

DEHUMANIZED: THE PRISON CONDITIONS OF PEOPLE SENTENCED TO DEATH IN INDONESIA

CAROLE BERRIH
AND KONTRAS



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KontraS
Komisi untuk Orang Hilang dan Korban
Tindak Kekerasan
The Commission for the Disappearances and
Victims of Violence

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LIST OF ACRONYMS

ADPAN:	Anti-Death Penalty Asian Network
BNN:	National Narcotics Board
Komnas HAM:	National Commission on Human Rights
KUHAP:	Kitab Undang-Undang Hukum Acara Pidana
KUHP:	Kitab Undang-Undang Hukum Pidana
HATI:	Coalition against the Death Penalty in Indonesia
HRW:	Human Rights Watch
ICJ:	International Commission of Jurists
ICJR:	Institute for Criminal Justice Reform
ICRC:	International Committee of the Red Cross
LBH:	Legal Aid Institute
NIHR:	Netherlands Institute of Human Rights
OPCAT:	Optional Protocol to the Convention against Torture
PK:	Peninjauan Kembali
PKI:	Partai Komunis Indonesia
PNI:	Partai Nasional Indonesia
RKUHP:	Rancangan Kitab Undang-Undang Hukum Pidana
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
VOC:	Vereenigde Oostindische Compagnie

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FOREWORD

Raphaël Chenuil-Hazan

ECPM Executive Director

Constant progress has been made towards abolition of the death penalty over many years, so much so that today $\frac{3}{4}$ of the world's countries have abolished capital punishment either in law (114) or in practice (33). Asia's track record on this issue has been mixed over the past few years: although some progress has been observed, retrograde steps are also in evidence. China, Vietnam and Pakistan are among those countries which sentence and execute the most across the world; Japan tripled the number of executions in 2018; the Philippines are heading for a reintroduction of capital punishment; and Sri Lanka, which has had a moratorium since 1976, would like to resume executions. Malaysia has been limiting the damage since its former Government amended the Narcotics Law in 2017 and thus removed the possibility of a mandatory death penalty for drug related offences, although subject to conditions. Buoyed by this progress, the current Law Minister, Datuk Liew Vui Keong, has begun the abolition process, declaring in October 2018 that his cabinet was working on a bill to abolish the death penalty, and has thus called for a suspension of all executions until abolition of that sentence. Malaysia also voted in favour of the Resolution for a moratorium on the use of the death penalty at the UN General Assembly in December 2018.

Indonesia has abstained from the vote on the UN Resolution since 2012, while it used to vote against it, and has been a signatory of the International Covenant on Civil and Political Rights (ICCPR) since 2006. At a national level, the death penalty has been discussed in Parliament on numerous occasions over the last few years within the framework of the incomplete reform of the Criminal Code. This sentence is a particularly well-established part of Indonesia's legal arsenal, a real punitive tool mainly used by judges in cases involving drugs and aggravated murder. However, debate about the death penalty exists and, although it does not seek to abolish it, it at

GENERAL CONTEXT

least aims to reform it. This study aims to understand the meaning of capital punishment within the country's history and the reality of its use from the judge's decision to the execution.

In Indonesia, humanist and universal abolitionist ideas were a fundamental part of key moments in the country's history. At the moment of independence, Soekarno expressed his aversion to capital punishment on many occasions. Henceforth, it was applied on only one occasion during his mandate (1945-1967). The founding principles of Pancasila, which are at the heart of the creation of the Indonesian State, particularly the principles of fair and civilised humanity and that of social justice for all the Indonesian people, reflect the values of abolition. And yet, it is common knowledge that in Indonesia, as elsewhere, the death penalty is applied in a discriminatory manner depending on social class. Thus, all the research has demonstrated that those who are victims of poverty are confronted by the death penalty to an unfair degree.

A few years after the bloody repressions of the Suharto era, the Reformasi, led in particular by Abdurrahman Wahid (Gus Dur), heralded a peaceful vision of justice. Gus Dur spoke out against the death penalty on several occasions. Such historical facts therefore raise questions about the reasons behind more recent use of the death penalty. The high number of executions in 2008 (10) and 2015 (15) suggests political manipulation of the punishment as these executions took place respectively the day before and the day after presidential elections. As if violations of the right to life could serve a political cause.

Finally, as the death penalty is mainly used in the "war" on drug-trafficking, the legitimate issue of public health has never been at the heart of debates. The problems often dealt with erroneously by the National Narcotics Board (BNN) are "supposed" to be resolved with security methods alone, like a magic wand. Were other important public health issues (often even more deadly within Indonesian society) handled this way? Were cigarette smokers and the drivers of cars and motorbikes responsible for hundreds of thousands of deaths treated like criminals? These debates have not taken place; the death penalty crystallises an easy answer where the reality is the opposite. This investigation aims to bring a little more complexity, scientific precision and political realism to the debate. We hope that the authorities will take this research into account to better understand the true face of the death penalty in Indonesia and the ineffectiveness of its practice.

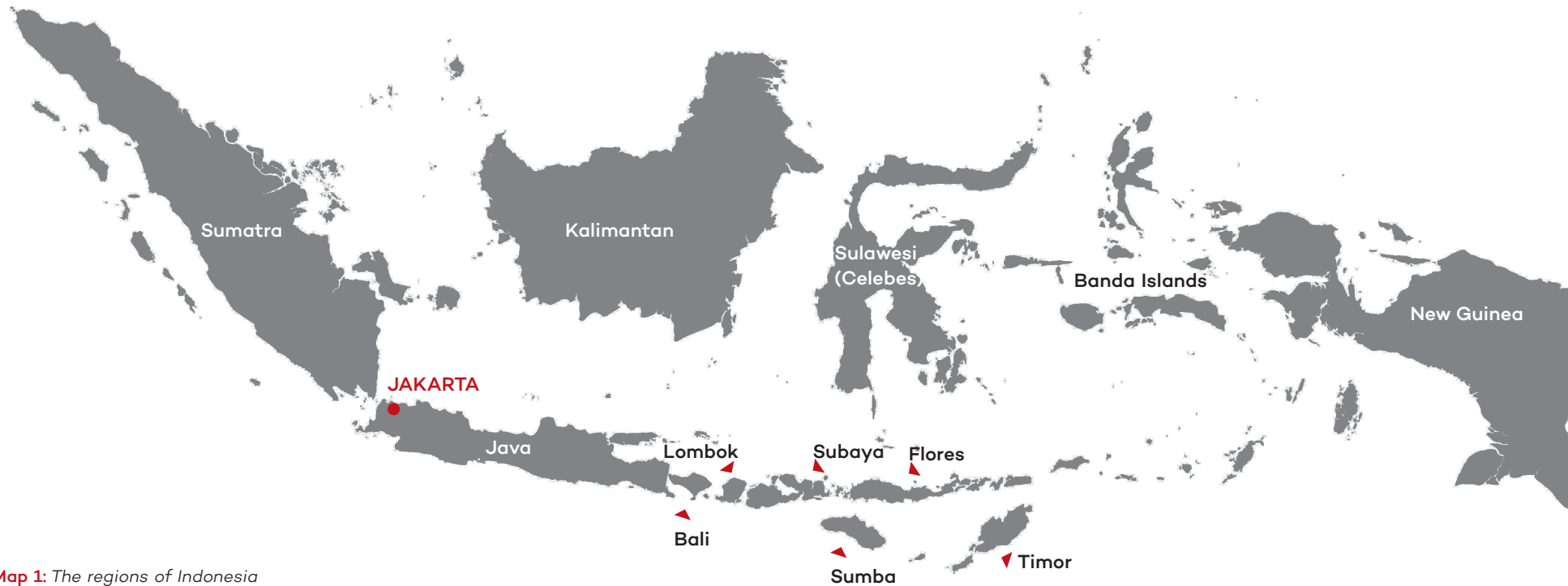
Although much research has been carried out into the administration of justice in death penalty cases in Indonesia, there is little research into the conditions of detention of the men and women sentenced to death in that country. This study is one of the first to focus on the conditions of detention of death row prisoners in Indonesia. This report aims to give a voice to the men and women on death row in Indonesia and to their families, while documenting their situation. The first part of the report analyses the evolution of the imposition of the death penalty since the country was colonized by the Dutch. The second part examines the experience of the men and women sentenced to death of the criminal justice system since their arrest. The third part analyzes the conditions of detention of death row prisoners. The fourth part details the execution process.

PRESENTATION OF INDONESIA

The Republic of Indonesia, with a population over 262 million people¹, is the fourth most populous country in the world. Indonesian people represent hundreds of cultural and linguistic groups. 87% of its population is Muslim.² Composed of more than 16,000 islands, Indonesia is the largest archipelago country in the world. The archipelago is located at the crossroads between the Pacific Ocean, the Indian Ocean and the China Sea, and connects two continents: Asia and Oceania. The country has abundant natural resources, including fertile soils, vast forests and important energy sources. It is the largest economy in Southeast Asia. For more than 40 years, from 1956 to 1998, Indonesia was governed by two authoritarian presidents. President Sukarno's "Guided Democracy" (1956-1965) and President Suharto's "New Order" (1965-1998) were characterized by significant restrictions on the Rule of Law and serious violations of civil and political rights. The fall of President Suharto in 1998 led to major legislative and political reforms in the country: during the *Reformasi*, Indonesia witnessed the demilitarization of the government, the implementation of free and

1 CIA (2018) World Fact Book (last visited July 17, 2019).

2 Ibid.



Map 1: The regions of Indonesia

fair elections, the emergence of a free press and the development of civil society organizations. However, despite significant progress Indonesian legislation has always provided for the death penalty. Twenty years after the start of the democratization process, the country faces a number of challenges. The number of acts of terrorism, in particular suicide bombings, has increased, and several groups promoting Islamic State-ISIS ideology are active in the country³. In addition, according to the authorities, Indonesia faces a “drug emergency” due to the large number of drug users in the country, estimated by the authorities to be more than four million people. At the same time, public institutions, including the judiciary, remain weak. In 2018, Indonesia was ranked 89th out of 180 on the Corruption Perceptions Index.⁴

3 Four key groups connect Indonesia to ISIS. See Fitriani, Satria, A., Nirmalasari, P. and Adriana, R. (2018) The Current State of Terrorism in Indonesia: Vulnerable Groups, Networks, and Responses. Centre for Strategic and International Studies, p. 8, available at: https://www.csis.or.id/uploaded_file/publications/the_current_state_of_terrorism_in_indonesia_-_vulnerable_groups__networks__and_responses.pdf (last visited July 17, 2019).

4 See Transparency International’s website, available at: <https://www.transparency.org/country/IDN>. See also Transparency International (2018) Indonesia: Overview of corruption and anti-corruption.

OVERVIEW OF THE DEATH PENALTY IN INDONESIA

“Everyone has the right to live and to defend his/her life and livelihood.”
Article 28A, Constitution of Indonesia

Legislation relating to the death penalty

The right to life is expressly recognized by the Indonesian Constitution in article 28A: *“Everyone has the right to live and to defend his / her life and livelihood”*.⁵ This right is also recognized in the 1999 Law on Human Rights⁶ and in the International Covenant on Civil and Political

5 1945 Constitution of the Republic of Indonesia, as amended by the First Amendment of 1999, the Second Amendment of 2000, the Third Amendment of 2001 and the Fourth Amendment of 2002. The constitutionality of the death penalty has been unsuccessfully challenged before the Constitutional Court MKRI. See infra Sub-Section “Indonesia’s policy on the death penalty for drug-related crimes”.

6 Article 4, Law No. 39/1999 on Human Rights.

Rights (ICCPR), ratified by the Indonesian government in 2006.⁷ Article 6 of the ICCPR recognizes the right to life and limits death penalty to the “most serious crimes”.⁸ Indonesia has not acceded to the 2nd Optional Protocol for the abolition of the death penalty. Indonesian legislation includes approximately 50 articles providing for offences that are punishable by death, for which the imposition of death penalty is not mandatory.⁹ Since the beginning of the democratic era in 1998, several new laws have broadened the scope of offences punishable by death. Nowadays, people may be sentenced to death for a wide range of crimes including, but not limited to, treason, aggravated murder, aviation crimes, drug trafficking, corruption, terrorism, sexual abuse of children and international crimes. Nonetheless, since Indonesia’s independence the death penalty has only been applied to four types of crimes: subversion¹⁰, aggravated murder, terrorism, and drug offences.

According to national legislation, certain categories of individuals are excluded from the death penalty: children¹¹, pregnant women – their execution is stayed until 40 days after the birth¹² –, and people with mental disabilities if they committed the crime because of their disabilities.¹³

7 Despite the fact that Indonesia has become party to a number of international conventions, the country does not have a clear stance on the position of international law in its legal system. There is a significant unresolved legal debate about whether Indonesia follows monism (the treaty is directly incorporated into its legal system) or dualism (the international treaty must be translated into a national legislation to be considered at domestic level). See Butt, S. (2014) ‘The Position of International Law Within the Indonesian Legal System’, *Emory International Law Review*, Vol 28, Issue 1, available at: <http://law.emory.edu/eilr/content/volume-28/issue-1/recent-developments/international-law-indonesian-legal-system.html> (last visited July 17, 2019).

8 See discussion on the “most serious crimes” threshold *infra*, in Sub-Section “Indonesia’s policy on the death penalty for drug-related crimes”.

9 The death penalty is applicable in the Indonesian criminal code, in the military criminal code and in several special pieces of legislation. See complete list of offences punishable by death in Appendix 2. In the Criminal Code, the death penalty is provided for the following crimes: attempt with intent to deprive the President or Vice-President of his life or liberty or to rend him unfit to govern (Article 104); collusion with a foreign power resulting in war (Article 111(2)); assisting the enemy (Article 124(3)); fraud in delivery of military materials in time of war (Article 127); premeditated murder of the head of a friendly State (Article 140); murder with deliberate intent and premeditation (Article 340); theft resulting in murder (Article 365(4)); extortion by two or more people resulting in serious injuries or death (Article 368(2)); piracy resulting in the death of a person (Article 444).

10 The offence of subversion does not exist anymore. See *infra*.

11 Article 64(f), Law No. 35/2014 on the Revision of the Law on Child Protection; Article 81(6), Law No. 11/2012 on Criminal Justice System for Children. However, the case of one minor sentenced to death has been identified. See *infra*.

12 Article 7, Law No. 2/PNPS/1964.

13 Article 44(1) KUHP provides that a person who commits a crime “by reason of the defective development or sickly disorder of his mental capacities” is not liable.

The legislation does not contain any specific provisions concerning the imposition of the death penalty on foreign nationals. Death sentences are equally applicable, whether the accused is an Indonesian or a foreign national.¹⁴

Under Indonesian law, the only acceptable method of execution is by firing squad.¹⁵ It should be noted, however, that the Aceh region has attempted to add new methods of execution. In 2009, the Parliament of the semi-autonomous conservative region of Aceh approved a draft regulation providing for stoning in cases of adultery.¹⁶ This draft regulation was never applied and this provision was removed in 2013 following opposition from the Indonesian Government.¹⁷ In 2018, the province of Aceh announced that it was considering the introduction of beheading as a sentence for murder under its Sharia system.¹⁸ However, the central government stated that the province did not have the legal authority to draft regulations contrary to national legislation.¹⁹

Death sentences in Indonesia

Over the last ten years, the number of death sentences has increased considerably, particularly since Indonesia’s “war on drugs”.²⁰ NGOs estimate that more than 70% of all death sentences

14 Some specific provisions allow foreign nationals to contact their embassies and to benefit from interpretation if they do not understand the local language during the criminal justice process. The latter right is provided for any person who does not understand Bahasa Indonesia. See *infra*, Sub-sections “Lack of proper interpretation” and “Contact with diplomatic missions”.

15 Law No. 2/PNPS/1964. Article 11 of KUHP also provides that: “Capital punishment shall be performed by shooting the sentenced person to death”. The method of execution has been confirmed by the MKRI, Decision 21/PUU-VI/2008, in which the Court upheld the constitutionality of the 1964 law.

16 The Guardian (2009) Aceh law threatens death by stoning for adultery, available at: <https://www.theguardian.com/world/2009/sep/14/indonesia-aceh-adultery-stoning-death> (last visited July 17, 2019).

17 Johnson C (2013) ‘Indonesia: Aceh Stoning Provision Deleted, Other Shariah-Influenced Rules Controversial’, *Global Legal Monitor*, available at: <http://www.loc.gov/law/foreign-news/article/indonesia-aceh-stoning-provision-deleted-other-shariah-influenced-rules-controversial/> (last visited July 17, 2019).

18 The Guardian (2018) Indonesian province considers beheading as murder punishment, available at: <https://www.theguardian.com/world/2018/mar/14/indonesian-province-aceh-considers-beheading-as-punishment> (last visited July 17, 2019); The Telegraph (2018) Indonesia’s Aceh considers beheading as punishment for murder, available at: <https://www.telegraph.co.uk/news/2018/03/15/indonesias-aceh-considers-beheading-punishment-murder/> (last visited July 17, 2019).

19 The Straits Times (2018) Jakarta opposes Aceh plan to behead murderers, available at: <https://www.straitstimes.com/asia/se-asia/jakarta-opposes-aceh-plan-to-behead-murderers> (last visited July 17, 2019).

20 See *infra*, Sub-section “Indonesia’s policy on the death penalty for drug-related crimes”.

recorded since 2015 relate to drug-related offences.²¹ In 2018, 81% of death sentences were imposed for drug-related crimes; the other crimes are aggravated murder (17%) and terrorism (2%).²² In 2018, Indonesia had the highest documented number of death sentences for drug-related crimes in Asia, although it should be noted that this data is not available for China, Iran and Saudi Arabia.²³

Table 1: Evolution of death sentences in Indonesia 2007-2018²⁴

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
# recorded death sentences	11+	10+	1	7+	6+	12+	16+	6	46+	60+	47+	48
# recorded death sentences for drug-related offences	N/A	N/A	N/A	3+	N/A	N/A	N/A	N/A	29	46	33	39

The exact number of people on death row is not clear. There are no published statistics. In addition, inconsistencies in the data provided by the authorities were reported.²⁵ However, according to data provided by the authorities in July 2019, 268 people were on death row on 21 June 2019: 100 individuals for drug-related offences, 69 for terrorism and 2 for murder.²⁶ NGOs, which monitor application of the death penalty in the country, report that the number of people

21 See table below.

22 Amnesty International (2019), p. 21.

23 Harm Reduction International (2019), p. 38.

24 We used Amnesty International's "+" notation to indicate that the figure represents a minimum. 2007 data: Amnesty International (2008) Death sentences and executions in 2007; 2008 data: Amnesty International (2009) Death sentences and executions in 2008; 2009 data: Amnesty International (2010) Death sentences and executions in 2009; 2010 data: Amnesty International (2011) Death sentences and executions in 2010; 2011 data: Amnesty International (2012) Death sentences and executions in 2011; 2012 data: Amnesty International (2013) Death sentences and executions in 2012; 2013 data: Amnesty International (2014) Death sentences and executions in 2013; 2014 data: Amnesty International (2015) Death sentences and executions in 2014; 2015 data: Amnesty International (2016) Death sentences and executions in 2015; 2016 and 2017 data: Amnesty International (2018) Death sentences and executions in 2017; 2018 data: Amnesty International (2019) Death sentences and executions in 2018. See also Harm Reduction International (2019), The Death Penalty for Drug Offences: Global Overview 2018.

25 See for instance the 2015 Amnesty International report which states that more than 70 cases were not included in the official list provided by the Ministry of Law and Human Rights, and that people who were executed were still counted in the list. Amnesty International (2015), Flawed Justice: Unfair Trials and the Death Penalty in Indonesia, ASA/21/2434/2015, p. 22.

26 Directorate of Correctional Institutions (2019) Letter to KontraS 'Pemenuhan Permohonan Keterbukaan Informasi Publik Terkait Data Jumlah Terpidana Matidi Lembaga Masyarakat di Indonesia'.

on death row almost tripled between 2008 (112 persons) and 2018 (estimate of 236 to 308 persons).²⁷

According to the 2017 report of the Indonesian National Commission on Violence Against Women, six women are on death row, all of them migrant workers who have been sentenced to death despite indications that they are victims of human trafficking.²⁸

According to data provided by the authorities in July 2019, 70 of the 268 people on death row are foreign nationals. However, this data does not indicate the nationality of foreign individuals on death row. In 2016, KontraS noted that 79 foreigners from 16 countries were on death row. The most represented nationalities are Nigeria (eight individuals), Malaysia (six) and China (six). 15 of the 48 people sentenced to death in 2018 were foreign nationals.

Table 2: Nationality of foreigners sentenced to death for drug-related offences in Indonesia (2016)²⁹

Nationality	# individuals on death row
Africa	12
Nigeria	8
Senegal	1
Sierra Leone	1
Zimbabwe	2
America	1
USA	1
Asia	21
China	6
Hong Kong	1
India	1
Iran	2
Malaysia	6
Pakistan	2
The Philippines	1
Taiwan	2
Europe	5
France	1
The UK	2
The Netherlands	2

27 In the absence of official data, some inconsistencies are reported between organizations. According to Harm Reduction International, there were 236 people on death row in Indonesia (including 130 for drug-related crimes) in 2018: Harm Reduction International (2019), p. 24. According to Amnesty International, there were at least 308 people on death row in Indonesia in 2018: Amnesty International (2019), p. 19. One of the reasons for this inconsistency may be that some NGOs only consider individuals who have been sentenced to death at any stage as death row prisoners, while others may consider death row prisoners to be individuals who have exhausted all appeals.

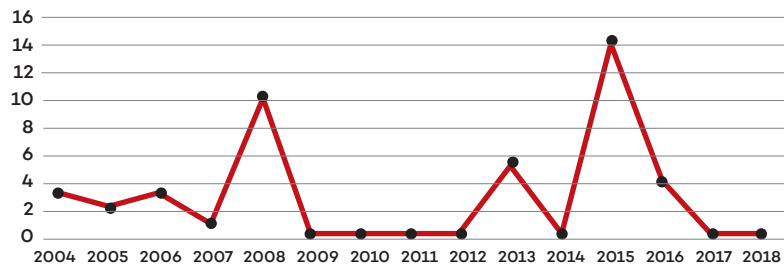
28 Indonesian National Commission on Violence against Women (2017) Independent NHRI Report, 3rd cycle, 27th Session of the Working Group on the Universal Periodic Review, p. 9.

29 This data was collected by KontraS in 2016.

Executions in Indonesia

No *de facto* moratorium has been declared in Indonesia, although no executions took place from 2009 to 2012. The last executions took place in 2016. Since 2012, 23 people have been executed in the country. Statistics show that these executions are particularly targeted at drug offenders, most of whom are foreign nationals. The 18 people executed in 2015 and 2016 were all convicted of drug trafficking; 15 of them were foreign nationals.

Graph 1: Evolution of execution in Indonesia (2004-2018)



Indonesia's position on a moratorium on the death penalty

In 2017, at the 27th session of the United Nations (UN) Universal Periodic Review, Indonesia rejected all the international community's recommendations to abolish the death penalty, stating that *"the death penalty was still a prevailing positive law in Indonesia"* and that *"the revision of the penal code provided a more robust safeguard in due process of law on the death penalty"*.³⁰ Legislative reform has indeed been initiated but it still includes the death penalty.³¹ Since 2012, however, Indonesia has changed its vote on the UN General Assembly Moratorium Resolution from a vote against the resolution to an abstention.

30 OHCHR (2017) Human Rights Council Universal Periodic Review outcomes of Morocco, Indonesia and Finland, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22127&LangID=E> (last visited July 17, 2019).

31 For more information on the new legislation, see *infra*, Sub-section "Legislative reform".

This report is based on extensive research³² and semi-directive individual interviews conducted from December 2018 to May 2019. All interviews in Indonesia were conducted by a team of three KontraS members who carried out individual interviews with people sentenced to death, prison staff and lawyers. Other interviews were conducted by the author of the report with relatives of people sentenced to death and legal scholars.

As mentioned above, the number of people on death row in Indonesia is not clear. There is no published data on the number of people sentenced to death per year, nor on the number of people on death row, despite the UN Economic and Social Council Resolution of May 1989 requesting that States publish such data.³³ Nevertheless, NGOs estimate that there are between 236 to 308 people sentenced to death and currently held in Indonesian prisons.³⁴

Even though those sentenced to death are supposed to be placed in high security prisons, in practice these men and women are detained in different types of prisons due to overcrowding.³⁵ As the KontraS team could not be deployed in all the prisons that house people sentenced to death, KontraS selected eight which represent different types of prisons and therefore different realities of detention, as shown in the following table.

32 See complete list of documents consulted in Appendix 3.

33 UN Economic and Social Council (1989) Resolution 1989/64 on the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty (hereafter "the UN death penalty safeguards").

34 According to Harm Reduction International, there were 236 people on death row in Indonesia in 2018: Harm Reduction International (2019), p.24. According to Amnesty International, there were at least 308 people on death row in Indonesia in 2018: Amnesty International (2019). See also note 27.

35 For more information on this aspect, see *infra*, Sub-section "Places of detention of the people sentenced to death".

Table 2: Sample of prisons visited

Prison	Security level / Class ³⁶	Location
Batu prison	High-Risk Prison, Class I	Nusakambangan island
Cilacap prison	Class II	Cilacap, Central Java province
Kembang Kuning prison	Class II	Nusakambangan island
Kerokoban prison	Class II	Bali, Bali province
Lapas Narkotika	Super-Maximum Security, Class II	Nusakambangan island
Lowokwaru prison	Class I	Malang, East Java province
Makassar prison	Class I	Makassar, South Sulawesi province
Tangerang prison	Class I	Tangerang, Banten province

Map 2: Prisons visited



Nusakambangan is a “prison island” where there are several high-security prisons. To access this island, the research team was invited to undergo a body scan. A female member of the research team was asked to undergo a strip search. As she indicated she had her period, she was also asked to take off her underwear to prove she was not carrying restricted material.³⁷ She refused but

³⁶ The security level is a new system implemented in 2018 but it only applies to Nusakambangan at the moment. Other prisons kept the former Class I / Class II system. See *infra*, Sub-section “Places of detention of the people sentenced to death”.

³⁷ This situation is not uncommon. See *infra*, Sub-section “Contact with the ‘outside’ world”.

was nevertheless authorized to visit the prisoners. In the high-risk Batu prison that mainly houses terrorists and drug kingpins, prison staff asked visitors to disguise themselves as guards – wearing helmets and security outfits – so that prisoners could not distinguish between guards and visitors. Indeed, according to prison staff prisoners convicted of terrorism are likely to target guards but less likely to target visitors. The use of this technique is supposed to avoid violence against guards.

Seven people sentenced to death in five prisons – including women and foreign prisoners –, six prison staff, two lawyers of death row prisoners and family members of people sentenced to death were interviewed. All interviewees agreed to answer the questions asked without difficulty. All interviews with people sentenced to death were conducted without a guard present, except in Lapas Narkotika. In this prison, contrary to international standards³⁸, two prison guards were present during some interviews.³⁹

More interviews have been scheduled with individuals sentenced to death. However, in one prison the warden told the KontraS team that they were not allowed to ask questions about the detainees’ judicial processes and conditions of detention. Prison staff remained with the KontraS team at all times during the very short authorized discussion with a prisoner. In another prison, the warden refused access to a death row prisoner, stating that the authorization granted to KontraS was insufficient, even though procedure was strictly followed. According to the warden, this was due to a communication problem between the Directorate General for Correction Facilities and the Attorney General’s Office. Other organizations which support this prisoner have reported that access was routinely hindered. The average length of detention of the people sentenced to death interviewed is 13 years; their time in prison varies from six to 18 years. In order to ensure the safety of the people sentenced to death who were interviewed, the exact number of people interrogated in each prison, their gender and nationality are not indicated. In addition, the names of all respondents have been changed.

³⁸ Rule 61(1) of the Standard Minimum Rules for the Treatment of Prisoners, also known as the Nelson Mandela Rules, states that: “Prisoners shall be provided with adequate opportunity, time and facilities to be visited by and to communicate and consult with a legal adviser of their own choice or a legal aid provider, without delay, interception or censorship and in full confidentiality, on any legal matter, in conformity with applicable domestic law. Consultations may be within sight, but not within hearing, of prison staff”.

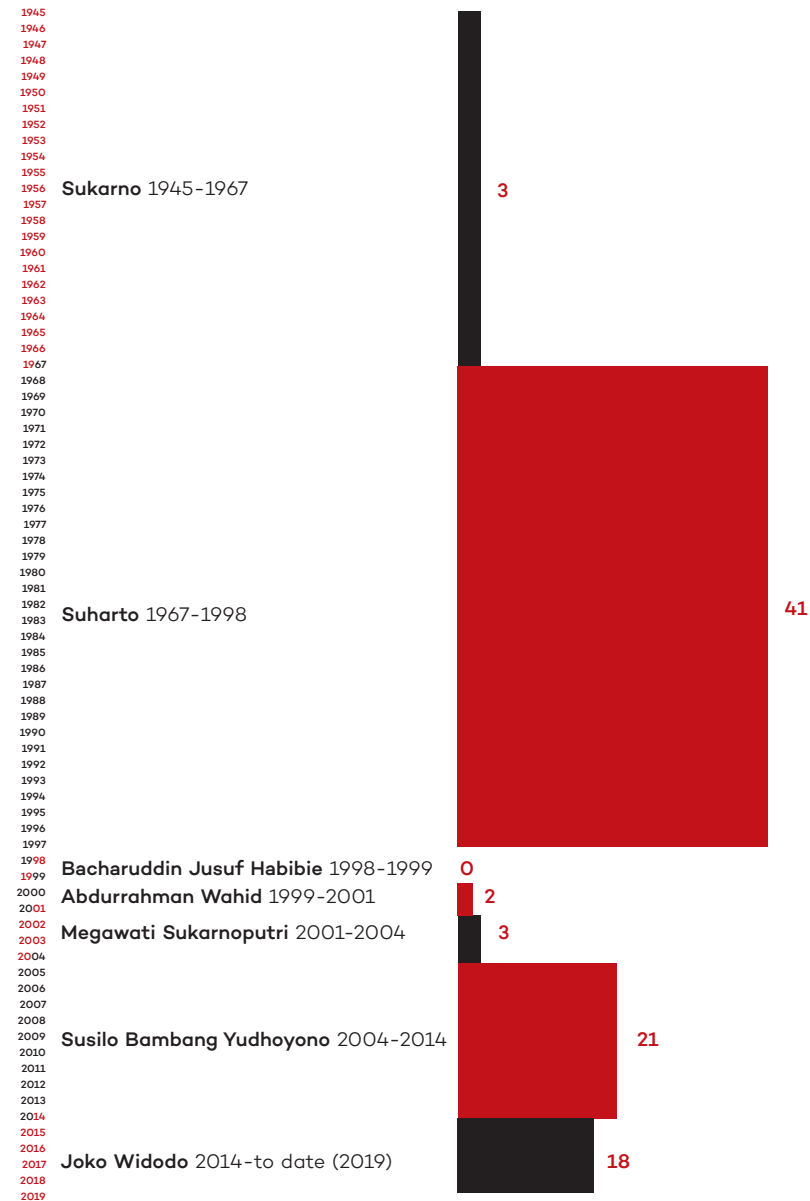
³⁹ Prison guards were only present during interviews conducted in the Bahasa Indonesia language.

HISTORY OF THE DEATH PENALTY IN INDONESIA: THE USE OF THE DEATH PENALTY AGAINST INTERNAL AND EXTERNAL THREATS



"Dimas", Painting by Myuran Sukumaran – 2014

Graph 2: Executions under each president



THE DEATH PENALTY IN INDONESIA BEFORE INDEPENDENCE

The practice of the death penalty on Indonesian territory before the 20th century has been revealed by a number of documents and research.

Before Dutch colonization in 1619, the territory of what became the Dutch East Indies was composed of several kingdoms which had their own laws and regulations. According to several reports, the death penalty was not a rare type of punishment in the kingdoms for a number of offences. 16th century Javanese *Agama* law provided for the death penalty for people who committed theft by night.⁴⁰ Bowrey, an English merchant who sailed around the East Indies in the 17th century, reported that, under the reign of the Sultana of Aceh Safiyyat Al-Din Syah, a thief would be sentenced to death if he stole a cow, buffalo or horse, even if it was his first offence.⁴¹ The thief was then delivered to the executioners “with great expedition”.⁴² Takeshi gives many examples in the 17th century of people of Aceh being executed for theft,⁴³ adultery⁴⁴ or treason.⁴⁵ Reid indicates that Aceh King Iskandar Muda ordered the execution of two persons, sentenced to death for inebriation, by “pouring molten lead down their throats”.⁴⁶ Andaya relates the arrest and beheading of a person in 1673, accused of trying to seize the throne of Bone and kidnapping one of the concubines of Bone King Arung Palakka.⁴⁷ In 1619, the Dutch East India Company (*Vereenigde Oostindische Compagnie* or VOC) took control of the Kingdom of Jakarta and imposed its customary criminal legislation. Although chained convict labor (*kettingstraf*) was the most common sentence in the VOC⁴⁸,

40 Boomgaard, P. (2009) ‘Following the debt: Credit and Debt in Southeast Asian legal Theory and Practice 1400-1800’, *Credit and Debt in Indonesia 860-1930: from peonage to pawnshop, from kongsi to cooperative*, p. 68. ISEAS publishing.

41 Bowrey, T. (1905) *A Geographical Account of Countries round the Bay of Bengal 1669-1679*, p. 315. Cambridge Ed.

42 Bowrey, T. (1905), p. 316.

43 Takeshi, I. (1984) *The World of Adat Aceh: A Historical Study of the Sultanate of Aceh*, pp. 172-174. Australian National University.

44 Takeshi, I. (1984), pp. 168-170. The accused were killed by flogging or strangled.

45 Takeshi, I. (1984), p. 181.

46 Reid, A. in Peletz, M.G. (2002) *Islamic Modern: Religious Courts and Cultural Politics in Malaysia*, p. 28.

47 Andaya, L. (1981) *The Heritage of Arung Palaka*, p. 322. Martinus Nijhoff Ed. See also Institute for Criminal Justice Reform (ICJR) (2017), *Death Penalty Policy in Indonesia*.

48 Van Rossum, M. (2018) ‘The Dutch East India Company in Asia, 1595-1811’, Anderson, C., *A Global History of Convicts and Penal Colonies*, pp. 157-182. Bloomsbury Academy.

the death penalty, followed by execution, was frequently imposed. Van Rossum reports, for instance, that over a period of nine months in 1718, four people – three slaves and one European soldier – were sentenced to death by the Court of Justice in Batavia (Jakarta). Death sentences were handed down for various crimes, such as murder, theft, physical assault, desertion, adultery or rebellion.⁴⁹ According to Dutch archeologist Hans Bonke, executions in the 18th century were regularly held in front of Batavia’s City Hall. He indicates that, while five executions per year were carried out in Amsterdam city, which comprised 210,000 inhabitants, twice as many executions were carried out per year in Batavia which comprised 130,000 inhabitants.⁵⁰ There are many examples of collective execution of the death penalty in the 17th and 18th centuries. In 1621, the VOC beheaded 40 “*orang kaya*”, leaders of Banda Neira island, accused of conspiring against the Dutch. The colonizers were reported to have tortured the leaders to obtain confessions.⁵¹ In 1623, in a climate of intense rivalry over the spice trade between England and the Netherlands, twenty people working for the English East India Company, as well as Japanese and Portuguese traders, were accused of conspiracy against the Dutch and beheaded by the VOC.⁵² Another example is the execution of Eurasian Pieter Erbeveld and his supporters in 1722, also accused of conspiring against the VOC.⁵³ From 1808, Governor-General Daendles attempted to reform the colonial administration, including the criminal justice system. The first written law that provides for the death penalty in the country is a law of 1808 which provides for the penalty of being burned

alive attached to a pole.⁵⁴ After Daendles, Lieutenant-Governor Raffles instituted a Court of Circuit (*Rechtbank van Ommegang*) for all cases involving the death penalty.⁵⁵ In 1848, a new law, the *Interimaire Strafbepalingen*, was passed which provided that hanging was the only method of execution.⁵⁶

In 1847, the Governor-General was instructed to draft new criminal legislation for the colony that would apply to all residents of the Indies. The commissions established to carry out this task were not successful. A first Criminal Code was introduced in 1867, targeting only Europeans (*Wetboek van Strafrecht*). A few years later, in 1873, another Criminal Code was introduced, targeting only native populations (*Wetboek van Strafrecht voor Inlanders*).⁵⁷

It is important to note that the last execution in the Netherlands was carried out in 1860.⁵⁸ The death penalty as a main punishment was removed from the Dutch national legal system in 1870. During the drafting of new criminal legislation for native populations, there was an important debate on whether the death penalty was an effective deterrent in the Netherlands’ colonial territories and whether it was possible to justify racial discrimination related to the execution of Indonesians but not Europeans.⁵⁹ After much debate, the new 1873 Criminal Code for natives incorporated the death penalty as a punishment.

In 1918, a new Criminal Code came into force which applied to all ethnic groups living in Indonesia (*Wetboek van Strafrecht voor Nederlandsch-Indië*). Article 11 provided that the capital punishment must be carried out by hanging. This legislation remained the foundation of Indonesian criminal law after the Japanese occupation.

49 Ibid.

50 Shahab, A. (2004) *Saudagar Baghdad dari Betawi*, p. 50. Republika Ed.

51 This was part of a military conquest of Banda islands and is known as the “Banda massacre”. See for instance Tracy, J. (2015) ‘Dutch and English trade to the East: the Indian Ocean and the Levant’, *The Cambridge World History, The Construction of a Global World 1400-1800, Part 2: Patterns of change*, Vol 6, p. 244. Cambridge University Press.

52 This episode, known as the Amboina massacre, resulted in the end of Anglo-Dutch cooperation in the region. Most of the accused were tortured during the criminal process. See Howell, M. (2015) ‘Into the East: European Merchants in Asian Markets During the Early Modern Period’, *Across the Ocean: Nine Essays on Indo-Mediterranean trade*, p. 161. Brill Ed. See also *Encyclopedia Britannica*, available at: <https://www.britannica.com/event/Amboina-Massacre> (last visited July 17, 2019).

53 This story has a number of versions, but all of them confirm the execution of the accused, Erbeveld. See for instance, Hall, D. (1964) *A History of Southeast Asia*, p. 310. 2nd ed., St Martin’s press, London; Igushi, M. (2014) *Java Essay: The History and Culture of a Southern Country*, p. 75. Matador Ed.; or Gelman Taylor, J. (2009) *The Social World of Batavia*, 2nd Ed, p. 181. The University of Wisconsin Press. The 2014 essay reports that they were dismembered and beheaded.

54 Law of 22 April 1808. See also Reni, H. (2015) *Legenda Hukuman Mati*, p. 6; or Salsabila, N. (undated) *Tinjauan Kepastian Hukum dalam Masa Tunggu Pidana Mati Kasus Tindak Pidana Narkotika di Indonesia*, p. 35.

55 Hall, D. (1964), p. 456.

56 ICJR (2017), p. 43.

57 Cribb, R. (2010) *Legal Pluralism and Criminal Law in the Dutch Colonial Order, Indonesia*, No. 90, p. 63. JSTOR. The code also applied to foreigners according to Jol, D.S. (2017) ‘Honderd jaar Wetboek van Strafrecht voor Nederlandsch-Indië’, *Thema: De staat van het strafrechtelijk onderzoek. Wat houdt jonge onbetrokken bezig?*, p. 489, available at: https://openaccess.leidenuniv.nl/bitstream/handle/1887/60997/2017_Honderd_jaar_WvSr_N-I_oeStrafblad.pdf?sequence=1 (last visited July 17, 2019).

58 Brants, C. (2012) ‘The Abolition of Death Penalty in the Netherlands’, Nelen, H. and Claessen, J., *Beyond the Death Penalty: Reflections on Punishment*, p. 25, in ICJR (2017), p. 4.

59 The last execution of Europeans in the colony was carried out in 1872, although the death penalty was included in both Criminal Codes. Cribb, R. (2010), pp. 62-63.

INDEPENDENCE AND THE THREE CONSTITUTIONS (1926-1955)

The rise of Indonesian nationalism

Indonesian nationalism emerged at the beginning of the 20th century with the founding of a number of associations and groups such as the “Budi Utomo” group which is considered the first native political organization. In 1926, a “general study club” was founded in Bandung, under the leadership of engineer Sukarno. This study club became the center of the future Indonesian Nationalist Party (*Partai Nasional Indonesia* – PNI) which aimed to achieve Indonesia’s independence on the basis of non-cooperation with the East Indies’ Government.⁶⁰ The PNI soon became the most powerful nationalist organization in the Indies.⁶¹

The activities of these organizations were repressed and Sukarno was arrested and sentenced to four years in prison in 1929.⁶² The PNI was banned, a new party was created: the Indonesian party *Partindo*. After Sukarno’s arrest, the two nationalists Mohammed Hatta and Sutan Sjahrir created a new PNI, focused on training executives, to maintain the movement’s leadership. When Sukarno was released in 1931 he tried to unify *Partindo* and the new PNI but failed. Sukarno was arrested again in 1933, exiled to a remote area and finally transferred to Benkulu Island in 1938. Mohammed Hatta and Sutan Sjahrir were arrested in 1934 and exiled in Western New Guinea and then Banda Island. All three remained in exile until Japan invaded Indonesia in 1942.

Japanese occupation

In 1942, Japan took control of the territory. Japanese Martial Law provided that the death penalty and severe penalties should be imposed for a number of military crimes such as opposition or hostility to the Japanese army, spying, or destruction of oil installations, mines, estates, or other sorts.⁶³ Martial Law No. 1 provided that the capital sentence should be executed by shooting.⁶⁴ According to Bin Siong, the change in the method of execution, from hanging – as

60 Palmier, L. H. (1957) Sukarno the Nationalist, *Pacific Affairs*, Vol 30, No. 2, p. 103. JSTOR.

61 *Ibid*, p. 104.

62 International Commission of Jurists (ICJ) and the Netherlands Institute of Human Rights (NIHR) (1987) *Indonesia and the Rule of Law: twenty years of “New Order” government*, p. 4. London: Ed. Frances Pinters.

63 Bin Siong, H. (1961) *An Outline of the Recent History of Indonesian Criminal Law*, p. 3. Martinus Nijhoff Ed.

64 *Ibid*.

prescribed by Article 11 of the 1918 Criminal Code –, to shooting, was necessary because hanging was impracticable under the circumstances at that time.⁶⁵

To avoid a legal vacuum, a decree came into force in 1942 according to which all laws and regulations promulgated during the previous government were still valid as long as they did not contradict the regulations of the Japanese Military Government: the 1918 Criminal Code remained applicable.⁶⁶ In 1944, a Criminal Code, *Gunsei Keizirei*, that provided for executions by firing squad, was promulgated in addition to the 1918 Criminal Code which still provided for capital punishment by hanging.⁶⁷

Sukarno and Mohammed Hatta cooperated openly with Japanese authorities, trying to get assistance to gain independence and free Indonesia from colonialism. In 1944, Japan promised the future independence of the East Indies. In March 1945, Japan authorized the establishment of an Investigating Committee for Preparatory Work for Independence. In August 1945, Japan surrendered to the Allies.

Indonesia’s Independence and the Constitutions

On August 17, 1945, taking advantage of the collapse of Japan and the absence of a Dutch colonial regime, Sukarno, accompanied by Mohammed Hatta, proclaimed Indonesia’s independence:

“We the people of Indonesia hereby declare the independence of Indonesia. Matters which concern the transfer of power and other things will be executed by careful means and in the shortest possible time [...]

So it is, brothers and sisters,

We are now already free!

There is not another single tie binding our country and our people! As from this moment we build our state. A free state, the State of the Republic of Indonesia—evermore and eternally independent.

Allah willing, God blesses and makes safe this independence of ours!”⁶⁸

On August 18th, the Committee for Preparatory Work for Independence elected Sukarno by acclamation as its first President and Mohammed Hatta as his Vice-President.

65 *Ibid*, p. 29.

66 *Ibid*, pp. 4-5.

67 Article 4, *Gunsei Keizirei*. *Ibid*, pp. 10 and 29.

68 Kahin, G. (2003) *Southeast Asia: A Testament*, p. 18, RoutledgeCurzon Ed.

Three weeks later, Indonesia had its first Constitution which provided for a unitary State. The Constitution was intended to be temporary: it comprised only 37 articles and is considered “the shortest Constitution in the world, notable more for what it does not state than for what it does”.⁶⁹ It makes little reference to the protection of Human Rights and to the Rule of Law.⁷⁰ The Preamble to the 1945 Constitution sets out the national doctrine of *Pancasila*, the supreme ideological framework on which Indonesia is founded, and enumerates its five principles: belief in One Supreme God, National unity, Civilized humanitarianism, Representative government and Social Justice.⁷¹ The Dutch were not ready to recognize Indonesian independence and sought to re-establish their power. Between 1946 and 1948, they launched several military interventions against Indonesia. The UN Security Council called for a ceasefire and peaceful negotiations. In 1949, the Dutch–Indonesian Round Table Conference led to the recognition by the Netherlands of Indonesian sovereignty over a new federal State known as the “United States of Indonesia”. A new federal Constitution was introduced. However, a year later it was decided to re-establish a unitarian republic. The 1949 Constitution was replaced by a new provisional 1950 Constitution which proclaimed the unity of the State.⁷² The 1950 Constitution guaranteed a wide range of civil and political rights enshrined in the Universal Declaration of Human Rights (UDHR); but did not recognize the right to life.

The Indonesian Criminal Code and the promulgation of special laws

In 1946, *Wetboek van Strafrecht voor Nederlandsch-Indië* was replaced by the Indonesian Criminal Code, *Kitab Undang-Undang Hukum Pidana* (KUHP), which is based on colonial legislation. According to the KUHP, the death penalty could be imposed for several crimes including treason, insurgency, premeditated murder or

69 Lindsey, in Stockmann, P. (2004) Indonesian Reformasi as Reflected in Law: Change and Continuity in Post-Suharto Era Legislation on the Political System and Human Rights, p. 29. New Brunswick & London: Transaction Publishers.

70 According to the Constitution, the President has the right to appoint and dismiss Ministers. Only three articles refer to citizens’ human rights: the right to equal status before the law, the right to work and to a decent living, and the right and duty to participate in the defense of the State. Some other articles refer to the “longing for a democratic State”: care for the poor and for neglected children, freedoms of association, assembly and expression of opinion (although these freedoms can be restricted by law), and freedom of religion. Stockmann, P. (2004), pp. 46–47.

71 ICJ and NIHR (1987), p. 36.

72 Ibid, p. 5.

extortion. The death penalty was to be carried out by firing squad.⁷³ The KUHP became applicable to all regions of Indonesia in 1958.⁷⁴ The Military Criminal Code KUHPM also provided for the death penalty for certain crimes committed by military personnel and crimes of a mixed military nature.

The period from 1949 to 1956 was characterized by governmental instability with seven successive prime ministers. Disillusionment and discontent due to corruption and unrepresentative politics increased in the regions and led to a growing rebellion supported by local military commanders. In response to these threats, President Sukarno cooperated more closely with the military⁷⁵ and enacted Emergency Law No. 12 of 1951 on the possession, use and importation of firearms, ammunitions and other explosives, which provided for the death penalty.

GUIDED DEMOCRACY (1956-1965)

The failure of the Constituent Assembly and the emergence of Guided Democracy

In 1955, a Constituent Assembly was appointed to draft a permanent Constitution.⁷⁶ According to Latif, the Assembly agreed on most parts of the draft constitution, including human rights issues and the unitary form of the State, but could not reach a compromise on whether the ideological basis of the State should be *Pancasila* or Islam.⁷⁷

During the same period, President Sukarno began to publicly criticize the negative effects of Western-style parliamentary democracy. In October 1956, after a visit to the People’s Republic of China, he called for political parties to be “buried” and became increasingly close to

73 In 1948, the name of the Criminal Code changed from *Wetboek van Strafrecht voor Nederlandsch-Indië* to *Wetboek van Strafrecht voor Indonesië*. The acronym KUHP, used throughout the report, refers to *Wetboek van Strafrecht voor Indonesië*.

74 Until 1958, when the KUHP became applicable to all regions of Indonesia, there was a conflict of legislation between the KUHP and the 1918 Criminal Code which was still in force in some regions. Han Bin Siong (1961) p. 47; and ICJR (2017) Death Penalty Policy in Indonesia, p. 38.

75 Latif, Y. (2008) Indonesian Muslim Intelligentsia and Power, p. 272. ISEAS.

76 Eldridge, P. (2002) The Politics of Human Rights in Southeast Asia, p. 117. London & New York: Routledge Ed.

77 Latif, Y. (2008), p. 270 and p. 306.

the Communist Political Party (*Partai Komunis Indonesia* – PKI). In December 1956, Vice-President Hatta announced his resignation.⁷⁸ While the country was still facing rebellion in the provinces, Sukarno, in his famous speech of 21 February 1957, announced the concept of a democracy with guidance, “*Guided Democracy*”:
*“I came to the conviction that we had used the wrong system, the wrongful style of government, that is, the style that we call western democracy. [...] We have experienced all the excesses which result from effectuating an imported idea [...] which is not in harmony with our national soul.”*⁷⁹

President Sukarno stated that parliamentary democracy had led to recurrent crisis due to the weakness of governmental authority and the vehemence of political opposition⁸⁰, and that parliamentary democracy contradicted the fundamental traditional principles of Indonesia which are *musyawarah* (prolonged deliberation) and *mufakat* (consensus). He called for a *gotong royong* democracy in which decisions are taken on the basis of mutual agreement.⁸¹ Sukarno further developed the “Guided Democracy” ideology with the slogan “*Nasakom*” which referred to the three socio-political elements that were legitimately part of the political system: Nationalism, Religion, and Communism⁸², thus legitimizing the PKI as an essential component of Indonesian politics.

In March 1957, he declared martial law which allowed him and the army to participate more actively in political and civilian affairs. In July 1959, when the Constituent Assembly could not reach agreement on the permanent Constitution, Sukarno, with the support of the armed forces, dissolved the Constituent Assembly and restored the 1945 Constitution by decree.⁸³

The fight against threats to national security

Sukarno’s reign became more and more autocratic. He banned several political movements, seized important Dutch assets, dissolved

78 Latif, Y. (2008), p. 272.

79 Sukarno, in Reid, A. (2005) ‘Writing the History of Independent Indonesia’, *Nation Building: Five Southeast Asian Histories*, pp. 77-78. ISEAS.

80 Van Ker Kroef, J.M. (1957) ‘Guided Democracy in Indonesia’, *Far Eastern Survey*, American Institute of Pacific Relations, Vol 26, No. 8, p. 113.

81 Ibid.

82 Leifer, M. (2002) *Dictionary of the Modern Politics of Southeast Asia*. United Kingdom: Taylor & Francis.

83 Latif, Y. (2008), pp. 273-274.

Parliament after it rejected the Government’s budget and replaced it with a provisional Parliament in which he appointed half its members, and started to rule by decree. In March 1963, Sukarno was proclaimed President for life by the Provisional People’s Consultative Assembly.⁸⁴ Several authors report that the Rule of Law had been completely abandoned: the Basic Law on Judiciary Power No. 19/1964 explicitly empowered the President to intervene in judicial affairs “[in] the interests of the revolution, the honor of the State and the nation, or the urgent interests of society at large”.⁸⁵ The Elucidation⁸⁶ of this law also provided that the legislative power, the judiciary and the executive power should not be separated because the revolution required the unity of all forces.⁸⁷

Between 1955 and 1965, the authorities promulgated several regulations that broadened the scope of the death penalty. It was included in 1959 for acts that endanger the provision of basic food and clothing supplies in times of national emergency⁸⁸ and for crimes that can cause economic disruption⁸⁹; in 1963 it was included for acts of subversion⁹⁰, and in 1964 for espionage when people reveal secrets related to Indonesia’s atomic energy program.⁹¹

The 1963 Decree on the Eradication of Subversive Activities (Anti-Subversion Decree), unlike the other new regulations⁹², played an important role in the history of the death penalty in the country. Its vague wording allowed for the prosecution and conviction of anyone whose words could be considered to disrupt public order or criticize *Pancasila* or the institutions. Article 1 provides that anyone who has committed the following criminal activities shall be punished by

84 Pauker, E.T. (1964) ‘Has the Sukarno Regime Weakened the PKI?’, *Asian Survey*, Vol 4, No. 9, p. 1059. University of California Press.

85 Crouch, H. (2010) *Political Reform in Indonesia after Soeharto*, p. 193. ISEAS.

86 An Elucidation aims at explaining the legislators’ intent. Elucidations are used when interpreting the texts.

87 Elucidation of Article 3 of the Basic Law on Judiciary Power No. 19/1964, in ICJ and NIHR (1987), p. 166.

88 Presidential Decree No. 5/1959 on the Authority of the Attorney General in Terms of Aggravating the Threat of Punishment against Acts that Endanger the implementation of Food and Clothing Supplies.

89 Government Regulation No. 21/1959 that aggravated the punishment for economic crimes.

90 Presidential Decree No. 11/PNS/1963 on the Eradication of Subversive Activities.

91 Act No. 31/PNS/1964 on the Basic Provisions of Atomic Energy.

92 The other pieces of legislation did not result in executions. However, at least one person was sentenced to death under the regulation relating to economic crimes but the sentence was not carried out. Amnesty International (1987) *Indonesia: The Application of the Death Penalty*, ASA 21/27/87, p. 5.

death, life imprisonment or imprisonment for a term not exceeding twenty years, with or without a fine:

“(1) Those held responsible for carrying out subversive criminal activity are:

1. *Whoever has carried an activity with the intention or evidently with the intention or which is known or reasonably considered to be known of:*
 - a. *distorting, stirring up trouble or digressing the state ideology Pancasila or the course of the state, or*
 - b. *overthrowing, damaging, or undermining state power or the authority of the legal Government or the State Apparatus, or*
 - c. *spreading feelings of hostility or creating hostility, dissension, conflict, chaos, instability or restlessness among the population or society in general or between the Republic of Indonesia and a friendly State, or*
 - d. *disturbing, hampering and stirring up trouble for industry, production, distribution, trade, cooperation and transportation run by the Government or based on Government’s decision, or which has a wide influence on the life of the people;*
 2. *Whoever has carried out an action or an activity expressing sympathy with the enemy of the Republic of Indonesia or with a State which happens to be not friendly relations with the Republic of Indonesia;*
 3. *Whoever has carried out damaging or destroying buildings which have functions for public interest or private property or the property of bodies in general;*
 4. *Whoever has carried out activities of spying;*
 5. *Whoever has carried out sabotage.*
- (2) Whoever traps the taking of actions as mentioned in section (1) above, is also held responsible for having carried out a criminal subversive activity.”⁹³*

To complete the fight against “threats” to the security of the people and the State, in December 1963 a Presidential Decree created the Extraordinary Military Court (*Mahkamah Militer Luar Biasa – Mahmillub*). The Mahmillub has the power to judge any person, civil or military, without the possibility of an appeal.

⁹³ Unofficial translation. Amnesty International (1997) Indonesia - The Anti-subversion Law: A Briefing, ASA 21/03/97.

Despite Sukarno’s lack of respect for the Rule of Law, and despite the existence of the death penalty in the law, capital punishment was carried out only once under his presidency, in 1960 in a case involving three men accused of trying to kill him.⁹⁴ Nevertheless, the regulations promulgated under Sukarno laid the foundation for more frequent use of the death penalty by his successor, Suharto. As will be explained in the following sections, it was under Suharto that the 1963 Anti-Subversion Decree and the Mahmillub were widely used to target political opponents, particularly those involved in the 1965 coup.

SUHARTO’S NEW ORDER (1966-1998)

The 1965 military coup

In 1965, members of the pro-communist “September 30th Movement” were accused of killing six of the highest generals in the Indonesian army in an attempt to protect President Sukarno from a military coup. Suharto, a general who had escaped the attack, mobilized the army and Muslim youth groups against members, supporters and sympathizers of the Communist PKI.

The PKI, although one of the pillars of Sukarno’s “*Nasakom*”, was banned. In 1966, the army forced President Sukarno to delegate his powers to General Suharto, the new dominant political figure. A Presidential decree gave Suharto the power to take “*any action necessary*” to maintain security. A year later, Sukarno was officially removed from office.⁹⁵

By the end of 1966, up to one million real or suspected communists had been killed or had disappeared and tens of thousands had been arrested. About 60 people linked to the PKI or to military units were sentenced to death: 23 were sentenced to death by Mahmillub⁹⁶, the others by ordinary civil or military courts.⁹⁷ Roosa reports that the Mahmillub trials were “show trials”, which were not intended to establish the truth about the event: not a single person brought before the court was acquitted.⁹⁸ According to press reports, ten people linked to the coup attempt were executed between 1965 and 1970.⁹⁹

⁹⁴ Amnesty International (1987), p. 1.

⁹⁵ Sukarno was then kept under house arrest until his death in 1970.

⁹⁶ ICJR (2017), pp. 69-70.

⁹⁷ Amnesty International (1987).

⁹⁸ Roosa, J. (2006) Pretext for mass murder, p. 6, University of Wisconsin Press.

⁹⁹ Amnesty International (1987), p. 2.

The New Order regime

Suharto presented himself as the nation's savior. The "New Order" (*Orde Baru*) began, characterized by political and military repression, the elimination of opponents, restrictions on civil society and a weak Rule of Law.¹⁰⁰ Although Suharto did not abandon *Pancasila*¹⁰¹, a new doctrine was needed to justify the army's place which had become even more important in the country. To achieve stability, Suharto implemented *dwifungsi* (*double role*), a concept created by the army according to which the armed forces have a dual military and socio-political role in order to protect national unity.¹⁰² As a result, the army was still responsible for continuing to eliminate pro-PKI suspects but it also began to occupy senior positions in administration, the regime's political organization and the State's enterprises.¹⁰³ According to this new doctrine, the military was necessary to protect Indonesia from a number of potential threats, real and imagined. A "National Vigilance Refresher Course" was created for the indoctrination of military forces and civilians to inform them of potential political threats to national security.¹⁰⁴ During Suharto's era, communism remained one of the most important threats but other types of organizations were also considered potentially subversive: extreme Islamic organizations, democratic movements and human rights organizations.

Use of the death penalty had become a means of deterring potential opponents and asserting the political power of the Government.¹⁰⁵ In 1969, the 1963 Anti-Subversion Decree was promoted to the rank of law. The Law was widely used. In 1993, when asked about abolition of this legislation, the Attorney General responded as follows: "*Those who say that the Anti-Subversion Law is unpopular are those who have the intention of committing subversive acts themselves*".¹⁰⁶

Meanwhile, until the fall of Suharto, the number of laws providing for the death penalty continued to increase. The death penalty

100 Roosa, J. (2006) p. 7.

101 In 1980, President Suharto suggested that he himself was the personification of Pancasila. See ICJ and NIHR (1987), p. 38.

102 Honna, J. (2003) *Military Politics and Democratization in Indonesia*, p. 9. Routledge Ed.

103 Rinakit, S. (2005) *The Indonesian Military After the New Order*, p. 27. ISEAS.

104 Honna, J. (1999) 'Military Ideology in Response to Democratic Pressure during the Late Suharto Era: Political and Institutional Contexts', *Indonesia* No. 67, p. 79.

105 Amnesty International (1994) *Indonesia and East Timor: Power and Impunity – Human Rights under the New Order*, ASA 21/17/94, p. 63.

106 *Ibid*, p. 22.

had been provided for crimes related to aviation¹⁰⁷, narcotics and psychotropics offences.¹⁰⁸ However, the death penalty was revoked for crimes related to nuclear energy.¹⁰⁹

The resumption of executions in 1978

After the execution of PKI convicts in 1970, the absence of executions for several years led legal scholars to consider that Indonesia had *de facto* abolished the death penalty.¹¹⁰ However, in 1978 a man who had been sentenced to death in 1967 for premeditated murder was executed. In 1980, two other men, convicted of murder and sentenced to death in 1964, were executed.¹¹¹ These executions were followed by several other executions of people convicted of murder.¹¹² Some authors explained the resumption of executions by the authorities' willingness to show their ability to respond to the increase in the crime rate in the late 1970s.¹¹³

From that period onwards, the authorities periodically executed people sentenced to death for rebellion and/or subversion. Several members of an Islamic organization "Imron Group", whose objective was to establish an Islamic State in Indonesia, were executed between 1983 and 1986. In 1985, a former PKI-affiliated trade unionist, arrested in 1968, was shot by firing squad. Twelve other prisoners linked to the PKI were executed in 1985-1986, nine of whom were tried by Mahmillub twenty years ago.¹¹⁴ According to Amnesty International, 27 people convicted of subversion were executed between 1985 and 1994 in order to remind the population of the need for vigilance against subversion and to express the ultimate power of the State.¹¹⁵ At least four other PKI prisoners died in prison, such as Sukatno, a former Member of the

107 Law No. 4/1976 on the Ratification and Addition of Several articles in the Criminal Code in relation to the extension of the implementation of Law on Aviation Crimes and Crimes against the Facilities /Infrastructures of Aviation.

108 Law No. 9/1976 on Narcotics, replaced in 1997 by Law No. 5/1997 on Psychotropic Drugs and Law No. 22/1997 on Narcotics. For more information on the legislation regarding narcotics, see *infra*, Sub-section "Indonesia's policy on the death penalty for drug-related crimes".

109 Act No. 31/PNS/1964 on the Basic Provisions of Atomic Energy was replaced by Law No. 10/1997 on Nuclear Energy that does not include the death penalty.

110 Amnesty International (1987), p. 2.

111 *Ibid*.

112 *Ibid*, pp. 3-4.

113 Maburi, Gufron, Pratama, O., Marpaung, R., Ibnu Reza, B., Araf, A., Indarti, P., Simun, J. and Ali Safa'at, M. (2010). *Inveighing Against Death Penalty in Indonesia*, pp. 11-12. Jakarta: Imparsial.

114 Amnesty International (1987), p. 3.

115 Amnesty International (1994), p. 5.

Parliament and PKI member, arrested in 1965 for his involvement in the coup who died in prison 32 years later in 1997.¹¹⁶

Several governments and multilateral stakeholders expressed their concerns about the executions that took place in Indonesia at that time.¹¹⁷ The Indonesian Government replied that the protests constituted external interference in matters of national jurisdiction. As the Minister of Justice said in August 1985: “*There is no need for foreigners to interfere with our domestic affairs just as we don’t want to meddle with other people’s internal problems.*”¹¹⁸ When seven PKI prisoners were to be executed in 1990, the Armed Forces Commander adopted the same position. He said: “*The issue of executions is an internal matter for Indonesia, an affair concerning our national interests, our sovereignty and our freedom. Therefore, outsiders should not interfere in our affairs. Write that in big letters.*”¹¹⁹ This position is still being adopted today to reject criticism from the international community.¹²⁰

After major economic successes in the first decades of the New Order, Indonesia experienced a severe economic crisis in the late 1990s. In 1998, following the shooting of four students, violent outbreaks and riots took place in several cities in Indonesia.¹²¹ More than 1,000 people are reported to have died during these events. On May 21, 1998, after 32 years in power, Suharto resigned in a climate of great frustration and generalized disorder.

116 Other PKI prisoners sentenced to death who died in prison include Ruslan Wijayasastra who died in 1995 at the age of 77; Iskandar Subetki who died in 1993 at the age of 73 after 25 years in prison; and Johannes Sucipto who died in custody in 1992 after 26 years in prison. See Amnesty International (1993) Conditional Release of Political Prisoners Hundreds Remain in Jail, ASA 21/21/93, p.3 and Amnesty International (1995) The 1965 prisoners, AI 21/36/95, pp. 2-3.

117 In 1986, Australia, France, the Netherlands, and the United Kingdom conveyed their regret at the executions. In 1985 and 1986, the European Parliament passed resolutions condemning the executions. Amnesty International (1987), p. 8.

118 Amnesty International (1987), p. 9

119 Amnesty International (1994), p. 63.

120 See *infra*, Sub-Section “Indonesia’s policy on the death penalty for drug-related crimes”.

121 The ethnic minority of Indonesians of Chinese descent, historically considered more prosperous and better connected to the political class, had been accused of causing the economic recession. Indonesian Chinese communities were mainly targeted by the violent outbreaks. See for instance, Sidel, J. (2006) Riots, Pogroms, Jihad: Religious Violence in Indonesia, pp. 121-122. Cornell University Press; BBC (2014) New voting power of Chinese Indonesians, available at: <https://www.bbc.com/news/world-asia-27991754> or Los Angeles Times (2010) In Indonesia, 1998 violence against ethnic Chinese remains unaddressed, available at: <https://www.latimes.com/archives/la-xpm-2010-jul-04-la-fg-indonesia-chinese-20100704-story.html> (last visited July 17, 2019).

THE DEMOCRATIC ERA (1998 TO PRESENT)

Political and legislative reforms: the Reformasi era

In May 1998, Suharto’s Vice-President, Bacharuddin Jusuf Habibie, was sworn in as President in accordance with the Constitution. Although he remained president for only 18 months, President Habibie undertook substantial political reforms: he limited the role of the army, lifted restrictions on the press and on the formation of political parties, drew up an anti-corruption plan, initiated the decentralization of the Government and released political prisoners.¹²² The notorious 1963 Anti-Subversion Law, which had often been used during the New Order, was repealed.¹²³ After 18 months of political liberalization, the first relatively free and fair elections were held: in 1999, Abdurrahman Wahid was elected President. In 2001, he was impeached by Parliament following a series of scandals and replaced by his Vice-President, Megawati Sukarnoputri, Sukarno’s daughter. In 2004, Susilo Bambang Yudhoyono was elected President and remained in power until the 2014 elections which saw the victory of Joko Widodo.¹²⁴

During *Reformasi*, four important amendments to the 1945 Constitution were adopted: the transfer of power from the President to Parliament (first amendment - 1999); the strengthening of human rights protection (second amendment - 2000); the creation of a Constitutional Court (*Mahkamah Konstitusi Republik Indonesia* - MKRI) (third amendment - 2001); and the direct election of the President and a reduced political role for the military (fourth amendment - 2002). It should be noted that, although the creation of the MKRI is an important achievement, only Indonesian citizens have the right to bring a case before this court.¹²⁵

A series of human rights laws were adopted between 1998 and 2000¹²⁶, based on the UDHR. The new 1999 Law on Human Rights provides for the right to life.¹²⁷ However, although the Elucidation

122 Crouch, H. (2010), p. 27.

123 Davis, T. and Galligan, B. (2011) Human Rights in Asia, p. 43. Edward Elgar Publishing.

124 Joko Widodo was re-elected for a second term in 2019.

125 This specific issue will be analyzed *infra*, see Sub-section “Exclusion of foreign petitions before the MKRI”.

126 Decree XVII set out the Human Rights Charter, followed in 1999 by Law No. 39/1999 on Human Rights and by Law No. 26 of 2000 on Human Rights Court.

127 Article 4, Law No. 39/1999 on Human Rights.

of this law extends the right to life to all individuals sentenced to death, it also contains two explicit exceptions: one concerning unborn children and one concerning people sentenced to death:

*“In the case or situation which is very exceptional, that is for the sake of the interest of the woman’s life in the case of an abortion or based on a court verdict in the case of the death penalty, then the action of abortion or death penalty in the case and or condition mentioned can still be permitted. Only in those two mentioned cases can the right to life be limited”.*¹²⁸

In addition, despite the objective of improving the protection of human rights, new legislation to protect human rights provides for the death penalty: according to the new Law 26/2000 on Human Rights Court, several serious human rights violations, such as genocide, extermination or apartheid, are punishable by death.

In fact, other new legislation has also extended the scope of the death penalty. The fight against corruption was an important item on the reform agenda: the 1999 anti-corruption legislation provided for the death penalty for corruption crimes.¹²⁹ In 2003, a new anti-terrorism law was enacted in response to the bombings that took place from 2000 to 2002, including the 2002 Bali bombings that killed 202 people: this new law provides for the death penalty.¹³⁰ This law applies to *“any person who intentionally uses violence or the threat of violence to create a widespread atmosphere of terror or fear in the general population or to create mass casualties, by forcibly taking the freedom, life or property of others or causes damage or destruction to vital strategic installations or the environment or public facilities or international facilities”.*¹³¹ This overly broad definition of terrorism has been condemned by the human rights community.¹³² More recently, in 2016, following the rape and killing of a 14-year-old girl in the country, an amendment to the Law on Child Protection introduced the death penalty for sexual crimes against children.¹³³

128 Stockmann, P. (2004) p. 216.

129 Law No. 31/1999 on Combatting Corruption. The law was revised in 2001 but still includes death penalty.

130 The Law No. 15/2003 on Combating Criminal Acts of Terrorism replaced the government regulation on the Elimination of Terrorism.

131 Law No. 15/2003 on Combating Criminal Acts of Terrorism, Chapter III, Section 6.

132 See FIDH, Imparsial and KontraS (2010) *Shadows and clouds: Human Rights in Indonesia*, p. 20; Amnesty International (2006) *Report 2006: the state of the world’s human rights*, p. 139.

133 Law No. 23/2002 on Child Protection, as revised by the 2016 Government Regulations Amending Law on the second amendment to the Child Protection Law.

2012: The first step towards a moratorium?

Despite the achievements of *Reformasi*, the death penalty continued to be applied in Indonesia. From 1998 to 2004, five people were executed. Between 2004 and 2014, under the reign of President Yudhoyono, 21 people were executed, including ten in 2008 alone.¹³⁴ Several authors have argued that the high number of executions was due to the significant pressure faced by President Yudhoyono to prove that he was *“tough on crime”* a few months before the 2009 presidential elections.¹³⁵

According to McRae, the death penalty became a prominent political issue in Indonesia when a female Indonesian domestic worker was sentenced to death in Saudi Arabia and executed in 2011. The Indonesian Government was criticized for its inaction. The Government set up a special task force composed of governmental officials, lawyers and civil society organizations to advocate on behalf of all Indonesians facing the death penalty outside the country. A wide range of actions were taken to protect Indonesian citizens abroad: the task force established a network of lawyers in priority countries to ensure that Indonesians have adequate legal representation; the Government paid a fee (*diyat*) to release Indonesians facing execution for murder in Saudi Arabia; the President wrote numerous letters to foreign governments; etc.¹³⁶ Although the task force was dissolved in 2012, advocacy continued under the aegis of the Indonesian Ministry of Foreign Affairs and Indonesian Worker Placement and Protection Agency. In August 2014, President Yudhoyono claimed that the Government had helped 190 Indonesians avoid the death penalty.¹³⁷ The Minister of Foreign Affairs stated that 42% of Indonesians who escaped the death penalty overseas had been convicted of drug-related crimes.¹³⁸ Many lawyers and organizations then argued that the continued use of the death penalty in Indonesia undermined Indonesia’s moral basis for defending its own citizens abroad.¹³⁹

134 McRae, D. (2017) ‘Indonesian Capital Punishment in Comparative Perspective’, *Journal of the Humanities and Social Sciences of Southeast Asia*, Brill Ed.

135 Brummitt, C. and McRae, D., in Pascoe, D. (2015) ‘Three Coming Legal Challenges to Indonesia’s Death Penalty Regime’, *The Indonesian Journal of International and Comparative Law*, Vol II, Issue 2, p. 245.

136 McRae, D. (2017), p. 12

137 *Ibid.*

138 *Ibid.*, p. 13.

139 This element is further detailed *infra*, Sub-section “Indonesia’s policy on the death penalty for drug-related crimes”.

In this context, several events in 2012 suggested that the country was moving towards abolition of the death penalty. The Minister of Foreign Affairs publicly stated that, although Indonesia continues to apply the death penalty, most countries in the world are moving towards its abolition, suggesting that Indonesia had doubts about the capital punishment.¹⁴⁰ Reports have also revealed that President Yudhoyono had commuted the death sentence of a drug trafficker to life imprisonment, against the Supreme Court's ruling.¹⁴¹ Moreover, after two votes against the resolution calling on UN members States to establish a worldwide moratorium on the death penalty, Indonesia abstained for the first time.

However, in March 2013, contrary to expectations, the Yudhoyono Government executed Adami Wilson, a Malawian citizen sentenced to death for drug-related crimes.¹⁴² While the country was showing positive signs of abolishing capital punishment, the Yudhoyono Government executed five people in 2013.

Indonesia's policy on the death penalty for drug-related crimes

Evolution of the legislation on drug-related crimes

Although the number of offences punishable by death has increased since the *Reformasi* era, the imposition of a death sentence has been limited to three types of offence: aggravated murder, drug-related crimes and terrorism. Since 2014, all executions have targeted people convicted of drug-related offences.

In Indonesia, the first anti-narcotics law adopted in the 20th century dates back to 1927.¹⁴³ No special law was adopted until 1976 when Indonesia enacted the Law on Narcotics "*in order to control the methods of supply and use of narcotics for medical and/or scientific purposes, and to prevent and overcome the dangers which may be caused by the side effects of the use and abuse of narcotics, and to*

rehabilitate drug addicts".¹⁴⁴ This Law introduced the death penalty for people who "*illegally carry, send, transport or transit narcotics*"¹⁴⁵ or who "*illegally import, export, offer for sale, distribute, sell, buy, deliver, receive, act as an intermediary in the purchase or sale of, or exchange narcotics*".¹⁴⁶ The death penalty for drug-related crimes was introduced at the same time in Singapore and Malaysia in an attempt to stop the flow of narcotics in the region. Although the death penalty existed for such crimes, only one case of execution for drug-related crimes was reported between independence and the end of the New Order.¹⁴⁷

In 1997, the authorities considered that the 1976 law was no longer appropriate as drug trafficking had become "*transnational, employing sophisticated modus operandi and technology*" and such crimes "*can endanger human life, the community, the nation, the State and the national resilience*".¹⁴⁸ Two new laws were introduced: a law on psychotropic drugs and a law on narcotics. In both cases, capital punishment is provided for several offences related to trafficking.¹⁴⁹ In 2009, the authorities again indicated that drug trafficking had evolved: they explained that drug-related crimes are "*no longer done individually, but involv[e] a lot of people collectively*" and that there are syndicates that organize "*a vast network that works in a neat and highly secret both at national and international levels*".¹⁵⁰ A new law was enacted to replace the 1997 law on narcotics. The new 2009 Law on Narcotics, which still applies today, contains an increasing number of criminal charges punishable by death.

The constitutional challenge to the death penalty for drug-related crimes

The constitutionality of the death penalty for drug-related crimes has been challenged before the MKRI. The two main arguments were as follows: first, the 1945 Constitution provides for the right to life,

140 Foreign Policy (2012) Indonesia has second thoughts on capital punishment, available at: <https://foreignpolicy.com/2012/10/19/indonesia-has-second-thoughts-on-capital-punishment/> (last visited July 17, 2019).

141 See for instance Global Times (2012) Indonesian president under fire for clemency to drug dealers, available at: <http://www.globaltimes.cn/content/738350.shtml>. Death penalty Worldwide (2012) Indonesia's Supreme Court, President Commute Death Sentences for Drug Offenders, available at: <https://blog.deathpenaltyworldwide.org/2012/11/indonesias-supreme-court-president-commute-death-sentences-for-drug-offenders.html> (last visited July 17, 2019).

142 McRae, D. (2017), p. 12.

143 Verdoovende Middelien Ordonantie, 1927, in Law No. 9/1976 on Narcotics, available at: https://www.unodc.org/res/cld/document/idn/narcotic-law-no-9_html/indonesia-law9-76.pdf (last visited July 17, 2019).

144 International Program on the Elimination of Child Labor (2004) The use of children in the production, sales and trafficking of drugs: A synthesis of participatory action-oriented research programs in Indonesia, the Philippines and Thailand, p. 30.

145 Article 23(4), read with Article 36, Law No. 9/1976 on Narcotics.

146 Article 23(5), read with Article 36, *ibid*.

147 Pascoe, D. (2015).

148 Preamble, Law No. 22/1997 on Narcotics, available at: https://www.unodc.org/res/cld/document/idn/law-no-22_html/indonesia-law_22-1997.pdf (last visited July 17, 2019).

149 Article 59 of Law No. 5/1997 on Psychotropic Drugs, available at: https://www.unodc.org/res/cld/document/idn/law-no-5_html/indonesia-law_5_of_97.pdf (last visited July 17, 2019) and articles 80 to 82 of Law No. 22/1997 on Narcotics.

150 Elucidation, Law No. 35/2009 on Narcotics.

without explicitly providing for capital punishment as an exception; second, the ICCPR, ratified by Indonesia, prohibits the imposition of the death penalty for all but the “most serious crimes”¹⁵¹ and drug-related offences do not meet this threshold.

The case involves two Indonesians and two Australians sentenced to death under the Law on Narcotics. The two Australians were part of a group of nine Australian citizens, also known as “the Bali Nine”.¹⁵² In 2007, the Australian citizens’ appeals to the MKRI were dismissed because access to the Constitutional Court is limited to Indonesian citizens.¹⁵³ However, considering that two Indonesian women had petitioned with them, the Court considered the application but nevertheless decided by a vote of six to three that capital punishment was in accordance with the Indonesian Constitution. MKRI considered that the right to life is not a non-derogable right under the Constitution.¹⁵⁴ Moreover, since the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances classifies certain drug-related crimes as “particularly serious”, the MKRI considered that the gravity of drug-related crimes was equivalent and that drug-related crimes reached the threshold of “most serious crimes”.¹⁵⁵ It should be noted, however, that there was dissent

151 According to the UN Human Rights Committee, the “most serious crimes” terminology applies “only to crimes of extreme gravity, involving intentional killing”. See below the Human Rights Committee’s analysis in its 2018 General Comment.

152 The nine Australian citizens traveled to Indonesia in 2005. The Australian Police suspected that they were involved in a plan to smuggle heroin out of Indonesia and alerted the Indonesian authorities who arrested them in possession of significant quantities of heroin. The accused were charged under the Narcotics Law. Despite the use of diplomatic means to avoid capital punishment before sentencing occurred, three people were sentenced to death by the Supreme Court as a last resort. Two of the nine were firstly sentenced to death by Denpasar District Court. The Bali High Court confirmed the death sentences. In 2006, the Supreme Court increased the penalty of four of the other Bali Nine members from 20-year jail terms to death. In 2008, the Supreme Court reduced three death sentences to life imprisonment, leaving three members of the Bali Nine on death row. Lynch, C. (2009) ‘Indonesia’s Use of Capital Punishment for Drug-Trafficking Crimes: Legal Obligations, Extralegal Factors, and the Bali Nine Case’, *Columbia Human Rights Law Review*, pp. 527-528.

153 On the legality of limitation, see *infra*, Sub-section “Exclusion of foreign petitions before the MKRI”.

154 In 2011, contrary to the MKRI, Indonesia’s Supreme Court commuted the death sentence imposed on a man, Hanky Gunawan, convicted for drug trafficking because the death penalty was inconsistent with a “plain reading” of the Constitution. See Supreme Court of Indonesia, Decision 239 PK/Pid.Sus/2011, Hanky Gunawan. A few months later, the Supreme Court changed its ruling and declared that the death penalty can be imposed. Supreme Court of Indonesia, Decision 144 PK/Pid.Sus/2012, Okwudili Ayotanze, in ICJR (2015) Overview of Death Penalty in Indonesia, p. 17. Pascoe notes that it is not uncommon for those courts to issue inconsistent rulings. Pascoe, D. (2015), p. 250.

155 MKRI, Decision 2-3/PUU-V/2007, Sianturi versus State. See also Lynch, C. (2009), p. 541.

among the judges: some judges dissented and discussed the constitutionality of the Narcotics Law.¹⁵⁶ After a while, some judges were replaced. In 2012, another case was brought before the MKRI using the same argument with regard to the constitutionality of the death penalty for violent robbery resulting in serious injury or death. The constitutionality of the death penalty for this crime was confirmed by the MKRI by nine votes to zero.¹⁵⁷

It is important to note that these interpretations were not in line with the recommendations of the UN Death Penalty Safeguards, endorsed by the UN General Assembly in 1984, that the most serious crimes are those that should “not go beyond intentional crimes with lethal or extremely grave consequences”.¹⁵⁸ In October 2018, the UN Human Rights Committee clarified this analysis in its General Comment on the interpretation of Article 6 of the ICCPR:

*“The term “the most serious crimes” must be read restrictively and appertain only to crimes of extreme gravity, involving intentional killing. Crimes not resulting directly and intentionally in death, such as attempted murder, corruption and other economic and political crimes, armed robbery, piracy, abduction, drug and sexual offences, although serious in nature, can never serve as the basis, within the framework of Article 6, for the imposition of the death penalty. In the same vein, a limited degree of involvement or of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission of murder, cannot justify the imposition of the death penalty. States parties are under an obligation to review their criminal laws so as to ensure that the death penalty is not imposed for crimes which do not qualify as the most serious crimes. They should also revoke death sentences issued for crimes not qualifying as the most serious crimes and pursue the necessary legal procedures to re-sentence those convicted for such crimes”.*¹⁵⁹

156 Lynch, C. (2009), p. 586.

157 MKRI, Decision 15/PUU-X/2012, Raja Syahril versus State, in Pascoe, D. (2015), p. 251.

158 UN Death Penalty Safeguard No. 1. The use of the death penalty to fight drug-related crimes has also been considered as a clear violation of international law by UN Special Rapporteurs on summary executions and on torture because drug-related crimes do not satisfy the criteria of the “most serious crimes”. See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (1996) Report, E/CN.4/1997/60, para. 92 and Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (2009) Report, A/HRC/10/44, para. 66.

159 Human Rights Committee (2018) General comment No. 36 on article 6 of the ICCPR, on the right to life, CCPR/C/GC/36, para. 35.

The hard-line policy against drug-related crimes

The qualification of drug-related crimes as very serious offences has been a subject of a continuous policy since the enactment of the 1997 law. In 2002, President Megawati Sukarnoputri declared that “for those who distribute drugs, life sentences and other prison sentences are no longer sufficient. No sentence is sufficient other than the death sentence” for traffickers.¹⁶⁰ The deterrent effect of the death penalty for drug-related crimes has been used – and still is – by the country’s authorities to justify capital punishment, despite a significant amount of research and studies proving the unreliability of data on drug use and sales in the country and the absence of such effects in other contexts.¹⁶¹

When he came to power in 2014, President Widodo, like his predecessors, pursued a policy of fighting drug-related crimes with the death penalty but he went much further. During his first months in power, President Widodo took a strong stand against drug-related crimes and announced that he would reject clemency pleas from all prisoners on death row for drug-related crimes. The Government explained that drug-trafficking is a “national emergency” due to the increasing number of incidents related to drug abuse. The authorities have reported that 30 to 50 young people die every day from drug-related causes.¹⁶² President Widodo has repeatedly cited this data from the National Narcotics Board (BNN) to justify the use of the death penalty, despite calls by researchers, scientists, practitioners and activists who have claimed that the data is unreliable and have called on the Government to adopt an evidence-based response to combat illicit drugs. In 2015, academics and researchers published an article in the world’s leading independent general journal *The Lancet* reacting to this data and stating that “the government is missing an opportunity to implement an effective response to illicit drugs informed by evidence”.¹⁶³

160 Megawati Sukarnoputri, in Amnesty International (2004) *Indonesia: A briefing on the death penalty*, p. 5.

161 See for instance Simandjuntak, D. (2015) *Spectacle of the Scaffold? The Politics of Death Penalty in Indonesia*, Vol 46, p. 2. ISEAS Yusof Ishak Institute; KontraS, FIDH and Center of Human Rights Law Studies (2016) *Submission to the UPR (third cycle)*, 27th session, p. 2.

162 Amnesty International (2015), p. 5. Simandjuntak, D. (2015) p. 2

163 Irwanto et al (2015) ‘Evidence-informed response to illicit drugs in Indonesia’, *The Lancet*, available at: <https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2815%2961058-3/fulltext> (last visited July 22, 2019). See also Simandjuntak, D. (2015), p. 2. KontraS, FIDH and Center of Human Rights Law Studies (2016), p. 2. *The Conversation* (2015) *Indonesia uses faulty stats on ‘drug crisis’ to justify death penalty*, available at: <http://theconversation.com/indonesia-uses-faulty-stats-on-drug-crisis-to-justify-death-penalty-36512> (last visited July 17, 2019).

In January 2015, six people – four men and two women – were executed for drug-related crimes. Three months later, in April 2015, eight other people convicted of drug-related crimes were executed. Within less than six months in power, the Widodo Government executed 14 people sentenced to death for drug-related crimes, including two of the Bali Nine and ten other foreign nationals from Brazil, the Netherlands, Vietnam and Nigeria. Two people were granted a temporary stay of execution but remained on death row: a Filipina citizen Mary Jane Veloso, probably a victim of human trafficking who had to testify at the trial of her alleged recruiters¹⁶⁴; and French citizen Serge Atlaoui who had an ongoing appeal.¹⁶⁵ In July 2016, the Government informed fourteen people that their execution was imminent. Four people, one Indonesian and three Nigerians, were executed for drug-related crimes. Ten others of different nationalities were spared at the last moment.¹⁶⁶ These three batches of executions attracted the attention of the media, human rights groups and the international community.

The executions surprised Indonesia’s international partners and human rights organizations. Although President Widodo did not discuss his views on the death penalty before the 2014 presidential elections, he campaigned for better respect for human rights.¹⁶⁷ He came to power with a national development agenda “*Nawa Cita*” 2015-2019, a program that includes reform of the system and law enforcement as one of the nine pillars of the country’s development, with priorities that include respect, protection and enforcement of human rights.¹⁶⁸ The executions were therefore considered regressive and represent a significant setback for human rights in general in the country, especially since reports indicate that serious human rights violations have been committed against those sentenced to death. Human rights organizations have revealed that many individuals executed or on death row were ill-treated in police custody, did not have access to a lawyer, were denied legal assistance, were mentally ill or minors at the time of their conviction and/or, if they

164 Mary Jane Veloso is a female migrant worker and was sentenced to death in 2010 when 2.6 kilograms of heroin were discovered in her suitcase upon arrival in Indonesia. Her recruiter surrendered and confessed his crime to the authorities.

165 Amnesty International (2015), p. 14.

166 They had already been transferred to Nusakambangan and placed in isolation cells.

167 McRae, D. (2017), p. 2; Amnesty International (2015), p. 6.

168 These priorities relate to the fourth pillar. Hafidz, J. (2017) ‘Nawacita and the law enforcement of civil state apparatus in constitutional law perspectives in Indonesia’, *Jurnal Pembaharuan Hukum* Vol IV, No. 2, p. 204.

were foreigners, did not have information on their right to communicate with representatives of their country.¹⁶⁹ In 2017, the National Commission on Human Rights (Komnas HAM) stated that the legal process leading to the death penalty did not provide judicial and legal protection as the rights of death row prisoners, including the right to legal assistance and interpretation, were not respected and allegations of torture were reported.¹⁷⁰

Widodo's focus on the execution of persons convicted of drug-related crimes means that foreign nationals are more likely to be executed than Indonesians as most people on death row for drug-related crimes are foreigners. This is a new model which has led to a significant increase in external pressure.¹⁷¹ Nonetheless, President Widodo stated: *"There are many pressures from the international community [...] This is normal, but again it is about our legal sovereignty, about our political sovereignty"*.¹⁷² In 2015, France's Ambassador told Indonesia that the execution of a French citizen for drug-related offences would affect bilateral relations. Nigeria had summoned the Indonesian Ambassador.¹⁷³ Brazil, the Netherlands and Australia temporarily recalled their ambassadors from Indonesia after the execution of their citizens in January and April 2016.¹⁷⁴

However, President Widodo maintained his position and repeated several times that he would reject any application for clemency submitted by people sentenced to death for drug-related crimes: *"Do not see only the death row prisoners, see their victims and the victims' families. People would just realize how evil the drug dealers*

are. Therefore, once again for me there is no pardon for the drug dealers or kingpins, no... no...".¹⁷⁵ President Widodo also reportedly told the police that they could execute any foreign drug dealer who resists arrest: *"Be firm, especially to foreign drug dealers who enter the country and resist arrest. Shoot them because we indeed are in a narcotics emergency position now."*¹⁷⁶ In 2017, 98 suspected drug dealers were killed by the police.¹⁷⁷ Between June 2018 and July 2019, 43 people were shot and killed by the police and 52 injured due to the war against drugs.¹⁷⁸

Some authors believe that the early use of the death penalty illustrated President Widodo's commitment to fighting drug-related crimes as part of *"a broader focus on commencing his government with quick wins"*¹⁷⁹ and allowed him to present himself as a decisive President and firm leader, despite major international protests.¹⁸⁰ The executions, which targeted fifteen foreigners out of eighteen people overall, were therefore intended to show the President's political strength to Indonesians, leading the public to believe that drug trafficking came from outside Indonesia, and was carried out by foreigners.¹⁸¹

President Widodo nonetheless continued to support his citizens sentenced to death abroad. In 2015, President Widodo declared: *"Of course I am going to try to save my citizens from execution [...] that's my obligation as a President, as a head of State. To protect my citizens who are facing the death penalty but on the other hand we have to respect other countries that apply capital punishment. The Constitution and the existing law still allow the death penalty."*¹⁸² This contradictory rhetoric has been highlighted

169 The violations of the right for a fair trial are specifically analyzed in the following Section "Shortcomings in the administration of justice". See also Amnesty International (2015); ICJR (2015) Overview of the death penalty in Indonesia; Indonesian Civil Societies Coalition Against Death Penalty (2017) Joint Stakeholders' Report on issues relating to the Death Penalty to the United Nations Human Rights Council on the Universal Periodic Review of the Republic of Indonesia, 27th Session (April-May 2017).

170 Human Rights Council (2017) Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/WG.6/27/IDN/3, para. 4.

171 Zhang, D. (2015) By the numbers: Indonesia's executions of foreigners.

172 Elshinta Radio (2015), Interview with President Joko Widodo in March 2015, in Amnesty International (2015), p. 14. When lawyers of Bali Nine were preparing clemency pleas, Australian Prime Minister's statement, reminding Indonesia that Australia had provided important aid following the 2004 tsunami, is reported to have irritated many Indonesians, Amnesty International (2015), p. 5.

173 Channels TV (2015) Nigeria Summons Indonesian Ambassador Over Drug Execution, available at: <https://www.channelstv.com/2015/01/19/nigeria-summons-indonesian-ambassador-over-drug-execution/> (last visited July 17, 2019).

174 McRae, D. (2017), p. 17.

175 Elshinta Radio (2015) Interview with President Joko Widodo in March 2015, in Amnesty International (2015), p. 13.

176 The Guardian (2017) Indonesia police ordered to shoot drug dealers to tackle narcotics emergency, available at: <https://www.theguardian.com/world/2017/jul/23/indonesia-police-ordered-to-shoot-drug-dealers-to-tackle-narcotics-emergency> (last visited July 17, 2019).

177 Amnesty International (2018), Indonesia 2017/2018, available at: <https://www.amnesty.org/en/countries/asia-and-the-pacific/indonesia/report-indonesia/> (last visited July 17, 2019).

178 KontraS data.

179 McRae, D. (2017), p. 15.

180 Ibid, pp. 14-17.

181 Simandjuntak, D. (2015), p. 7.

182 News.com.au (2015) Indonesia's bloodthirsty desire for crime and punishment, available at: <https://www.news.com.au/world/asia/indonesias-bloodthirsty-desire-for-crime-and-punishment/news-story/66ea1528736cb0bb853bbc3e838205d8> (last visited July 17, 2019).

by many academics, media and human rights organizations.¹⁸³ It should be noted that some recent statements by President Widodo suggest that he would be prepared to establish a moratorium if the Indonesian people were in favor of abolition. In an interview in March 2017, when asked about the possibility of a moratorium, he replied: “Why not? But I must ask my people. If my people say OK, they say yes, I will start to prepare.”¹⁸⁴ Several reports suggest that possible abolition of the death penalty was used as a bargain to achieve positive results at international levels on major political issues. Some believe that abolition of the death penalty was a negotiation point to obtain a seat on the Security Council.¹⁸⁵ However, when Indonesia obtained a non-permanent seat on the Security Council 2019-2020, its public position did not change. Others report that Indonesia, the world’s largest producer of palm oil, has put pressure on French parliamentarians to abolish a tax on unsustainable palm, palm kernel and copra oils, in exchange for preventing the execution of French citizen Serge Atlaoui. The tax was dropped in 2019.¹⁸⁶ In 2018, however, the Attorney General reported that the executions had been simply postponed because other economic and political issues required more attention than the death penalty.¹⁸⁷ In 2017, during Indonesia’s Universal Period Review, capital punishment was the main issue highlighted with 30 States recommending that Indonesia abolish the death penalty or declare a moratorium. The Government rejected these recommendations, as well as recommendations to strengthen safeguards on the use of the death

183 See for instance, Human Rights Watch (2017) Indonesia’s Contradictory Death Penalty Rhetoric; The Sydney Morning Herald (2016) Former Indonesian president Bacharuddin Habibie ‘rejects’ death penalty, available at: <https://www.smh.com.au/world/former-indonesian-president-bacharuddin-habibie-rejects-death-penalty-20160601-gp8oag.html>; The Conversation (2015) Indonesia’s stance on the death penalty has become incoherent, available at: <https://theconversation.com/indonesias-stance-on-the-death-penalty-has-become-incoherent-37619>; ABC (2015) Indonesia’s death penalty double standard explained, available at: <https://www.abc.net.au/radionational/programs/latenightlive/indonesia%E2%80%99s-execution-double-standard-explained/6225848> (last visited July 17, 2019).

184 The Straits Times (2017), President Joko open to review of death penalty, available at: <https://www.straitstimes.com/asia/se-asia/president-joko-open-to-review-of-death-penalty> (last visited July 17, 2019).

185 Human Rights Watch (2017). See also CNN Indonesia (2018) Jaksa Agung Ungkap Alasan Belum Lanjutkan Eksekusi Mati, available at: <https://www.cnnindonesia.com/nasional/20180131180557-12-272988/jaksa-agung-ungkap-alasan-belum-lanjutkan-eksekusi-mati> (last visited July 17, 2019).

186 DeSmog UK (2019) French Politicians Scrapped Palm Oil Tax After Indonesia Execution Warning.

187 CNN Indonesia (2018) Jaksa Agung Ungkap Alasan Belum Lanjutkan Eksekusi Mati.

penalty, including adequate and early legal representation of defendants and a ban on the execution of people with mental illness.¹⁸⁸

Legislative reform

Discussions to revise the KUHP have been ongoing for more than ten years. In 2015, legislative reform was initiated to revise Indonesian criminal legislation. In June 2015, a revision of the Criminal Code was announced and a new draft Criminal Code (*Rancangan Kitab Undang-Undang Hukum Pidana - RKUHP*) was proposed by the Government to the House of Representatives. The new legislation includes the death penalty for at least 15 offences comprising treason, drug-related crimes, terrorism and corruption.¹⁸⁹ However, the proposed bill provides for a 10-year stay on executions, after which the death penalty could be commuted to life imprisonment or 20 years’ imprisonment under certain conditions: 1) there is no strong public reaction against the prisoner; 2) the prisoner demonstrates remorse and there is hope for his or her rehabilitation; 3) the role of the prisoner was not essential in the committing of the crime. According to abolitionists, this draft law represents a first step. It has been under review for the past four years. The Jakarta and Surabaya attacks in 2016 and 2018 led the authorities to consider revising the law on terrorism. In May 2018, less than two weeks after the Surabaya suicide bombings, a new Anti-Terrorism Law was enacted which expands the death penalty as a punishment.¹⁹⁰ This legislation added a new article on the imposition of the death penalty for crimes relating, among others, to the importation, transport and exportation of chemical and nuclear weapons.¹⁹¹ Human rights organizations have expressed their concerns as to other aspects of the amended legislation: the use of an overly broad definition of terrorism, the provision of lengthy pre-charge and pre-trial detention periods or the possible use of anonymous prosecution witnesses.¹⁹²

188 HRW (2017).

189 Indonesian Civil Societies Coalition Against Death Penalty (2017); KontraS, FIDH and Center of Human Rights Law Studies (2016), p. 3.

190 Law No. 5 of 2018 amending Law No. 15 of 2003.

191 Article 10A, Law No. 5 of 2018. See unofficial translation in ICJR (2018) Perpetuating Lies. 2018 Indonesia Death Penalty Report, p. 41.

192 See for instance Human Rights Watch (2018) Letter on Indonesia’s New Counterterrorism Law. Amnesty International (2018) Indonesia: Newly amended anti-terror law threatens to undermine human rights. See also ICJR (2018) Perpetuating Lies. 2018 Indonesia Death Penalty Report, pp. 13-15 and ICJR (2018) Indonesia’s legal framework on terrorism.

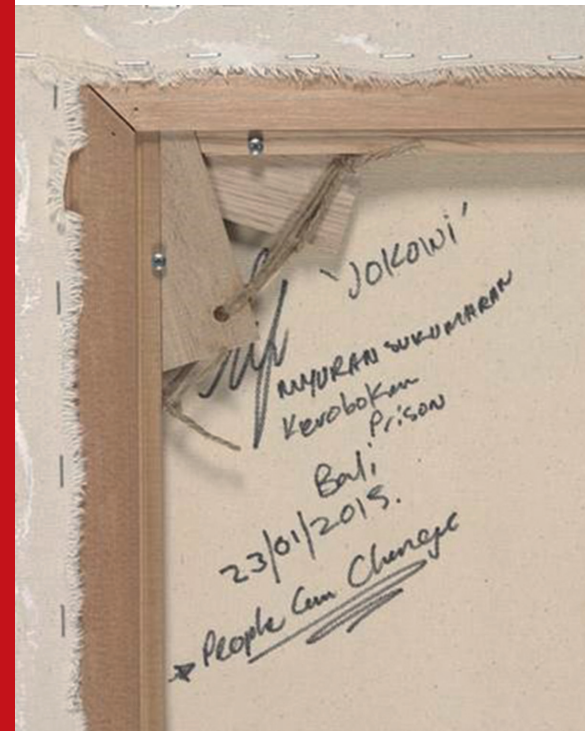
CONCLUSION ON THE EVOLUTION OF THE DEATH PENALTY IN INDONESIA

The death penalty has existed in Indonesia for hundreds of years. From independence to democratic transition, the death penalty has hardly been used and has been imposed mainly to combat internal threats: communists, terrorists and murderers.

In Indonesia's history, the death penalty has never been imposed as often as it has been in the past 15 years. According to the authorities, the most important new threat to the nation is drugs which are reported to come from abroad and are brought in by foreign nationals. In five years, as a result of the "war on drugs" the courts have sentenced more than 200 people to death and the Government has executed 18 people.

At the same time, the number of crimes punishable by death continues to increase. The death penalty is applied for a wide range of crimes. The draft legislation currently before the Indonesian Parliament maintains the death penalty, including for crimes that are not the "*most serious crimes*". This situation is worrying, in particular because the standards guaranteeing the right to a fair trial are not applied in practice in the country, as reported by people sentenced to death and their lawyers.

SHORTCOMINGS IN THE ADMINISTRATION OF JUSTICE



"Jokowi", Painting by Myuran Sukumaran – 2015 – Verso and Recto

The Criminal Procedure Code (*Kitab Undang-Undang Hukum Acara Pidana - KUHAP*) sets out a number of rights for arrested individuals, including the right to be assisted by counsel¹⁹³, the right to be assisted by an interpreter¹⁹⁴, the right to a medical examination¹⁹⁵ and the right for a foreign national to contact a representative of his/her country.¹⁹⁶ However, interviews with the men and women on death row revealed that many of them have been sentenced to death following trials based on confessions obtained under duress and without effective legal representation. Some of them, who did not understand the official language, Bahasa Indonesia, did not benefit from high quality interpretation. The results of this research confirm several studies conducted by other institutions and organizations which have highlighted the fallibility of the criminal justice system and violations of fair trial standards in death penalty cases.¹⁹⁷ These serious gaps affect the credibility of trials and increase risks of serious miscarriages of justice which is of great concern when the life or death of the accused is at stake.

INTIMIDATION AND ILL-TREATMENT DURING POLICE INTERROGATION

Although Indonesia has ratified the Convention against Torture, torture or ill-treatment does not constitute a crime under domestic law. Nonetheless, the 1999 Human Rights Law provides for the right not to be subjected to torture and ill-treatment¹⁹⁸ and Article 117 of KUHAP provides that the testimony of a suspect must be given without any pressure. In addition, Article 422 of the KUHP provides that the use of coercion by a civil servant to obtain a confession is an offence punished by imprisonment.

However, the testimonies of several people sentenced to death revealed that they had been beaten up by police forces during their interrogation in order to confess alleged crimes or to provide

193 Articles 54 and 55, KUHAP.

194 Articles 53 and 177, KUHAP.

195 Article 58, KUHAP.

196 Article 57(2), KUHAP.

197 See for instance, Human Rights Council (2017) Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/WG.6/27/IDN/3; Indonesian Civil Societies Coalition Against Death Penalty (2017); ICJR (2015) Overview on Death Penalty in Indonesia; Amnesty International (2015).

198 Article 33(1), Law on Human Rights 39/1999.

information relating to this crime. Six of the seven people sentenced to death interviewed revealed that they had been beaten several times until they confessed to these offences. Ahmad said he had been tortured. Faisal explained that he and his co-accused suffered injuries to several parts of their faces. Irene reported: *"The police beat me in the face several times. My upper lip was torn and my head was swollen. It has happened more than once. Each time, they tried to get information"*. Arif said: *"I was beaten several times by the police during the investigation, most of the time on my face. Now I can no longer see clearly with my right eye"*. Irene also indicated that she was sexually harassed and that the police told her that if *"[she] refused to do what they asked for, the sentence would be even more severe"*.

Beatings were also used to gather other false information. Ahmad also said that the police told him that he would receive a lighter punishment if he involved others in the crime that had been committed. He told the police that several other people were involved, even if that was not true, but he was still sentenced to death: *"I did this because I could not stand the torture and I was lured by the investigators' promise to reduce the sentence"*. Following his false confession, other people were arrested and sentenced to death like him.

The case of Yusman Telaumbanua is well known: a teenager, aged 16 on the day of his arrest, was forced to admit he was 19 years old. He had no identity papers to prove his age. He was sentenced to death in 2013 when he was a minor in violation of Law No. 11/2012 on the Criminal Justice System for Children and of the ICCPR and Convention on the Rights of the Child ratified by Indonesia.¹⁹⁹ It was only after five years of advocacy and criminal and forensic proceedings that the Supreme Court overturned the death sentence.²⁰⁰

The use of ill treatment and intimidation to obtain confessions and false information has been documented by other institutions and organizations. Komnas HAM reported in 2011 that 23 of 56 people sentenced to death whom they interviewed told them that they had been subjected to torture or ill treatment during police investigations.²⁰¹ In a report published in 2015, the ICJR found that at least 11 of 42 death row prisoners interviewed reported that they had been intimidated

199 Article 6(5), ICCPR and Article 37(a), UN Convention on the Rights of the Child.

200 Forensic evidence - Yusman's teeth and bone structure - proved that he was minor at the time of his conviction.

201 See Amnesty International (2015), p. 38.

or tortured by law enforcement officials to collect evidence.²⁰² This situation is not new: in 2008, during Indonesia's last review before the Committee against Torture²⁰³, the Committee expressed its deep concern "about the numerous, ongoing, credible and consistent allegations, corroborated by the Special Rapporteur on torture in his report and other sources, of routine and widespread use of torture and ill-treatment of suspects in police custody, especially to extract confessions or information to be used in criminal proceedings".²⁰⁴

This situation was facilitated by the lack of contact with a judge for a long period after the arrest. Indeed, according to KUHAP, a person suspected in a death penalty case can be detained for up to 171 days before seeing a judge.²⁰⁵ Reports have revealed that people sentenced to death have been detained for several months before appearing for the first time before a judge. Irene also indicated that she did not have access to a lawyer during the preliminary investigation which took place in a hotel and not at the police station. She was only appointed a lawyer after her arrival at the police station.

POOR QUALITY OF LEGAL REPRESENTATION

The right to be assisted by a legal counsel of one's own choosing is guaranteed by Articles 54 and 55 of KUHAP. If the arrested person has not chosen a legal counsel and is suspected or accused of having committed an offence punishable by death, he/she must be assisted by a lawyer in all criminal proceedings even if he/she cannot afford to pay.²⁰⁶ In 2011, Law No. 16/2011 created a State-funded legal aid scheme to provide free legal aid to the most vulnerable citizens. However, the budget allocated to legal aid is deeply insufficient to

²⁰² ICJR (2015), p. 10

²⁰³ Indonesia's next periodic report was due by June 2012 but had not been submitted at the time of writing this research.

²⁰⁴ Committee against Torture (2008) Concluding observations of the Committee against Torture on Indonesia, CAT/C/IDN/CO/2, p. 3. See also Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment Manfred Nowak (2008) Report – Mission to Indonesia, A/HRC/7/3/Add.7, p. 20. Torture and ill treatment are not circumscribed to death penalty cases and have been continuously reported by NGOs. See for instance the US Department of State Human Rights reports on Indonesia.

²⁰⁵ Amnesty International (2015), p. 33.

²⁰⁶ Article 56(1), KUHAP.

cover needs; moreover, there is only a limited number of legal aid offices in the country.²⁰⁷

Thus, according to interviews with the men and women sentenced to death, the quality of representation by the lawyers assigned to them is very poor.²⁰⁸ The majority of respondents indicated that their first lawyer was appointed by the police force, either because of their limited financial means or because they were not aware that they could choose their own counsel. Respondents indicated that the police rely on their own network of lawyers who are not part of the national Legal Aid Institute (LBH). One lawyer interviewed explained: "Most defendants are in a difficult economic situation and do not have a good knowledge of the legal system. [Police officers] do not recommend legitimate legal aid. Instead, they appoint a lawyer who cooperates with the police institution. In this way, the lawyer will maintain the reputation of the police and not protect the accused as he/she should."

Several people sentenced to death indicated that the lawyers who assisted them during the police investigation and trial were not interested in their case. Some lawyers were not always present during trials, did not challenge the evidence presented and/or met with the accused only a couple of times. Intan told his lawyer that he had been severely beaten but his lawyer did not mention it during the hearings. Irene indicated that she had asked her lawyer to find her a doctor to obtain a medical report but her lawyer did not follow up. She also stated that the lawyer had never tried to produce evidence at trial: "I thought it was the lawyer's duty to seek evidence that could reduce my sentence. But he was not communicative and he did not ask me if I had any evidence that I could present in court". In the case of Faisal and his co-defendants, the lawyer acted against the interests of his clients: it was their lawyer who asked the judges to sentence them to death. KontraS has initiated malpractice proceedings against this lawyer before the Indonesian Bar Association. This process is ongoing. The poor socio-economic situation of the accused is a very significant barrier to accessing high quality defense. Men and women accused of crimes cannot challenge evidence in court because they do not have the financial means to submit legal documents, call a witness, seek additional evidence or change lawyers. As a result,

²⁰⁷ In 2018, there were 405 legal aid offices to cover the whole territory. Center for International Legal Cooperation (2018) Indonesia – Netherlands Rule of Law and Security Update 2018, p. 14.

²⁰⁸ All allegations are consistent with reports from other organizations such as Amnesty International (2015) and ICJR (2015).

several people sentenced to death did not present any evidence at the trial. This situation of poverty was never taken into consideration by the courts when they sentenced the accused to death. All the interviewees have since changed lawyers and are currently supported by lawyers of their choice, including pro bono lawyers provided by KontraS.

LACK OF APPROPRIATE INTERPRETATION

Although the KUHAP guarantees that a suspect or accused person is entitled to a competent and qualified interpreter during the police investigation and trial proceedings²⁰⁹, interviews with several people sentenced to death revealed that the reality is far from these standards. The lack of an appropriate interpreter has been reported in cases involving people who do not speak Bahasa Indonesia, whether they are foreign nationals or Indonesian citizens who do not speak Bahasa Indonesia. Faisal, a member of the Nias ethnic group originating from a remote region of Indonesia, did not understand Bahasa Indonesia well. He stated that his interpreter had not translated the police documents and that he did not understand the judicial process. Foreign national Kevin reported that his interpreter had told the police that he had admitted to committing the crime, something which Kevin had never said. Nonetheless, he had no choice but to sign the police report.

ADMISSION OF FORCED CONFESSIONS AS EVIDENCE DURING THE TRIAL

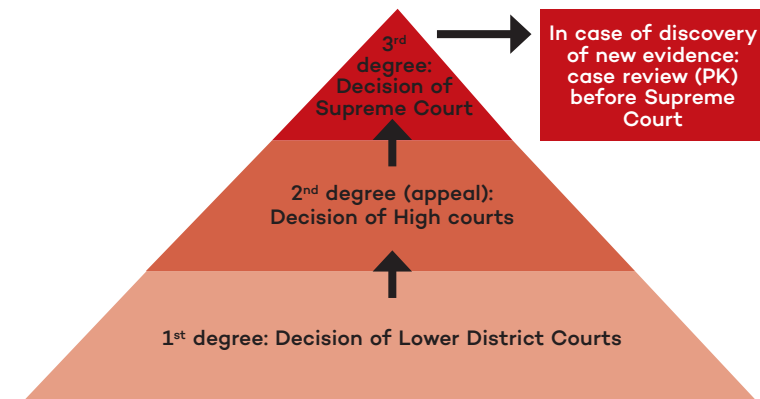
The exclusion of evidence obtained under torture is provided for in the Convention against Torture ratified by Indonesia and constitutes a norm of customary law applicable in all circumstances. Although the KUHAP does not explicitly exclude such evidence, Article 183 provides: “A judge must not impose a criminal penalty on someone unless there are at least two valid pieces of evidence and the belief that a criminal offence has occurred, and the defendant is guilty of such criminal offence”. The quality of the evidence is therefore essential for judges to determine guilt.

²⁰⁹ Articles 53(1), 177(1) and 178(1), KUHAP.

However, according to the men and women sentenced to death, forced confessions have been used as evidence in the trials of those who have been ill-treated by the police, even though the accused have told the court that they have been tortured or beaten. The authorities have never investigated these allegations. Some respondents explain this situation by the “war on drugs”.²¹⁰ One lawyer stated: “The judge is very strict because the offence is a drug-related crime. It is very difficult for judges to be lenient with these crimes given the Government’s anti-drug agenda”. It should be noted, however, that the court’s systematic refusal to consider allegations of ill-treatment applies to other charges, including murder. Arif, sentenced to death for murder, reported: “The judge never took my complaint into consideration”.

RESTRICTED ACCESS TO APPEALS, CASE REVIEW AND CLEMENCY PROCEDURES

Figure 1: Stages of criminal proceedings



In Indonesia, the death sentence can be imposed at any stage of the criminal proceedings: lower District Courts (first degree), High Courts (second degree) and Supreme Court (third degree). In addition, after the Supreme Court’s decision to uphold or reject the High Court’s decision, an exceptional legal remedy called case review (*Peninjauan Kembali*

²¹⁰ See *supra*, Sub-Section “Indonesia’s policy on the death penalty for drug-related crimes”.

– PK) is available before the Supreme Court after the discovery of new evidence.²¹¹ A constitutional review can also be initiated to challenge the constitutionality of a law before the Constitutional Court MKRI. The last option to change the court's decision is to apply for presidential clemency. Nonetheless, despite the existence of a number of avenues of appeals and recourse processes, there are significant limitations that restrict the use of those procedures.

Lack of clarity on PK procedures

The number of PKs that can be submitted prior to execution has been the subject of considerable debate since 2013. In 2013, the MKRI cancelled a provision of the KUHAP that limited the number of PK requests that could be submitted.²¹² However, in 2014 the Supreme Court of Indonesia issued a circular letter which stated that only one application was allowed and could only be submitted on the basis of new evidence.²¹³ The contradiction about PKs between these two high court procedures encourages imprecision and uncertainty about the applicable procedure, something which prevents prisoners from seeking this remedy.

Exclusion of foreign petitions before the MKRI

The use of constitutional review to challenge the constitutionality of national legislation is an important element of the consolidation of the Rule of Law: it ensures that all domestic laws and regulations respect the Constitution which guarantees human rights. In the context of the death penalty, the availability of a constitutional review is essential in view of the legal ambiguities that could rule in favor of death row prisoners. Nonetheless, so far the court has ruled against the unconstitutionality of criminal legislation providing for the death penalty and against the unconstitutionality of methods of execution.²¹⁴

211 Articles 263–269, KUHAP.

212 MKRI, Decision 34/PUU-XI/2013.

213 Circular letter No. 7 of 2014 on the Application of Case Review in Criminal Matters.

214 This is the case, for instance, of the contradiction between domestic legislation that punishes drug-related crimes by death and international standards and procedures that clearly state that the death penalty shall not be imposed for drug-related crimes. In 2007 and 2012, in two separate cases the MKRI ruled in favor of the constitutionality of the death penalty for drug-related crimes and for violent robbery resulting in serious injury or death. See *supra*, Sub-Section “The constitutional challenge to the death penalty for drug-related crimes”. In 2008, in another case the MKRI found that executions conducted by firing squad did not amount to torture even though death was not instantaneous. The Court found that such pain was an inevitable consequence of the lawful act of executing a prisoner. *McRae, D. (2017), pp. 7–8. MKRI, Decision 21/PUU-VI/2008, Nurhasyim versus State.*

Law No. 24 of 2003 on MKRI denies foreign nationals the opportunity to challenge the provisions of Indonesian law. Thus, the petition for constitutional review can only be submitted by Indonesian citizens, whereas, as indicated above, most people sentenced to death are foreign nationals.²¹⁵ In 2007, this led the MKRI to reject the Bali Nine's appeals.²¹⁶ Such discrimination based on the nationality of the accused violates the Indonesian Constitution, as well as Indonesia's obligations under the ICCPR which require States to guarantee equality before the law and equal protection without distinction.²¹⁷

Breaches of the right to seek clemency

The President has the constitutional power to grant clemency.²¹⁸ According to the law, denial of clemency removes the last formal obstacle to executions: a Presidential Decree must be issued, rejecting the petition, before an execution can take place.²¹⁹ The President is not required to give reasons for his decision if he refuses the clemency application.

In 2010, an amendment to Law No. 22/2002 on Clemency limited the number of clemency petitions that could be submitted. While before 2010 clemency petitions could be submitted every two years if the execution had not been carried out, the amendment provides that only one petition for clemency may be submitted to the President. Another amendment provided that prisoners had one year to apply for clemency from the date on which the sentence reached ‘permanent legal force’. However, the new time-limit was challenged before the MKRI which declared this limit invalid and unconstitutional.²²⁰

It is important to note that the results of clemency petitions are far from transparent: the Supreme Court publishes an annual report on clemency which indicates the number of clemency petitions that have

215 See *supra*, Section “Overview of the death penalty in Indonesia”.

216 See *supra*, Sub-Section “The constitutional challenge to the death penalty for drug-related crimes”.

217 Article 28(D)(1), 1945 Constitution, provides: “Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law”. See also Articles 2 and 26, ICCPR.

218 Article 14, 1945 Constitution.

219 Articles 3 and 13, Law No. 22 of 2002 on Clemency.

220 MKRI, Decision 107/PUU-XII/2015, *Rusli versus State*. See analysis of the impact of this decision in *Pascoe, D. (2019) ‘Su’ud Rusli’s Constitutional Court Challenge: Overhauling Clemency in Indonesian Death Penalty Cases?’*, *Australian Journal of Asian Law* 19-2. This article analyses, *inter alia*, the question of whether the one-year deadline has been abolished for current death row prisoners or only for prisoners who will petition for clemency in the future.

succeeded and the number of petitions that have been refused. This report does not mention the names of the prisoners or the type of sentences.²²¹ For example, the 2018 Supreme Court report indicates that 68 clemency petitions were judged, without distinguishing whether they were death penalty cases or not, or between clemency petitions granted or refused. As a result, a lawyer explained that one of his clients, who is a death row prisoner who applied for clemency a few years ago, does not know whether the petition has been accepted or not. This lack of transparency in clemency procedures has been denounced by the ICJR which has initiated a legal procedure to request the publication of presidential clemency decrees for death row prisoners. In 2017, the Supreme Court ruled that presidential decrees on clemency were confidential information.²²²

From 1975 to 2013, 24 to 33 per cent of death penalty cases resulted in clemency.²²³ From the election of Widodo until February 2016, five clemency petitions for death penalty cases have been accepted, all concerning individuals convicted of murder²²⁴, and 23 were rejected, representing 17 per cent. No information is available on the type of offences for which clemency was rejected. As mentioned above, President Widodo has announced that he will reject all clemency petitions for people sentenced to death for drug-related offences²²⁵: to our knowledge, no such petitions have been accepted since Widodo came to power. Many organizations have denounced this position, considering it a violation of Article 6(4) of the ICCPR which states that: “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases”. This interpretation has been confirmed by the UN Human Rights Committee which has stated that all petitions for clemency must be duly examined and that no category of sentenced person can *a priori* be excluded from these measures.²²⁶ The Human

221 Supreme Court of Indonesia (2019) 2018 Annual Report Executive Summary: A New Era of Modern IT-Based Judiciary, p. 6.

222 Supreme Court of Indonesia, Decision 568 K/TUN/2016, in ICJR (2017) Overcoming the Execution in Limbo: Review on the Death Penalty Policy in Indonesia in 2017, p. 24.

223 Pascoe, D. (2017) ‘Legal dilemmas in releasing Indonesia’s political prisoners’, *Indonesia Law Review*, p. 323.

224 Ade Mulyana (2016), ‘KIP Sidangkan Setneg Soal Transparansi Pemberian Grasi’ RMOL in Pascoe, D. (2017), p. 320.

225 See supra, Sub-Section “Indonesia’s policy on the death penalty for drug-related crimes”.

226 Human Rights Committee (2018) General comment No. 36 on article 6 of the ICCPR, on the right to life, CCPR/C/GC/36, para. 47.

Rights Committee has also described several “essential guarantees” that must be offered in pardon proceedings such as “the right for individuals sentenced to death to initiate pardon or commutation procedures and to make representations about their personal or other relevant circumstances”, “the right to be informed in advance when the request will be considered” and “the right to be informed promptly about the outcome of the procedure”.²²⁷ Such guarantees have not been implemented in current clemency petitions for death row prisoners in Indonesia.

The people sentenced to death interviewed are aware of this limitation. Intan said: “From what I have learned from the other prisoners, because I was sentenced to death I cannot benefit from a reduction of my sentence”. As a result, some of them prefer to wait to exercise their right to seek clemency. Arif pointed out: “The obstacle is the recent Government’s strong campaign in favor of the death penalty. It is difficult to know when the time is right to submit the petition”.

Executions while legal action and clemency procedures are ongoing

Reports have revealed that several prisoners were executed in 2015 even though their cases were not final and legal action or clemency petitions were still pending.²²⁸ This practice has been denounced as a violation of the ICCPR and UN Death Penalty Safeguards No. 8, according to which the death penalty cannot be carried out “pending any appeal or other recourse procedure or proceeding relating to pardon or commutation of the sentence”.

CONCLUSION ON SHORTCOMINGS IN THE ADMINISTRATION OF JUSTICE

Interviews with the men and women sentenced to death revealed a number of violations of national laws and regulations and of international standards relating to the right to a fair trial. Criminal proceedings are flawed: they are based on the testimonies of people who have been forced to provide information to the police or to sign documents they did not understand; suspects do not receive quality legal assistance; and judges rely on this “evidence” to sentence

227 Ibid.

228 This involves five people executed in 2015. See Amnesty International (2015), pp. 52-53.

people to death. In addition, the number of proceedings opened to review death penalty cases is increasingly restricted: the number of PK submissions is not clear but seems limited to a single petition; the number of clemency petitions is restricted to a single application; clemency petitions are systematically rejected for drug-related crimes; the constitutional review mechanism is opened only to Indonesians, while most people on death row are foreign nationals. In addition to the situations reported by respondents, other serious deficiencies in the administration of justice were reported, such as denial of access to consular support²²⁹, discrimination based on color or nationality²³⁰, or lack of consideration of mental health disorders.²³¹ These shortcomings undermine the Indonesian criminal justice system and significantly increase the risks of judicial errors which is of great concern. Based on these decisions, Indonesia currently detains 200 to 300 people sentenced to death in poor conditions and executed 18 people in the last five years.

229 Several people had no access to their embassy during their arrest and detention or their nationality had not been correctly identified, something which prevented them from receiving consular assistance which is a violation of Article 57(2) of KUHAP and Article 36 of the Vienna Convention on Consular Relations ratified by Indonesia in Law No. 1/1982. See LBH Masyarakat, Reprieve and International Center on Human Rights and Drug Policy (2017) NGO submission, 3rd cycle, 27th Session of the Working Group on the Universal Periodic Review, p. 8. On consular representation in prison, see *infra*, Sub-Section "Contact with diplomatic missions".

230 The case of the Nigerian citizen Humprey Jefferson before the Central Jakarta District Court illustrated discrimination when the accused was sentenced. According to the Court, "black people coming from Nigeria often become police surveillance targets" because they are suspected of drug-trafficking. See Joint Stakeholders Report on Issues relating to the Death Penalty (2017), p. 6.

231 The Brazilian citizen Robrigo Muxfeldt Gularte was sentenced to death even though there was overwhelming evidence that showed he was suffering from paranoid schizophrenia and bipolar disorder. He was executed in April 2015. See KontraS, FIDH and Center of Human Rights Law Studies (2016), p. 6; LBH Masyarakat, Reprieve and International Center on Human Rights and Drug Policy (2017), p. 7.

INTERVIEW WITH **JULIAN MCMAHON,** AUSTRALIAN BARRISTER

**Lawyer for Myuran Sukumaran and Andrew Chan,
2 members of the “Bali 9”**

How did you become the lawyer for two of the Bali Nine?

The Bali 9 were arrested in April 2005. Over the next 16 months, they were sentenced to death three times, after trial and appeals. At that time, the families of two of the accused, Myuran Sukumaran and Andrew Chan, approached a senior Australian lawyer, Lex Lasry QC, for help and he asked me to help. We were both barristers. In our system, barristers must never “chase” work. They simply accept it if it is offered. So prior to being asked to help, we could watch but not help. We had previously acted for another Australian, in Singapore, who was ultimately executed there.

Did you face any procedural difficulties because you represented foreign nationals / individuals sentenced to death?

Once we were involved and had commenced our research, we went to Indonesia to try and find a suitable lawyer. We moved everyone who had been on the case up until then off and started with a fresh team. Our practice is not to represent the accused in courts outside Australia but to assist local lawyers who act for the client in those jurisdictions. We asked in many places who would be the best lawyer to have in Indonesia and repeatedly we were told to try and get Todung Mulya Lubis. We were very fortunate that eventually he agreed to take the case. He is greatly respected in Indonesia as a lawyer and a distinguished citizen of unquestioned integrity which was of course invaluable for us. It meant we had someone who could handle whatever the legal process threw up.

Can you explain your relationship with them?

In many criminal cases, due to the intensity of the work and the consequences, you get to know the client well. Almost always, it is a typical professional relationship – as close as necessary but

with clear boundaries. In many cases that can mean not close at all, except in terms of obtaining instructions. However, in this case as it turned out the case dragged on for 9 years, through many highs and lows, many courts, and a lot of politics. So gradually our clients matured, they eventually became model prisoners and great educators within the prison. We slowly got to know them very well and admired how they matured personally and progressed. Since we were old enough to be their fathers we all developed strong bonds, working as a team for the common goal of getting a lesser sentence. The families were very involved too so the case became unusual in that regard. The lawyers were able to provide guidance not only on the legal case but other matters such as media and political issues which arose and required decisions from the family or clients.

Did you see them psychologically and socially evolve during their detention?

Absolutely. They moved from being selfish drug dealing punks to grown men with great maturity and courage, fighting for their fellow prisoners for better education, healthcare etc. They also evolved in a delightful way as young men. Many in the prison were devastated when the time came to have them shot, with prisoners even trying to exchange places with them so that they could continue to live and educate and assist so many other prisoners.

Can you tell us about their last days before the execution and your role in the process?

Finally there came a point where they were given 72 hours before death. It was traumatic but they and most of the other 6 prisoners about to be executed handled it very well. Mary Jane Veloso, a well-known prisoner from the Philippines, was also to be shot with them but was pulled off the line at the last minute. They calmed their families and loved ones, and were stoic. One Brazilian amongst the 8, Rodrigo Gularte, was mentally ill and had no idea he was to die until the last minute. The prison was humane in allowing lengthy visits in those last few days and the prisoners and their loved ones shared many intense moments. Legally, some of our team were still fighting a losing battle in Jakarta, far away, because we had both a corruption enquiry and a Constitutional challenge we were trying to get running, but these processes were ignored – the machinery of killing just rolled over everyone.

How did you perceive the entire process? Was this case a turning point in your career? Did it have a specific impact on how you understand your work as a barrister?

The case was certainly an education in political power where the rule of law is weak. And after years of having to discuss the death penalty publicly, to explain the case and its various turns, I gradually became involved in the broader death penalty movement. In that sense, the case did change my career. I describe myself as a reluctant activist. But given what I have seen and learnt about the death penalty in the last 17 years, I am committed to doing what I can to change the dreadful injustices which abound in this area of the law and society in many countries. The needless brutality of State sanctioned killings is something which can change and come to an end if enough people have the courage and tenacity to focus on the task in constructive ways.

“I was not there to witness the executions. I was not allowed to witness Andrew and Myuran’s last moments. Frankly, lawyers like me are not allowed to witness these things in most countries because of the possible political consequences for the powerful if we started talking about what we saw. Later that night, as it was drawing close to the execution, we were next to some of Mary Jane [Veloso]’s family, sitting on the dock on the island, a few hundred metres from the killing field. We sat and waited for the inevitable” (2016 Mary MacKillop Oration, Speech by Julian McMahon)

Interview conducted in July 2019

Arrested and sentenced to death in 2005 for attempting to smuggle drugs out of Indonesia, **Myuran Sukumaran** and **Andrew Chan** were executed by firing squad on 29 April 2015.

THE LAST DAY OF RODRIGO

Fr. Charlie Burrows O.M.I. (Romo Carolus O.M.I.)
To
Christina Widianarti

Father Charlie Burrows is an Irish-born priest who has lived in Indonesia for more than 50 years and who ministers to prisoners at Nusakambangan’s prisons.

Christian Wadianarti was one of the lawyers working on Rodrigo Gularte’s case.

As it would be the last day with Rodrigo, Angelita, his cousin who has fought so hard over the last few months to have Rodrigo’s death sentence reduced to life imprisonment, Leonardo from the Brazilian embassy, who has equally worked hard, Christina from Y.S.B.S. Law department, who is now representing Rodrigo in a number of Court Cases Attempts, and myself, went together to Cilacap Prosecutors office to get the necessary papers to attain access to the prison island and visit Rodrigo for the last time.

As usual, we had to wait quite a long time to get the necessary documents and one prosecutor was not over happy with my presence and reputedly agreed to give me my papers, with a caveat that I should not “talk too much”. I agreed – for the day – and he added “into the future”. I smiled “politely”.

We then went down to the port where we were all re-examined. Frisked. And then another wait for a boat to cross to the prison island and then a bus trip to the Prison. Frisked again and eventually we met Rodrigo.

All the families of the 9 people to be executed were spread out on a veranda sitting on mats on the floor. We were put in an office and Dili’s group was with us. Dili is from Nigeria and has turned his life around and is also close to me.

Rodrigo, as usual, was self-effacing: “You are all busy people, why are you wasting your time with me?” “I am OK. Look after the others”. We assured him ‘today we want to be with him’.

He relaxed and began telling us of his life and the voices continually speaking to him in his head and we would be given a vivid, description of what it is like to be Bipolar/Schizophrenic which for him was his “reality”. He did not see himself as “sick” and disliked the word “sick” being applied to him.

He related experiences from his youth. “One day I was playing football. My team was winning but then suddenly I could not walk/run right. I was falling around – the game stopped – it was my fault the game stopped – my team – the other team were not happy with me – I spoiled the game for everybody.”

A second incident – “we were playing chess, suddenly I was confused, could not see straight, the game had to stop – it was my fault – I spoiled the game for everyone – it was my fault”.

He gave some similar incidents and I asked “maybe you feel guilty”. “No, but it was all my fault. But this is because I have voices, noises in my head – all the time “. Then he put his ear to my ear. “Can you hear them?” I said “YES” but obviously I could not. He then put his ear to Angelita and asked her could she hear.

He has told us there is a war going on between Good and Evil – but it is getting better, next year good will overcome. “At night-time in my cell I feel the vibrations from explosions – we are being attacked (Holcim – the cement company take limestone rock from a quarry on the island and uses explosives).”

“I hear gun shots, they are attacking from another angle.” (The Indonesian Commandos use a nearby beach as a shooting range). “In the jail I am safe – outside No”.

“Even in the jail I must be careful what I eat, what I wear – because there are “TOXICS” everywhere – in meat sometimes – in rice sometimes” etc. We told him we saw him as a gentle, compassionate, kind person but he said “No, no, no” so we had a vote on it and he lost – three to one. Leonardo and Christine went outside and Angelita ask that we pray together. I often pray with the imposition of hands but as before I tried this and he said “Are you trying to break my neck” so we decided it would be a holding hands prayer session and we prayed together for some minutes.

After praying, Rodrigo put his arm around Angelita and rubbed her back so we left them to have a “quite time” together. Even thought there were guards sitting close all the time, but in their minds they could be unaware of them.

After an hour we came back together again and listened to Rodrigo. He was very happy at being listened to and was on a roll. He told us I am

being emptied. More and more I feel empty. If I read I forget what has gone before so I cannot connect – it’s no use I just stop reading. I am being emptied. I suggested “Nature abhors a vacuum” so there must be a time now when he will be “refilled”, when good will overcome evil. Then Rodrigo was remembering a time when he was young and the whole extended family went for recreational time to the farm of an uncle of his. This was a happy time for him, playing with all the cousins. He had told me before that he had predictions of all the things that would happen in his life. He said I was with them on the uncle’s farm. Then the inferiority complex came to the fore again and he said they liked me more than him. He said this, not in jealousy but he continually puts himself down. Any praise given always gets a “No, no, no”.

The warders told us that family visiting time must end at 14.00 P.M. whereas it is usually 16.00. I left Angelita with Rodrigo again and went for some prayer time with Dili – imposition of hands – Rest in the Spirit.

The most stressful time came when we were politely told it was time to “Go”. Mary Jane, the Filipino Lady, had been putting on a brave face but she broke down. Why must the family – her two children – leave at 14.00 P.M? This would be the last time they would see one another alive – she was hysterical as any mother would be in her situation. Every one present was touched, even the Prosecutors. The other families were all trying to “be strong” for one another but the “heart” was taking over. One of the Australian Prisoners had just been married the day before. Mothers suffered worst. Angelita was doing well, “holding up”, but the final parting was a very harrowing experience. Christina had contacted Pasir Putih jail demanding Rodrigo’s belongings and these were now “on the way”. The buses were waiting for us but I suggested they leave and did a deal with one of the bus drivers who had a car in the port to come back with this for us.

Eventually Rodrigo’s belongs arrived with a young Catholic Warden. Angelita found some personal items that would be very meaningful for the family. The rest she sent back to be given to poor prisoners. The car took us to the port and again a deal with a small boat and back to Cilacap. With Christine, I went to the Prosecutor’s Office to get another set of papers so we could access the island that night. The family papers had been collected by Christine’s lawyer friends but I was told I must get my pass from the central police station. I went there and they said “I was not on the list” – go back to the Prosecutor’s Office – I went – halfway back – no – go back to Central Police

office and after another hour's wait I got my pass. Home – quick meal and back to the port.

We had done another deal with the Prosecutors: by signing some documents we would get certain special rights. I could be with Rodrigo for a long time before the executions, I could go with him to the car, take him to the execution site, meet him getting out of the car and be with him before the execution. He had expressed fears of a sniper waiting outside the prison to shoot him or somebody to shoot him in the car. I asked to go with him, even if it meant me being handcuffed to him, but this was not allowed.

While waiting at the port the Prosecutors expressed their dislike for the executions but they had to do their job.

Then back on the boat, car drive to the prison, frisked again and then allowed into the cell with Rodrigo – there were no chairs in the cell – only a very thin mattress and this was standing up against the wall. Also Rodrigo prefers standing.

Again I listened to Rodrigo – again he expressed the pain of listening to the voices, Good versus evil. I told him as I am 72 I could meet him relatively shortly and if he knew what “house” I would get in heaven maybe he could get the garden ready for me. Again some prayers – “tonight you will be in paradise” etc.

I told him he would be handcuffed and put in chains and to be ready for this.

Then the guards started taking out the prisoners one by one and when it was Rodrigo's turn I went with him. At the prison gate the warders handed over Rodrigo to the Police and only when they began putting on the chains did Rodrigo say “Am I being executed?” and I went with him to the car.

After the Prisoners were tied to crosses we were again given time with them. Rodrigo expressed “annoyance” – “I made a mistake I must pay for but the proper punishment is life in jail, not execution.” I agreed whole heartedly with him and expressed my disagreement with the whole process. After three minutes we were told to move but as Rodrigo was still talking I stayed but someone took my arm and “helped me move”.

We were put in a tent and, as we had already done, we prayed and sang hymns and the prisoners did likewise, trying to connect together in prayer. When the shots rang out the praying become more intense but death must have come quickly as there were no further shots. (If the prisoner does not die within 15 mins. the captain of the firing squad must shoot his pistol into the head. The squad is 12 shooters for each prisoner – all at the same time).

After the bodies were taken to a make-shift morgue, the team of six Catholics, six Protestants and two Muslims prepared the bodies and the police placed them in coffins.

By this time we had gone back to the port to be with the families and they told us hearing the shot was a very harrowing time and they too were praying and singing hymns. We talked some more – Angelita, Leonardo, Christina and myself – and now it was a big effort to stay awake. It was 4.00 A.M. and we had been up since 5.00 A.M. the previous day. Eventually, at about 4.30.A.M. the ambulances came with the coffins. Angelita asked to see the body – the police man said “No” – then he relented and we unscrewed the lid of the coffin. This was a very difficult moment for Angelita – we then prayed together – the coffin was closed and we went with the ambulance onto the ferry. As there were 8 ambulances, loading took some time and eventually the ferry headed for Cilacap. Angelita asked me to hold her hand as we had to run the gauntlet of the Media Circus outside the Port gate. We raced through this and the media went back to film the next family

We waited some time and the ambulances passed quickly. Luckily, we connected with Christina, now in a car behind the ambulances and we bundled Angelita into this to head for Jakarta. I lost contact with Leonardo as some of the Catholics who washed the corpses needed a lift home and I had a car in the port, eventually reaching the Presbytery at 6.00 A.M.. All during the process I did not feel tired but had no trouble sleeping on hitting the pillow. It was a grace and an honor to be with Rodrigo on his last day in this world and to support Angelita and Leonardo through this very difficult ordeal. We remembered Rodrigo's mother, family and cousins over the next days in masses and prayers as they experience a very difficult grief process.

Cilacap, 4 May 2015
Carolus Burrows, O.M.I.
(Charlie Patrick Burrows, O.M.I.)

Brazilian-born Rodrigo Gularte, was arrested in 2004 and sentenced to death in 2005 for drug trafficking. Rodrigo was diagnosed with schizophrenia and bipolar disorder. He was executed by firing squad on 29 April 2015.

TESTIMONY OF **CELIA VELOSO,** MOTHER OF MARY JANE VELOSO



I am Celia Veloso, mother of Mary Jane Veloso who is currently on death row in Indonesia.

Mary Jane is my youngest child. We are a very poor family. We raised all my children with the meager income my husband and I earn as street vendors.

Because of our hand-to-mouth existence, Mary Jane was only able to finish elementary schooling. She could not speak English well. She also married early and bore two sons. In 2009, she was forced to leave to work in Dubai as a domestic helper because of the lack of decent job opportunities in the Philippines but was then forced to come back home because she was almost raped there.

In 2010, she was offered a job as a domestic helper in Malaysia by her god-brother's girlfriend, Kristina Sergio, whom she trusted. Kristina turned out to be illegally recruiting other young, vulnerable Filipina rural poor women who also live in their village for employment abroad. Because Mary Jane trusted Kristina, she grabbed the job offer, as millions of other poor Filipinos do, and had to scour for supposed placement fees in the hope of giving her sons a better life. When Mary Jane and Kristina travelled to Malaysia, purportedly for the job, the latter suddenly informed her that the job was no longer available. Kristina then asked her instead to go to Indonesia alone, claiming she should wait for another job opportunity. Since Mary Jane only brought a few pieces of clothes to Malaysia, her god-sister bought her some clothes to take to Indonesia which she placed in a suitcase that the brother of her god-sister's African boyfriend gave her. Mary Jane was very thankful for all their help.

When Mary Jane arrived in Jogjakarta Airport, she was shocked to learn that the Indonesian authorities discovered 2.6 kg of heroin secretly stashed in the luggage that her god-sister asked her to bring. She was immediately arrested and jailed and had no means of contacting us or the Philippine Embassy.

During that time, we had no inkling about Mary Jane's fate. This was because when Kristina arrived back home she assured us that

Mary Jane was "happy" and that Mary Jane's employer was "kind". She even gave us milk that Mary Jane supposedly asked her to give her son who was just a baby then.

Imagine our shock when Mary Jane called us in May 2010, a few days after her father's birthday, and told us that is was in jail. We rushed to Kristina's house but she warned us against going public or approaching the authorities. She said that they will do everything for Mary Jane's release.

Kristina assured us that their syndicate will get Mary Jane out if we just kept quiet and waited. We trusted her. We were also afraid because she said that should we tell authorities, Mary Jane's and our lives will be at stake.

After a six-month trial, Mary Jane was convicted and sentenced to death. She was represented by a court-appointed lawyer during the trial, supposedly recommended by the police. She was not given timely, adequate and proper legal and consular support by the Philippine Embassy. The Embassy only hired a private lawyer to represent her after conviction and at the appeal stage. The appeals, which were mainly based on the lack of a competent interpreter, were denied by the higher courts.

Since then, we have frantically knocked on government doors but were either ignored, given the run around or even deceived about the status of her case and the responses. Belated puny appeals for clemency by the Philippine government were also rejected by the Indonesian President, Widodo.

Five years after her conviction, her case was given media attention and thrust into the public interest in light of the impending execution of the so-called Bali 9. Migrant International searched for us and offered their help. We are very thankful to them because they introduced us to Filipino human rights lawyers who asserted the issue of her being an unknowing victim of a drug trade via human trafficking. The Philippine Government authorities, however, looked at such efforts and initiatives coldly or with disfavor but were nonetheless pressured into urgently addressing her case.

Mary Jane's case also shined a public light on the Philippine Government's neglect and lack of assistance for other Filipinos on death row. As a victim of trafficking, Mary Jane was also given significant attention in the pursuance of the legal appeal for her.

We thank everyone who helped and supported Mary Jane up to the final hours of her scheduled executions. Mary Jane was scheduled to be executed by firing squad in April 2015, together with 8 other

INTERVIEW WITH SABINE ATLAOUI WIFE OF SERGE ATLAOUI

nationals on death row convicted of drug charges. Furious national and international appeals, campaigns and outrage which complemented the rejected intense last-ditch legal struggles to overturn the conviction, together with renewed appeals for clemency, resulted in a dramatic last-minute reprieve of her execution. The temporary reprieve was granted to give way to the legal proceedings in the Philippines against her god-sister and her partner after they surrendered to the authorities hours before Mary Jane's execution.

More than a year after her reprieve, the trial for human trafficking and illegal recruitment charges against her recruiters continues to drag on due to the delaying tactics of the accused on top of the trademark slow pace of cases in the Philippines. We continue to appeal for your continued support for the campaign to "Save Mary Jane". She has been suffering for six years. We long for the day when she will be reunited with her sons. We hope, with your help, that she could return to the Philippines and start a new life.

We are eternally grateful to all of Mary Jane's supporters. We will not stop until justice is achieved. We enjoin you all to join us in our fight. Thank you very much and good day to all.

Oslo, June 2016

*6th World Congress Against the Death Penalty,
Oslo, Norway.*

Celia Veloso is the mother of Filipino death row prisoner Mary Jane Veloso. She was arrested in 2009 and sentenced to death in 2010 for smuggling drugs into Indonesia. Scheduled to be executed on 29 April 2015, Mary Jane was granted a stay of execution at the very last minute. However, she is still sentenced to death.

You lost contact with your husband, who is incarcerated in Indonesia, for several months. What is the impact of your husband's incarceration on your family?

My son Yasin could talk to my husband without difficulty but overnight there was no more contact for months. Yasin could not talk to his father anymore. A child is worse than an adult. He did not understand because he has been able to call him on the phone since he was a baby. All that anger, trauma and distance came out. It was like pressing a switch. He has had some pretty severe crises. I had asked his teachers to let me know if his behavior changed at school. For the first time, he lost concentration at school, he had no desire to do homework and he hardly went out anymore. Yasin can have very strong emotions. Only with me can he express his anger. When I go to him and try to talk to him to understand, he says to me, "I'm sad. I don't see my daddy". He clings to his hopes and his sadness of never having lived with his father at home, even for one day: "Anyway, Daddy will be back in five years because the President changes every five years". After floods of tears, he said to me, "The President is mean. My daddy's nice. I want Daddy to come home at least for a day, even if he has to go back to prison and come back in a year. Just a day at home". Yasin has no idea when his dad will be back but for the past year he has realized that he is growing up, that the years are passing and that his father is still in prison. Two years ago, I wrote a letter and he told me he wanted to participate. He asked that his father be able to leave before he died. On another occasion without his knowledge I recorded a discussion when he was talking about his father and his emotions. I wanted his father to be able to listen to the recording. But when he realized I had recorded it, he asked me to share it with other people, to support and help his father. He wanted to express himself as we, the adults, have done for years. Yasin has no goal, he despairs and sees no future with his father outside prison.

How are visits to the prison going?

Over the years, visiting days have been restricted. For years we could see him every day from morning to afternoon. Since 2014, everything has changed. Visits were reduced to two hours, three times a

week. We had managed to get other days thanks to the exceptional requests of the Embassy because of the distance. Sometimes the checks take longer and we can only stay for an hour and a half. What is unbearable is the 3 or 4-hour wait to get to the visit. When we arrive, it is almost eleven o'clock. In terms of checks in the prison, when we arrived in the waiting room before visiting the guards were really understanding. If they saw Yasin waiting and he was impatient to see his father they would take him to his father while we waited in the waiting room to get written permission for the visit. I have always thanked them. Instead of letting Yasin wait, they were already taking him to visit his father. Those minutes alone together before everyone arrived have always been important to Yasin. A kind of intimacy without the gaze of everyone on them. There was still this atmosphere but they did not oppress the children.

What has the situation been like since Serge moved to the new prison?

When he was transferred to the maximum security prison they cut off all contact with the family. All his personal belongings, photos and letters, were stolen or burned. It is like that with every transfer. For the past three weeks we have been in contact again. The Embassy had to be contacted because the prison's telephone booth did not allow calls abroad. We had to complain, say that it was unfair, since he was paying anyway. He told me that the Embassy had sent a letter to the prison to make sure he could have contact. Now he can contact me.

How did you manage the distance and visits?

In 2017, I found work again. But I cannot be away for a month and a half. And there is also the financial aspect. This year, my husband told me: "As long as the visiting conditions are like that, don't come". But he could not give any details. We were unable to visit him in 2018 and 2019. Two years is an eternity. We can only go in the summer during my three-week holiday. In 2020 it will be three years since the last time we were together.

How does he manage in prison? Does he have easy access to a telephone, food and medicine?

He needs money on hand to make calls. We send him money every month for his prison expenses for calls, medical expenses, hygiene or other things accepted by prison regulations. Telephone calls are very short: between five and ten minutes, four times a week depending on the waiting time and the number of prisoners who wish to call.

They are restricted on many things. On prison premises we cannot bring food from the outside so he has nothing because he does not have any visits. Each time we have to find solutions and adapt to the changes in the regulations by the prison authorities but also by the prison director. If I summarize what he told me, there is a rice ball with three chickens for all the detainees. The ration is worthless, there are no vegetables. In addition, he must be careful about his diabetes and cholesterol. In Narkotika, he had no access to medication. The first time I spoke to him on the phone after Narkotika, he was in a pitiful state physically and morally. He had lost a lot of weight. From the moment the Embassy was able to visit him, he was able to receive his medication for his blood pressure but even though he has one medicine to take every day he only received five every month. The drugs were also stolen when he was transferred.

Does he ever talk to you about acts of violence in prison?

There was no physical violence against him. In 2005, when he was incarcerated at Pasir Putih, there was still violence. There have been isolated cases, some prisoners have been hit with water hoses. In Narkotika, when no one could hear from him, even the director would hit the prisoners at random. I think that with the reform of prisons in recent years, the restrictions apply to all prisoners, they are not linked to the sentence. There is a resurgence of violence taking place and the prisoners are completely isolated. There is nothing we can do. It is simple: when he was transferred, I knew he was not going to have any clothes but there was no way to have a consular visit, he was left without clothes for over a month. They are left to their own devices. When I managed to get in touch, my husband told me "I can't do it anymore". It is because he contacts us that he manages to hold on. I know him, I know what he can handle. If he does not have a call to appease him, he cannot take it anymore. Anyone would explode. Last week, he told me that they had no place to store their things. They have a limited number of clothes. He had put them in a box but they are not theoretically entitled to a box. When he arrived, he was sleeping on the floor, there was no mattress.

Are the conditions for entering the island and visiting Serge challenging?

One day, I was asked to remove my sanitary tampon for the search. We have no choice. Even if I think they don't have the right to pull down our underwear, we have to let ourselves be humiliated. It is not

all the guards but some of them take a malicious pleasure in doing it. We accept this humiliation so that we are not deprived of a visit. We accept, we have no choice.

Does he have good contact with the other detainees?

He had made friends in 2015 and 2016 with people with whom he played ping pong. That was when there were executions. Some of them also died of illness. It was a shock to him. I can see he is not socializing like he used to. He no longer has the same social relationships. At Pasir Putih, many people were convicted of drug-related offences, there were no violent people. But then they were mixed with rapists and murderers and there was an upsurge of violence. He also protects himself emotionally and psychologically by having little contact with the others.

Has his situation in prison changed since the corruption scandals?

At Pasir Putih the detainees had a gym but it was removed. Same in the other prison. Everything that had been arranged, all the work they had done, it was broken. Over the past two years, they have taken away many rights and violated the dignity of detainees, and there are more and more humiliations and violence. They accuse convicts of trafficking within prisons but the scandal is the corruption in prisons that the guards took advantage of. The authorities did not strike in the right place. There were more and more guards involved in drug-trafficking. They just get transferred or demoted. To my knowledge, only one Narkotika guard has been sentenced to prison. Today, we are in a process of humiliation for visitors and convicts. There is no information. We cannot get any news. They say that the detainees are receiving “shock treatment” but they are driving them crazy. I have the impression that it is the directors who make their own rules of procedure. According to the director who is taking up his post, either there will be more humanity or it will become hell for the detainees and their families. They will not listen to us here. We will put ourselves in even greater danger. KontraS must do something. There is abuse. They have become animals, they are no longer men.

Interview conducted in August 2019

Sabine Atlaoui is the wife of French death-row prisoner Serge Atlaoui. Serge was arrested in 2005 and sentenced to death in 2007 for drug trafficking.

THE CONDITIONS OF DETENTION OF DEATH ROW PRISONERS



"Andrew", Painting by Myuran Sukumaran – 2013

*“They deprive prisoners of their humanity [...].
They say it’s ‘shock therapy’ but they just push them into madness”.
– Relative of a person sentenced to death*

OVERVIEW OF THE CONDITIONS OF DETENTION IN INDONESIA

In 2019, Indonesia had 473 prisons.²³² Although several prisons date back to the Dutch colonial period, a number of prisons have been built recently or renovated.

Many reports have revealed that detention conditions in Indonesia are often harsh and sometimes life threatening, and that there is significant overcrowding.²³³ Although the Directorate General for Correction Facilities has recognized the need to address prison overcrowding and a regulatory and legislative reform plan has been developed to reduce the number of prisoners²³⁴, national statistics show that the number of prisoners has steadily and significantly increased: from 2013 to 2019, the prison population rose from 160,064 to 261,294. Over the same period, occupancy capacity increased only slightly (+16,000) compared to the increase in the number of prisoners (+100,000), resulting in a very sharp increase in the national occupancy rate, from 143 per cent in 2013 to 205 per cent in March 2019.²³⁵

Prison occupancy rates vary considerably from one prison to another: according to the information collected during the mission and provided by prison staff, the occupancy rate of the prisons visited varies from 15 to 512 per cent. The highest occupancy rate (512 per cent) was recorded at Kerobokan prison where four death row prisoners used to be detained²³⁶: it has an official capacity

of 323 places but houses 1,653 people.²³⁷ Lowokwaru and Cilacap prisons, which still house individuals sentenced to death, have occupancy rates of 242 per cent and 196 per cent respectively.²³⁸ In contrast, the high-risk prison of Batu in Nusakambangan has an official capacity of 700 persons but it operates under the new “one man-one cell” system²³⁹ and housed only 106 prisoners, including two death row prisoners²⁴⁰: its occupancy rate is 15 per cent. The same applies for the super-maximum-security prison of Lapas Narkotika which is dedicated to people sentenced for drug-related crimes. This prison, which houses 17 death row prisoners, has an official capacity of 382 but detains only 250 prisoners, something which represents an occupancy rate of 65 per cent. A few weeks before the research team’s visit, about 100 prisoners had been transferred from this prison to medium-security prisons in accordance with the new security system in place.

Such general overcrowding in the country has serious repercussions on detainees, especially since the resources allocated to prisons are limited.²⁴¹ Several prisons have experienced escapes, riots and violence. In May 2018, the maximum security Mako Brimob prison was attacked by prisoners and resulted in the death of five police officers and one prisoner. More than 1,300 escapes were reported in the last quarter of 2018.²⁴² In addition, official data revealed that 448 prisoners died in custody in 2017, 548 in the first half of 2016 and 452 in the first half of 2015. According to government data, the main cause of death is natural but the Government has also reported deaths caused by disease due by

232 Directorate General for Correction Facilities, List of prison centers, available at: <http://www.ditjenpas.go.id/unit-pelaksana-teknis/> (last visited April 23, 2019).

233 US Department of State (2019) Indonesia 2018 Human Rights Report, p. 4. See also ICJR (2018) Strategies to reduce overcrowding in Indonesia.

234 UNODC (2016) Country Program for Indonesia 2017–2020, p. 20.

235 In 2013, the total prison population was 160,063 with an occupancy capacity of 111,857. In March 2019, the prison population was 261,294 with an occupancy capacity of 127,112. Source of 2013 data: ICJR (2018), p. 27. Source of 2019 data: World Prison Brief Data – Indonesia, available at: <http://www.prisonstudies.org/country/indonesia> (last visited July 17, 2019).

236 Including two Bali Nine members.

237 April 2019 data.

238 The capacity of Lowokwaru correctional center is 1,282 while there were 3,099 prisoners in the prison (March 2019). The capacity of Cilacap correctional center is 254 while there were 498 prisoners in the prison (December 2018).

239 See *infra*, Sub-Section “The rights of prisoners”.

240 January 2019 data.

241 Restrictions include, but are not limited to, limitations in terms of human resources, food or medicine. See *infra*.

242 Several breaks in overcrowded prisons occurred after an earthquake took place in the Sulawesi region in October 2018. See NDTV (2018) 1,200 Convicts Escape After Multiple Mass Prison Breaks in Indonesia, available at: <https://www.ndtv.com/world-news/indonesia-confirms-multiple-mass-prison-breaks-in-quake-tsunami-zone-1924815> (last visited July 17, 2019). Escapes were also reported at other prisons: The Straits Times (2018) Indonesia launches hunt for 90 escaped prisoners, available at: <https://www.straitstimes.com/asia/se-asia/indonesia-launches-hunt-for-90-escaped-prisoners> (last visited July 17, 2019).

poor hygiene (leptospirosis²⁴³) or epidemics related to overcrowding (tuberculosis).²⁴⁴

To address overcrowding, the Ministry of Justice has announced the construction and rehabilitation of new prison facilities.

THE PRISON REGIME

Types of prisons

Until 2018, prisons were divided into two categories: Class I prisons located in larger provinces which have a large capacity; and Class II prisons located in smaller provinces which house fewer prisoners. Class I prisons include maximum security prisons where, in theory, all prisoners sentenced to death are sent.²⁴⁵

In July 2018, the Indonesian Commission for the Eradication of Corruption revealed a corruption scandal taking place in a West Java prison. Due to overcrowding and poor conditions of detention, prisoners bribed prison staff to stay in better cells which provided air conditioning, television, a refrigerator and a lock that could be controlled by prisoners.²⁴⁶ Following this scandal, a new decree was issued aimed at reorganizing the prison system.²⁴⁷ The new Decree No. 35/2018 on Correctional Institutions Revitalization divides prisons into four categories according to their level of security, super-maximum security, maximum security, medium security and minimum security²⁴⁸:

²⁴³ Humans become infected through direct contact with the urine of infected animals or with a urine-contaminated environment, WHO, available at: <https://www.who.int/topics/leptospirosis/en/> (last visited July 17, 2019).

²⁴⁴ US Department of State (2018) Indonesia 2017 Human Rights Report, p. 5; US Department of State (2017) Indonesia 2016 Human Rights Report, p. 5; US Department of State (2016) Indonesia 2015 Human Rights Report, p. 5.

²⁴⁵ Regulation of the Director General of Corrections, in Konmas HAM (2013) Comment on Indonesia's Compliance with the ICCPR. In reality, death row prisoners may be sent to any prison. See *infra*.

²⁴⁶ DW (2019) Indonesian prison caught in 'luxury' cell scandal, available at: <https://www.dw.com/en/indonesian-prison-caught-in-luxury-cell-scandal/a-44804489> (last visited July 17, 2019).

²⁴⁷ Decree No. 35/2018 regarding Correctional Institutions Revitalization. See also Gatra.com (2019) Atasi Kepenuhan Narapidana, Kemenkumham Klasifikasi Lapas dalam Empat Tingkat, available at: <https://www.gatra.com/detail/news/411655/politic/atasi-kepenuhan-narapidana-kemenkumham-klasifikasi-lapas-dalam-empat-tingkat> (last visited July 17, 2019).

²⁴⁸ Article 8, Decree No. 35/2018 regarding Correctional Institutions Revitalization. See following Sub-section "The rights of prisoners".

- Super-maximum security prisons are intended for people who endanger the security of the society and the State²⁴⁹;
- Maximum security prisons are intended to change the attitude and behavior of prisoners, to make them aware of their mistakes, obey the law and enhance their discipline²⁵⁰;
- Medium security prisons are intended to improve prisoners' attitudes and behavior, their obedience to the law and to build their capacities and abilities²⁵¹; and
- Minimum security prisons are intended to improve prisoners' behavior and productivity.²⁵²

Each level of security reflects a different treatment of prisoners. At the time of writing, in May 2019, the new system is only being implemented on the island of Nusakambangan, an island that houses several high security prisons and is particularly known as the place where executions take place.²⁵³ The new system is expected to be implemented in other prisons in the coming months. Therefore, the two systems coexisted at the time of writing.

In addition to the division implemented by the new decree, another system has been specifically applied to Batu prison which is dedicated to housing terrorists and drug kingpins. This prison was reclassified as a "high risk prison" by a circular letter from the Directorate General for Correction Facilities.²⁵⁴ As a result, its security level is even higher than the super-maximum security level: Batu prison has the highest level of security of all Nusakambangan prisons. It should be noted that this level of security is not regulated by any decree which leaves a high degree of uncertainty about the treatment of prisoners.

Legislation relating to the rights of prisoners

Prison administration is under the responsibility of the Directorate General for Correction Facilities of the Ministry of Justice and Human Rights (hereafter the Ministry of Justice). The prison institution underwent a major reform in 1964 when the concept of "correctional institution" initiated by Minister of Justice Sahardjo

²⁴⁹ Article 10(1), Decree No. 35/2018.

²⁵⁰ Article 13, *ibid*.

²⁵¹ Article 17, *ibid*.

²⁵² Article 12, *ibid*.

²⁵³ Regarding Nusakambangan, see *infra* Sub-section "The execution".

²⁵⁴ KontraS' discussion with Lapas Batu's prison warden, May 2019.

was formalized by President Sukarno.²⁵⁵ This concept is regulated by Law No. 12/1995 on Corrections, according to which the aim of the penitentiary system is no longer only to act as a deterrent but constitutes an attempt at rehabilitation and reintegration.²⁵⁶ This Law does not distinguish between types of convictions: in theory, it applies to everyone, even those sentenced to death. This illustrates the ambiguity of the reform which pleads in favor of reintegration while some people are being executed.

In order to achieve the objectives of rehabilitation and reintegration, the Law incorporated certain principles of the UN Standard Minimum Rules for the Treatment of Prisoners that apply to all prisoners, including those sentenced to death. For example, the Law provides that prison staff must protect prisoners and respect their human dignity. It also provides that prisoners have the right to healthcare and decent food, to be visited by their family and legal counsel, and to file a complaint.²⁵⁷ In addition to Law No. 12/1995, several rights for prisoners, including food, health, clothing, sports and education, have been further detailed in Government Regulation No. 32/1999 on the Conditions and Procedures for Implementation of the Rights of Prisoners, which was amended in 2006 and 2012.²⁵⁸

However, the new Decree No. 35/2018, which classifies prisons according to their security levels, introduces restrictions to these rights and sets out differences in treatment between prisoners. For instance, people detained in super-maximum and maximum

security prisons are not allowed to participate in education and training programs, unlike people detained in medium security prisons.²⁵⁹ Reference is also made to the fact that people detained in super-maximum security prisons must be placed in single rooms.²⁶⁰ None of these regulations contain specific provisions concerning people sentenced to death, with one exception.²⁶¹ The difference in treatment between prisoners is therefore based on the prisons in which people are placed, rather than on their sentence. As one prison warden reported, “*anyone transferred to the super-maximum security prison receives the same treatment whether or not they are on death row*”.

Places of detention of individuals sentenced to death

Contrary to the regulation that provides that all prisoners sentenced to death must be sent to Class I prisons, there are death row prisoners in both Class I and Class II prisons due to overcrowding.²⁶² In Nusakambangan, which follows the new system, people sentenced to death can be held in prisons with different security levels: there are death row prisoners at high risk security Batu and in super-maximum security Lapas Narkotika.

All prisons are separated by gender. Although there are specific prison facilities for children, several children are detained with adults.²⁶³ However, it should be noted that there are no children currently being sentenced to death in Indonesia.

255 Irani, D. (2018) ‘Law enforcement and legal awareness of female prisoners in correctional institution of Ponorogo’, *Journal Hukum*, Vol 2 No. 1, Maret 2018.

256 Elucidation of the Law No. 12/1995 on Corrections. See also Article 2 of this Law that provides that a correctional institution aims to ensure that prisoners are aware of their mistakes, improve themselves, do not repeat criminal acts, are received back into their communities, take an active role in development and live freely as good and responsible citizens. The emphasis on rehabilitation, development and education is more generally in line with the reform of justice introduced by Sahardjo who replaced Indonesia’s symbol of Justice – the blindfolded lady with scales – with a banyan tree inscribed with the word Pengajoman – protection and succor – in 1960. See Lev, D. (2000) *The lady and the banyan tree: Civil Law Change in Indonesia*, *Legal Evolution and Political Authority in Indonesia: Selected Essays*, p. 119. Kluwer Law International.

257 Articles 5 and 14, Law No. 12/1995 on Corrections.

258 Government Regulation No. 32/1999 regarding Conditions and Procedures for the Implementation of the Rights of Prisoners. Significant controversy emerged when Government Regulation No. 99/2012 amending Government Regulation No. 32/1999 was issued because it places restrictions on sentence remissions and parole for prisoners convicted of some offences, such as terrorism, corruption and drug trafficking. This regulation was issued after 212 people escaped and five people, including two guards, were killed in a riot at Tanjung Gusta prison in North Sumatra.

259 Article 11 on super-maximum security prisons, Article 15 on maximum security prisons, Article 19 on medium security prisons, Decree 35/2018 regarding Correctional Institutions Revitalization.

260 Article 10, *Ibid*.

261 The only exception is the 1999 Government Regulation which contains one provision, stating that death row prisoners are allowed to receive visit from their families or lawyers if their clemency plea has been rejected. Article 32, Government Regulation No. 32/1999.

262 This result is in line with the findings of Konmas HAM’s 2010 study, conducted in 13 correctional centers across Indonesia, which revealed that death row prisoners can be placed in both classes. Konmas HAM (2013) *Comment on Indonesia’s Compliance with the ICCPR*.

263 This is the case, for example, in Malang and Bali. In Bali, the children’s prison is far from the city center. According to an interview with Bali prison staff, the Prosecutors’ Office decided to detain minors with adults to avoid transferring them from one place to another for trial sessions.

HOUSING FOR INDIVIDUALS SENTENCED TO DEATH

The conditions of detention of the men and women sentenced to death vary considerably from one prison to another, depending on where they are detained. It is impossible to consider the conditions of detention of death row prisoners as a general situation: there are as many conditions of detention as there are types of prisons housing prisoners sentenced to death. It should also be noted that most of those sentenced to death interviewed passed through several other prisons before being detained where they are now. For example, an individual who attempted to escape from a medium security prison was transferred to a higher security prison. Another person sentenced to death was transferred in 2016 to Nusakambangan to be executed and then eventually transferred to another prison. The relative of a person sentenced to death, who had been transferred four times, explained that every time the prisoner was transferred his personal belongings were stolen: clothes, family photos, private letters, as well as medicines.

At Batu high risk security prison, people sentenced to death are placed in single rooms like other prisoners. Although the research team was not allowed to interview people sentenced to death in this prison²⁶⁴, the prison staff interviewed confirmed that the prison operates under the “one man, one cell” system. They reported that the 300 individual cells are 12 square feet in size and include sanitary facilities. Due to the very high security level of this prison, a 24-hour surveillance mechanism has been put in place in every corner of each cell, including in the sanitary facilities, which does not respect the privacy of the prisoners.

At super-maximum security Lapas Narkotika, death row prisoners are not separated from other prisoners. There are several types of cells: large cells that include 30 people and smaller ones that house two to four people. The prisoners interviewed indicated that there was a window in their cell but it is very small. As a result, the brightness level is low, making it difficult to read and write. Prisoners are left with a limited number of clothes and without a closet to store them. At the other prisons visited, men and women sentenced to death are also housed with other prisoners. People sentenced to death are generally held in the same cell but may also be housed with other

²⁶⁴ See supra, Section on “Methodology”.

prisoners. At Lowokwaru prison, for instance, four people, including people sentenced to death, share a 12-square foot cell. At Makassar, due to overcrowding, nine to eleven people share a 12-square foot cell. At Tangerang, the cells are larger and are shared by thirty people. The prisoners interviewed indicated that they have access to fresh air, clean water and decent lighting in these prisons. According to prison staff working there, the surveillance mechanisms are located in certain crucial areas but protect the privacy of prisoners. It should be noted that the situation of overcrowding has been reported as very stressful in other prisons where some individuals sentenced to death interviewed were previously detained. This is the case at Cipinang prison.

At all prisons visited interviewees indicated that cells generally include mattresses and toilets but that some mattresses are missing or considered very thin and some toilets humid. It is the prisoners who are responsible for cleaning their showers and toilets. Cleaning products are provided by the prison. Sanitary items (soaps, toothbrushes and shampoos) and bedding supplies are usually provided by religious organizations operating in these prisons or by families.²⁶⁵ However, at Lapas Narkotika some prisoners reported that they did not have a blanket.

ACTIVITIES AND CONTACT WITH OTHER PRISONERS

The type of activities allowed in prisons varies according to the level of security. At high risk security Batu prison and the super-maximum security Lapas Narkotika prison, only two activities are allowed for prisoners: they can access religious activities and they are allowed to walk in front of their cell for one hour per day, handcuffed and leg-cuffed, under strict supervision. The prisoners stated that they should stay near the cell. There are no sports facilities, no educational or training programs, and no library. Although prisoners may request books, prison staff explained that the books must be checked. Batu prison staff said they must “ensure that the book does not contain radical values or provocative thoughts”. At Lapas Narkotika, a prisoner interviewed reported that prison staff confiscated his books

²⁶⁵ Religious organizations are the only organizations allowed to enter prisons. Some restrictions also apply in prisons such as Batu where no external products are allowed in the prison. See infra.

and pens. He was provided with a small notebook and a ballpoint pen refill which makes it difficult to write. Due to the security level, Batu prison management does not accept any gifts from outside the prison, including gifts from families; everything is provided by the prison.

At Lowokwaru, Tangerang Makassar and Cilacap prisons, death row prisoners are allowed to socialize with other prisoners and have access to the same activities without any restrictions. Lowokwaru prison staff reported that a foreign death row prisoner had started teaching English to prisoners and prison guards. People detained in these prisons confirmed that they have access to several activities and can spend time outside their cells during the day. Arif, a death row prisoner held at Lowokwaru, reported: *“We can be outside the cell to do crafts, religious activities, sports during the day, until 5PM”*. Irene, a woman sentenced to death detained at Cilacap, indicated: *“We are obliged to stay in our cell from 5PM to 6AM, but otherwise we are free to do any activity: religious activities, sport, artistic, cultural activities”*. Makassar prison includes a football field and Lowokwaru prison provides access to a television that is placed in a hall. In these prisons, handicrafts made by the prisoners are displayed in the visiting area and can be sold during visiting hours.

Although people detained in these prisons have access to a library, the number of books is limited – there are no legal books and books are reported to be outdated. In one prison, the staff reported that the limited number of visitors in the library was due to the fact that *“the prisoners’ interest in reading is very low”*.

DISCIPLINE AND RELATIONSHIPS WITH PRISON STAFF

Prison staff reported that guards have not received any specific training on how to treat people sentenced to death: all prisoners are treated in the same way and no differences with regard to discipline or security measures are reported on the basis of prisoners’ sentences. The people sentenced to death interviewed generally considered that relations with prison staff are of good quality and did not report any patterns of violence between prisoners and guards. It should be noted, however, that several interviews taking place at Lapas Narkotika were conducted in the presence of prison guards

which may have made some answers biased.²⁶⁶ Violence against prisoners has been reported by other sources. In March 2019, a video showing the ill-treatment of prisoners transferred to Lapas Narkotika was posted on the Internet: prisoners appeared handcuffed and leg-cuffed, dragged on gravel and beaten.²⁶⁷ The prison warden of Lapas Narkotika was dismissed in May 2019. In addition, two people sentenced to death revealed that they had been beaten by guards in other prisons. Moreover, at least one person sentenced to death who had been transferred from Batu prison reported that there was bullying and discrimination against foreign African prisoners in that prison. However, the research team was not allowed to meet prisoners at this prison.²⁶⁸

All the prisons visited have isolation cells where prisoners can be placed for a few days if they commit acts of violence against other prisoners or against themselves: suicide attempts are considered reprehensible behavior. People placed in solitary confinement are not allowed to meet their families or embassies if they come to visit. One person sentenced to death was placed in solitary confinement several times because he had attempted suicide, although it is unlikely that placement in an isolation cell would improve his mental health. People sentenced to death indicated that violence between prisoners can occur but that it is not widespread.

ACCESS TO FOOD

Due to prison overcrowding, the prison staff interviewed explained that they do their best with what is provided but that they know the quantity is too limited and the food not nutritious enough. Interviewed prisoners did not generally complain about the quality of food as they are allowed to receive additional food from their families which

266 The presence of guards was a requirement of prison management in Lapas Narkotika. See supra, Section on “Methodology”.

267 CNNIndonesia (2019) *Penyiksaan Tahanan, Kalapas Narkotika Nusakambangan Dicapot*, available at: <https://www.cnnindonesia.com/nasional/20190503092109-12-391561/penyiksaan-tahanan-kalapas-narkotika-nusakambangan-dicapot> (last visited July 17, 2019); The Age (2019) *New video reveals violent treatment of prisoners in Indonesia*, available at: <https://www.theage.com.au/world/asia/new-video-reveals-violent-treatment-of-prisoners-in-indonesia-20190503-p51jt0.html> (last visited July 17, 2019).

268 See supra, Section on “Methodology”.

is allowed in all the prisons visited except Batu prison. The situation is also particularly difficult for people who do not receive any food from the outside, such as foreign nationals or people whose families live far from the prison. A foreigner sentenced to death interviewed at Lapas Narkotika said that the food was very bad: this person lost 20 kg in three months and had food poisoning after eating the food in prison.

MEDICAL CARE OF DEATH ROW PRISONERS

Physical health

All prisons visited include a medical doctor. In some prisons, such as Lowokwaru, the doctor carries out routine medical checks on prisoners but in others, such as Makassar, there is no routine check and prisoners must request access the clinic.

Discussions with prison staff revealed that the healthcare budget is 10,000,000 Rupiah (or 657 Euros) per year per prison which is equivalent to 27,400 Rupiah (or 1,72 Euros) per day for the entire population of one prison. In a prison like Batu, which houses 106 prisoners, this corresponds to a budget of 258 Rupiah (or 0.016 Euros) per day per prisoner. With such a limited budget, prisons clinics cannot provide a fair level of health services. The men and women sentenced to death complained about the lack of availability of medicine in prison clinics. A prisoner reported: *"I had diarrhea. They gave me Paracetamol because they did not have other medicine"*. This was confirmed by prison staff who explained that there were few drugs available. Prison staff at Makassar explained: *"We do not have a sufficient budget for the health of prisoners"*. To remedy this situation, Makassar and Lowokwaru prisons have signed a memorandum of understanding with local authorities to provide State Health Insurance for the prisoners: prisoners can thus have free access to the government hospital. Budi, a death row prisoner detained at Lowokwaru, said that the prison facilitated contact with the general hospital, allowing him to undergo free surgery and receive good quality follow-up medical care.

In addition, some prisons allow families to bring medicines from outside but these medicines must first be approved by the prison doctor to ensure their safety. Nonetheless, the quality of access to external medicines depends on the prison security system: it is

much more complicated at Nusakambangan island than at other prisons. Although Lapas Narkotika prison staff indicated that prisoners can access medicines from outside the prison, the people sentenced to death interviewed indicated that this is generally not the case, even if prisoners have a special prescription. One prisoner reported that the prison authorities refused to provide him with the necessary medication for his blood pressure. In another case, the prison administration provided medication to a prisoner only a few times a month, even though he had to take it every day to monitor his health. Nonetheless, prisoners may be taken to a hospital outside the island if they are seriously ill if they are transferred early enough.

People sentenced to death can also die on death row. In May 2018, Zulfiqar Ali, a Pakistani citizen detained since 2005, died of cancer at a Jakarta prison despite Indonesia's promises to return him to his family before his death.²⁶⁹

Mental health²⁷⁰

Access to mental health treatment and psychosocial support is extremely limited. All the prison staff interviewed regretted that there are no professional and permanent human resources to support the mental health of prisoners, particularly those who remain on death row for many years. According to prison staff, this need is not reflected in the central government budget.

To fill this gap, Lowokwaru prison has set up a partnership with a faculty of psychology to offer counseling sessions. However, prisoners detained at this prison reported that the support is not of high quality. As Arif explained: *"They are not professional resources"*. At other prisons some guards have participated in training to enable them to assess the mental health of prisoners. However, Makassar prison staff indicated that their expertise remains limited and that they can only do an initial assessment. Although some prisoners, such as Kevin, nonetheless reported that the kindness of some guards and other prisoners helped him avoid despair, most prisoners reported that this support is not sufficient for them. Most of them have spent years on death row and faced extremely stressful times.

269 See for instance, Human Rights Watch (2019) World Report 2019 – Indonesia, available at: <https://www.hrw.org/world-report/2019/country-chapters/indonesia> (last visited July 17, 2019).

270 For the purpose of this report, two dimensions of mental health were considered: psychological distress, and mental or psychopathological clinical disorders.

One prisoner interviewed was part of the third batch of executions in 2016 and was granted a temporary stay at the last moment, while already transferred to Nusakambangan. Ahmad, who has been detained since 2002, has made several suicide attempts and has not received any specific assistance to help him get better. On the contrary, after each suicide attempt, prison staff placed him in solitary confinement for a few days with restrictions on family visits. Irene asked to see a psychologist after being sentenced to death but prison management refused due to a lack of budget: *“I was very stressed about my case. I had to pay [for a psychologist] but I was not able to do so.”* Such execution anxiety is common among people sentenced to death and is known as *“death row syndrome”*.

As a result, many prisoners turn to religion and pray for a miracle or simply for the truth about their case to be revealed. Irene reported: *“I have my ups and downs. [...] I can no longer do anything anymore but pray”*. Budi said: *“We can only rely on God and pray for the best. [...] Anything that will happen in the future is the will of God”*. Arif indicated: *“I believe the truth will be revealed sooner or later. God will help anyone who needs his help. I will serve God for the rest of my life.”*

CONTACT WITH THE “OUTSIDE” WORLD

Contact between prisoners and the outside world is very limited and has become increasingly restricted, particularly for those detained in Nusakambangan.

Contact with families

In theory, family visits are allowed at all prisons, as provided for in Law No. 12/1995 on Corrections. In practice, access to prisoners depends on a number of factors. A first factor is the length of the visit. Since there are no regulations in this respect, each prison has its own regulations. In some prisons the duration is very short. Batu prison staff indicated that visits are allowed only once a month for a maximum duration of 30 minutes under the supervision of five prison guards. At Lapas Narkotika visitors are allowed for a maximum of one hour twice a week. At Kembang Kuning visitors are allowed three times a week.

Another obstacle is the isolation of several prisons housing people sentenced to death. This is the case with the prisons on Nusakambangan Island. In 2008, the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment stated that visits by relatives are *“extremely complicated and costly”*.²⁷¹ Visitors must register at the port of Cilacap then submit to a body scan to check if they are carrying goods. Female visitors reported that they were subjected to humiliating strip searches: they were asked to remove their underwear and their tampons. As one family relative reported: *“When I came out of the room, everyone was laughing. [...] We must let them humiliate us, otherwise we can be denied family visits. We accept because we have no choice”*. Men are not subjected to such searches. After this search, visitors must wait, sometimes for several hours, before meeting their relatives.

Moreover, visits may be complicated to organize simply because families live far from prisons. Budi said that his family lives far away and therefore does not visit him regularly. The situation is particularly difficult for foreign nationals who could go for years without seeing their relatives due to the time and budget required for these visits to take place. As a result, prisoners may spend years without seeing their spouse and children; conversely, spouses and children may spend years without seeing their spouse and parent. The wife of an individual sentenced to death explained: *“The last time I saw my husband was two years ago. From time to time, my son has a violent outbreak. I am the only one with whom he can share his anger. [...] He tells me ‘I am sad. I cannot see my dad’. He sees no future with his father.”* Separation from families creates suffering that reaches the whole family.

In some prisons prisoners can call their families by telephone using a reload card system. However, foreign nationals are subject to restrictions, particularly at Lapas Narkotika. Kevin, a foreign national sentenced to death, said: *“I have no family in Indonesia. It is difficult for me to communicate with them, even by phone. So sometimes I feel jealous”*. The relative of another foreign prisoner also indicated that the family had no contact with their relative for a long period because the telephone booths were restricted to domestic calls. This situation has improved in recent months with long-distance calls being authorized by prison management.

²⁷¹ Human Rights Council (2008), para. 34.

Finally, as mentioned above, a prisoner may be held in an isolation cell: in such cases, visitors are not allowed to see the prisoner.

Contact with lawyers and legal counsel

Discussions with respondents revealed that prisoners are not handcuffed during their meetings with the lawyers. However, according to those sentenced to death, the confidentiality of interviews with lawyers depends on the prison. In some prisons, such as Cilacap, prison staff remain outside the room. At Lapas Narkotika, meetings with death row prisoners are supervised by prison guards, something which is contrary to international standards.²⁷²

When an execution is planned, contact with the prisoners' lawyers at Nusakambangan is problematic: the port is closed and the number of people who can enter the island is restricted. In practice, this situation strongly complicates lawyers' access to prisoners, even though this is their last chance to start a clemency process. One lawyer explained: *"I had difficulties meeting [the defendant] [...] because the port guards did not allow more people to come due to the preparation of the execution. I wanted to meet [the defendant] a week before the execution but the port was closed. I could meet [the defendant] only three days before the execution."*

Contact with diplomatic missions

There are many foreign citizens in Indonesian prisons from different countries. Indonesian legislation recognizes the right for a foreign national to *"contact and speak with the representative of his country when facing the process of his case"*²⁷³ and the right to inform an embassy or consulate when a foreign national is arrested or detained in order to assist prisoners with their legal proceedings.²⁷⁴

Nevertheless, according to several prison staff interviewed it is sometimes difficult to organize contact between a prisoner and diplomatic representations. Prison staff indicated that some embassies are very active and involved. However, prison staff also reported that some countries do not have consular representation in Indonesia.

272 Rule 61(1), Nelson Mandela Rules. The research team was supervised by prison guards during the interviews with prisoners, except when the prisoner spoke a language they did not understand. See supra, Section on "Methodology".

273 Article 57(2), KUHAP.

274 Article 36(1)(c) of the Vienna Convention on Consular Relations provides that: "Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation". This Convention was ratified by Indonesia in Law No. 1/1982.

For instance, the nearest embassy for Sierra Leone is in China; it is not easy to contact the consulate to support the prisoner from Sierra Leone detained at Lowokwaru.

Contact with civil society

There are a very small number of organizations authorized to operate in Indonesian prisons. According to prison staff interviewed, the only external organizations that can enter the prisons visited are Muslim and Christian religious organizations that lead prayers and provide "religious spiritual guidance" to prisoners, and universities that work in partnership with prisons to provide psychosocial support. NGO access to prison is very strict and must go through a long bureaucratic process involving a number of stakeholders, including the police, attorney generals, courts and the Ministry of Home Affairs.²⁷⁵ Prison staff indicated that no humanitarian organizations operate in the prisons visited. In 2014, after five years without access, the International Committee of the Red Cross (ICRC) received permission to monitor detention conditions but the Government banned confidential interviews with prisoners.²⁷⁶ According to the prison staff interviewed, the ICRC has not recently visited the prisons they managed.

STEPS TOWARD INDEPENDENT MONITORING OF PLACES OF DETENTION

Discussions with prison staff revealed that there is no routine monitoring system to supervise places of detention. In 2016, following the signing of a memorandum of understanding with the Directorate General for Correction Facilities, Komnas HAM investigated the conditions of detention but the findings of the report are not public.²⁷⁷ According to the prison staff interviewed, prosecutors may also visit prisons from time to time when there is a transfer of prisoners or an imminent execution at Nusakambangan but they do not monitor conditions of detention.

In 2017, during the third cycle of its UPR, Indonesia accepted recommendations to consider future ratification of the Optional

275 US Department of State (2019), p. 5.

276 US Department of State (2016), p. 6.

277 US Department of State (2019), p. 5; US Department of State (2018), p. 6; US Department of State (2015) Indonesia 2014 Human Rights Report, p. 6.

Protocol to the Convention against Torture (OPCAT).²⁷⁸ This Protocol obliges States to establish an independent National Preventive Mechanism (NPM) which monitors places where people are deprived of their liberty and makes recommendations. The NPM is a very important tool for the prevention of torture and ill treatment. The importance of having an independent mechanism that monitors the situation of detained individuals was stressed by the relative of someone sentenced to death who said: “*There should be control procedures, an external eye, an NGO. Everything is hidden. Even NGOs find it hard to enter and when they enter they cannot ask all the questions they have*”. At the time of writing, in June 2019, a monitoring mechanism is being established, led by Komnas HAM, which includes the following other members: the Ombudsman, the Indonesia Child Protection Commission (*Komisi Perlindungan Anak Indonesia - KPAI*) and the Victim and Witness Protection Agency (*Lembaga Perlindungan Saksi & Korban – LPSK*). However, Indonesia has not yet ratified OPCAT.

CONCLUSION ON THE CONDITIONS OF DETENTION OF PEOPLE SENTENCED TO DEATH

In Indonesia, it is not the type of sentence that determines the treatment of prisoners; it is the level of security attached to each prisoner. Some people sentenced to death are held in medium security prisons, such as Lowokwaru or Cilacap: they have access to cultural, educational and sporting activities, and can meet with their families. Others are held in high risk security or super-maximum security prisons such as Batu prison or Lapas Narkotika: the only activity available is walking for one hour in front of their cells. In these prisons, there is no education, training or sports programs, no access to a library, and restrictions on medicine. There are reports of violence. Access to visitors is severely restricted. As reported by one prisoner’s relative, “*prisoners are considered animals*”. The treatment of these prisoners is not compatible with national regulations and

²⁷⁸ Recommendations from Bosnia and Herzegovina, Czechia, Denmark, France Georgia, Guatemala, Hungary, Kazakhstan, Montenegro, Mozambique, Portugal, Turkey. See Indonesia (2017) Responses to Recommendations, 3rd review, 27th session, available at: https://www.upr-info.org/sites/default/files/document/indonesia/session_27_-_may_2017/response_to_recommendations_indonesia_2017.pdf (last visited July 17, 2019).

international standards. The absence of independent monitoring of prisons contributes very significantly to the situation. The mental health of those sentenced to death is particularly problematic. In all prisons no professional support is provided to address suicide attempts and depression. Many men and women sentenced to death have been detained on death row for decades and are deprived of any possibility to look towards the future. They fear executions which can take place at any time.

EXECUTIONS



Selfportrait by Myuran Sukumaran – 2013

"I don't know if it will be painful or not." - Faisal

PRE-EXECUTION PROCESSES

The three batches of executions in 2015 and 2016 took place on Nusakambangan island, a 210-square kilometer island off the coast of Java.²⁷⁹ This island, which served as a penal colony under the Dutch regime, is also known as "Execution island". Tourism has increased on the island as a result of media coverage of executions.²⁸⁰

The execution process is strictly regulated by Decree No. 2/1964 on Procedures for Death Penalty Execution Imposed by Court within the General and Military Court System. This Decree provides that executions take place out of the sight of the public.²⁸¹ People sentenced to death must be notified of the imminent execution at least 72 hours before the execution and they are entitled to a final request, including the right to meet their families. Several violations of this regulation were reported during recent executions and a few people sentenced to death did not have the opportunity to meet their relatives before being shot.²⁸² People sentenced to death must be isolated and separated from other prisoners pending their execution, as provided by the law²⁸³, although this form of solitary confinement has been considered ill treatment and torture at international level.²⁸⁴ Discussions with lawyers, however, revealed that those executed in 2015 remained together in a single room before their execution.

279 Those are not the first executions to take place on the island. Several people were shot at Nusakambangan in 2008, including those convicted for the 2002 Bali bombing.

280 The Jakarta Post (2015) Tourism on the rise on Execution island, available at: <https://www.thejakartapost.com/news/2015/08/07/tourism-rise-execution-island.html> (last visited July 17, 2019). See also ABC (2015) 'Execution island: Inside Indonesia's Nusakambangan jail where Andrew Chan and Myuran Sukumaran are set to be put to death, available at: <https://www.abc.net.au/news/2015-03-04/bali-nine-inside-nusakambangan-island-prison/6129300> (last visited July 17, 2019).

281 Article 9, Law No. 2/PNPS/1964 and Article 271, KUHP.

282 Law No. 2/PNPS/1964 provides that the Attorney General's Office of Indonesia must notify prisoners and their relatives 72 hours before the execution. In some cases, the execution was carried out less than 72 hours after the notification or no notification was received by families. See KontraS, FIDH and Center of Human Rights Law Studies (2016), p. 4.

283 Article 5, Law No. 2/PNPS/1964.

284 Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (2012) Interim report to the 67th session of the UN General Assembly, A/67/279.

SHOOTINGS

Article 11(4) provides that the prisoner's eyes must be covered unless the person sentenced to death refuses to do so. Several prison staff at Nusakambangan reported that someone who was recently executed refused to cover his eyes. He moved during the shooting and the bullet missed the target. He had to be shot again at gunpoint.

KontraS' monitoring of the 2015-2016 executions revealed that many people died in pain before being officially declared dead by the medical team. Someone shot in the first batch of executions was declared dead 35 minutes after being executed. All the executed prisoners in the second batch of executions were declared dead 27 minutes after being executed. A priest, who was present at several of the third batch executions, reported that it can take up to 15 minutes to die. According to many, this is a form of ill treatment which is prohibited by the Convention against Torture.²⁸⁵ The level of suffering induced by non-instantaneous death in executions was challenged in 2008 before the MKRI. The court considered that *"the pain that arises and is inherent in the execution of capital punishment is something that is unavoidable in every method of capital punishment execution"*.²⁸⁶ Consequently, the MKRI rejected the petition.

Fear of pain and suffering during execution is the greatest fear among the death row prisoners interviewed. Budi said: *"I do not know if they suffer before they actually die"*.

CONCLUSION ON EXECUTIONS

After decades on death row, people sentenced to death may be transferred to Nusakambangan for execution. They may be shot, sometimes without being able to see their relatives. Several people, including prison staff, witnessed the high level of mental and physical pain and suffering endured during executions.

Some prison staff interviewed stated that they regret the execution

285 Joint Stakeholders Report on Issues relating to the Death Penalty (2017), p. 2. See also KontraS, FIDH and Center of Human Rights Law Studies (2016), pp. 4-5.

286 Decision 21/PUU-VI/2008, Nurhasyim versus State in Newton, M.A. (2010) Terrorism - International Case Law Reporter 2008, Vol 1, p. 138. Oxford University Press.

of people sentenced to death. According to them, people were shot dead even though they had improved their behavior and were having a positive influence on other detainees. Several prison staff said that the Government should change its position on the death penalty: *“Do not let a death row prisoner who has already faced so many years in prison, with good behavior, be executed. It must be taken into consideration that they had already paid their debts”*. Another prison staff member, who observed two executions, reported: *“Watching them get shot when [...] we know that they changed to become a better person, it is difficult. [...] We have pity on them. We think that the Government should rethink the sentence if the person has been imprisoned for more than ten years”*.

CONCLUSION

The purpose of this report was to inform policy makers and actors in the criminal justice system about the situation of men and women sentenced to death in Indonesia. This report shows that more people have been executed during 20 years of democracy (1999-2019) than during more than 50 years of autocratic rule (1945-1999). One of the main reasons for this phenomenon is the “war on drugs” declared by the authorities to combat drug-trafficking in the region: more than 140 people have been charged with drug-trafficking and sentenced to death since 2014. Most people sentenced to death for drug-related crimes are foreign nationals. NGOs estimate that 236 to 308 people were on death row in 2018.

Over the past five years, 18 people – all convicted of drug-related crimes – have been shot by firing squad, despite numerous reports that showed that many of them did not receive a fair trial: several people were tortured or ill-treated during the investigation, or did not have access to a good defense, mainly due to their poor socio-economic situation, or to appropriate interpretation. In these circumstances, the risk of miscarriage of justice is very high. Interviews with people currently on death row confirm this situation.

While some people sentenced to death are placed in medium security-risk prisons, others are held in prisons with limited contact with the outside world. Some of them spend their days locked in their room without anything to do except for an hour’s walk in front of their cell. Acts of violence committed by prison guards have been illustrated by recent videos. None of the people who have attempted suicide or suffer from depression have been treated by mental health professionals. To date, there is no independent monitoring mechanism to prevent torture and ill treatment in places where people are deprived of their liberty. Although no executions have taken place since 2016, men and women sentenced to death may be transferred without notice to Nusakambangan, Execution Island, and shot within a few days.

In recent years, the number of prominent political and religious figures, institutions and organizations that have taken a stand in favor of abolition has increased. In 2006 and 2008, Abdurrahman Wahid, former president and former chairman of Nahdlatul Ulama – the largest independent Islamic organization in the world – publicly

RECOMMENDATIONS

stated his opposition to the death penalty for corruptors²⁸⁷ and people accused of apostasy.²⁸⁸ In 2016, former president Habibie publicly denounced use of the death penalty.²⁸⁹ Since 2017, Komnas HAM has been calling for abolition of the death penalty.²⁹⁰

The abolitionist movement is increasingly well-organized. KontraS is a member of the World Coalition Against the Death Penalty in Indonesia and a member of the regional Anti-Death Penalty Asian Network (ADPAN). KontraS has joined forces with other stakeholders in the “Coalition against Death Penalty in Indonesia” (HATI). HATI is composed of the most important human rights and research organizations in the country: KontraS, Imparsial, ICJR, Jakarta Legal Aid, Community Legal Aid, Indonesia Legal Aid Foundation and the Indonesian Church Coalition. Every October 10 – World Day Against the Death Penalty – HATI raises awareness about the death penalty, calls on the public to become more involved and more critical of the authorities’ policy, and campaigns in favor of abolition at national level.²⁹¹ In 2018, many activities were carried out to advocate for abolition reaching Parliamentarians, NGOs, lawyers, legal aid organizations and researchers. The abolition movement is gaining more and more weight in the public debate and some results have been noted.²⁹² Although limited, these results suggest there is hope for change in Indonesia’s public position on the death penalty.

287 NUonline (2008) Gus Dur disagrees with death sentence for corruptors, available at: <https://www.nu.or.id/post/read/29280/gus-dur-disagrees-with-death-sentence-for-corruptors> (last visited July 22, 2019).

288 It must nonetheless be noted that apostasy is not an offence punishable by death in Indonesia. The Washington Post (2006) Extremism Isn’t Islamic Law, available at: https://www.washingtonpost.com/archive/opinions/2006/05/23/extremism-isnt-islamic-law/ef481abd-d979-47df-93fd-25f0df8ec9df/?utm_term=.cde11729ac22 (last visited July 22, 2019).

289 Asian Correspondent (2016) Indonesia: Former president BJ Habibie calls for end to death penalty, available at: <https://asiancorrespondent.com/2016/06/indonesia-bacharuddin-habibie-death-penalty/> (last visited July 17, 2019).

290 Komnas HAM, Indonesia, 3rd UPR (2017), para.8, available at: https://www.upr-info.org/sites/default/files/document/indonesia/session_27_-_may_2017/komnas_ham_upr27_idn_e_main_rev.pdf

291 See HATI’s press release in October 2018, available at: <http://kontras.org/backup/home/?id=2536&module=pers> (last visited July 17, 2019).

292 A review of the Criminal Code that includes the death penalty as an alternative sentence, rather than a primary punishment, has been considered by many organizations as progress towards abolition. See ABC (2018) Indonesian death penalty laws to be softened to allow reformed prisoners to avoid execution, available at: <https://www.abc.net.au/news/2018-01-11/indonesia-to-soften-death-penalty-stance/9320900> (last visited July 17, 2019). SBS (2017) The journey from death row, available at: <https://www.sbs.com.au/topics/life/feature/journey-death-row> (last visited July 17, 2019).

The recommendations of this study are based on the interviews and research carried out.

RECOMMENDATIONS TO THE STATE OF INDONESIA

Commit to abolition of the death penalty

- Establish a moratorium on all executions with a view to abolishing the death penalty;
- Ratify the Second Optional Protocol to the ICCPR aiming for abolition of the death penalty and support the UN Resolution on the establishment of a universal moratorium on application of the death penalty;
- Commute the sentences of all those sentenced to death to life imprisonment;
- Re-try all cases where the procedure was flawed.

Remove the death penalty from all domestic laws and regulations

- Remove capital punishment from all draft piece of legislation, including the RKUHP and the draft anti-terrorist law;
- Bring national legislation, including the KUHP, the Military Code, the Anti-Terrorist Law, the Anti-Corruption Law, the Narcotics Law, etc., into line with international standards by removing all offences that are not the “most serious crimes”, as defined by the Human Rights Committee in 2018, from the scope of the death penalty.

Prevent torture and ill treatment during police investigations

- Define torture in the national legal framework and ensure that its definition complies with the Convention against Torture;
- Train police forces about the absolute prohibition of torture and ill treatment;
- Guarantee that interviews with accused individuals during the police investigation phase are conducted in official police offices;
- Ensure that alleged victims of torture or ill treatment have access to a forensic examination as soon as possible;
- Amend the legislation to ensure that all accused individuals are

brought promptly before a judge, within a maximum of 48 hours after their arrest.

Ensure high quality representation for people facing the death penalty

- Ensure that experienced, independent and competent lawyers represent those facing the death penalty as soon as they are arrested and throughout the judicial process;
- Significantly increase the budget allocated to legal aid;
- Take steps to increase the number of legal aid offices in all provinces throughout the country.

Improve the rights of minorities and foreign nationals

- Guarantee the presence of an interpreter for all those who do not understand Bahasa Indonesia during the investigation phase and throughout the process, including the translation of reports and documents;
- Take steps to contact all the diplomatic representatives of those sentenced to death, including those with no representation in Indonesia, from the investigation phase if the accused so wishes.

Ensure additional training of judicial professionals

- Ensure that all allegations of torture and ill treatment are thoroughly investigated by judges;
- Guarantee that all information obtained under torture or duress is declared inadmissible;
- Train judges on the prohibition of the death penalty for minors and people with mental illness;
- Ensure that people sentenced to death who have a mental illness have access to a psychiatric examination and place them in an institution appropriate for their state of health.

Lift restrictions to the access to appeal and clemency processes

- Amend the law to ensure that Indonesian and foreigners can challenge the constitutionality of national laws and regulations before the MKRI without discrimination;
- Ensure transparency on clemency processes. In particular, publish the names of people sentenced to death who have been granted and denied clemency;
- Ensure that all clemency petitions are meaningfully considered and that no one, including people convicted of drug-related crimes, is *a priori* excluded from clemency procedures.

Improve the conditions of detention of people sentenced to death

- Investigate all cases of ill treatment against prisoners;
- Amend the prison regulations to comply with international standards, including the Nelson Mandela Rules, for all categories of prisons, including Batu high risk security prison;
- Train prison guards on the treatment of detainees, including the specificity of housing death row prisoners;
- Modify the prison surveillance system so that it respects the privacy of prisoners;
- Ensure that regulations clearly describe the treatment of prisoners, including with regards to family visits, bedding, education, healthcare, library or sport.
- Allow social, cultural, education and sporting activities for all male and female prisoners, in particular those sentenced to death;
- Ensure a psychological support program, implemented by qualified professionals, for men and women sentenced to death;
- Guarantee that people sentenced to death receive unhindered visits from their families and increase the number and length of visits per week;
- Ensure that all prisoners can contact their family by telephone. Guarantee that foreigners have access to telephones that allow international calls;
- Increase the healthcare budget to provide adequate medicine for prisoners. Allow prisoners access to medicines appropriate for their medical conditions;
- Increase the food budget to improve the quantity and quality of food provided, especially in prisons where visitors are not allowed to bring food to their relatives;
- Ensure that hygiene products are available to all prisoners in sufficient quantity;
- Ensure that meetings with lawyers taking place in prisons are not supervised by prison guards;
- Allow unrestricted access to NGOs and humanitarian organizations to all prisons and to all prisoners to enable them monitor prison conditions and support prisoners.

Establish an independent mechanism to prevent torture and ill treatment

- Ratify OPCAT and lodge the ratification instruments with the UN;
- Ensure that the future NPM is under the responsibility of independent institutions and involves civil society organizations in the monitoring;
- Guarantee that the NPM will be allowed to visit any place where people are deprived of their liberty, including places where preliminary investigations take place, at any time and without hindrance.

Publish data on the death penalty

- Publish annual data on the number of people sentenced to death, the nature of the offences for which they have been sentenced, the number of people sentenced to death being detained, their nationality, the place where they are being detained, the number of people sentenced to death who have died in prison, the reasons for their deaths, and the number of death sentences commuted or confirmed before the Supreme Court.

RECOMMENDATIONS TO KOMNAS HAM

Strengthen the monitoring of prisons and detention centers

- Organize more regular visits to places of detention, paying particular attention to people sentenced to death and those placed in prisons with significant security risks (maximum security risk, super-maximum security risk and high security risk prisons);
- Publish reports on the conditions of detention.

RECOMMENDATIONS TO THE ABOLITIONIST MOVEMENT

Increase the mobilization of abolitionist actors

- Strengthen advocacy on the conditions of detention of people sentenced to death, particularly those detained in prisons with significant security risks;
- Increase training and awareness about conditions of detention and the prohibition of torture and ill treatment for several groups including police forces, prison staff, lawyers, civil society organizations, religious leaders and Parliamentarians.

RECOMMENDATIONS TO REGIONAL AND INTERNATIONAL COOPERATION STAKEHOLDERS

Ensure high-level advocacy

- Advocate for abolition of the death penalty;
- Advocate for the prevention of torture and ill treatment in prisons and raise awareness among officials of international standards, including the Nelson Mandela Rules and the 2018 Human Rights Committee's General Comment on the right to life;
- Advocate for the access of NGOs and humanitarian organizations in prison settings.

APPENDIX

APPENDIX 1: RATIFICATION STATUS OF HUMAN RIGHTS INSTRUMENTS (INDONESIA)

Treaty	Signature date	Ratification date; Accession date (a)
CAT - Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	23 Oct 1985	28 Oct 1998
OPCAT - Optional Protocol of the Convention against Torture		
CCPR - International Covenant on Civil and Political Rights		23 Feb 2006 (a)
CCPR-OP2-DP - Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty		
CED - Convention for the Protection of All Persons from Enforced Disappearance	27 Sep 2010	
CEDAW - Convention on the Elimination of All Forms of Discrimination against Women	29 Jul 1980	13 Sep 1984
CERD - International Convention on the Elimination of All Forms of Racial Discrimination		25 Jun 1999 (a)
CESCR - International Covenant on Economic, Social and Cultural Rights		23 Feb 2006 (a)
CMW - International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	22 Sep 2004	31 May 2012
CRC - Convention on the Rights of the Child	26 Jan 1990	05 Sep 1990
CRC-OP-AC - Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	24 Sep 2001	24 Sep 2012
CRC-OP-SC - Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	24 Sep 2001	24 Sep 2012
CRPD - Convention on the Rights of Persons with Disabilities	30 Mar 2007	30 Nov 2011

Source: United Nations Office of the High Commissioner for Human Rights https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN (accessed on 01/04/2019)

APPENDIX 2: REGULATIONS PROVIDING FOR THE DEATH PENALTY

Regulations in *italics* are no longer applicable.

KUHP	Articles 104, 111(2), 124(3), 127, 140, 340, 365(4), 368(2) and 444
Military Criminal Code	Articles 64, 65, 67, 68, 73(1) to 73(4), 74(1) and 74(2), 76(1), 82, 89(1) and 89(2), 109(1) and 109(2), 114(1), 133(1) and 133(2), 135(1) and 135(2), 137(1) and 137(2), 138(1) and 138(2) and 142(2)
Emergency Law No. 12/1951 relating to firearms	Article 1(1)
Presidential Decree No. 5/1959 on the Authority of the Attorney General in Terms of Aggravating the Threat of Punishment against Acts that Endanger the implementation of Food and Clothing Supplies	Article 2
Government Regulation in lieu of Law No. 21/1959 on increasing the Punishment for Crimes against the Economy	Articles 1(1) and 1(2)
<i>Law No. 11/PNPS/1963 on the Eradication of Subversive Activities</i>	<i>Revoked during Reformasi</i>
<i>Law No. 31/PNPS/1964 relating to Basic Provisions of Atomic Energy</i>	<i>Revoked in 1997 – replaced by Law No. 10/1997 on Nuclear Energy</i>
Law No. 4/1976 on the Ratification and Addition of Several articles in the Criminal Code in relation to the extension of the implementation of Law on Aviation Crimes and Crimes against the Facilities /Infrastructures of Aviation	Article 479(k)(2) and 479(o)(2)
Law No. 5/1997 on Psychotropic Drugs	Article 59(2)
Law No. 26/2000 on Human Rights Courts	Articles 36, 37, 41 and 42(3)
Law No. 20/2001 on Corruption	Article 2(2)
Law No. 23/2002 on Child Protection (as amended in 2016)	Article 89(1)
Law No. 15/2003 on Combating Criminals Acts of Terrorism (as amended in 2018)	Articles 6, 8, 9, 10, 14, 15 and 16
Law No. 35/2009 on Narcotics	Articles 113, 114, 116, 118, 121 and 133

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APPENDIX 4: PRESENTATION



ECPM (Together Against the Death Penalty) is a French NGO working for the universal abolition of the death penalty under all circumstances.

Proximity to prisoners sentenced to death

ECPM carries out and publishes investigations into death row, supports victims of the death penalty, prisoners and their families, and supports correspondence with prisoners sentenced to death.

Advocacy with the highest authorities

ECPM has obtained ECOSOC status which guarantees a presence and the possibility of advocating at the very heart of the UN system, and initiated the creation of the World Coalition Against the Death Penalty in 2002. Along with the World Coalition, ECPM leads advocacy and public mobilisation campaigns with political decision-makers (European Union, African Commission on Human and Peoples' Rights, governments, etc).

Uniting abolitionists from across the world

ECPM is the founder and organiser of the World Congresses Against the Death Penalty. These events bring together more than 1,300 people representing the world abolitionist movement. Ministers, parliamentarians, diplomats, activists, civil society organisations, researchers and journalists come together every three years to strengthen their ties and draw up strategies for the future.

Education and awareness of abolition

ECPM works in schools to encourage young people to support the issue through drawing competitions, introductions to journalism and free class visits – with the participation of specialists, individuals previously sentenced to death or the families of prisoners sentenced to death. ECPM raises awareness among the public of the situation of minorities and vulnerable groups by participating in Gay Pride, the Fête de l'Humanité, Cities for Life, the World Day Against the Death Penalty, World Human Rights Day, etc.

Strengthening the capacities of local actors and taking action with them

ECPM fights against the isolation of activists wherever the death penalty remains by supporting the formation of national and regional coalitions against the death penalty, as well as the creation of networks of abolitionist parliamentarians and lawyers. ECPM encourages efficiency among its local partners by organising training sessions and advocating at all political levels for their work to be supported.



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

The Commission for the Disappeared and Victims of Violence (**KontraS**) is a human rights NGO based in Jakarta, Indonesia. KontraS has consistently undertaken efforts to campaign for abolition of the death penalty in Indonesia as one of KontraS focus issues. In order to get solid support for this movement, KontraS has taken an active role both in regional and global networks, namely the Anti-Death Penalty Asia Network (ADPAN) and the World Coalition Against Death Penalty (WCADP), to bring attention to the issue. By using different approaches, such as mainstream campaigns, human rights research and continuous advocacy, KontraS hopes to shift both the public and government paradigms on how to legitimately use the rule of law to address human rights issues in Indonesia.

DEHUMANIZED: THE PRISON CONDITIONS OF PEOPLE SENTENCED TO DEATH IN INDONESIA

“When I came out of the room, everyone was laughing. [...] We must let them humiliate us, otherwise we can be denied family visits. We accept it because we have no choice”. Relative of someone sentenced to death on Nusakambangan Island.

“Watching them get shot, when [...] we know that they changed to become a better person, it is difficult. [...] We pity them. We think that the Government should rethink the sentence if the person has been imprisoned for more than ten years”. A prison staff member from Bali Kerobokan Prison.

This book is derived from a fact-finding mission carried out in Indonesia from December 2018 to May 2019 by KontraS and ECPM (Together Against the Death Penalty). It was led by three KontraS members who conducted semi-directive individual interviews with death row prisoners, prison directors and wardens, and lawyers in Indonesia. Given that the investigation team could not be deployed in all the prisons that house people sentenced to death, they selected eight prisons which represent different types of prison. Other interviews were conducted by the author of the report, Carole Berrih, Director of Synergies Coopération, with relatives of people sentenced to death and lawyers. Carole Berrih accurately uses all the accounts collected and puts them into context within the country’s criminal and penitentiary systems.

This report is part of the “Fact-Finding mission on death row” collection which aims to make an assessment of living conditions on death row in various countries across the world. The goal is both to report on the reality of death penalty and to engage public opinion.



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