

International Death Penalty Report 2023

# Steep Road for Abolishing Death Penalty in Indonesia



**KontraS**  
Komisi Untuk Orang Hilang  
dan Korban Tindak Kekerasan

**International Death Penalty Report 2023**

# **Steep Road for Abolishing Death Penalty in Indonesia**

**Commission for the Disappeared and Victims of Violence (KontraS)**

## **Team of Writers**

Helmy Hidayat Mahendra  
Rizky Fariza Alfian  
Muhammad Yahya Ihyaroza  
Jane Rosalina Rumpia

Hans Giovanny Yosua  
Rozy Brilian Sodik  
Andrie Yunus

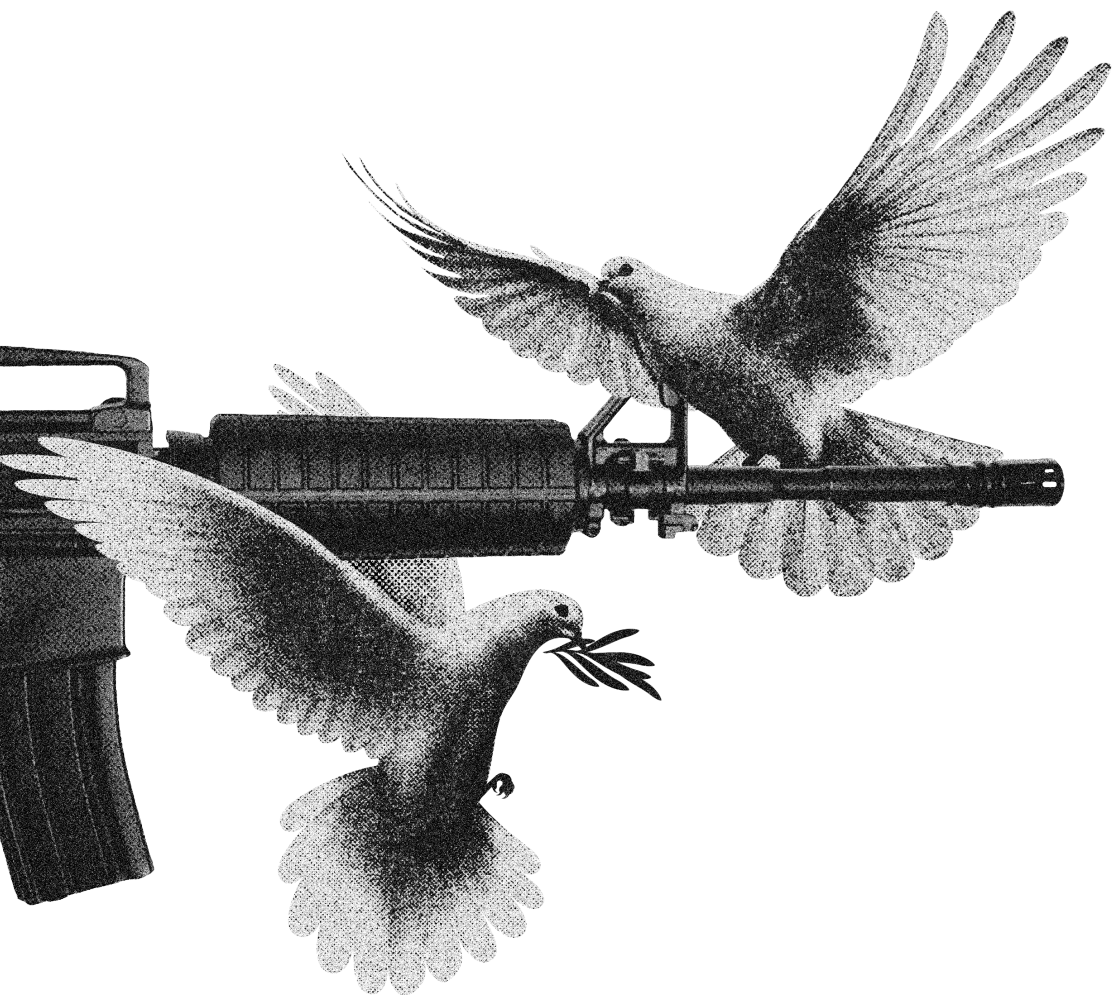
## **Layout**

Tuan Parkodi

**October 2023**

## **Publisher**

Komisi untuk Orang Hilang dan Korban Tindak Kekerasan (KontraS)  
Jalan Kramat II/7, Kwitang  
Senen, Jakarta Pusat  
Tlp: 021-3919097 | Fax: 021-3919099 |  
Email: [kontras\\_98@kontras.org](mailto:kontras_98@kontras.org)  
Website: [kontras.org](http://kontras.org)



# Executive Summary

In light of the 2023 World Against the Death Penalty Day, Commission for the Disappeared and Victims of Violence (KontraS) published an annual report on the death penalty that still exists in Indonesia from October 2022 - September 2023. During this period, we focus on the slippery slopes of abolishing the death penalty, even though Indonesia is a pioneer in the death penalty reform based on the Indonesian Criminal Code (KUHP).

On the momentum of World Against the Death Penalty Day, we highlight at least on many death penalties have been handed down. We found at least 27 of death sentences while 18 of them were narcotics cases, 7 were premeditated murder, and 2 were sexual violence cases. Furthermore, we also noticed that the District Court was the judicial institution that often imposes death sentences at 20 sentences, followed by 3 sentences imposed in the High Court, and 4 sentences imposed in the Supreme Court.

Based on the data, we found that the Indonesian Government remains passive in the face of global trend of reducing the death penalty, despite the government having a breakthrough on the reformation of the death penalty policy. We also see that the government fails to see the structural issue of the death penalty and continues to choose it as a shortcut in resolving criminal cases. Other than that, it is necessary to make an overall evaluation regarding the effectiveness and the preciseness of the death sentences that are still handed down to this day.

In addition to emphasizing this point, we also deem the death penalty has now become a red carpet for the country to ensure the longevity of torture practices. This is because torture can exist from the absence of a whole fair trial

by law enforcement. Additionally, it may also provide a record of the judges' performances as they have a very important role to be able to protect the human rights to the defendants in terms of the death penalty.

Moreover, this report provides a record regarding the provision of the death penalty in the newly enacted Criminal Code. In the Criminal Code, we found that the regulation of death penalty as an alternative sentence should be seen as the first step towards the abolition of the death penalty. In the near future, when the new Criminal Code comes into force, Judges may no longer issue the death sentences to convicts. Other than that, we also highlight that when the death convict has to undergo 10 years of probation, if possible, the death penalty imposed on the convict may be revised to life imprisonment or imprisonment for 20 years.

Furthermore, we examine Indonesia's disposition to work towards the abolition of the death penalty on a global scale. We found that currently 112 countries have abolished the death penalty from their criminal law, followed by 23 countries that still regulate the death penalty in their criminal law but have never imposed the death penalty on criminal defendants. However, Indonesia is one of the 55 countries that still defends the death penalty and sentences the defendant to death. The phenomena from the other side of the world should be an important note to the Indonesian government to impose a nation-wide moratorium on the death penalty and prepare a more effective step regarding the death penalty.

Beyond that, in this report, we deem the practice of imposing death penalty is part of the penal populism. Within the past year, there have been a lot of criminal phenomena or criminal acts that enrage the public such as the death of Brigadier Josua Hutabarat and the Herry Wirawan case. We see that currently, the imposition of the death penalty serves to appease the public only momentarily. We see that fighting against the populism narration should be underlined but not legitimize nor support the criminal act. It is because the narrative is oversimplified by retentionists.

Finally, this note may provide recommendations to the Indonesian Government. In addition, it hopefully becomes an input to the nation as a path towards the abolition of the death penalty. We expect that this simple report may be considered and evaluated to the stakeholders to abolish the practice of death

penalty in the current legal policy, also that the nation will follow the Human Rights principles as a whole and instigate the public awareness of the death penalty issue in Indonesia.

**Jakarta, 10 October 2023**

**Working Board**

**Dimas Bagus Arya, S.H.**

**Coordinator**

# Table of Contents

<b>Executive Summary</b>	<b>2</b>
<b>Table of Contents</b>	<b>5</b>
<b>I. Introduction</b>	<b>6</b>
<b>II. Situation and Condition of Death Penalty in Indonesia</b>	<b>9</b>
<b>From October 2022 - September 2023</b>	
KontraS Advocation Notes on Death Penalty Case	13
<b>III. Death Penalty Practice: Nation’s Red Carpet to Perpetuate</b>	<b>20</b>
<b>Torture Practices</b>	
<b>IV. Death Penalty Provision Notes in the New Criminal Code</b>	<b>23</b>
<b>V. Death Penalty: Indonesia’s Position in the Efforts to</b>	<b>27</b>
<b>Abolish the Death Penalty in the World</b>	
<b>VI. Against Populism: The Illusion of Deterrent Effect in</b>	<b>31</b>
<b>Imposition of the Death Penalty</b>	
<b>VII. Conclusion</b>	<b>36</b>
<b>VIII. Suggestion and Recommendation</b>	<b>39</b>
<b>IX. Attachment</b>	<b>41</b>
Request of Information on Death Row Prisoners	42

I.

# Introduction

In the past several periods, the Commission for the Disappeared and Victims of Violence has consistently published annual reports on the condition under which the death penalty is still imposed in Indonesia in Indonesia. At the least, in the October 2022-September 2023, we focus on several death penalty practices that are still perpetuated by the Indonesian Government, despite it giving new breakthroughs regarding the renewal of the death penalty policies under the Indonesian Criminal Code (KUHP) - in which death penalty now serves as an alternative punishment.

Along the 2023 World Against the Death Penalty Day that falls on October 10th, we adopted a main theme of **“The Slippery Slopes of the Abolition of the Death Penalty”**. The decision of the theme was based on several findings along the October 202-September 2023 where we found that the efforts to abolish the death penalty in Indonesia still face a long, hard, and sloped road ahead. In fact, the death penalty in Indonesia clearly violates Article 28 I of the 1945 Constitution stated that the right to life should not be reduced in any circumstances (non-derogable rights) - meaning that in any situation, the taking of a person’s life is against the constitution.

Moreover, we view that Indonesia as a nation that has ratified the Convention on Civil and Political Rights (ICCPR) under Law no. 12 Year 2005 also does not states that every human being has a binding right to their life and this right shall be protected by the law, that no one shall be arbitrarily deprived of his right to life. This article states that the death penalty may be imposed as long as the crime is the most serious crimes.<sup>1</sup> Moreover, the United Nations Human

1 The phrase the most serious crimes is explained in paragraph 91 of the Report of the



Rights Committee affirms that the right to life is the supreme right in which its derogation is unacceptable, even in a dire situation (paragraph 6 *General Comment* No. 6 ICCPR).<sup>2</sup>

On International standpoint, we found that the government has yet to show desire to abolish the death penalty as a form of national support towards the implementation of the Human Rights. At least during the Universal Periodic Review (UPR) showcase, the issue of the abolition of the death penalty, it was an important recommendation and became the majority issue recommended by 28 nations to the Indonesian government. Though in reality, the recommendation was not heeded by the Indonesian government, seen from the lack of support given to any of the recommendation regarding the death penalty issue.

The Indonesian government actually has given the newest breakthrough regarding the continuation of the death penalty practice under Law No. 1 Year 2023 regarding the Criminal Code. However, we note that the regulation still raises a series of major questions in the form of legal insecurity particularly towards death penalty convicts. Moreover, the new Criminal Code brought forth the decolonization spirit to abolish any and all articles that has an essence of colonialism or colonial legacy. Unfortunately, the efforts to abolish the death penalty has yet to be done completely.

From the facts above, this short report will provide an extensive yet concise exposure on the practical overview of the death penalty in Indonesia. While analyzing the findings, we use the human rights framework, policy, and several pre-existing regulations be it on an international (convention) and national scale. Also in this report, we summarized some findings into several topics including: *First*, Situation and Condition of Death Penalty in Indonesia from October

Special Rapporteur (E/CN.4/1997/60), dated 24 December 1996 which states "In addition, Paragraph 1 of the Safeguards guaranteeing the protection of the rights of persons facing the death penalty, endorsed by the Economic and Social Council in its resolution 1984/50 of 25 May 1984, states that the crimes for which the death penalty may be imposed should be limited to intentional crimes, which cause lethal or other extremely serious consequences. Hence, the Special Rapporteur concluded that the death penalty should be abolished for crimes such as economic crimes and drug-related offenses.

2 Todung Mulya Lubis and Alexander Lay. 2009. *The Death Penalty Controversy Dissenting Opinions of Constitutional Judges*. Jakarta: Kompas Book Publisher.

2022 - September 2023. *Second*, Death Penalty Practice: Nation's Red Carpet to Perpetuate Torture Practices. *Third*, Death Penalty Provision Notes in the New Criminal Code. *Fourth*, Death Penalty: Indonesia's Position in the Efforts to Abolish the Death Penalty in the World. *Fifth*, Against Populism: The Illusion of Deterrent Effect in Imposition Death Penalty.

## II.

# Situation and Condition of Death Penalty in Indonesia from October 2022 - September 2023

Based on the observational data collected by KontraS from October 2022-September 2023, we recorded **27 death sentences** in Indonesia. The number was collected from media observation, case liaison, also network data owned by KontraS; remembering that the Indonesian government continuously fail to publish data regarding the exact number of death penalty convicts in Indonesia.

As support towards the data findings by KontraS, we also sent letter of public information disclosure on 6 September 2023 to two (2) institutions including the Ministry of Law and Human Rights (Q.q. Director General of Correctional Institutions and Human Rights) and the Supreme Court under letter numbers 13/SK-KontraS/IX/2023 and 12/SK-KontraS/IX/2023. Unfortunately, even until the publishing of this report, there has yet to be any information provided by the two institutions. The lack of transparency from the two institutions indicates that the nation is still trying to evade giving open information regarding the death sentences in Indonesia. Moreover, the recommendation given by other countries at UPR regarding the transparency of the death penalty data in Indonesia has not been heeded.

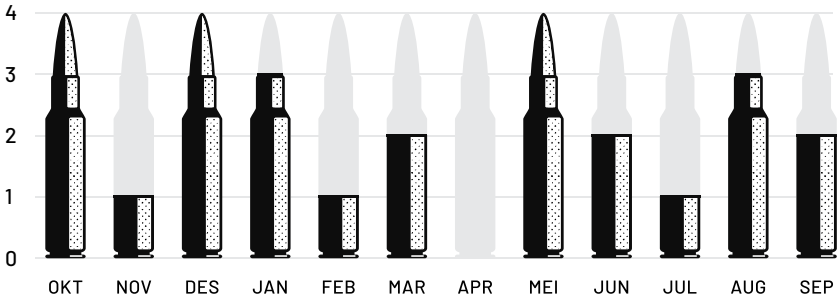
Furthermore, based on the observation we have done, we found that the 27

# Death Sentence

October 2022 - September 2022

27 Death Sentences

50 Defendants



## Based on Case

18 Narcotic

7 Murder

3 Sexual Violence

## Based on the Judicial Institution

20 District Court

3 High Court

4 Supreme Court

of death sentences were spread in several regions in Indonesia. We noted that **North Sumatra** has **8** death sentences, followed by **Jakarta** with **5** death sentences. As for the monitoring that we have conducted, there are at least 50 defendants from the 27 death sentences that have been handed down.

On the other side, based on the categorization of the verdict, we recorded that from the 27 death sentences that have been handed down, **18** death sentences were related to narcotics crimes where we noted that the article applied in the sentencing was Article 144 of the Constitution No. 35 Year 2009. Followed by **7** death sentences related to premeditated murder regulated under Article 340 of the Criminal Code. Also, **2** other sentences related to sexual violence crimes, where we noted that it was regulated under Article 81 paragraph 2, paragraph 5 Jo Article 76D of the Constitution No. 35 Year 2014 Jo No. 17 of the Constitution Year 2016 regarding to Child Protection Jo Article 65 paragraph (1) of the Criminal Code. In addition, one other case was under Article 81 paragraph (3) juncto Article 76 D of the Constitution of the Republic of Indonesia number 35-year 2014 regarding to Child Protection juncto Article 65 paragraph (1) of the Criminal Code, subsidiary Article 82 paragraph (2) juncto Article 76 E of the Constitution of the Republic of Indonesia no. 35 year 2014 regarding Child Protection juncto Article 65 paragraph 1!) of the Criminal Code. We regard that the consistent number of the death sentences indicate that the application of punishment does not give a significant prevention effect.

Based on the judicial institution, we noted that the First Instance Court (District Court) has the most counts in imposing the death penalty towards individuals at **20** sentences, followed by the Second Degree Court (High Court) with **3** death sentences, and the Supreme Court with **4** death sentences.

The number of sentences handed down by the First Instance Court needs special attention. Judges indeed have sovereignty over the decisions they make. The number of sentences handed over by the District Court shows that judges tend to still have punitive paradigms in sentences towards defendants. Other than that, we also deem that the number of sentences handed over by the District Court showed the lack of understanding regarding the principles of being cautious in death sentences. Moreover, we found the judges did not view at the subject matter structurally, for example on the Mawardi's case in Medan, North

Sumatra.<sup>3</sup> According to the information we gathered, Mawardi was forced to be a courier to pay for his mother's medical bills from her stroke. This is what led Mawardi to agree to his friend's offer to bring marijuana to Medan.

Referring to several documented data, we examined the large number of sentences imposed in Indonesia reflects the passiveness of the Indonesian government in responding to the global trend that has clearly shown an ever decreasing number of death sentences by other nations despite the government having shown improvement by making the death penalty an alternative punishment. The number of death sentences on narcotics issues shows that the government is still stuck in the "deterrent effect" in imposing the death penalty. In fact, in research conducted by Novrianza,<sup>4</sup> it is mentioned that there no proof that the death penalty can be compared to other types of punishment that can show deterrent effect and effective punishment. In addition, the logic of the argument regarding the deterrent effect still makes sense, but there is no statistical (empirical) data and research that can support the notion, what happen is otherwise. Apart from the lack of study showing the deterrent effect in death sentences, it was found that poverty is one of the factors for the imposition of the death penalty. This becomes a class-based discriminatory act in some parts of countries.<sup>5</sup>

We regard that the government has failed in this aspect as seen by the number of structural issues occurring, and yet they still choose the death penalty as a shortcut when handling criminal cases. Further observation is required regarding the background of a person in committing a criminal act. The neglect regarding the matter is a form of disavowal on the main purpose of the law which is to strive for justice. We also regard that the continuous pattern that happens such as the dominance of the death sentences in narcotics cases and the consistency of the sentences from the District Court should urge the nation to seriously evaluate

3 See <https://www.detik.com/sumut/hukum-dan-kriminal/d-6458449/alasan-mawardi-nekat-jadi-kurir-13-ton-ganja-terdesak-biaya-pengobatan-ibu>

4 Novrianza, Mitro Subroto. 2021. Imposition of Death Penalty for Narcotics Crime. Syntax Fusion Journal. Vol 1 No 11, November 2021. E-ISSN: 2775-6440. Online: <https://fusion.rifainstitute.com/index.php/fusion/article/view/104/102>

5 United Nations, Death penalty disproportionately affects the poor, UN rights experts warn. Online: <https://www.ohchr.org/en/press-releases/2017/10/death-penalty-disproportionately-affects-poor-un-rights-experts-warn>

the effectiveness and appropriateness of imposing the death penalty.

## KontraS Advocation Notes on Death Penalty Cases

### A. Legal Effort in the Reconsideration of the Rusula Hia Case

On December 3033 - January 2023, KontraS provided litigation assistance towards a death penalty convict by filing a Judicial Review against death convict named Rusula Hia aka Sini aka Rusula to the Supreme Court through the Gunungsitoli District Court, Nias, North Sumatra. The case started in 2012 when Rusula Hia and Yusman Telaumbanua<sup>6</sup> became victims of a staged murder case on 3 (three) people who wanted to buy geckoes. During the trial evidence process, the evidence presented and examined were deemed weak because the Public Prosecutor was only able to present witnesses who were not at the scene of the incident and were not aware of the events clearly (*Testimonium De Auditu*). yang tidak berada di lokasi kejadian dan tidak mengetahui pasti peristiwa (*Testimonium De Auditu*).

As a result, Rusula Hia was deemed guilty on premeditated murder charge as per Article 340 juncto Article 55 paragraph (1) of the Criminal Code and was handed down the death penalty. In the court decision number 07/PID.B/2013/PN-GS, the panel of judges heed the precautionary principle in examining, judging, and deciding a quo. It was obvious when the judge erred in considering the witness evidence, had erred in determining the elements of error and crime, had erred in the gravity of the conviction, also had ruled out the fact that there were coercion that caused Rusula be deemed guilty of the crime. The erroneous decision of the panel of judges forced Rusula to bear the burden.

<sup>6</sup> Yusman Telaumbanua was a juvenile convict who was a KontraS client. In the same case, Yusman was also given the death penalty. But the PN Gunungsitoli conviction was rectified by the Supreme Court on January 2017 of this year. There were new evidence (novum) submitted by KontraS regarding Yusman Telaumbanua's age examined by dental forensic analysis that most likely become one of the main reasons Yusman evaded the death penalty. From expert explanation presented on the Judicial Review with Case Number 8/PID/B/2013/PN-GST, it was made known that the dental and bone examination on Yusman Telaumbanua by the Padjajaran University Bandung Dentist Team proved that Yusman Telaumbanua's age during the exam in 2016 was around 18-19 years old which means that in 2012, Yusman was 15-16 years old.

On such belief that there were mistakes by the judges in the trial and conviction of Rusula, KontraS filed for a Judicial Review with four main arguments. First, the panel of judges has wrongly examined the witness evidence on case 07/PID.B/2013/PN-GS on behalf of the defendant Rusula Hia. Second, in regards of *a quo* the panel of judges had erred in determining guilt and the element of intent. Third, the panel of judges also erred in determining the severity of the punishment for the defendant. Fourth, the panel of judges negated that there was coercion carried out by the suspect - who is still on the Wanted List - by forcing and threatening Rusula to commit a criminal act.

The Judicial Review memory appeal hearing was held on 1 December 2022. Furthermore, the first hearing was done on 5 January 2023 with the agenda of reading the memory of Judicial Review plea. The second hearing was conducted on 11 January 2023 with the agenda of reading the response based on Judicial Review memory by Gunungsitoli District Court. During the process of Judicial Review, a number of forensic linguistic experts sent *amicus curiae*. Precisely, on 29 March 2023, representatives of linguistic experts from the Tarbiyah Science Faculty and the State Islamic University (UIN Syarif Hidayatullah Jakarta) Teaching Faculty submitted an *amicus* titled "*Construction of the argument of Gunung Sitoli District Court decision No. 07/Pid.B/2013/PN-GS: Forensic Linguistic Review.*"<sup>7</sup> Through the *amicus*, experts reviewed the verdict and argued that the language issued by the Wanted List suspect in a threatening and coercive tone frightened Rusula into committing a criminal act.

The case under register number 58 PK/Pid/2023 was then decided by the panel of judges to be reviewed on 24 May 2023. The panel consisted of Dr. Desnayeti M., S.H., M.H., Judge Yohanes Priyana, S.H., M.H. as Chairman, dan H. Dwiwarso Budi Santiarso, S.H., M.Hum., as a member. The panel who examined and sentenced the Judicial Review of Rusula Hia stated that they denied the Judicial Review request. In the decision, the panel postulated that there were no mistakes nor oversight done by the the panel of first instance judges who decides and tried case number 07/Pid.B/2013/PN-GS. The panel's decision for the Judicial Review was disappointing and deemed a step back in efforts to abolish the death penalty

7 *Amicus Curiae* submitted by the forensic linguist experts was published in the *Kembara FKIP Muhammadiyah University Malang Journal* Vol. 9, No. 1, April 2023. More details are available on <https://ejournal.umm.ac.id/index.php/kembara/article/view/24279/12275>.



in Indonesia.

## **B. Case Assistance for Ruben Pata Sambo, Markus Pata Sambo, and Augustine Sambo**

In 2013, KontraS received report of death penalty on a family in Tana Toraja from the previous Attorney. Based on the information from the previous Attorney, after going through all legal proceedings, Agustinus Sambo was deemed guilty on charges of continuous joint premeditated murder and joint rape under the article 340 of the Criminal Code Juncto Article 55 paragraph 1 of 1 of the Criminal Code, and was found guilty of theft as stipulated in Article 362 of the Criminal Code. Meanwhile, Ruben and Markus Pata Sambo were each found guilty of joint premeditated continuous murder as stipulated in Article 340 Juncto Article 55 paragraph 1 of 1 of the Criminal Code juncto Article 64 paragraph 1 of the Criminal Code.

After verification report and an investigation, an attempt to fabricate the case by the Investigator was revealed by practicing torture against the Main Perpetrator, Agustinus Sambo, and people accused in the murder case including Ruben Pata Sambo and Markus Pata Sambo. KontraS, who assisted the Ruben and Markus case, found a number of irregularities and attempts to fabricate the case as described below:

**First**, the arrest of Ruben and Markus, who allegedly came from from the Tana Toraja Police Department, did not show an arrest warrant . The arresting police officers never officially declared themselves as Tana Toraja Departmental Police officers.

**Second**, Ruben and Markus were not assisted by a lawyer and neither asked their willingness to be assisted by a lawyer during the drawing up of the Police Investigation Report at Tana Toraja Departmental Police. Ruben was forcibly asked to sign the Police Investigation Report that he did not understand. He could not read the file because he did not wear glasses and the lighting in the police detention cell was inadequate. Meanwhile, the signing of Police Report by Markus Pata Sambo was carried out at Makale Detention House instead of the Tana Toraja Departmental Police after the investigation. Markus also admitted that he was not given the time to read the document because the police urged

him to just sign without reading as the Police Investigation Report was very thick.

**Third**, during the witnesses' confrontation, the investigator always started by asking Agustinus Sambo to provide statements first, and then questioned the other perpetrators. As a result, the statement provided ended up seeming to corner Agustinus. In reality, Agustinus confessed to have received pressure and intimidation during the investigation. Furthermore, there was an allegation of torture against Ruben and Markus during arrest and investigation at the police.

**Fourth**, the manipulation attempts in this case was evident from the inconsistency of the Main Perpetrator or this case Agustinus, in providing the information be it in the Police Investigation Report or information as a witness against the other defendants, as evidenced in the case file when Agustinus became a witness for the other defendants, also the during the acquittal of Budi's case, who was one of the other 8 defendants.

Nama	TK I	Banding	Kasasi	PK	Grasi
Agustinus	Hk. Mati	Hk. Mati	Hk. Mati	Hk. Mati	
Ruben Pata Sambo	Hk. Mati	Hk. Mati	Hk. Mati	Hk. Mati	Ditolak
Markus Pata Sambo	Hk. Mati	Hk. Mati	Hk. Mati	Hk. Mati	
Juni	20 Tahun	20 Tahun	20 Tahun	20 Tahun	
Yulianus Maraya	20 Tahun	20 Tahun	20 Tahun	20 Tahun	
Martinus Pata Sambo	12 Tahun	12 Tahun	12 Tahun	12 Tahun	
Petrus Tadaan	10 Tahun	10 Tahun	10 Tahun		
Benediktus Budi	SH	Bebas	Bebas		

Table of Comparison of Decisions, Source: KontraS Observation Data

The result of examination, which in the recommendation that the panel of judges

on the Judicial Review simply accepted the legal arguments that were filled with manipulation. Based on this background, KontraS believes the murder case that dragged all 7 (seven) people who were accused was an attempt to fabricate the case by Investigators. It is supported by Agustinus' statement, which was obtained due to the pressure given by the Investigators in the form of torture against Agustinus to involve other people in the murder case of three family members in Tana Toraja, Sulawesi including Andarias Pandin and Martina Labirin (wife of Andarias Pandin) on 23 December 2005, and Israel (son of Andarias Pandin and Martina Labirin) on 24 December 2005. The confession as a sole perpetrator was also conveyed during the initial arrest, testimony on the appeal level for the Benediktus Budi case, and the *affidavit*<sup>8</sup> drawn up before the notary.

Additionally, it was found that Agustinus was a death row prisoner who suffered from mental disability. This was found after the Correctional Facility assessment which stated that Agustinus is a death penalty row prisoner with a mental disorder. There were manipulation attempts on the case and on Agustinus's mental disability predicament, has also become slippery slopes in KontraS advocacy process in assisting Ruben Pata Sambo and Markus Pata Sambo, whom in this case can be considered as victims of unfair trial until they are sentenced to death. Ruben, aged 78, and Markus, aged 48, were sentenced to decades in prison for a crime they did not commit.

The injustice experienced by Ruben and Markus Pata Sambo has not ended. Now, Ruben and Markus Pata Sambo was moved from Malang Class I Correctional Facility to inmates at Nusa Kambangan Correctional Institution, which is categorized as a high-risk person. Automatically, this affects Ruben and Markus psychologically because they have to deal with other high risk prisoners and the fear of execution. During the process, KontraS also found proof of maladministration<sup>9</sup> in their transfer from Malang Class I Correctional Facility

8 In Indonesian legal terminology, an affidavit is better known as a statement letter, either drawn up under the hand, legalized by a notary, or drawn up in the form of a notarial deed in order to have perfect evidentiary power.

9 Referring to: Article 1 point 3 of Law No. 37/2008 on Ombudsman: "Maladministration is a behavior or action against the law, exceeding authority, using authority for other purposes than those for which the authority is intended, including negligence or neglect of legal obligations in the implementation of public services carried out by State and government officials which cause material and/or immaterial losses to the public and

to Nusa Kambangan Correctional Facility. During the legal process, both Ruben and Markus Pata Sambo were placed in Malang Class I Correctional Facility since 2008. Then, at the end of 2021, KontraS received information from a pastor who used to provide services at Malang Class I Correctional Facility. He said that Ruben and Markus, who were currently detained in Madiun prison, would be transferred to Nusa Kambangan Correctional Facility.

To verify the information, KontraS sent request to the Director General of Corrections, Ministry of Law and Human Rights under the letter numbered: PAS1.HH.01.05-286 regarding the Fulfillment of Requests for Specific Information Regarding Death Row Inmates, to be informed by the latest 28 November 2021 has been moved to Nusa Kambangan Prison. The transfer process was not disclosed to the family or KontraS as power of attorney, be it verbally or in writing. If referring to the implementing regulations regarding the guidance and mentoring of community inmates, Article 46 paragraph (2) of the Government Regulations Number 31 year 1999 regarding the Guidance and Mentoring of Community Inmates requires the transfer of inmates in the form of a written transfer permission from the authorized official, equipped with guidance files; and the consideration result from the Community Observation Team.<sup>10</sup> It also violates Article 53 paragraph (1) letter a of Government Regulations Number 31 Year 1999 regarding the Guidance and Mentoring of Community Inmates as explained, "*The Head of Prison who approved the transfer is **required** to notify: a. Inmate's family or relating Social Students, and...*".

Furthermore, KontraS also found inconsistencies from the Malang Class I Correctional Facility regarding the transfer of Ruben and Markus Pata Sambo to Nusa Kambangan Correctional Facility. This is seen from the response to the Request for Specific Information that KontraS submitted to Malang Class I Correctional Facility, among others:

- a. Director General Letter Number: PAS1.HH.05-254 dated 15 December 2021 on Point 1 "*...both inmates are high risk hence they were moved to Nusakambangan Prison, Central Java*";

individuals.."

<sup>10</sup> See Article 46 paragraph (2) of Government Regulation No. 31/1999 on the Guidance and Mentoring of Correctional Prisoners..

- b. Letter of the Head of Class I Malang Correctional Facility Number: W15. PAS.PAS2.PK.01.01.02-0554 dated January 2022 Page. 4 in the section on Review of the Status of Prisoners of Correction Review of WBP on behalf of Ruben Pata Sambo “...in order to prevent security and order disturbances”. Review of WBP on behalf of Markus Pata Sambo “...in order to prevent security and order disturbances”.

Moreover, The **inconsistency** of the information regarding the Transfer of Death Row Inmate on behalf of Ruben Pata Sambo and Markus Pata Sambo from Malang Class I Correctional Facility to Nusakambangan Correctional Facility, can be seen from the result of clarification conducted by the Ombudsman Representative of East Java to the Malang Class I Correctional Facility as the Respondent submitted to us through letter number B/419/LM.16-15.0276.2022 dated 11 August 2022 on Point 5 “...the transfer of both inmates was not for security and order reasons...” In this case, the **inconsistency** proved to be a discriminatory decision.

Paying close attention to the unilateral transfer process done without verbal nor written notification, it was clear that the process did not adhere to the existing principle on the United Nations Minimum Standards Rules regarding the Treatment of Prisoners or commonly referred to as “Mandela Rules”. Mainly, on Article 68 regarding the Notification, it was stated that “Each prisoner shall have the right and be equipped with the ability and means, to immediately inform his family, or other people who serve as a contact person, regarding his imprisonment, transfer to other institutions, and illness or serious injuries. The disclosure of personal information shall adhere to the national regulations”.<sup>11</sup>

11 See UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), Notification, Rule 68, “Every prisoner shall have the right, and shall be provided with the ability and means, to promptly inform his family, or other person designated as a contact person, of his imprisonment, of his transfer to another institution and of any serious illness or injury.”, page 21, or on the page: “Every detainee shall have the right, and shall be provided with the ability and means, to inform his or her family, or other person designated as a contact person, of his or her imprisonment, of his or her transfer to another institution and of any serious illness or injury. The sharing of detainees’ personal information shall be subject to domestic legislation.”, page 21, or via the following website [https://www.unodc.org/documents/justice-and-prison-reform/Nelson\\_Mandela\\_Rules-E-ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf)

### III.

# Death Penalty Practice: Nation's Red Carpet to Perpetuate Torture Practices

The imposition of the death penalty on an individual is different with other impositions as it is impossible to replace a person's life if a mistake is made during the trial process and cannot be fully proven. This becomes an important aspect because all parties involved in a death penalty case from investigators, prosecutors, and even judges should be ensured that the defendant's rights for a fair trial can be complied with the highest standard and with deep caution. Moreover, we currently still find a lot of sentencing process that disregard fair trial, despite Article 7 and Article 14 of the Civil and Political Covenant regarding the right to be free of torture and the right that everyone is equal before the trial and tribunal<sup>12</sup> We can interpret that the death sentence handed down without adhering to the standard of fair trial and the right to be free of torture can cause violation towards the right to life as provided in Article 6 of the Civil and Political Covenant.<sup>13</sup>

The process of imposing the death penalty also causes several effects, both physically and psychologically. We consider that the practice of death sentencing will only serve the government a way to torture people indirectly.

12 International Covenant on Civil and Political Rights. 1966. <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

13 Every human being has an inherent right to life. This right must be protected by law. No one should be deprived of his or her life arbitrarily..

One of the form of torture against the death penalty that go unnoticed is the death row phenomenon. This phenomenon consists of three components: the time spent in imprisonment, the severity of the situation faced by inmates, and the psychological effects arising from the individuals who are in death row.<sup>14</sup>

These conditions unconsciously will trigger adverse effects on the mental well-being and stability of the inmates. Moreover, death row inmates currently face the reality of the conviction above their heads regarding the risk of being executed. That is in line with what Hempel said who argues that the psychological suffering experienced by death row inmates who are in the death row phenomenon is inherent and a violation towards the prohibition of torture or inhumane act.<sup>15</sup> Furthermore, James Panton also found that convicts in the death row phenomenon showed increase in depression and hopelessness, but severe disorders such as psychosis were not observed.<sup>16</sup>

Several research showed the pattern of torture prevails in the practice of death sentence exist even in Indonesia. It does not stop on psychological torture, if we look at the existing correctional institutions, the facilities and services provided by said institutions are inadequate, which in return causes overcrowding in prisons, the treatment towards other inmates among other issues. Moreover, if we look at the existing correctional institutions, we can conclude that the facilities and services provided are very limited and inadequate. This starts from the condition of inmate's living quarters that is deemed inadequate, the overly liberal treatment towards death row inmates, to other issues. These issues obviously violated the international standard under Article 10 of the Civil and Political Covenant that stated, "those whose freedom has been stolen should be treated as humanely by respecting their dignity that is attached to each person."

In addition to this, we also highlight of the ineffective practices of the fair trial

14 Olga Hempel, 2016. "Death Row Phenomenon A Fate Worse Than Death." Torture on death row from a psychological and legal perspective. <https://repository.gchumanrights.org/server/api/core/bitstreams/46fb25ee-fe55-477f-b871-0aac092b8daa/content>

15 *ibid.*

16 James Panton.1976. "Personality characteristics of death row prison inmates". 32 *Journal of Clinical Psychology* 306.

principals in the imposition of the death penalty in Indonesia. We consider that the existence of fair trial is pertinent to preserve an honest and unbiased trial. At this point, the role of judges is emphasized on their ability to confirm that the death penalty defendants will acquire quality legal aid during trial. Other than that, judges have a significant role in ensuring the principles of justice and impartiality. For example, one of the cases that did not adhere to fair trial effectively is the Yusman Telaumbanua case. He was handed down the death sentence without legal aid.<sup>17</sup> We see that the legal process against death row inmates are often legally defective that cause a lot of violation against the death row inmates even before the execution.

As a whole, the absence of fair trial application will affect a number of tortures be it physical or psychological. The judges have a very important role to preserve the defendant's human rights in terms of death penalty. Moreover, they also have a responsibility to ensure that be no rights are violated against the defendant (such as torture and inhumane acts) during trial.

17 See <https://kontras.org/2015/03/16/rekayasa-kasus-yang-berujung-pada-vonis-hukuman-mati-terhadap-yusman-telaumbanua-dan-rasula-hia/>



# IV.

## Death Penalty Provision Notes in the New Criminal Code

In status quo, the Death Penalty is regulated as a Main Conviction under Article 10 of the Criminal Code. The regulation of the Death Penalty cannot be detached from the history of convictions in Indonesia, particularly the allowance of criminal law by the Dutch Colonialism Government. It is because the Criminal Code is essentially an 'extension' of the Dutch-Indie Criminal Code (*Wetboek van Strafrecht Voor Indonesie*) legalized in 1915 and practiced since 1918. Numerous criminal regulations in the Dutch-Indie Criminal Code adopted the Dutch Criminal Code (*Wetboek van Strafrecht*) that has been implemented in the Netherlands since 1886.

In the Dutch-Indie Criminal Code of 1915, we found rules regarding the death penalty. Article 10 of the Dutch-Indie Criminal Code stated:<sup>18</sup>

*"Laws are: Primary Law"*

1. *Death Sentence*
2. *Prison Sentence*
3. *Detainment Sentence*
4. *Fine Sentence*

18 R. Boediharjo, *Wetboek van Strafrecht voor Nederlandsch Indie*, Kitab Hoekoem Oentoek Tanah Hindia Nederland, (Imperial Snelpersdrukkerij), spelling has been adjusted to the EYD (Reformed Spelling)..

After the legalization of the regulations, death penalty was officially allowed in the Dutch-Indie region. After the independence of Indonesia, under Constitution No. 1 Year 1946, the Dutch-Indie Criminal Code including the article regarding the death penalty was formally regulated all over the Republic of Indonesia.

It should be noted that despite the Dutch Colonial government allowing death penalty to the Dutch-Indie citizen, the regulation of death penalty in the Netherlands itself had been abolished since 1870.<sup>19</sup> This showed that the death penalty regulated in the Dutch-Indie region was inconsistent from the Dutch's side as they allowed punishment that took a person's right to life only on the people they colonized without the same implementation towards Dutch people. Seeing the timeline, we can say that the death penalty is truly a discriminatory product of the law drawn up by the Colonialism government.

Therefore, the death penalty law that remains regulated in Indonesian criminal law after Indonesia's independence is actually a form of maintaining "colonial" rules by the Indonesian government.

The journey of the criminal law in Indonesia has received objection complaints by academics and civil organization towards the existence of the death penalty in the Criminal Code. The objection towards its existence then urges several groups to ask the government and House of Representatives to review and change the regulation of the death penalty in the Criminal Code.

In its development, the new Criminal Code approved in December 2022 and legalized in January 2023, regulate the death sentence as an alternative sentence, which is different from the previous Criminal Code that set the death penalty as a principal sentence. We understand that such decision is a 'middle road' that can accommodate both abolitionists and retentionists.

The death penalty regulated under Article 67 that stated that **the death penalty is a conviction that is specified and should treated alternatively,**<sup>20</sup> Article 98

19 Criminal Justice System in Netherland, <https://www.ojp.gov/ncjrs/virtual-library/abstracts/criminal-justice-system-netherlands>

20 Article 67 of Law No. 1 Year 2023: Special punishment under Article 64 letter c is death penalty which is always imposed alternatively.

of the New Criminal Code also states that the death penalty should only be applied as a last resort to prevent criminal acts and protect, further Article 100 paragraph (1) of the Criminal Code states

*“Judges impose the death penalty with 10 (ten) years of probation by observing:*

*a. Convict’s remorse and hope for self-improvement; or*

*b. The role of the convicted in the Criminal Act.”*

Article 100 of the New Criminal Code also states that during the probational period, if convicts show commendable behavior, they can have their sentences rectified to life imprisonment. Regarding the life imprisonment, Article 69 of the New Criminal Code states that if the convict has served 15 years of sentence, then the life imprisonment may be rectified to 20 years imprisonment.

Ideally, the New Criminal Code that brought forth the “decolonialization” spirit of criminal sentences or the means to abolish all articles that has a colonialism heritage nature should abolish regulations regarding the death sentence. Retaining the death penalty means that discriminatory punishments are being preserved that in the past was made “specially” for Indonesian citizens.

Even so, the regulation of death penalty as an alternative sentence in the New Criminal Code should be seen as the first steps towards the abolition of the death sentence. First of all, the death sentence is now an alternative conviction, so when the Criminal Code is regulated, judges will not be able to abuse the death sentence towards convicts. We understand that in certain cases, the judges need to dig the public’s sense of justice and in certain situations, the public want the death penalty to be imposed, even so the death penalty now cannot be seen as a mean to seek revenge or retribution.

Second, even if in certain context the judge deems the death penalty is necessary, the convict should have faced 10 years of probation so that his death penalty can be replaced to a life imprisonment or 20 years sentence. Even if such regulation incites hope to death row inmates that they would be free of the death penalty, it should be noted that such decision causes further question.

Should a judge deem that the convict’s role is big enough in the crime that happened and said convict has not shown remorse, then should the convict be sentenced to death even before the 10 years probational period ends? In other

words, the provision regarding the death penalty in the New Criminal Code truly incite uncertainty towards convicts in the “waiting period”.

Moreover, regarding the regulation, there should be an active role by the legal institution which in this case is the Supreme Court in the observation of convicts who are in the “waiting period.”

V.

# Death Penalty: Indonesia's Position in the Efforts to Abolish the Death Penalty in the World

In 2023, a total of 112 countries have abolished the death penalty from their criminal law. Practically, there are 23 countries that still regulate the death penalty in their criminal law but have never imposed the death penalty on any criminal defendant. This shows a progressive global trend towards the abolition of the death penalty. Indonesia is one of the 55 countries that still retain the death penalty and impose sentences on criminal defendants despite the fact that the Indonesian government has not carried out executions since 2016.

Over the past year, we have noticed an increasing number of countries around the world following the trend of abolishing the death penalty. Among the countries showing positive developments are Malaysia, Papua New Guinea, and Zambia. Malaysia is currently making positive progress in abolishing mandatory death sentences for 11 serious crimes including Murder, Treason against the state, and terrorism. It also provides room for commutation of sentences for convicted offenders. Recently, Malaysia has also enacted the Revised Death Penalty and Life Imprisonment Law 2023 (Temporary Jurisdiction of the Federal Court) – otherwise known as the Resentencing Law that may mark the process of reviewing and commuting the sentences of 1020 death row prisoners in

Malaysia.<sup>21</sup> This enactment is also a hope for the Indonesia citizens in Malaysia who are sentenced to death to seek a Judicial Review of the verdict against them.

Although the progress in Malaysia is promising, this trend has not been fully followed by other countries in the Southeast Asian. In Singapore, an alarming increase has occurred regarding the death penalty's application to drug-related offenders. At least five convicts were executed in 2023 for drug charges that do not comply with international standards as the Most Serious Crimes category. One execution was carried out against convict Saridewi Djamani, sentenced in 2018, becoming the first woman to be executed in 19 years. In the midst of the trend of abolishing the death penalty at the global level, the execution of women convicts carried out by the Singapore government is an irony considering the international community's attention to the vulnerabilities that may be experienced by women sentenced to death who have their own vulnerabilities, including limited knowledge that goes hand in hand with domestic violence to gender violence they may experience.

In Myanmar, the first death execution in decades is another example of its poor human rights record. According to the Government media, on Monday, 25 July 2023, Myanmar carried out its first executions after decades to four democracy activists. The four included well-known activists Kyaw Min Yu better known as 'Ko Jimmy', arrested in October 2021 and Phyo Zeyar Thaw, a former Member of Parliament from the National League for Democracy (NLD), and a rapper arrested in November 2021 for alleged acts of terror by the junta. The remaining two activists were Hla Myo Aung and Aung Thura Zaw. All four pro-democracy activists were convicted of false charges of terrorism under the draconian 2014 Counterterrorism Law and other laws, and then sentenced to death in June 2022. However, their closed court proceedings by a secret military tribunal was criticized for its lack of transparency and adherence to due process of law. Kyaw Min Yu was also allegedly tortured during his detention.<sup>22</sup>

The series of prospective developments in Malaysia to the alarming increase in

21 Anti-Death Penalty Asia Network (ADPAN) "Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Act 2023"

22 KontraS, Junta Brutality Intensifies as 4 Activists Were Executed, <https://kontras.org/2022/07/27/kebrutalan-junta-makin-menjadi-4-aktivis-di-eksekusi-mati/>

the number of executions in Singapore and Myanmar should be a concern for the Indonesian government to provide adequate legal assistance for Indonesian citizens who are dealing with a lawsuit overseas. In contrast, Indonesia's position in efforts to abolish the death penalty throughout the world does not offer any promise.

Under the Indonesia Review – 41st Session of the Universal Periodic Review (UPR), one of the important issues recommended by the member states of the UN to the Indonesian government is the abolition of the death penalty as a form of the state's support for the human rights implementation. In the 4th cycle of UPR this year, the issue of abolishing the death penalty is an essential recommendation and is the majority issue advocated by more than 28 countries including France, Spain, and Timor Leste to the Indonesian government.<sup>23</sup> The recommendations are for the Indonesian government to publish and transmit data on the number of people sentenced to death, pay more attention to the death row phenomenon, and abolish the death penalty for narcotics related cases.

Civil society groups, including KontraS, have also recommended Indonesia to adopt the international recommendations of the 4th cycle of UPR through a shadow report mechanism by proposing the following steps, 1) Establish a moratorium on all executions with the aim of abolishing the death penalty; 2) Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming to abolish the death penalty; 3) Pay attention to the physical and mental health needs of prisoners; 4) Ensure that experienced, independent and competent lawyers represent those facing the death penalty immediately after their arrest and during the judicial process.

According to the official website of the UN Human Rights Agency (OHCHR), on 21 March 2023, the Government of Indonesia presented the adoption of 269 recommendations received from the UN Human Rights member states' representatives at the UPR Session on 9 November 2022 at the Palais De

23 KontraS, UN Human Rights Council urges Indonesia to abolish the death penalty, Joint Release on Indonesia's Response to the Death Penalty Issue of Anti-Death Penalty Network (ADPN) <https://kontras.org/2022/11/11/sidang-ham-pbb-mendesak-indonesia-menghapus-hukuman-mati-rilis-bersama-tanggapan-indonesia-terhadap-isu-hukuman-mati-jaringan-tolak-hukuman-mati-jati/>

Nations, Geneva, Switzerland. Referring to the set of recommendations obtained, 55 recommendations were subtly rejected through noted status, 5 recommendations were partially supported, while 210 recommendations were given supported status. Particularly on the issue of the death penalty, not a single recommendation received a supported status, ranging from the ratification of OP-ICCPR to a moratorium on the death penalty. In fact, the imposition of the death penalty violates the provisions of Article 28 I of the 1945 Constitution stating that the right to life shall not be diminished under any circumstances. Meanwhile, the government has missed many matters related to the death penalty sentencing process, such as the death row phenomenon that affects psychological and physical pressure on prolonged delays in executions, unfair trials, and the principle of caution of judges when hearing and sentencing death penalty cases.<sup>24</sup>

Upon the above facts, we view the position of the abolition of the Death Penalty in the Southeast Asian countries shows a prospective but simultaneously alarming in several countries including Myanmar and Singapore. The Abolition of the mandatory death penalty and Resentencing policy in Malaysia is also an opportunity for the Indonesian Government to provide maximum legal assistance for Indonesian citizens sentenced to death in that country. The phenomenon in the Southeast Asian countries, especially in Malaysia, also becomes an important note for the Indonesian Government to also implement a moratorium on the death penalty nationally and prepare proper steps related to the death penalty.

24 See <https://kontras.org/2023/03/23/hasil-adopsi-universal-periodic-review-indonesia-4th-cycle-komitmen-dan-tanggung-jawab-baru-yang-harus-diimplementasikan-oleh-negara/>



# VI.

## Against Populism: The Illusion of a Deterrent Effect in the Imposition of the Death Penalty

In recent years, numerous crimes or criminal offenses have sparked public outrage. One case is the death of Brigadier Josua Hutabarat murdered by Ferdy Sambo. It happened on July 8, 2022, which led to public pressure for Ferdy Sambo to be subjected to the severest punishment, with death penalty.<sup>25</sup> In a nutshell, Ferdy Sambo was sentenced to death at the first level (District Court) and the appeal level (High Court). However, the Supreme Court in Decision No. 813 K/Pid/2023 approved Ferdy Sambo's appeal for cassation thereby changing the previous court's decision from death penalty to a life imprisonment.<sup>26</sup>

Similarly, the case of Herry Wirawan, a Quran teacher who committed a heinous act by raping 13 female students in Bandung. Initially, the Bandung District Court judges sentenced him to life imprisonment. Nevertheless, the West Java High Prosecutor's Office filed an appeal to the High Court, which eventually sentenced the defendant to death. Moreover, when the cassation was carried

<sup>25</sup> Republika, Observer: Sambo's death sentence is not a police achievement, but a public pressure, <https://news.republika.co.id/berita/rq0p89436/pengamat-vonis-mati-sambo-bukan-prestasi-polri-tapi-desakan-masyarakat>

<sup>26</sup> Decision Number 813 K/Pid/2023 can be found on <https://putusan3.mahkamahagung.go.id/direktori/putusan/zaee455b5b243ef29e1d313132383336.html>

out, the Supreme Court rejected the appeal and re-affirmed the previous court's decision to impose the death penalty. Interestingly, following the Supreme Court's decision, many stakeholders including the Ministry of Women Empowerment and Child Protection (MoWECP), I Gusti Ayu Bintang Darmawati, and the Governor of West Java, Ridwan Kamil, expressed their appreciation for the decision.<sup>27</sup> The above phenomena clearly show that penal populism remains the dominant punishment paradigm in our society, reflected by the insistence and appreciation for the imposition of the death penalty.

According to research conducted by The Death Penalty Project, retentionists state their primary reason for retaining the death penalty is to prevent further crimes. The death penalty should be retained to prevent murder and a crime.<sup>28</sup> The report reveals that while more than two-thirds (69%) of respondents support the death penalty abstractly - meaning that the support for the death penalty is still dominant. The number in the research also indicates that Indonesian society is still strongly punitive towards criminals, since they have a strong preference for the death penalty.

Penal populism<sup>29</sup>, concerning the imposition of the death penalty for a number of crimes, apparently only 'satisfies' the community for a short period of time. The imposed death penalty unfortunately never touches the root of the problem, particularly if viewed through the criminological lens.<sup>30</sup> Taking an example, the

27 West Java PR Release, Minister of MoWECP and Governor Ridwan Kamil Appreciate Supreme Court Decision Rejecting Herry Wirawan's Cassation, <https://jabarprov.go.id/berita/menteri-pppa-dan-gubernur-ridwan-kamil-apresiasi-putusan-ma-tolak-kasasi-herry-wirawan-8150>

28 Carolyn Hoyle assisted by Diana Batchelor, Public Opinion on the Death Penalty in Indonesia Part II Public Opinion: No Obstacles to Abolition, (Jakarta: The Death Penalty Project, 2021), page 24.

29 A phenomenon where harsh punishment policies are implemented by following the popular trend of public attitudes and by utilizing public distress due to rampant crime for political purposes. Thus, populist punishment policy making does not aim to improve the existing system due to the absence of rational considerations, expert involvement, or valid research results, but is solely carried out to gain public sympathy. Quoted from ICJR, The Rise of Penal Populism in Indonesia: A Note on the Situation of Criminal Policy Reform in Indonesia in 2018.

30 An Analysis of the Development of the Death Penalty Concept in Indonesia, <https://repositori.usu.ac.id/handle/123456789/36142>

death penalty does not deter perpetrators, and there is no scientific evidence stating that a crime is significantly reduced after the imposition of the death penalty. In terms of narcotics, based on documentation conducted by Reprieve, during 2017-2021, 367 death sentences were issued for all criminal offenses, and 279 death sentences were for narcotics cases. However, the high number of death sentences in narcotics cases has not stopped the illicit trafficking of narcotics.<sup>31</sup>

Over the past year, in addition to the Sambo and Hery cases, we have seen so many parties making remarks that lead to penal populism. For example, the Commander of the Indonesian National Armed Forces, Yudo Margono, referred to the perpetrators of torture against an Acehnese civilian will be sentenced to death.<sup>32</sup> This also applies in other cases, one of which was Bobby Nasution's statement calling for all "*begal*" (motorcycle robbers) to be shot dead. We believe that such a remark only creates a false and momentary calm.

Furthermore, regarding the death sentence against Sambo, it is necessary to encourage the elimination of the violent culture within the police institution through cultural, structural, and instrumental police reform efforts. Evidently, the tragedy of the 'policeman kills policeman' in Sambo's case, for whom the death penalty was previously imposed, does not have any implications as shown by the emergence of a similar case, namely the murder of Bripda IDF in Bogor.<sup>33</sup> Police violence continues, and the numbers rise every year.

In addition, in the case of the death penalty against Herry Wirawan, the case of sexual violence in the midst of society, especially in educational institutions, also shows no improvement. Instead of focusing on imposing punishment by losing

31 Legal Aid Society Press Release, Herry Wirawan's Death Sentence: State Negligence, Victims' Rights Abandoned!, <https://lbhmasayarakat.org/vonis-mati-herry-wirawan-negara-lalai-hak-korban-diabaikan/>

32 Republika, Commander of the Indonesian National Armed Forces to sentence Presidential Security Force personnel to death for murdering an Acehnese, <https://news.republika.co.id/berita/s030i2484/panglima-tni-akan-hukum-mati-personel-paspampres-pembunuh-warga-aceh>

33 Detiknews, 7 Fakta Terkini Polisi Tembak Polisi di Bogor yang Tewaskan Bripda IDF, <https://news.detik.com/berita/d-6848520/7-fakta-terkini-polisi-tembak-polisi-di-bogor-yang-tewaskan-bripda-idf>

the life of the perpetrator, the State must provide solutions that get to the root of the problem. In sexual violence cases of this kind, the State is supposed to think of effective remedies for the victims, rather than facilitating public anger and not acting in an educative manner. Sadly, when this case surfaced, several members of the House of Representatives even issued provocative statements such as 'just shoot the perpetrator in the head'.<sup>34</sup> This affirms the strength of penal populism, in which using public unrest against a crime is solely for electoral purposes or gaining votes.

In overcoming the sexual crime issues, the State is required to present by focusing on the aspects of victim recovery and preventing all forms of recurrence by creating a safe space. Despite focusing on this agenda, the state returns to the paradigm of severe and punitive punishment, one of which is reflected in the death sentence to Herry Wirawan.<sup>35</sup> The legal process and protection for victims of sexual violence and harassment are still very minimal. Therefore, the criminal sentence against HW is not the answer to the needs of victims and this case should be a notification for the Government to be more optimal in implementing protection for victims, rather than imposing a death sentence.

We must underline that opposing populism does not mean legitimizing or supporting criminal acts, since this narrative is always simplified by retentionists. We cannot simply conclude that the cause of high crime rates is the non-implementation of the death penalty. It should be remembered that the deterrent effect arising in the community is greatly influenced by the well-integrated criminal justice system. Amid the poor criminal justice system characterized by cases of wrongful arrest, unfair trial, and even corrupt judiciary, we precisely perpetuate state killing. Other than the criminal justice system that needs a serious reform, the philosophy of punishment/sentencing must gradually be shifted from emphasizing revenge to providing opportunity for an individual to repent and return to society. Do not allow the death penalty both prosecuted by the prosecutor and sentenced by the judge to only be used as a 'sweetener'

34 detiknews, "Legislator on Herry Wirawan Case: Child Predator, Shoot Him in the Head!" read more <https://news.detik.com/berita/d-5896323/legislator-soal-kasus-herry-wirawan-predator-anak-tembak-kepalanya>.

35 KontraS and Legal Aid Society, Death Penalty Does Not Meet the Justice of Sexual Crime Victims, <https://kontras.org/2023/01/05/hukuman-mati-tidak-memenuhi-keadilan-korban-kejahatan-seksual/>

for the image of law enforcers wanting to be impressed as firm. In reality, it has absolutely no implications for the significance of the deterrent effect in the midst of society.

Quoting the decision of Constitutional Judge Chaskalson of South Africa in the case of *S v Makwanyane* (paragraph 123) which then also contains in Decision of the Constitutional Court Number 2-3/PUU-V/2007. *When it comes to debates about the deterrent effect of the death penalty, the problem is that the choice sometimes seems to be between the murderer being put to death or, otherwise, not being punished at all. On the contrary, this is certainly not the case. Properly, the choice is between the death penalty and a long prison sentence, which when necessary, may be life imprisonment. Both sentences have a deterrent effect, and the question is whether compared to the possibility of a life sentence, the possibility of a death sentence has a demonstrably higher deterrent effect; and whether the Constitution allows for restrictions on certain rights as a result of a life imprisonment.*

According to the constitution, Article 28I of the 1945 Constitution explicitly guarantees that the right to live shall not be diminished under any circumstances (non derogable rights). Additionally, if viewed based on international regulations, the death penalty is also against the International Convention on Civil and Political Rights (ICCPR) as regulated in Article 6.<sup>36</sup> The death penalty imposed also violates the spirit of the government that has ratified the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

Profoundly, the death penalty imposed is irreversible, meaning that it is non-reversible. The state is certainly irresponsible if they keep or even support the death penalty amidst speculation that the executed person might be found innocent in the future. Moreover, the data is not yet fully complete to support the effectiveness of imposing the death penalty. Hence, the alternatives to death penalty approach must be reformulated in order to make our criminal justice process more dignified so no more human lives are taken as a result of the criminal justice system.

36 Indonesia has ratified the ICCPR through Law No. 12 of 2005.

# VII.

## Conclusion

From the above explanations and findings, it can be concluded that the effort to not carry out the practice of death penalty still encounters various kinds of steep roads. It can be seen from the fact that the death penalty has not been applied as regulations related to the right to life that cannot be reduced under any circumstances. Furthermore, as a state that has ratified the International Covenant on Civil and Political Rights (ICCPR), the government should be able to implement these regulations properly.

We also recorded that between October 2022 and September 2023, at least **27 death sentences** were handed down in Indonesia and spread across several regions. We also notice that the pattern of death sentences in this period is a repetitive pattern similar to the previous year, where the most sentences were imposed on convicts with narcotic cases. This provides evidence that the application of the death penalty in Indonesia does not have a significant deterrent effect. In addition to this, we also pay attention to the majority of sentences handed down by the Court of First Instance (District Court). In this case, we consider that the significant number of verdicts handed down by the District Court shows that the precautionary principle in handing down death sentences is not well understood by judges in the District Court.

Subsequently, we provide notes related to the process of imposing the death penalty which actually perpetuates various forms of torture practices both physically and psychologically. An example is the phenomenon of death row, which will unconsciously have implications for the psychological effects arising from the individual concerned. This phenomenon is an inherent part of the violation of the prohibition against torture or inhumane treatment, and leads to increased feelings of depression and discouragement. This is partly supported

by the inadequate and insufficient facilities in correctional institutions. Furthermore, the perpetuation of the torture practice may also be reflected in the ineffective implementation of the fair trial principle in the imposition of the death penalty.

We also provide important notes regarding the Criminal Code that has currently been ratified by the Government of Indonesia. The attempt to make death penalty as an alternative punishment is a middle way that may accommodate the wishes of abolitionist and retentionist groups, however, we provide an important note that the death penalty regulation as an alternative punishment in the new Criminal Code may be considered as the first step towards the abolition of death penalty. When the new Criminal Code comes into force, judges may no longer impose death sentences on convicts without considering various problems arising later. Next, we also think that the attempts to make death penalty as an alternative punishment should be minimized to the utmost extent possible.

Besides that, we take notes on the practice of death penalty in the international realm along with Indonesia's position in responding to it. At least in 2023, 112 countries have abolished the death penalty from their criminal law, and other 23 countries still regulate the death penalty but never impose the death penalty on the defendants. This demonstrates a progressive global trend of abolishing the death penalty. Indonesia itself is a country that continues implementing the death penalty in the midst of many countries in the world that have abolished it, although under the Indonesia Review - 41st Session of the Universal Periodic Review, the most widely recommended issue is the death penalty. The abolition of the death penalty is the majority issue recommended by more than 28 countries to the Indonesian government. Those recommendations include publication and transparency of data on the number of people on death row, the death row phenomenon, and abolishing the death penalty for narcotics cases. Ironically, Indonesia opted not to support (noted) any of the recommendations offered by these various countries.

In addition to these notes, we provide notes related to the crimes or criminal acts that sparked public anger and resulted in the imposition of the death penalty. Two cases that are of concern to us are Ferdy Sambo and Herry Wirawan. We consider that the sentences imposed on the two convicts are the impact of penal populism, where the imposition of the death penalty is in fact only to "satisfy" the

public in a short period of time. We believe that the creation of a deterrent effect is greatly influenced by the well-integrated criminal justice system. We see that the sentences imposed in some cases are only to satisfy the public in the midst of the current poor criminal justice system, such as unfair trial, state killing, corrupt judicial system.

These various problems conclude that the Indonesian government currently has quite a lot of records in trying to abolish all forms of death penalty practices, moreover with the various issues described above, the government has a full responsibility to improve these problems amidst the pressure of the international world that seeks to abolish the death penalty practice.



# VIII.

## Suggestions and Recommendations

Referring to several KontraS records and findings during the period of October 2022 - September 2023 and with numerous forms of pressure both nationally and internationally, the Indonesian government is expected to be able to review the implementation of the practice of various problems arising from the implementation of the death penalty practice. For this reason, KontraS has prepared a number of recommendations, including:

*First*, the Indonesian Government must commit to eliminating all forms of cruel and inhumane punishment practices, especially in the form of death penalty. The government must also seriously reform the criminal justice system, particularly regarding the fulfillment of the right to a fair trial, because often the process is filled with injustice which leads to the death penalty. Meanwhile, another important aspect that must be taken into account is the fulfillment of the rights of death row inmates, both physically and psychologically.

*Second*, the Indonesian Government, in this regard the President and his staff together with the Indonesian Parliament, should conduct a review of the articles in the New Criminal Code governing the imposition of death penalty. Various vague norms must be immediately clarified under derivative regulations. As for death convicts sentenced before the New Criminal Code takes effect, the Government must ensure that they get equal access to the 10-year waiting period.

*Third*, in the international realm, the Indonesian Government must commit to a moratorium on the imposition of the death penalty in Indonesia and commit to

immediately ratifying the OP-ICCPR. Aside from that, the Government should be able to consider various recommendations from other countries in the last UPR session, specifically related to the abolition of the death penalty.

*Fourth*, the Supreme Court must be committed to evaluating the effectiveness of the imposition of the death penalty in order to prevent any further loss of human life due to a poor criminal justice system. Apart from that, the Supreme Court must mainstream the principle of prudence in sentencing. Slowly, the Supreme Court also carries the duty to educate judges to shift the paradigm of punishment, from punitive to utilitarian/purposeful.

IX.

## **Attachment**

## Request for Information on Death Row Prisoners - Supreme Court



Komisi untuk Orang Hilang dan Korban Tindak Kekerasan  
The Commission for The Disappeared and Victims of Violence

Sekretariat:  
Jl. Kramat 2 no. 7 Senen 10420  
Jakarta Pusat – Indonesia  
Phone : +62-21- 391 – 9097 / 9098  
Fax : +62-21- 391 - 9099  
Email : [kontras\\_98@kontras.org](mailto:kontras_98@kontras.org)  
[http : www.kontras.org](http://www.kontras.org)

No : 12/SK-KontraS/IX/2023  
Hal : **Permohonan Informasi Terkait Data Terpidana Mati**

Kepada Yth,

**Pejabat Pengelola Informasi dan Dokumentasi Mahkamah Agung**

**Republik Indonesia**

Di tempat

Dengan Hormat,

Komisi untuk Orang Hilang dan Korban Tindak Kekerasan (KontraS) merupakan lembaga non-pemerintahan yang bergerak di bidang pemajuan Hak Asasi Manusia. Salah satu fokus kerja kami adalah melakukan pemantauan secara aktif dan mendorong negara untuk menghapuskan hukuman mati.

Atas dasar tersebut, kami bermaksud mengajukan permohonan informasi kepada Mahkamah Agung Republik Indonesia dengan rincian data sebagai berikut:

1. Berapa jumlah orang yang mendapatkan vonis penjatuhan hukuman mati terhitung dari Oktober 2022 – September 2023?
2. Apa jenis kelamin dan kewarganegaraan para terpidana mati tersebut?
3. Berapa usia dari para terpidana mati tersebut?
4. Bagaimana sebaran wilayah pengadilan dari para terpidana mati tersebut?
5. Tindak pidana/kejahatan terkait apa sehingga vonis dijatuhkan vonis hukuman mati?

Permintaan informasi ini menjadi bagian dari bentuk akses masyarakat sipil terhadap informasi yang dimiliki oleh Badan Publik sebagaimana ketentuan Undang - Undang Nomor 14 tahun 2008 tentang Keterbukaan Informasi Publik (KIP), yang dalam hal ini adalah Mahkamah Agung Republik Indonesia.

Dengan ini Mahkamah Agung Republik Indonesia memiliki waktu 10 (sepuluh) hari kerja untuk memberikan informasi/jawaban/tanggapan secara tertulis atas permohonan informasi sebagaimana yang diatur dalam Pasal 22 ayat (7) UU KIP.

Informasi/jawaban/tanggapan tertulis tersebut dapat dikirimkan ke alamat kami melalui pos dan fax sebagai berikut:

**Komisi untuk Orang Hilang dan Korban Tindak Kekerasan (KontraS)**  
**Jl. Kramat II No.7 Kwitang, Senen, Jakarta Pusat 10420**  
**Telepon 021-391.9097/391.9098, Fax 021-391.9099, email [kontras\\_98@kontras.org](mailto:kontras_98@kontras.org)**  
**atau [helmy@kontras.org](mailto:helmy@kontras.org)**  
**Kontak: Helmy Hidayat Mahendra (081259269754)**

Demikian permohonan ini kami sampaikan. Atas perhatian dan kerjasamanya kami ucapkan terima kasih.

Jakarta, 6 September 2023  
Badan Pekerja KontraS,



**Dimas Bagus Arya Saputra**  
*Koordinator*

Tembusan:

1. Ketua Komisi Informasi Pusat

# Request for Information on Death Row Prisoners - The Ministry of Law and Human Rights



Komis untuk Orang Hilang dan Korban Tindak Kekerasan  
The Commission for The Disappeared and Victims of Violence

Sekretariat:  
Jl. Kramat 2 no. 7 Senen 10420  
Jakarta Pusat – Indonesia  
Phone : +62-21- 391 – 9097 / 9098  
Fax : +62-21- 391 - 9099  
Email : [kontras\\_98@kontras.org](mailto:kontras_98@kontras.org)  
[http : www.kontras.org](http://www.kontras.org)

No : 13/SK-KontraS/IX/2023  
Hal : **Permohonan Informasi Terkait Data Terpidana Mati**

Kepada Yth,

**Pejabat Pengelola Informasi dan Dokumentasi Kementerian Hukum dan Hak Asasi Manusia**

**Q.q. Dirjen Lembaga Masyarakat Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia**

**Republik Indonesia**

Di tempat

Dengan Hormat,

Komis untuk Orang Hilang dan Korban Tindak Kekerasan (KontraS) merupakan lembaga non-pemerintahan yang bergerak di bidang pemajuan Hak Asasi Manusia. Salah satu fokus kerja kami adalah melakukan pemantauan secara aktif dan mendorong negara untuk menghapuskan hukuman mati.

Atas dasar tersebut, kami bermaksud mengajukan permohonan informasi kepada Kemenkumham Republik Indonesia dengan rincian data sebagai berikut:

1. Berapa jumlah terpidana mati terhitung dari Oktober 2022 – September 2023?
2. Apa jenis kelamin dan kewarganegaraan para terpidana mati tersebut?
3. Berapa usia dari para terpidana mati tersebut?
4. Sebaran wilayah lapas mana saja yang melakukan pemasyarakatan kepada terpidana mati?
5. Apa tindak pidana/kejahatan yang mendasari dijatuhkannya vonis mati pada terpidana mati tersebut?

Permintaan informasi ini menjadi bagian dari bentuk akses masyarakat sipil terhadap informasi yang dimiliki oleh Badan Publik sebagaimana ketentuan Undang - Undang Nomor 14 tahun 2008 tentang Keterbukaan Informasi Publik (KIP), yang dalam hal ini adalah Kementerian Hukum dan HAM Republik Indonesia.

Dengan ini Kementerian Hukum dan HAM Republik Indonesia memiliki waktu 10 (sepuluh) hari kerja untuk memberikan informasi/jawaban/tanggapan secara tertulis atas permohonan informasi sebagaimana yang diatur dalam Pasal 22 ayat (7) UU KIP. Informasi/jawaban/tanggapan tertulis tersebut dapat dikirimkan ke alamat kami melalui pos dan fax sebagai berikut:

**Komisi untuk Orang Hilang dan Korban Tindak Kekerasan (KontraS)**  
**Jl. Kramat II No.7 Kwitang, Senen, Jakarta Pusat 10420**  
**Telepon 021-391.9097/391.9098, Fax 021-391.9099, email [kontras\\_98@kontras.org](mailto:kontras_98@kontras.org)**  
**atau [helmy@kontras.org](mailto:helmy@kontras.org)**  
**Kontak: Helmy Mahendra (081259269754)**

Demikian permohonan ini kami sampaikan. Atas perhatian dan kerjasamanya kami ucapkan terima kasih.

Jakarta, 6 September 2023  
Badan Pekerja KontraS,



**Dimas Bagus Arya Saputra**  
Koordinator

Tembusan:

1. Ketua Komisi Informasi Pusat
2. Kemenkopluhukam RI

