countries practicing death penalty can limit the use by tightening the criteria and requirements for imposing the punishment. For example, the punishment is only given for the most serious crimes, such as premeditated murder, terrorism, or crimes against national security.
4. Improving justice in the legal system: Improving justice in the legal system is obtained by strengthening the right of the defendants as well as promoting the standards of evidence and legal quality.⁷¹

Reformulating death penalty mainly aims to create a fair and humane legal system. Those countries who implement death penalty must improve the legal systems in compliance with international human right standards. Additionally, the reformulation should complement the judicial system to reduce the risk of wrongful or misguided decisions which occur due to various factors such as identification errors, false evidence, as well as political or racial influence.

⁷¹ PHILIP SMITH, PUNISHMENT AND CULTURE 34-142 (2008).

5. Indonesia's Position on Death Penalty

Indonesia's position on death penalty reflects a complex interplay of social, cultural, and political factors. Since its independence in 1945, Indonesia has maintained death penalty within its legal system as a sanction for serious crimes such as narcotics, terrorism, and premeditated murder. Proponents of death penalty argue that it is necessary to maintain security and public order, serving as a deterrent for potential lawbreakers. They believe that capital punishment provides a strong deterrent effect and demonstrates the state's firmness in responding to crimes that harm many people.⁷²

On the other hand, there are voices opposing the application of the death penalty. Opponents argue that the judicial system in Indonesia is still prone to errors, with a significant risk that innocent people may be sentenced to death. Additionally, criticism is directed at the effectiveness of the death penalty in reducing crime rates.⁷³ Many researchers and human rights activists contend that the focus be redirected toward rehabilitation and reintegration of offenders into society, rather than imposing a permanent and irreversible punishment like the death penalty.⁷⁴

Indonesia is also influenced by international pressure from various human rights organizations, including Amnesty International, which calls for the country to follow the global trend toward the abolition of the death penalty.⁷⁵ Nevertheless, the Indonesian government continues to uphold capital punishment, arguing that it is part of a legal policy that aligns with societal values and local context.⁷⁶ Thus, the issue of death penalty in Indonesia remains a controversial and complex topic that requires ongoing dialogue between the government, society, and international organizations to seek a more just and humane resolution.

⁷² Surya Tjandra, *Death Penalty in Indonesia: A Legal Perspective*, 47(1) INT'L J.L. CRIME & JUST. 142-55 (2016).

⁷³ MICHAEL CAVADINO ET AL., *THE PENAL SYSTEM: AN INTRODUCTION* 150-2 (2007).

⁷⁴ *Id.*

⁷⁵ Amnesty International, *Death Penalty: A Global Perspective* (2021), <https://www.amnesty.org/en/what-we-do/death-penalty>.

⁷⁶ Tjandra, *supra* note 72.

6. Conclusion

Death penalty is a highly topical issue across various countries due to its perceived disregard for human rights, particularly the fundamental right to life. This controversy has led many nations to abolish the death penalty from their legal systems, recognizing the ethical and legal challenges it presents. However, some countries, including Indonesia, still maintain the death penalty as a form of capital punishment for certain crimes. Their differences have sparked ongoing debates about the need for reformulating the death penalty in the context of the twenty-first century's human rights standards. The reformulation may be a step toward aligning domestic legal practices with international human rights norms. These efforts often focus on protecting human rights within the legal system and improving the overall quality and fairness of the judicial process. Reformulation includes the complete abolition of the death penalty, which would align Indonesia with the global trend. Alternatively, other reform measures suggest reducing the time a convict spends on death row, limiting the scope and application of the death penalty to only the most heinous crimes, and increasing safeguards to ensure justice is served without bias or discrimination. Such measures aim to enhance the fairness and integrity of the legal system, addressing concerns about potential miscarriages of justice and the disproportionate impact of the death penalty on marginalized groups. In this regard, the death penalty should also be reviewed as a form of punishment. Given the evolving standards of human rights and the shift toward more rehabilitative approaches, the death penalty warrants careful reconsideration. This includes weighing its ethical implications, the potential for irreversible errors, and the need for justice that prioritizes rehabilitation and reintegration over retribution. Ultimately, the ongoing debate on the death penalty highlights the complex interplay between justice, legal traditions, and evolving human rights standards. Indonesia's position on the death penalty reflects the tension between a retributive legal tradition and the demand to respect human rights. Despite calls for reform, the abolition of the death penalty remains a complex and controversial issue that requires ongoing dialogue between the government, society, and international organizations.

To move forward, it is crucial to conduct comprehensive reviews of the death penalty's application in Indonesia, considering its ethical implications and alignment with international human rights standards. Additionally, promoting ongoing discussions between the government, civil society, and international organizations will foster understanding and explore various perspectives on this critical issue.

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