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IN THE 2023 CRIMINAL CODE AND THE 2025 CRIMINAL PROCEDURE CODE

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A Footnote on the Death Penalty in the 2023 Criminal Code and the 2025 Criminal Procedure Code

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INTRODUCTION

A Footnote on the Death Penalty within the Criminal Code of 2023

The efforts to establish safeguards for the death penalty have not been without criticism. It is not the lack of importance, yet, because the issue of arbitrariness within the death penalty will always persist. Saul Lehrfreund and Roger Hood argue that the subjectivity in imposing the death penalty merely shifts to those who establish the criteria for imposing it and to law enforcement officials when applying those guidelines.[1] In other words, it is not a matter of finding the safest way to impose the death penalty, but the debates on the death penalty should cease to exist.

This is a perspective that the authors fully understand. However, the creation of these safeguards is not intended to legitimize the death as long as the safeguards within this writing remain. The safeguards within this document serve as a complement to the provision of the 2023 Criminal Code, which, to a certain extent, still recognizes the existence of the death penalty. The objective is simple, which is to ensure that the imposition of the death penalty is applied by judges strictly and selectively.

With the enactment of the Criminal Code No. 1 of 2023 (hereinafter referred to as the 2023 Criminal Code), which will take effect in 2026, there are new developments regarding the death penalty, namely: (1) several changes regarding offenses punishable by death; (2) the possibility of commutation of the death penalty to life imprisonment; and (3) the change in the status of the death penalty from its previous classification as a principal punishment to a distinct category of punishment, namely a special punishment.

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1 Saul Lehrfreund and Roger Hood, The Inevitability of Arbitrariness: Another Aspect of Victimisation in Capital Punishment Laws in Death Penalty and the Victims, (New York; United Nations 2016), pg. 140-141.

First, there are two offenses that were punishable by death according to the previous Criminal Code but have been amended in the 2023 Criminal Code, namely Article 140 (2) and (3)/Article 224 the 2023 Criminal Code and Article 44 Criminal Code/Article 544 the 2023 Criminal Code.[2] *Second,* the 2023 Criminal Code opened the door to commutation for those sentenced to death under 2 (two) conditions, namely:

1. If, during the 10-year probationary period, the convicted demonstrated commendable conduct, then the sentence may be commuted from the death penalty to life imprisonment through Presidential Decree upon the recommendation of the Supreme Court; and
2. If, the person sentenced to death has met the requirement for execution, yet the state has not carried out the execution for 10 (ten) years, their sentence shall be commuted to life imprisonment by Presidential Decree.

Third, the important change within the 2023 Criminal Code is regarding the classification of the death penalty as a special category of criminal offense. However, the shift of paradigm is not followed by an adequate explanation on the intent and purpose. In fact, there is no specific provision indicating a shift of paradigm from the previous Criminal Code. Instead, the 2023 Criminal Code contains more detailed and firm provisions regarding criminal penalties within the main criminal cluster, as seen in Article 79, Article 71, Article 80, and Article 85.

While not dismissing the positive changes introduced the 2023 Criminal Code, these changes were not accompanied by efforts to strengthen the adjudication phase through strict and selective law enforcement standards when imposing the death penalty, including in the Criminal Procedure Code No. 20 Year 2025 (hereinafter referred to as the 2025 Criminal Procedure Code). Whereas the issue of the death penalty does not only happen when a court verdict is issued, as these problems emerge as early as the adjudication phase. For example, in India, there is a *'lethal lottery'* phenomenon, which refers to the inconsistency of the courts' approaches when assessing the category of a criminal offense

2 Under the previous Criminal Code, the death penalty could be imposed for the following criminal offenses: (a) Article 104 concerning treason against the President and Vice President; (b) Article 111 (2) concerning treason involving the incitement of a foreign state to wage war or engage in hostilities; (c) Article 124 (3) regarding aiding the enemy in war under certain conditions; (d) Article 140 (3) regarding treason resulting in the death of the head of a friendly state; (e) Article 340 regarding premeditated murder; (f) Article 365 (4) regarding robbery with violence resulting in death or serious injury, and committed by two or more persons; (g) Article 444 regarding the hijacking of a vessel with violence resulting in the death of the captain, commander, or vessel leader; (h) Articles 479k and 479o (2) regarding aviation crimes resulting in death or damage to an aircraft.

punishable by death.[3] It is as if appearing in court is like a lottery, waiting to see what sentence the judge will impose. In Indonesia, the inconsistency is also common, especially with narcotics cases. There is still not consistent pattern in the imposition of the death penalty regarding aggravating circumstances, the defendant's role, the weight of the narcotics evidence, and recidivism.[4]

For that purpose, this paper is intended to serve as a guide for lawmakers and other decision-makers, reflecting state's paradigm shift in treating the death penalty as a special form of punishment. The footnotes on the death penalty within the 2023 Criminal Code within this writing will be divided into two main focuses. First, regarding the adjudication process, ranging from substantial matters related to the standard for imposing the death penalty to procedural matters related to the criminal procedure law.

3 Ibid., pg. 151.

4 Hisyam Ikhtiar Mulia et al., Faktor-faktor Penentu Hukuman Mati di Indonesia: Sebuah Indikator, LBH Masyarakat, (Jakarta: Lembaga Bantuan Hukum Masyarakat, Indonesia Judicial Research Society, and Reprieve 2022), pg. 51-62.

Chapter I

Identifying the Principles Governing the Applicability of the Death Penalty to Specific Cases

1. The Death Penalty in Indonesia

Since its independence, Indonesia has recognized and imposed the death penalty, considering that, at that time, the existing Criminal Code was adapted from the Dutch Criminal Code, which still ruled the death penalty as one of its principal punishments.[1] Now, with the implementation of the 2023 Criminal Code, there have been no significant changes to the types of criminal offenses punishable by death. The 2023 Criminal Code reclassifies the death penalty, which was previously a principal punishment, into a special punishment that is always imposed as an alternative.[2] In addition to the 2023 Criminal Code, sectoral laws also continue to regulate the application of the death penalty. The types of criminal offenses still punishable by death in Indonesia include:

1. Article 191 of the 2023 Criminal Code about the act of treason with the intent to kill or deprive the President and/or Vice President of their liberty;
2. Article 192 of the 2023 Criminal Code about acts of treason intended to place Indonesian territory under foreign control or to secede from Indonesia;
3. Article 212 (3) of the 2023 Criminal Code about aggravated punishment for acts of aiding the enemy or harming the state for the benefit of the enemy during wartime;

1 Article 10 Wetboek van Strafrecht.
2 Article 67 Law No. 1 of 2023 on Criminal Code.

4. Article 459 of the 2023 Criminal Code about premeditated murder;
5. Article 479 (4) of the 2023 Criminal Code regarding aggravated robbery with violence;
6. Article 588 (2) of the 2023 Criminal Code regarding crimes against the safety of the aircraft resulting in death or destruction of the aircraft;
7. Article 598 of the 2023 Criminal Code regarding crimes of genocide;
8. Article 599 of the 2023 Criminal Code regarding crimes against humanity;
9. Article 600 of the 2023 Criminal Code regarding crimes of terrorism;
10. Article 610 (2) of the 2023 Criminal Code regarding the production, importation, exportation, and distribution of narcotics;
11. Article 114(2), Article 116(2), Article 119(2), and Article 121(2) of Law No. 35 of 2009 on Narcotics (the Narcotics Law), which govern the distribution of narcotics and the administration of narcotics to others;
12. Article 59 (2) from Law No. 5 of 1997 on Psychotropic Substance regarding the production, distribution, importation, ownership, and organized control of psychotropic substances;
13. Article 8, 9, 10, 10A, 14, and 15 of Government Regulation in Lieu Law No. 1 of 2002 regarding Eradication of Terrorism amended by Law No. 5 of 2018 regarding the acts of terrorism and the types of conduct that constitute acts of terrorism;
14. Article 89 (1) of Law No. 23 of 2002 regarding Child Protection as last amended of Government Regulation in Lieu of Law No. 1 of 2016 regarding criminal penalties for every person who involves a child in the abuse, production, and distribution of narcotics and psychotropics;
15. Article 2 (2) of Law on the Eradication of Corruption Crimes, which addresses corruption offenses under specific conditions, such as national disasters and economic crises;
16. Article 81(5) of Government Regulation in Lieu of Law No. 1 of 2016 Amending the Child Protection Law regarding the repeated sexual intercourse with a child that results in serious injury, mental disorder, infectious disease, or impairment or loss of reproductive function.
17. Article 1(1) of the -Emergency Law No. 12 of 1951 Amending the "Ordonnantie Tijdelijke Bijzondere Strafbepalingen" which regulates the unauthorized acts of bringing into Indonesia, manufacturing, receiving, importing, attempting to acquire, delivering, possessing, storing, transporting, concealing, using, or removing from Indonesia any firearm, ammunition, or explosive.

The most common cases that have resulted in the most death sentences within the last few years (as evidenced by the number of death row inmates waiting for execution) are drug-related cases. By the end of 2024, there were 562 people in total sentenced to death. From the total, 380 of those sentenced to death (68%) were convicted of drug-related offenses. The next highest numbers were death row inmates convicted of premeditated murder (141 people) and theft (13 people). Several other types of offenses have contributed to the death row population, but the numbers are not significant in comparison to the inmates from the three previous offenses mentioned.[3]

Although the 2023 Criminal Code no longer classifies the death penalty as a principal punishment but rather as a special punishment, the 2023 Criminal Code has not provided a clear explanation on the implementation of the special punishment. In terms of the wording of the provisions, the death penalty remains explicitly linked to the offenses for which it is prescribed. Thus, similar to the situation when the previous Criminal Code was still in place, the judge may still deliver a death sentence without the need for special considerations that would make the imposition of the death penalty more stringent. Yet, the 2023 Criminal Code positions the death penalty as a last resort to prevent criminal acts and to protect society.

Procedurally, the only distinction in the 2023 Criminal Code is that the imposition of death penalty on an individual will result in a 10-year probationary period for the condemned to assess any improvement in their conduct. Furthermore, the 2023 Criminal Code does not establish any special provision. Instead, one of the most defining characteristics of the death penalty is the fact that it is the most severe punishment and is irreversible once the condemned has been executed. Therefore, the key aspect of the "special nature" of the death penalty should be meticulous case review and the strict and selective application of the death penalty. It is important as violations of the rights of suspects and defendants still occur frequently in criminal proceedings, in which it could potentially lead law enforcers to mishandle or wrongfully convict an individual, or prevent a suspect or defendant from presenting effective defense in their case.

3 Ove Syaifudin Abdullah, et al., Laporan Situasi Kebijakan Pidana Mati di Indonesia 2024: Transisi Semu Menuju Transformasi, (Jakarta: Institute for Criminal Justice Reform, 2025), pg. 21-22.

The discussion in this chapter will present and analyze examples of the use of special principles in the imposition of the death penalty by courts in several countries. The aim is to find and identify strict principles for determining which cases warrant the death penalty and which do not. The countries that have been chosen to be discussed in this chapter are those identified as still having the death penalty in their legal system and whose courts adhere to certain standards or principles, whether in the form of judicial precedents or statutory regulations when imposing the death penalty. It is highly likely that there are courts in other countries that apply specific standards or principles in imposing the death penalty. However, the discussion focuses on India, Japan, and Singapore because the relevant sources are relatively more abundant and easier to access. The author hopes that, through the discussion in this chapter, law enforcement agencies can adopt similar standards or principles in applying the death penalty in Indonesia. Thus, law enforcement agencies can apply the death penalty in a highly selective and non-arbitrary manner, ensuring its application aligns with the spirit of the 2023 Criminal Code.

2. Principles in Imposing the Death Penalty in Various Countries

2.1 India

In its criminal code, India lists various crimes punishable by death, among them murder, sexual violence, terrorism, and organized crimes resulting in death. Overall, the types of crimes that are most frequently punishable by death in India are murder and sexual violence,[4] particularly sexual violence towards children, whether it results in the victim's death or not.[5]

In examining and adjudicating cases punishable by death, the criminal justice system in India recognizes and applies the "rarest of the rare" principle. The principle was first introduced by a decision of the Supreme Court of India in the

4 Project 39A, Annual Statistics Report 2024, (Delhi: National Law University, 2025), pg. 6.

5 Interview with Shreya Rastogi, Director of Litigation and Forensic Science at The Square Circle Clinic NALSAR University of Law, on 13 November 2025.

case of Bachan Singh v. State of Punjab in 1980. The Supreme Court of India used the "rarest of the rare" principle by referring to the provisions of Article 354 (3) of the Indian Code of Criminal Procedure of 1973. The provision stated that in imposing the death penalty, the court must elaborate special reasons underlying the imposition, in addition to the general grounds for sentencing.[6]

In the case of Bachan Singh v. State of Punjab[7], the Supreme Court of India interpreted Article 354 (3) with the understanding that imposing life imprisonment is the standard rule, and the death penalty is only imposed in cases involving special or exceptional circumstances.[8] In this context, the Supreme Court of India explained that the death penalty cannot be imposed except in rare and extreme cases and the alternative of the death penalty, which is a life imprisonment, is not commensurate to the offender's crime.[9]

However, the Supreme Court of India in its ruling did not establish criteria for determining whether a case is "rarest of the rare". Thus, the court of India does not have a clear guide on how to judge whether a case fulfills the principle of "rarest of the rare" or not. Nonetheless, there are several important aspects of the Bachan Singh v. State of Punjab decision. In the decision, the Supreme Court of India explained that in assessing the existence of special or extraordinary reasons of a crime, the court must examine the act and the perpetrator, as well as the aggravating and mitigating factors.[10] The Supreme Court of India provided the following analogy: it is agreed upon that murdering another person is a cruel act, yet cruelty may vary according to the degree of culpability. Therefore, the application of "special reasons" by the court that opened the door to the death penalty may only be applied when the crime has reached an extreme

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6 The Criminal Procedure Code of India was amended in 2023, such that the provisions of Section 35 4(3) of the Criminal Procedure Code 1973 have now been renumbered as Section 393(3) of the Criminal Procedure Code of India 2023. Substantively, the content of Section 354(3) of the Criminal Procedure Code 1973 is identical to Section 393 (3) of the Indian CPC 2023. See Bharatiya Nagarik Suraksha Sanhita 2023, Section 393(3).

7 There are various versions of the chronology of the Bachan Singh v. State of Punjab case available online. In essence, Bachan Singh murdered three of his relatives using an axe. The trial court and the appellate court sentenced Bachan Singh to death, prompting him to file a petition for review with the Supreme Court of India regarding the legitimacy of the death penalty in the Indian criminal justice system. See Academike, "Case Law Summary: Bachan Singh v. State of Punjab [AIR 1980 SC 898]", https://www.lawctopus.com/academike/case-law-summary-bachan-singh-v-state-of-punjab-air-1980-sc-898/, accessed on 9 March 2026. See also Vintage Legal, "Bachan Singh v. State of Punjab (1980)", https://www.vintagelegalvl.com/post/bachan-singh-v-state-of-punjab-1980, accessed on 9 March 2026.

8 See Indian Kanoon, "Bachan Singh v. State of Punjab", https://indiankanoon.org/doc/1235094/, paragraph 170, accessed on 29 October 2025.

9 Ibid., paragraph 167.

10 Ibid., paragraph 216.

degree of heinousness.[11] In addition, the Supreme Court of India stated that the circumstances must exhibit extreme or extraordinary degree of aggravations in order for the court to include them into the "aggravating factors" that can form the basis of special reasons within Article 354 (3) of Indian Criminal Procedure Code.[12]

Following the ruling in Bachan Singh v. State of Punjab, the Supreme Court of India's jurisprudence on the "rarest of the rare" principle has continued to evolve. In the Machhi Singh v. State of Punjab (1983),[13], through referring to the "rarest of the rare" principle, the Supreme Court of India attempted to provide factors that the court should consider in determining the appropriateness of imposing the death penalty. In the case of the murder involving Macchi Singh and associates, the Supreme Court of India assessed five factors: the brutality of the crime, the motive of the crime, the impact of the crime on society, number of victims, and the vulnerability of the victims.[14] Within this case, the Supreme Court of India still considered the existence of aggravating and mitigating circumstances. However, despite considering the possibility of that the defendant might reform, in the end the Supreme Court of India concluded that the aggravating circumstances outweighed the mitigating circumstances.[15]

In reality, it is not easy to define the boundaries of cases that meet the "rarest of the rare" principle. In the case of Earabhadrappa v. State of Karnataka, the perpetrator who worked as a domestic servant strangled his own employer to death and stole the victim's belongings. However, the Supreme Court of India did not consider it to be "rarest of the rare". In the case of Mukund v. State of MP, the Supreme Court of India overturned the death penalty despite the fact the defendant has exploited the trust of the victim and her family, then murdered a mother and her two children along with robbing the victim's house. In the case of State v Suresh, the rape and murder of a four-year-old child also did not result in the imposition of death penalty on the defendant. According to

11 Ibid.

12 Ibid., paragraph 220.

13 In the case of Machhi Singh v. State of Punjab, Machhi Singh was found guilty of murdering, with his accomplices, 17 people in five different villages. The murders were motivated by a grudge against the victims for acts deemed to have insulted Machhi Singh's relatives. See Aashayein Judiciary, "Machhi Singh v. State of Punjab (1983 AIR 957)", https://www.alec.co.in/judgement-page/machhi-singh-v-state-of-punjab-1983-air-957, accessed on 9 March 2026.

14 The Usthadian, "Revisiting The 'Rarest Of Rare' Doctrine: India's Uneven Use Of Capital Punishment", https://www.usthadian.com/revisiting-the-rarest-of-rare-doctrine-indias-uneven-use-of-capital-punishment/, accessed on 4 December 2025.

15 LawBhoomi, "Machhi Singh vs State of Punjab", https://lawbhoomi.com/machhi-singh-vs-state-of-punjab/#Observations_by_the_Supreme_Court_in_Machhi_Singh_vs_State_of_Punjab, accessed on 4 December 2025.

Bindal and Kumar, the decision not to impose the death penalty in these cases is a discretionary matter heavily influenced by the will of the panel of judges themselves.[16]

In spite of that, the standards and principles applied by the Supreme Court of India in imposing the death penalty continue to evolve. In the case of Santosh Kumar Bariyar v. State of Maharashtra in 2009, [17] the Supreme Court of India emphasized the importance of evidence related to the background of the defendant, including their socioeconomic background. The Supreme Court of India also held that the possibility of the defendant reforming their behavior constitutes a significant mitigating circumstance in avoiding the imposition of the death penalty. [18] Similar considerations emerged in the case of Rajesh Kumar v. State of NCT of Delhi. [19] In this case, The Supreme Court of India emphasized the importance of the factor of the defendant's potential for behavioral change over the factor of the brutality of the crime committed in determining whether a case meets the "rarest of the rare" principle. The decisions on the case of Santosh Bariyar and Rajesh Kumar demonstrate a shift on the court's focus from solely considering the brutality of the crime to assessing the defendant's background and the likelihood of behavioral change. [20]

In another landmark case in 2022, Manoj vs State of Madhya Pradesh[21], the Supreme Court of India introduced another standard in which cases a judge may have the jurisdiction to impose the death penalty. In its reasoning, the Supreme Court of India stated that, before determining the sentence for the offender, both the trial court and the appellate court must order a socioeconomic, psychological, and psychiatric evaluation of the defendant.[22]

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16 Amit Bindal and C. Raj Kumar, "Abolition of the Death Penalty in India: Legal, Constitutional, and Human Rights Dimensions", in Confronting Capital Punishment in Asia Human Rights, Politics, and Public Opinion, ed. Roger Hood and Surya Deva, (Oxford: Oxford University Press, 2013), pg. 129-130.

17 Santosh Kumar Bahariyar was found guilty of the kidnapping and murder of the victim, Kartikraj. See Indian Kanoon, "Santosh Kumar Satishbhushan Bahariyar v. State of Maharashtra", https://indiankanoon.org/doc/1312651/, accessed on 9 March 2026.

18 Ibid., pg. 132.

19 The Indian court found Rajesh Kumar guilty of murdering two children. See Casemine, "Refining the 'Rarest of Rare' Doctrine: Balancing Mitigating and Aggravating Factors in Death Penalty Sentencing", https://www.casemine.com/commentary/in/refining-the-%27rarest-of-rare%27-doctrine:-balancing-mitigating-and-aggravating-factors-in-death-penalty-sentencing/view, accessed on 9 March 2026.

20 Amit Bindal and C. Raj Kumar, "Abolition of the Death Penalty in India..., Op.cit., pg. 131.

21 Manoj and his accomplices murdered and robbed a family consisting of a mother, a child, and a grandmother. See Indian Kanoon, "Manoj v. State of Madhya Pradesh", https://indiankanoon.org/doc/182334419/, paragraphs 3-5, accessed on 5 December 2025.

22 Ibid., paragraph 213-216.

This demonstrates the Supreme Court of India's tendency to carefully consider the defendant's background and potential for behavioral change as more significant than the crime they committed. The Manoj v. State of Madhya Pradesh ruling itself demonstrates this trend. In this case, the defendant, initially sentenced to death by both the trial court and the appellate court, was ultimately sentenced to life imprisonment by the Supreme Court of India. One of the Supreme Court's considerations was that the defendant had demonstrated good behavior during the sentence and had a hope of behavioral change — despite the severity of the crime. Ultimately, the Supreme Court ruled that life imprisonment was a commensurate punishment for the defendant's actions.[23]

Based on this discussion, it is concluded that in implementing the "rarest of the rare" principle as a standard for imposing the death penalty, judges in Indian criminal courts cannot apply it simply by generalizing it to certain types of cases, but rather must assess various factors. First, judges can only impose the death penalty when life imprisonment is no longer an appropriate option. Second, in considering the imposition of the death penalty, the court must, on the one hand, assess the following factors: **the severity of the crime; the perpetrator's motive; the impact of the crime on society; the number of victims; and the victims' vulnerability**.[24] On the other hand, the court must also assess **the perpetrator's background and the potential for behavioral change in the defendant.** This potential for behavioral change must be considered a significant factor, and if it is met, the court must waive the death penalty. When the court deems that an extreme, abnormal level of cruelty has occurred and there are no mitigating circumstances that can outweigh the cruel nature of the crime, the "rarest of the rare" principle applies, and the judge is obliged to explain the specific reasons for considering imposing the death penalty.

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23 Ibid., paragraph 224-228.

24 In its decision in the case of Machhi Singh v. State of Punjab, the Supreme Court of India cited the victim's vulnerability, citing the following examples of the victim's characteristics: (a) a minor who is highly unlikely to have provided the perpetrator with a motive or trigger for the murder; (b) a helpless woman or a person rendered helpless due to old age or physical infirmity; (c) a person over whom the murderer held a position of dominance or with whom the murderer had a relationship of mutual trust; (d) a public figure who was loved and respected by the community for their services and the murder was committed for political or similar reasons rather than personal ones. See Indian Kanoon, "Machhi Singh and Others v. State of Punjab", https://indiankanoon.org/doc/545301/, accessed on 10 March 2026.

2.2 Japan

The Penal Code of Japan (Law No. 45 of 1907) stipulates the death penalty for various crimes, including rebellion (Article 77), murder (Article 199), robbery resulting in death (Article 240), robbery accompanied by rape resulting in death (Article 241), and several other crimes.[25] However, in practice, courts impose the death penalty only for murder cases.[26] As background, the Japanese criminal justice system has introduced a new system since 2009 in which courts involve ad hoc civilian judges to hear and decide cases in a panel with professional judges. The involvement of ad hoc judges also applies to cases in which the defendant faces the death penalty. Furthermore, there is no specific criminal procedure law or official standards for hearing and deciding cases that carry the death penalty.

The only principles or standards that can be referred to is *Nagayama Standards*. In 1983, the Supreme Court of Japan examined the case of defendant Norio Nagayama, who was accused of murdering four people consecutively in various locations between October and November 1968. Nagayama was initially sentenced to death by the first instance court in Tokyo. On appeal, the appeals court commuted the sentence to life imprisonment, taking into account the defendant's intellectual disability.[27] However, in a subsequent legal action, the Supreme Court of Japan rejected the lighter sentence, outlining several factors that the court should consider in deciding whether or not the death penalty should be imposed, namely:[28]

1. the nature of the crime;
2. the motive of the perpetrator;
3. the method by which the convict committed the crime, including the level of cruelty;
4. the consequence of the crime, especially regarding the number of victims;
5. the feelings of the victims and their bereaved families;
6. the impact of the crime on society;

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25 See CrimeInfo, "Death Penalty in Japan", https://www.crimeinfo.jp/death_penalty_en/, accessed on 8 December 2025. See also https://www.japaneselawtranslation.go.jp/en/laws/view/3581#je_pt2ch38at8, accessed on 10 March 2026.

26 CrimeInfo and Eleos Justice, Report on a moratorium on the use of the death penalty: the death penalty in Japan, 22 April 2022.

27 Amnesty International, The Death Penalty: A Cruel, Inhuman and Arbitrary Punishment, https://www.refworld.org/reference/countryrep/amnesty/1995/en/23966, 1 May 1995, accessed on 8 December 2025.

28 David T. Johnson, "Capital Punishment without Capital Trials in Japan's Lay Judge System", in The Asia-Pacific Journal Vol 8, Issue 49, No 1, 6 December 2010, https://apjjf.org/david-t-johnson/3461/article, accessed on 8 December 2025.

7. the age of the perpetrator;
8. the perpetrator's criminal record; and
9. mitigating circumstances and conditions after the crime, such as remorse or changes in the perpetrator's behavior.

Given all these factors, if the gravity of the offense is extremely severe and the judge deems the death penalty unavoidable from the perspective of proportionality or deterrence, the Supreme Court of Japan holds that the judge may impose the death penalty. [29] Ultimately, the judge imposed the death penalty on Nagayama. However, the nine factors outlined by the Supreme Court of Japan in its deliberations on the Nagayama case eventually became known as the "Nagayama Standards."

According to research by Kenji Nagata of Kansai University, between the introduction of Nagayama Standards in 1983 and the end of 2012, there were 171 decisions in which the death penalty was upheld by the Supreme Court of Japan. Of these hundreds of decisions, Nagata identified four stages of sentencing standards carried out by judges in deciding whether to impose the death penalty. These four stages are:[30]

1. The basic consideration stage
2. The screening stage
3. The tentative conclusion stage
4. The final conclusion stage

In the first stage, the basis for deciding on the death penalty or other punishments that the judge usually considers are: a) whether the public prosecutor demands/recommends the death penalty to be imposed; and b) whether there is at least one death as a result of the crime committed with the intention to kill. If the answer to both of these questions is positive, the judge tends to impose the death penalty. Conversely, if the answer to either of these two questions is negative, the judge tends to avoid imposing the death penalty.[31]

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29 Amnesty International, The Death Penalty: A Cruel, Inhuman and Arbitrary Punishment, https://www.refworld.org/reference/countryrep/amnesty/1995/en/23966, 1 May 1995, accessed on 8 December 2025.

30 Kenji Nagata, Sentencing Standards for Death Penalty Cases: Did the Japanese Supreme Court Kill the Legitimacy of the Death Penalty?, in 6th Annual Conference of the Asian Criminological Society, 29 June 2014, pg. 18.

31 Ibid.

The second stage is the screening stage, where the judge considers factors related to the number of victims the defendant intended to kill. In Japanese judicial practice, the more victims, the more severe the penalty. If the perpetrator killed three or more victims with premeditation, the judge is likely to immediately impose the death penalty.[32]

The third stage is the tentative conclusion stage. In this stage, the judge will deliberate on the crimes along with the consequences of the crimes rather than the personal factors of the defendant. There are six factors that influence the decision within this stage:[33]

a. the nature and the objective of the crimes;
b. criminal records involving a homicide;
c. the occurrence of multiple homicides on separate occasions;
d. the importance of the role of the defendant in the commission of the crime;
e. the premeditation of the homicides; and
f. the existence of sexual violence.

Some of the factors mentioned above are not included in the Nagayama Standards, but in practice, these things are still considered by judges.[34]

Finally, in the fourth stage the judge will consider various other factors, including:[35]

a. reasons that prompted the perpetrator to commit the crime;
b. the persistence and degree of cruelty of the murder method;
c. the feelings of the victim's family;
d. the impact on society;
e. the age of the defendant, including if the defendant is a minor (a child); and
f. the defendant's circumstances, including feelings of remorse, life history, living conditions before committing the crime, and potential for behavioral improvement.

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32 Ibid.
33 Ibid., pg. 19.
34 Ibid., pg. 20.
35 Ibid.

If the judge considers the tentative conclusion from the third stage is still not commensurate with the defendant's actions, after considering the factors in the fourth stage, the judge will usually change their assessment based on the conclusion from this fourth stage...[36]

However, in practice, the Nagayama Standards are generally viewed as insufficient to assist judges, particularly ad hoc judges, in determining whether a defendant should live or die. Legal practitioners in Japan view the Nagayama Standards as a set of vague criteria for making decisions regarding a defendant's fate. [37] Nevertheless, the existence of such standards at least provides a framework for the parties involved in the trial — prosecutors, defense attorneys, and judges — to analyze a case within that framework and arrive at a conclusion in the form of a decision for which they can be held accountable.

2.3 Singapore

The death penalty is imposed on several types of crimes under the Penal Code 1871 of Singapore, such as murder, piracy that endangers life, attack to the president, and several other crimes that are regulated within special acts, such as: attempts to use arms to attack other people under Arms Offences Act of 1973; bringing firearms, explosives, or ammunition into certain areas without permit under the Internal Security Act 1960; kidnapping resulting in death under the Kidnapping Act 1961, and drug trafficking under the Misuse of Drugs Act 1973.[38] Some of these criminal offenses also carry mandatory capital punishment, meaning that if the defendant is found guilty of the offense, the judge is required to impose the death penalty.

Under Singaporean criminal law, there are general and specific grounds that can result in the death penalty being commuted. General grounds are conditions that apply to all types of criminal offenses, and if proven, the death penalty is commuted to life imprisonment. The conditions in question are:

a. If the defendant was under 18 years of age when the crime was committed; [39] and

36 Ibid.

37 David T. Johnson, "Capital Punishment without Capital Trials in Japan's Lay Judge System", in The Asia-Pacific Journal Vol 8, Issue 49, No 1, 6 December 2010, https://apjjf.org/david-t-johnson/3461/article, accessed on 8 December 2025.

38 https://www.amnesty.org/ar/wp-content/uploads/2021/09/asa360012004en.pdf, page 11.

39 Section 314 CPC

b. If the defendant was pregnant when the judge sentenced her.[40]

As for special conditions, judges only consider such conditions in specific criminal offenses, such as the provisions of Section 33B of the Misuse of Drugs Act 1973. Drug trafficking is one of the criminal offenses carrying a mandatory death penalty; if a defendant is found guilty of trafficking, importing, or exporting narcotics in certain quantities, the defendant must be sentenced to death. This is also one of the reasons why drug-related offenses are the type of crime that most frequently results in the death penalty, with 9 out of 11 convicts executed in 2025 having been convicted of drug-related offenses.[41]

Section 33B of the Misuse of Drugs Act was added through amendments to the Act in 2012. This section aims to provide incentives for defendants in narcotics cases to provide information to the Central Narcotics Bureau in order to eradicate narcotics syndicates and networks. [42] This provision grants judges the authority to impose a life sentence in lieu of the death penalty, provided the defendant's role is limited to:

a. transporting, shipping, or delivering a controlled drug;
b. offering to transport, ship, or deliver a controlled drug;
c. doing or offering to do any act preparatory to or for the purpose of his or her transporting, sending, or delivering a controlled drug; or
d. any combination of those activities.

In addition to their limited roles, the defendants must also be shown to have suffered from a mental disorder that rendered them incapable of being held criminally responsible for the offense, or they must demonstrate that they provided substantial assistance to the Central Narcotics Bureau in combating drug trafficking activities within or outside Singapore.

The determination of whether the defendant has provided substantial assistance is made by the Public Prosecutor as stipulated in Section 33B(4). This provision was not originally intended to avoid the imposition of the death penalty, but rather to provide an incentive for suspects to facilitate the investigative process. For this reason, the Public Prosecutor informs the suspect of this provision from

40 Section 315 CPC

41 https://www.hrw.org/news/2025/10/07/australia-should-urge-singapore-to-halt-execution

42 https://transformativejusticecollective.org/2021/05/29/explainer-what-is-the-certificate-of-substantive-assistance/

the very beginning of the arrest process, to ensure that the suspect cooperates from the start, and that the information they provide is more useful for the law enforcement process. [43] However, providing information does not guarantee that the Public Prosecutor will grant leniency, as the information provided must have an impact on the investigation process, such as leading to the disruption of drug transactions and the arrest of other individuals within the drug network. If the suspect cannot provide information that leads to legal action against others involved in the drug network, the suspect does not meet the criteria for substantial cooperation.[44]

This mechanism has been in place since 2013 and has had a significant impact on reducing the number of prisoners sentenced to death. Research by Amnesty International shows that from 2013 to 2017, out of 66 drug-related criminal cases that carried the mandatory death penalty, 32 defendants met the criteria under Section 33B of the Misuse of Drugs Act, and none of those 32 defendants were sentenced to death. [45] This indicates that when judges have the authority to avoid imposing the death penalty, judges in Singapore prefer to impose life imprisonment.

However, there are also some criticisms of this mechanism, particularly regarding its legal certainty. The granting of a certificate of substantial assistance is vested in the Public Prosecutor and does not constitute a guaranteed reward. Therefore, it remains possible that a defendant who has cooperated in providing information that results in the arrest of another person may not be granted a certificate of substantial assistance if the Public Prosecutor so determines. The Public Prosecutor cannot be prosecuted for their decision to grant this certificate unless the defendant can prove that the refusal was based on bad faith. [46]

In the case of Muhammad Ridzuan bin Mohd Ali v. Attorney-General, bad faith was defined as "the exercise of discretionary power outside the original purpose for which such power was granted," with one example provided by the Court

43 https://www.elitigation.sg/gd/s/2021_SGCA_113

44 https://www.parliament.gov.sg/docs/default-source/Bills-Introduced/misuse-of-drugs-(amendment)-bill-27-2012.pdf, explanatory

45 https://transformativejusticecollective.org/2021/05/29/explainer-what-is-the-certificate-of-substantive-assistance/

46 33B MDA.

of Appeal being the use of this mechanism as a means to promise immunity from prosecution to a criminal offender in exchange for their cooperation. [47] If a suspect or defendant feels that the Public Prosecutor has wronged them by failing to provide a certificate of substantial assistance, the suspect or defendant must file an appeal with the Court of Appeal, which requires the plaintiff to prove the Public Prosecutor's bad faith. [48] Furthermore, the authority to use such information ultimately rests with the relevant law enforcement officials. Thus, if those law enforcement officials choose not to use the information provided by the suspect, the requirement for substantial assistance will not be met, no matter how cooperative the suspect may be. [49]

3. Implementation of Specific Safeguards in Certain Crimes

The various countries cited above demonstrate that judges must adhere to certain standards or principles when imposing the death penalty. We believe that the existence of these standards or principles can guarantee legal certainty, reduce disparities in sentencing for cases with similar characteristics, and ensure judicial accountability because the public can clearly understand the reasons and criteria used by judges in imposing the death penalty. Furthermore, we also believe that these standards and principles for imposing the death penalty align with human rights principles in the context of protecting the right to life (Article 6 of the International Covenant on Civil and Political Rights), namely that states parties (especially those that still have the death penalty in their criminal legal systems) are prohibited from arbitrarily depriving people of the right to life. Judicial institutions, as part of the state, are also responsible for ensuring that the death penalty is not implemented arbitrarily. Therefore, we believe that the standards and principles applicable to the application of the death penalty are included as efforts to prevent courts from imposing the death penalty arbitrarily.

In Indonesian judicial practice, we have not been able to identify any specific

47 See Court of Appeal Singapura, Muhammad Ridzuan bin Mohd Ali v Attorney-General [2015] SGCA 53, Paragraph 70-71.

48 Ibid, paragraph 73-74.

49 https://transformativejusticecollective.org/2021/05/29/explainer-what-is-the-certificate-of-substantive-assistance/s

standards or principles used in imposing the death penalty. Judges have considerable discretion in imposing the death penalty. However, in various situations, this has the potential to create a wide disparity and a tendency to impose arbitrary death sentences due to its heavy reliance on the judge's subjectivity. Furthermore, with the enactment of the 2023 Criminal Code, Indonesia positions the death penalty as a last resort to prevent criminal acts and protect society.[50] However, there is also no standard for determining the circumstances and situations that require a judge to implement this "last resort" in the form of capital punishment. Therefore, the discourse on introducing standards or principles for imposing the death penalty in Indonesia is relevant due to the need to fulfill the state's obligation to uphold human rights principles and to respond to the death penalty in the 2023 Criminal Code.

3.1 Death Penalty Safeguards for Premeditated Murder and Violent Theft Resulting in Death in Indonesia

In the Indonesian context, judges can impose the death penalty for various crimes, including premeditated murder and theft with violence under certain circumstances. In the 2023 Criminal Code, these two crimes are regulated under separate articles and each has its own elements, as follows:

1. Premeditated murder which is punishable by death is regulated in Article 459 of the Criminal Code, where punishable when a person with prior planning takes the life of another person;
2. Theft with violence which is punishable by death is regulated in Article 479 paragraph (4) of the Criminal Code, which regulates the following series of acts:
    a. any person who commits theft which is preceded, accompanied, or followed by violence or threats of violence against people, with the intention of preparing or facilitating the theft or, in the case of being caught in the act, to enable themselves or another person to retain control of the goods they have stolen; and
    b. the act results in serious injury or death of a person which is carried out together and in association and is accompanied by one of the following conditions:

50 See Law No. 1 of 2023 on Criminal Code Law, Article 98.

iii. carried out at night in a house or enclosed yard where a house is located, on a public road, or in a moving public transport vehicle; or
iv. by damaging, dismantling, cutting, breaking, climbing, using fake keys, using fake orders, or wearing fake official clothing, to enter the place where the crime was committed or to get to the items taken.

These two distinct types of criminal offenses share a common prerequisite for the imposition of the death penalty: each act results in the loss of another person's life. Therefore, when assessing the criteria for applying the death penalty in both cases, judges may use similar indicators or factors.

To encourage the cautious use of the death penalty in both types of crimes, there must be clear and strict criteria for judges to determine in which cases they may exercise their authority to impose the death penalty. Referring to the practices in several countries described above, there are several factors or criteria that judges can use to decide whether to impose the death penalty:

a. The degree of cruelty or brutality of the criminal act committed by the perpetrator; in this case, the judge may assess this based on:
   - the nature and manner of the criminal act committed by the perpetrator, including, for example, whether the act was a one-time occurrence or involved repeated acts at various times and places;
   - the motive or reason that prompted the perpetrator to commit the criminal act;
   - the consequences of the criminal act, especially the number of victims;
   - the impact of the criminal act on society;
b. The personal circumstances of the perpetrator, which the judge may assess based on:
   - the perpetrator's age;
   - the perpetrator's criminal record;
   - the perpetrator's remorse;
   - the perpetrator's socioeconomic background;
   - the perpetrator's psychological or psychiatric condition;
c. The perpetrator does not show any potential of character or behavioral imporvement;
d. The absence of any mitigating circumstances or grounds, whether relating

to the personal circumstances of the perpetrator or to the criminal act itself, including the context surrounding the incident;

e. That there is no alternative punishment less severe than the death penalty for the crime committed by the perpetrator, which the judge may assess in terms of proportionality.

By applying standards or principles for imposing the death penalty that take these factors into account, the public can expect that, at the very least, the courts will be able to be more selective and measured in applying the death penalty to cases of premeditated murder and theft with violence resulting in death. Thus, the imposition of the death penalty would not depend on the judge's subjectivity. Legal certainty, judicial accountability, and compliance with human rights principles regarding the right to life would also be better ensured, as these standards or principles would narrow the overly broad scope of judicial discretion, preventing judges from imposing the death penalty arbitrarily.

3.2 Death Penalty Safeguards in Narcotics Criminal Cases in Indonesia

In Indonesia, the crimes that most frequently result in death sentences are drug-related offenses. As of 2024, 68% of the 562 people on death row were convicted of illegal trafficking in narcotics or psychotropic substances.[51] Under Indonesia's drug laws, following the enactment of the 2023 Criminal Code, the threat of the death penalty is spread across several different laws, namely the 2023 Criminal Code in conjunction with Law No. 1 of 2026 on Criminal Adjustments (Criminal Adjustment Law) and Law No. 35 of 2009 (Narcotics Law) in conjunction with the Criminal Adjustment Law.

In the 2023 Criminal Code in conjunction with the Criminal Penalty Adjustment Act the provision regarding narcotics-related offenses that carry the death penalty is Article 610 (2), which regulates the acts of producing, importing, exporting, or distributing:

a. class I narcotics in plant form weighing more than 1 kilogram or consisting of more than 5 plants, or in non-plant form weighing more than 5 grams; or

51 https://icjr.or.id/wp-content/uploads/2025/06/Final_Laporan-Situasi-Kebijakan-Pidana-Mati-2024.pdf, pg. 5.

b. class II narcotics weighing more than 5 grams;

Then, there are other provisions in the Narcotics Act in conjunction with the Criminal Code Amendment Act that provide for the death penalty, namely;

1. Article 114 (2) that regulates the act of offering for sale, selling, purchasing, receiving, brokering of sales, exchanging, or giving class I narcotics in plant form weighing more than 1 kilogram or consisting of more than 5 plants, or in non-plant form weighing more
2. Article 116 (2) that regulates the use of class I narcotics on another person that resulted in death or permanent disability;
3. Article 119 (2) that regulates the act of offering for sale, selling, purchasing, receiving, brokering of sales, exchanging, or giving class II narcotics weighing more than 5 grams;
4. Article 121 (2) that regulates the use of class II narcotics on another person that resulted in death or permanent disability

Of all these articles, there are some that essentially regulate the illicit trafficking of narcotics. However, the narcotics trafficking article itself does not specify when the death penalty can be imposed, other than if the weight of the narcotics exceeds a specified amount. This results in inconsistent and often arbitrary imposition of the death penalty.

In Indonesia, drug cases that carry the death penalty do not show any specific similarities between one and another. Research reports conducted by LBHM, IJRS, and Reprive show that many of the death row inmates have never committed a crime before (88.6%),[52] only transported one type of narcotic (70%),[53] and did not profit from it (29.1%).[54] The majority of death row inmates were also proven in court to have only acted as couriers (96.2%),[55] with the weight of the methamphetamine found varying from under 1 kilogram to 1 ton. [56] At the same time, research on sentencing disparities conducted by IJRS also found that only 6 of 79 drug dealers were sentenced to death, so the defendant's

52 Faktor-Faktor Penentu Hukuman Mati di Indonesia, pg. 51.
53 ibid, pg. 58.
54 ibid, pg. 55.
55 ibid, pg. 54.
56 ibid, pg. 59.

role is not a factor in warranting the imposition of the death penalty.[57] These data indicate that the severity of the narcotics found, the defendant's criminal history, their role in the crime, and other circumstances cannot guarantee that the defendant will be free from the threat of the death penalty.

Sentencing in narcotics cases takes into account two main factors. First, the defendant's role in drug trafficking, and second, the quantity and type of evidence found. Regarding roles, the classification of roles in drug trafficking cases is regulated in various sentencing guidelines, one of which is from the United Kingdom which divides the perpetrator's culpability into three main roles:[58]

1. Leading role
   Defendants in leading roles are those who organize or control large-scale purchases and sales, wielding significant authority and influence over those under their control. They receive the greatest economic benefits and also have close ties to the source of the narcotics being distributed.
2. Significant role
   Defendants with significant roles are those responsible for managing the operational aspects of drug trafficking. They involve others through offers of rewards or threats. Defendants with significant roles receive some economic benefits, although not as significant as the ones in leading roles, and also understand some aspects of the drug lord's operations.
3. Lesser role
   Defendants with lesser roles are those whose functions and duties are limited to the orders of their superiors. They tend to be exploited without receiving commensurate economic compensation. Furthermore, they generally lack knowledge of the operations of the drug dealer beyond their duties and roles, and are usually complicit in their involvement due to economic or social pressure.

The higher the defendant's role, the harsher the sentence imposed on the defendant. In the United Kingdom, if a defendant is found to have played a

57 IJRS's Disprarity Research (Penelitian Disparitas IJRS), pg.25

58 https://sentencingcouncil.org.uk/guidelines/supplying-or-offering-to-supply-a-controlled-drug-possession-of-a-controlled-drug-with-intent-to-supply-it-to-another/?source=7511

leading role in managing within the organization or received large sums of money, the initial sentence will already be much higher than for defendants in other roles.

Regarding the quantity and type of narcotics, the 2009 Narcotics Law already has provisions limiting the death penalty, in which the death penalty may only be imposed on defendants with evidence exceeding 1 kilogram for plants and 5 grams for non-plants. However, because the range is still very large, there is still a disparity in the imposition of the death penalty. [59] On one hand, there are cases where defendants with evidence of 64 grams of methamphetamine are sentenced to death, but there are also cases where accused drug dealers carrying 19 kilograms of methamphetamine are sentenced to 20 years in prison.[60] To minimize disproportionate death sentences, it would be advisable to establish a specific upper limit for the death penalty as the most severe punishment. Referring to Singapore, their regulations have a narcotics threshold that regulates the amount for personal use, the amount that can be sentenced to a certain prison term, and the amount that must be sentenced to death.[61] This narcotics threshold is also adjusted for each type of narcotic, so that for more potent narcotics, the threshold will be lower than for other narcotics.[62] Thus, the application of the death penalty will be consistent in cases where the amount of narcotics is much greater than in other cases with the same type of substance.

In addition to limiting the death penalty to the defendant's role and the amount of narcotics evidence, Singapore has also implemented an exemplary substantive assistance mechanism. This mechanism is similar to the justice collaborator system, which also aims to reduce criminal penalties for such witnesses. The Witness and Victim Protection Act stipulates that a Justice Collaborator may be granted leniency through a recommendation from the Witness and Victim Protection Agency (LPSK) if the Justice Collaborator provides testimony that reveals criminal acts in the same case.[63] However, the

59 Ruling No. 255/Pid.Sus/2019/PN Tjb.

60 https://www.kompas.id/artikel/lolos-hukuman-mati-bandar-narkoba-di-palu-divonis-20-tahun-penjara

61 Second Schedule, Misuse of Drugs Act, https://sso.agc.gov.sg/Act/MDA1973?ProvIds=Sc2-#Sc2-

62 In Second Schedule, Misuse of Drugs Act), the thresholds established to determine criminal penalties vary by type of narcotic, meaning that two individuals who each possess the same amount of Class A drugs may face different criminal penalties.

63 Witness and Victim Protection Law, Article 10A (3)

substantive assistance mechanism differs from the Justice Collaborator system because it does not require the involvement of the LPSK or a victim protection agency to grant criminal leniency. In Singapore, the Public Prosecutor is the authority responsible for determining the application of this mechanism based on the need for further information regarding the eradication of criminal acts. Through this mechanism, the Public Prosecutor can assess whether the defendant's assistance has sufficiently aided law enforcement in combating the circulation of other narcotics. If the defendant is deemed to have provided sufficient assistance, the Public Prosecutor issues the defendant a Certificate of Substantive Assistance, which spares them from the death penalty. In Singapore itself, this right is limited to defendants who are only involved in transporting, sending, or delivering drugs, and judges still retain the authority to impose the death penalty. Nevertheless, this mechanism ensures that, at the very least, cooperative couriers have the opportunity to avoid the death penalty. Although it cannot cover all drug offenders, applying this safeguard to those categorized as couriers will significantly reduce the number of death row inmates, given that the majority (96.2%) of death row inmates for drug-related crimes in Indonesia are couriers.

3.3 Death Penalty Safeguards in Terrorism Cases in Indonesia

Terrorism is also a crime punishable by death. As of the end of 2024, there were nine death row inmates on death row for terrorism cases awaiting execution. [64] The Anti-Terrorism Law itself defines the crimes punishable by death as:

1. Article 6 that regulates individuals who intentionally use violence or threats of violence to incite an atmosphere of terror and widespread fear among the people, causing mass casualties by depriving others of their freedom or the loss of life and property, or causing damage or destruction to vital strategic objects, the environment, and public/international facilities;
2. Article 8 that regulates acts related to air traffic and aircraft which are considered criminal acts of terrorism.;
3. Article 9 that regulates the act of bringing in, making, receiving, obtaining, handing over, controlling, carrying, having a stock of it or having it in one's

64 https://icjr.or.id/wp-content/uploads/2025/06/Final_Laporan-Situasi-Kebijakan-Pidana-Mati-2024.pdf, page 22.

possession, storing, transporting, hiding, removing firearms, ammunition, or explosives and other dangerous materials with the intention of committing acts of terrorism from and to the territory of Indonesia;

4. Article 10 which regulates the use of chemical, biological, radiological, microorganism, nuclear, radioactive weapons or their components, which create a widespread atmosphere of terror or fear among people, cause mass casualties by taking away the freedom or loss of life and property of other people, or cause damage or destruction to vital strategic objects, the environment, or public/international facilities;
5. Article 10A that regulates the act of bringing into Indonesia, making, receiving, obtaining, handing over, controlling, carrying, having a stock of it or having it in one's possession, storing, transporting, hiding, removing from Indonesian territory chemical, biological, radiological, microorganism, nuclear, radioactive weapons or their components, with the intention of committing a crime of terrorism;
6. Article 14 that regulates the instigation of criminal acts of terrorism, however, only acts of instigating the commission of criminal acts in Articles 6, 8, 9, 10 and 10A can be sentenced to death; and
7. Article 15 that regulates attempted acts of terrorism, however, only those who attempt to commit crimes in Articles 6, 9, 10 and 10A can be sentenced to death.
8. Article 16 that regulates providing assistance, convenience, means or information for the commission of criminal acts of terrorism.

The criteria for imposing the death penalty in terrorism crimes are also quite different from those for other crimes. In crimes such as murder, theft, and drug offenses, there are clear parameters in the law for determining when the death penalty can be imposed. For example, ordinary murder is not punishable by death, but in cases where the murder is premeditated, the defendant may be sentenced to death. Similarly, in the case of theft, when certain conditions are met, the penalty may be increased to death. This differs from terrorism, where even an attempt can be punishable by death. Therefore, an effective mechanism to prevent the arbitrary imposition of the death penalty is to establish clear boundaries defining when a terrorist act can be classified as at least extremely serious.

For an act to qualify as a terrorist act as stipulated in Articles 6 and 10, the act must instill terror or fear in the community, or cause mass casualties through mechanisms strictly regulated in the Anti-Terrorism Law. Thus, the consequences of a terrorist act can be a sense of terror in the community or mass casualties. [65] Crimes that result in mass casualties are worse than crimes that cause terror in the community without victims, so that gradations of punishment can be created for certain acts in the Terrorism Law. Moreover, in General Comment no. 36 of the ICCPR, the death penalty can only be imposed for the "most serious" crimes, which involve killing with intent. [66] Referring to this standard, the only terrorism crimes punishable by death are those resulting in loss of life. However, the Anti-Terrorism Law also includes formal offenses, such as Articles 9 and 10A, which regulate the importation of various types of weapons, ammunition, and other materials intended to commit acts of terrorism. In this case, because there are no consequences that can be assessed in the trial, the appropriate determination of the severity of the sentence to be imposed depends on the quantity and type of items prepared to commit the crime.

In addition to the consequences or number of weapons, criminal sanctions must also consider the defendant's role in the act of terrorism. Similar to drug offenses, determining sanctions for terrorism crimes also depends on the defendant's role, which can be divided into three categories: [67]

1. Acting alone or in a leading role
   A defendant in a leading role is the person who organizes or plans the crime. This defendant initiates and enables the terrorist act to occur, possessing extensive knowledge on how to carry out the terrorist act, acquire weapons, or make other preparations. Without the defendant, the terrorist act would not have occurred. If the defendant is part of a terrorist organization, then the defendant is the party who founded the organization or the party capable of mobilizing or ordering other members. Defendants in this category are involved in all aspects of the terrorist act, from planning and preparation to execution.

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65 Academic Paper of the Bill to Amend Law No. 15 of 2003 on the Eradication of Terrorism Offences, pg. 13-14.

66 Paragraph 35, General Comment No.36 ICCPR.

67 https://sentencingcouncil.org.uk/guidelines/preparation-of-terrorist-acts/?source=7511

2. Significant role
   A defendant with a significant role is a defendant who played a significant role in carrying out a crime and was involved in planning the crime. A defendant with a significant role played a crucial role in carrying out the terrorist act due to their extensive knowledge of the terrorist plan. Furthermore, a defendant with a significant role also possesses the specialized knowledge or expertise necessary to run a terrorist organization or carry out the terrorist act.

3. Lesser role
   A defendant with a lesser role is a defendant who was not involved in the planning of the crime and only played a minor role in its execution. Defendants in this category do not have a specific role and can be replaced by another person without hindering the organization or execution of the terrorist act. Defendants with a minor role do not have in-depth knowledge of the organization or planning of terrorist acts, and do not possess the specialized skills necessary to carry out their duties or roles.

The parameters used in the United Kingdom do not consider the defendant's actions in carrying out the terrorist act, but rather depend on their level of knowledge or involvement in the organization or the execution of the terrorist act. This means that defendants who commit crucial acts in a terrorist act, such as detonating or planting a bomb in a crowded place, can still be categorized as having a lesser role if they lack in-depth knowledge of the organization or the terrorist act.[68]

In this division of roles, only those who play a leading role or act alone as the initiator and enabler of the crime should be subject to the death penalty. The defendant must be proven to have complete knowledge of the planned terrorist acts or to have a high-ranking position within a terrorist organization capable of mobilizing others within the organization. By applying the following culpability standard, defendants who only play supporting or minimal roles cannot be sentenced to death, even though the threat in Articles 15 and 16 of the Anti-Terrorism Law allows for it. This division of roles can also provide protection for defendants who are newly involved or are victims of coercion or incitement by others in carrying out terrorist acts.

68 UK Sentencing Council, Terrorism Guidelines Response to Consultation, https://sentencingcouncil.org.uk/media/qownawq0/terrorism-consultation-response-document-final.pdf, pg. 14.

CHAPTER II
Ordinary Examination for Extraordinary Crime

Judges are people, too, of course.[1] From this sentence, we can imagine that their differing life experiences can certainly influence their perspectives when adjudicating a case, even allowing for unconscious bias to rise. Likewise, when faced with a heavy workload, it is highly likely that judges may overlook certain aspects of their decisions. For your information, between 2020 and 2024, a judge in a first-instance General Court—assuming an even distribution of caseload—handled an average of 22 cases per month. This means that nearly every working day of each month brings a new case that must be resolved.[2] Therefore, lawmakers must design the process of adjudicating cases in such a way as to facilitate their work and minimize the possibility of errors.

The potential for error in sentencing—which, in reality, will always exist—is one of the challenges in imposing the death penalty. For example, in a case in the United States, Cameron Todd Willingham was executed in 2004 on charges of arson that killed his three children. The Texas Forensic Science Institute later acknowledged that the investigative standards used for proving the case, by scientific standards, were outdated.[3] In Indonesia, we can also find a similar case, although not in the context of the death penalty, namely the case of Sengkon and Karta in 1974. Sengkon was sentenced to 12 years in prison while Karta received 7 years.[4] It was later revealed that both were innocent.[5] This

1 J. Mark Ramseyer, Who Hangs Whom for What? The Death Penalty In Japan, Journal of Legal Analysis, Volume 4, Issue 2, Winter 2012, Pages 365. This sentence is taken from the opening paragraph of J. Mark Ramseyer's article, which essentially aims to illustrate that a judge's background, social relationships, and experiences will, to some extent, influence their perspective when adjudicating a case, making it highly likely that there will be differences between one judge and another.

2 The Supreme Court of the Republic of Indonesia, Laporan Tahunan 2020, pg. 154; 2021 Annual Report, pg. 122; 2022 Annual Report, pg. 132; 2023 Annual Report, pg. 122; 2024 Annual Report, pg. 139.

3 Death Penalty Information Center, INNOCENCE: Texas Forensic Science Commission Closes Case of Possible Innocence, https://deathpenaltyinfo.org/innocence-texas-forensic-science-commission-closes-case-of-possible-innocence, accessed on 18 November 2025.

4 Eliyas Eko Setyo, Kisah Salah Tangkap Sengkon-Karta dan PK Pertama di Indonesia, https://dandapala.com/article/detail/kisah-salah-tangkap-sengkon-karta-dan-pk-pertama-di-indonesia, accessed on 22 November 2025.

5 Ibid.

then subsequently sent shockwaves through the Indonesian legal world and ultimately became the primary reason for the birth of the judicial review forum. [6] Another example in Indonesia is the case of Ruben and Markus, who were sentenced to death, only for the actual perpetrators to later be caught and confess to the crime. [7]

Given that the death penalty is irreversible, the potential for judicial error must be minimized as much as possible by applying extremely strict and high standards. In fact, the drafters of the 2023 Criminal Code also understood this concern. The 2023 Criminal Code contains at least three fundamental differences regarding the death penalty compared to the previous Criminal Code, namely: (1) the affirmation that the death penalty is a special type of punishment; (2) the commutation of a death sentence to life imprisonment if the condemned person demonstrates commendable behavior during the 10-year probationary period; and (3) the conversion of the death sentence to life imprisonment for a condemned person who has been on death row for 10 years.

Regarding the second and third amendments, the idea behind the changes is clear and understandable, namely strengthening the post-adjudication process by providing convicts with the opportunity to demonstrate behavioral change. However, regarding the revised provisions regarding the death penalty, which is now a special type of punishment, the direction of strengthening the adjudication process remains unclear. This lack of clarity stems from the fact that, in addition to the 2023 Criminal Code not including specific standards for imposing the death penalty, Indonesia's current criminal procedure law lacks specific provisions for handling death penalty cases. There are only provisions regarding the obligation for the defendant to be accompanied by free legal counsel[8] and the right not to be executed until a presidential pardon is granted[9]. This illustrates how the state views the death penalty as a punishment, as if it were no different from other forms of punishment in general.

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6 Ibid.

7 See in https://www.bbc.com/indonesia/berita_indonesia/2013/06/130619_kontras_kasus_hukumanmati_ruben

8 See Article 155 Criminal Procedure Code 2025.

9 See Article 3 Law No. 2 of 2002 on Clemency.

Best practices can actually be seen in how the state provides special treatment for children within the criminal justice system. In cases involving children, Indonesia has established various special mechanisms as a manifestation of the "best interests of the child" principle as stipulated in the Convention on the Rights of the Child. These range from the pre-adjudication stage, which includes diversion mechanisms, to the adjudication stage, where there is a mandatory legal aid requirement for children and specific trial procedures are established for them. [10] Unfortunately, efforts to reform the criminal justice system, such as those implemented for children, are not happening in the imposition of the death penalty.

For comparison, countries in the Eastern Caribbean and India, which recognize the death penalty as a special punishment, have specific procedures in place. For example, in both India and countries in the Caribbean, there is a requirement for a social assessment process in cases where the death penalty may be imposed. [11] In fact, in one case in India, a judge overturned a death sentence due to the absence of such process.[12] In various other countries, when imposing the maximum penalty, changes are also made to the composition of the panel of judges hearing the case.

The various examples above demonstrate how important it is to view the imposition of the death penalty as a serious violation of the right to life. Therefore, the state must distinguish it from other penal processes that merely restrict liberty or deprive individuals of their property. Therefore, this paper aims to outline several proposed special mechanisms or procedures, both for the drafting of future legislation and through internal guidelines for law enforcement agencies, to improve the status quo.

10 See in Law No. 11 of on the Juvenile Criminal Justice System.

11 Edward Fitzgerald QC and Keir Starmer QC, A Guide to Sentencing in Capital Cases, (London: The Death Penalty Project Ltd 2007), pg. 34.

12 Ibid. pg. 34.

Seeking for an Ideal Model for a Non-Ideal Penalty

A. Providing Sufficient Space in Discussing Criminal Sentencing

There is an issue rarely discussed in Indonesian legal scholarship, despite its crucial importance which is the deprivation of a person's rights. Prof. Sudarto described this issue as the "stepchild" in criminal law.[13] The issue in question concerns the imposition of criminal penalties (*straftoemeting*).[14]

To understand the sentencing process, we may refer to the explanation from Cassia Spohn. The sentencing process is explained in terms of several questions that the judge must answer:

1. When the perpetrator is proven to have committed the crime, should they be punished?
2. If so, what is the intended goal of imposing such punishment?
3. Then, what kind of punishment is appropriate to be imposed to the perpetrator? And
4. How severe should the punishment be?[15]

In countries with a common law tradition, such as India,[16] the trial process is indeed divided into two phases: (1) determining whether the defendant is guilty or not of the charges brought by the prosecutor; and (2) sentencing, which involves determining the appropriate type of punishment and the severity of the sentence the defendant will receive. Meanwhile, in countries with a civil law tradition, such as Germany, the Netherlands, Japan, and Indonesia, such a division is not found. These two matters are addressed within the same court proceeding. This distinction is commonly known as the "bifurcated court" (separating the determination of the defendant's guilt or innocence from the sentencing) and the "unitary court" (the opposite of the bifurcated court).

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13 Sudarto, Kapita Selekta Hukum Pidana, (Bandung: Alumni, 2006), pg.78.

14 Ibid.

15 Cassia Spohn, How Do Judges Decide? The Search for Fairness and Justice in Punishment, (California: SAGE Publications, 2009), pg.18

16 See CrPC 235 (2): "If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the questions of sentence, and then pass sentence on him according to law."

There is no guarantee that having a separate evidentiary agenda in sentencing will improve the process. For example, in India, despite using a bifurcated court model, the imposition of the death penalty in practice is still often criticized as being rife with arbitrariness, as evidenced by the wide variation of attitudes in judicial decisions regarding the death penalty.[17]

Whether we choose to adopt a bifurcated court model or maintain the status quo is not an issue; the most important thing is that the hearing process is not limited to matters of evidence (guilty or not guilty). Both the public prosecutor and the judge must play a significant role in assessing the case, and it is also crucial to handle it with attention to the type and severity of the appropriate sentence to be imposed on the defendant.

Indonesia faces problems in the criminal sentencing process, especially the continued presence of a variety of aggravating and mitigating circumstances that cannot be scientifically justified. For example, in narcotics cases, IJRS research on 616 narcotics trafficking cases between 2016 and 2020 found that 66.6% of criminal decisions considered "the defendant's actions contradicted the government's program to eradicate narcotics crime" as an aggravating circumstance.[18] The same factor was also found in 93.7% of narcotics abuse cases.[19] Furthermore, several other aggravating circumstances were also identified, such as "the defendant knew from the outset that the act was prohibited by law" and "the defendant's actions were detrimental to the defendant himself."[20].

The points above demonstrate that judges often fail to properly consider what constitutes as aggravating circumstances. Aren't all criminal acts fundamentally contrary to government programs? And isn't it assumed that everyone is to know the law (a legal fiction)? Therefore, including these points as aggravating factors is irrational. This also includes "the defendant's actions that harm themselves", which should more appropriately be considered as mitigating circumstances.[21]

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17 Saul Lehrfreund and Roger Hood, The Inevitability of Arbitrariness: Another Aspect of Victimisation in Capital Punishment Laws in Death Penalty and the Victims, (New York; United Nations 2016), pg. 151-152.

18 Matheus Nathanael et al., Penelitian Disparitas Pemidanaan dan Kebijakan Penanganan Perkara Tindak Pidana Narkotika di Indonesia, pg. 102.

19 Ibid., pg. 105.

20 Ibid.

21 Ibid., pg. 106-107.

Regarding the issues above, there are at least several things that can actually encourage the revival of the issue of criminal sentencing in Indonesian courts, such as:

reforming the trial model by adopting a bifurcated court system, which strictly separates the process of proving the perpetrator's guilt from the process of proving the appropriate punishment for the perpetrator. This separation must be accompanied by the right for the public prosecutor and the defendant to present the evidence necessary to determine the severity of the penalty.

remain on the current unitary court model, but by imposing the obligation on the public prosecutor to prove both aggravating and mitigating circumstances during the trial process by referring to the provisions of Article 54 of the 2023 Criminal Code. Thus, it is actually necessary to provide space for the public prosecutor to present parties who are not fact witnesses, considering that it is very possible that the evidence to consider the severity of the sentence to be imposed on the perpetrator may have no connection with the fact witnesses presented.

involving a third party, such as the Bapas (Balai Pemasyarakatan, the Correctional Center), to conduct a Social Inquiry Report on the defendant. This specific matter will be explained further in the discussion below.

B. The Function of Social Inquiry Report in Imposing the Death Penalty

Law No. 22 of 2022 concerning Corrections (hereinafter referred to as the Corrections Law) introduces the term "Social Inquiry Report." Simply put, Social Inquiry Report is a series of activities aimed at providing data to inform detainee services, inmate development, and for purposes of case resolution (sentencing).[22]

In the matter of imposing the death penalty, the role of Social Inquiry Report is undoubtedly crucial. Judges naturally require sufficient and objective information regarding the case under trial. Hallevy explained that two main

22 For more information, see Article 1 Number 15, Law No. 22 of 2022 on Corrections

factors play a role in determining the amount and type of punishment: the characteristics of the act committed (*crime/in rem*) and the characteristics of the perpetrator (*criminal/in personam*).[23] To take the simplest example, in two cases of theft involving items of equal nominal value, the perpetrator who committed the crime out of a need to meet basic necessities, compared to the perpetrator who committed the crime out of desire to satisfy secondary needs, will certainly experience different/unequal suffering if they were to receive the same punishment.

For the characteristics of the act (*crime/in rem*), factors considered include the magnitude of the loss, the method of committing the crime, and the impact of the crime. Meanwhile, for personal characteristics (*criminal/in personam*), factors considered include age, criminal record, social relations, health history, income, and the like. Dynamic risk factors in the perpetrator's characteristics are particularly important when assessing the potential for change within the perpetrator, which is a key consideration in sentencing for the death penalty. Therefore, a Social Inquiry Report is crucial for providing a comprehensive picture of the defendant's condition, particularly those related to dynamic factors, which are inherently invisible.

Various countries that still use the death penalty have adopted a similar approach. For example, in the Eastern Caribbean, the state is obligated to fund the implementation of this Social Inquiry Report.[24] The absence of a Social Inquiry Report can even lead to the overturning of a sentence and a request for a retrial.[25]

In Indonesia, the practice of using Social Inquiry Reports during the adjudication phase is nothing new. Since 2012, Social Inquiry Reports have been a mandatory requirement for submission to judges in cases involving children.[26] Failure to consider the Social Inquiry Report by a judge may even render the decision null and void. [27]

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23 Gabriel Hallevy, The Right to Be Punished: Modern Doctrinal Sentencing (Heidelberg: Springer; 2013), pg. 57.

24 Edward Fitzgerald QC and Keir Starmer QC, A Guide to Sentencing in Capital Cases, (London: The Death Penalty Project Ltd 2007), pg. 34.

25 Ibid.

26 See in Article 60 paragraph (3) Law No. 11 of 2012 on the Juvenile Criminal Justice System

27 Ibid., Article 60 paragraph (4)

With the enactment of the 2023 Criminal Code, the requirement for a Social Inquiry Report in death row cases has become increasingly rational. There are at least three main reasons for the view expressed above.

First, the classification of the death penalty as a special punishment must be interpreted as a recognition by the 2023 Criminal Code that judges must impose the death penalty with utmost strictness and caution. One way to ensure this sentence is imposed with strictness and caution is through the mandatory conduct of a Social Inquiry Report on the defendant. As previously explained, a Social Inquiry Report can help judges obtain more comprehensive information about the defendant, which is necessary for determining the appropriate sentence.

Second, Article 54 of the 2023 Criminal Code requires judges, when imposing a sentence, to consider sentencing guidelines, which include factors such as the defendant's social background, social circumstances, the economic circumstances of the offender, the offender's attitude and conduct after committing the crime, and the impact of the sentence on the offender's future. Although the article does not explicitly state that the consideration of the above factors must be conducted through a Social Inquiry Report, in the context of imposing the death penalty, the description of these factors can at least be interpreted by judges as an obligation for the state to ensure that a Social Inquiry Report is conducted for individuals facing the death penalty. A similar practice has been observed in the Eastern Caribbean, where the state is required to fund the conduct of a Litmas for individuals facing the threat of the death penalty.[28]

Third, the 2023 Criminal Code provides an opportunity for death row inmates to have their sentences commuted if they are later proven to have behaved well while serving a 10-year probationary period. In this commutation process, the President, as the decision-maker, naturally requires a picture of the convict's previous circumstances. This includes at least their condition during the adjudication process and their behavior during post-adjudication rehabilitation as a comparison. Without the results of a Social Inquiry Report conducted at

28 Edward Fitzgerald QC and Keir Starmer QC, A Guide to Sentencing in Capital Cases, (London: The Death Penalty Project Ltd 2007), pg. 34.

the time the convict is sentenced to death, it is difficult for the President to have an objective benchmark for determining whether the convict has changed his behavior.

Furthermore, in addition to requiring a Social Inquiry Report for defendants who are likely to face the death penalty, regulations also need to be in place regarding the defendant's right to respond to the results of the Social Inquiry Report conducted on them. The judge's discretion in deciding which information to use is ultimately up to the judge.

C. Changes in the Judicial Panel Composition in Death Penalty Sentencing

Generally, in countries such as Japan, Germany, and France, the number of judges presiding over a case depends largely on the potential impact of the ruling to be handed down. In addition to the severity of the potential criminal penalties in the case at hand, the number of judges is usually also influenced by the complexity of the case being heard.

In Indonesia, the Judicial Power Law stipulates that a panel hearing a case must consist of at least three judges, unless otherwise stipulated by law.[29] This means that, generally, cases heard by a court must have a panel of at least three judges; the number may be greater but not fewer. Typically, cases heard by more than three judges are those receiving significant public attention, such as the blasphemy case involving former Jakarta Governor Basuki Tjahaja Purnama, which was tried by a panel of five judges. The only exception in Indonesia applies to minor criminal offenses, where the Criminal Procedure Code (KUHAP) stipulates that trials for such offenses are conducted by a single judge.

In addition to exceptions for minor criminal proceedings, there are other provisions specifically governing the composition of judges in corruption cases. This is based on the assumption that corruption cases are often complex, necessitating the addition of ad hoc judges. Therefore, the corruption court

29 See in Article 11 paragraph (1) Law No. 48 of 2009 on Judicial Power Law

stipulates that the composition of judges examining corruption cases should be at least three and at most five.

In several countries with civil law traditions, such as Germany, France, and Japan, this pattern is also found, particularly in cases with potentially severe penalties. In Japan, in cases involving the death penalty, life imprisonment, or crimes committed intentionally resulting in death, the composition of the judges changes to three professional judges and up to six lay judges (*saiban-in*). Both professional judges and *saiban-in* are involved in determining a person's guilt or innocence and the sentence to be imposed.[30]

Meanwhile, in Germany, the number of judges has been increased to three judges and two lay judges for serious cases, those with potential sentences of more than four years in prison or cases of public interest, with trials taking place not in the *Amtsgerichte*/local court but directly in the *Landgericht*/regional court.[31] Meanwhile, for less serious cases, those with sentences of no more than two years in prison, they are tried by a single judge in the *Amtsgerichte*/ local court. [32] For cases tried in the Amtsgerichte/local court but with more serious charges, those with potential sentences of two to four years in prison, they are tried by one judge and two lay judges. [33]

Unlike Germany and Japan which do not have a jury system as is typical in civil law countries, in France, the judges for very serious cases punishable by fifteen years to life imprisonment are composed of three professional judges and six civilian jurors.[34] Meanwhile, for minor offenses and *délit* cases, the judges are tried by professional judges alone without a jury. In cases involving minor offenses tried in the police court, the judges are handled by a single judge. The primary penalty is a fine and cannot be imprisonment. For offenses/

30 Setsuo Miyazawa, Citizen Participation in Criminal Trials in Japan: The Saiban-in Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives. Page 73. International Journal of Law, Crime and Justice 42 (2014) 71-82. See also in Saiban'in no sanka suru keiji saiban ni kansuru horitsu [Law Regarding the Criminal Trials in which Jurors Participate], Law No. 45 of 2006.

31 See in Article 76 Gerichtsverfassungsgesetz, https://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html#p0373, accessed on 28 November 2025.

32 See in Article 22 and 25 Gerichtsverfassungsgesetz, https://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html#p0373, accessed on 28 November 2025. See also Marijke Malsch, Democracy in the Courts Lay Participation in European Criminal Justice System, (ASHGATE:2009), pg.38.

33 See in Article 28 and 29 Gerichtsverfassungsgesetz, https://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html#p0373, accessed on 28 November 2025

34 Ministére de la Justice, Les juridictions pénales, https://www.justice.gouv.fr/justice-france/lorganisation-cours-tribunaux/lordre-judiciaire/juridictions-penales, accessed on 28 November 2025.

délit or minor offenses related to offenses/*délit*, the judges are tried in the criminal court with three judges. The penalty can be up to ten years in prison or twenty years in cases of repeat offenses, fines, community service, and so on. Furthermore, in cases punishable by fifteen to twenty years in prison, such as rape or armed robbery, the judges are composed of five professional judges.

The concept of adding or changing the composition of judicial panel mentioned above is actually very reasonable and makes perfect sense. The principle is that the more significant the decision a judicial panel must make, the more judges must be involved. Unfortunately, in Indonesia, there are no special provisions regarding this matter, even for very serious criminal penalties such as the death penalty. It is as if special treatment is only necessary for minor criminal cases; for other penalties, the mechanism is a blanket one.

With the enactment of the 2023 Criminal Code, the reclassification of the death penalty into a special category of criminal offenses must be accompanied by changes to certain mechanisms, one of which is increasing the number of judges on the bench. As previously mentioned, the Judicial Power Act does not actually prohibit this, and in practice, it is common for the number of judges to be increased. Unfortunately, so far this has been limited to high-profile cases and corruption cases only.

There needs to be an effort to revive public discourse regarding the composition of the judicial panel for cases with the threat of severe penalties, such as the death penalty. Regarding which model the state will use, such as increasing the number of professional judges, lay judges, or increasing the composition using a jury system, is a further question that can only be answered after conducting an in-depth study. However, one thing is certain: the current system, which only clearly differentiates the composition of judges for cases of minor crimes and those involving corruption, clearly needs to be overhauled immediately. At the very least, the most feasible option in the near future is to request that the Supreme Court exercise its discretion under Article 11 (1) of the Judicial Power Law, stipulating that at least five judges must preside over cases that where the death penalty is a potential sentence.

D. Special Considerations in the Imposition of the Death Penalty

As previously explained, the death penalty, which is referred to as a special punishment in the articles of the 2023 Criminal Code, does not adequately explain its specific nature. The examination process remains the same as usual, and the judge's considerations in imposing the death penalty remain unchanged. In this situation, there should be several special mechanisms and specific considerations in place regarding the imposition of the death penalty.

The existence of special considerations can serve as a reference for judges and prosecutors when demanding or imposing the death penalty. These special considerations are closely related to how judges and prosecutors implement existing criminal law principles and elaborate on mitigating and aggravating circumstances. Currently, decisions only state mitigating and aggravating circumstances without further elaboration or explanation on these circumstances.

Beyond the verdict, the current prosecution also fails to explain why a defendant deserves the death penalty. The public prosecutor is obligated to convincingly prove in court that the defendant truly deserves the death penalty, providing supporting reasons. This lack of justification often leads different prosecutors to have differing opinions when seeking the death penalty. In fact, prosecutors also have an obligation to explain why the maximum penalty is being imposed, such as the defendant's lack of remorse or the absence of a more appropriate punishment.

Research findings from LBH Masyarakat, the Indonesia Judicial Research Society (IJRS), and Reprieve reveal that there is no consistency regarding the dominant factors that lead panels of judges to impose the death penalty. This inconsistency is particularly evident in relation to aggravating circumstances, concurrent offenses, the defendant's role, the quantity of narcotics involved, and recidivism. The absence of clear and standardized rules regarding the criteria for imposing the death penalty in cases of premeditated murder and narcotics offenses will continue to raise questions about whether the death penalty is indeed being used for the most serious crimes.[35]

35 Hisyam Ikhtiar Mulia et al., Faktor-faktor Penentu Hukuman Mati di Indonesia: Sebuah Indikator, LBH Masyarakat, (Jakarta: Lembaga Bantuan Hukum Masyarakat, Indonesia Judicial Research Society, and Reprieve 2022), pg. 68.

For example, in India, based on interviews conducted by the research team[36], the lack of uniform procedures for handling criminal cases potentially subject to the death penalty, both by prosecutors and judges, has ultimately led to significant disparities and differing interpretations in the handling of such cases. However, the Supreme Court of India, through its decision in the case of Manoj & Ors. v. State of Madhya Pradesh (2022), sought to mitigate this issue by issuing guidelines known as the "Manoj Guidelines." These guidelines encourage the conduct of sociological research and psychological/social history assessments of the defendant during the investigation and trial process, particularly for cases potentially subject to the death penalty. In this regard, the Supreme Court of India urges courts to elaborate further and clearly outline mitigating circumstances for death row inmates, particularly regarding the psychological conditions and social history experienced by the inmate throughout their life.[37]

The lack of elaboration on these factors in Indonesian court rulings should also be addressed by including a specific section for considerations, both in the indictment and in the ruling. It is important for the prosecutor to explain why a defendant should be sentenced to death without any alternative sentencing options. In the indictment, the prosecutor should also explain that if there is no potential for the defendant's future rehabilitation based on sociological research, if the act was committed in a particularly heinous manner resulting in the loss of another person's life, or if there are other highly destructive consequences, then the prosecutor will seek the death penalty as a last resort.

In addition, judges should be required to include a specific section on their reasoning in their rulings. Judicial rulings are, by their very nature, binding and final; therefore, the reasoning provided when imposing the death penalty must be exceptionally strong and rational. The United Nations (UN) Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions outlines standards for cases where the death penalty may be imposed, emphasizing that: 1) suspects or defendants facing the threat of the death penalty must have access to competent legal counsel and representation at every stage

36 Research Team Interview with Shreya Rastogi (The Square Circle Clinic), 13 November 2025.

37 Legally Present, (2025), Supreme Court Reserves Judgment on Death Row Convict's Plea to Apply 'Manoj' Guidelines: A Test of Procedural Justice, https://legallypresent.in/supreme-court-manoj-guidelines/, accessed on 26 November 2025.

of the judicial process; **2) the collection and evaluation of evidence must be conducted to a high standard so that the defendant can be convicted without any doubt regarding the alleged offense; and 3) all mitigating factors must be considered by the judge.**[38]

The inclusion of a special consideration section is primarily intended to assist judges in elaborating on mitigating and aggravating factors for the defendant, so that judges can easily determine whether the death penalty is appropriate to impose. In addition to mitigating factors, in this special consideration column, judges can also apply and analyze various principles widely used in many countries, such as the "rarest of the rare" and "worst of the worst" principles.

The inclusion of a "special considerations" section, both in indictments and in court rulings, is intended to facilitate the work of prosecutors and other judges when they seek to impose the death penalty on a defendant. Ultimately, this section is intended to encourage prosecutors and judges to present logical reasoning and strong arguments, as outlined in the "special considerations" section.

E. The Importance of Prosecution Guidelines and Sentencing Guidelines in the Investigation of Cases Potentially Subject to the Death Penalty

a. Prosecution Guidelines

In various literatures, we learn that the indictment is often referred to as the "judge's crown." This indicates that the indictment is, in essence, binding on the judge when deciding a criminal case. In principle, Article 232 (3) of Law No. 25 of 2025 on the Criminal Procedure Code (KUHAP) states that the deliberations of the judicial panel must be based on two things: the indictment and everything proven during the trial proceedings. This principle underscores the critical importance of the indictment within the criminal justice system and how this document ultimately serves as a sufficiently 'binding' framework for judges when imposing a sentence.

38 UN Special Rapporteur on extrajudicial executions, E/CN.4/1998/68, paragraph 83, 23 December 1997. See also PRI, Op.Cit., pg. 28.

Meanwhile, for the public prosecutor, the indictment itself serves as the basis and guideline for proving the alleged crime and charging the defendant according to the articles contained in the indictment. Therefore, the indictment and the charges are integral and interrelated. The indictment explains the alleged crime, while the charges explain the severity of the sentence demanded by the public prosecutor. The public prosecutor's demands will be considered by the judge when imposing a sentence, in addition to the evidentiary process during the trial. When the judge believes the defendant is guilty, the judge, based on their beliefs and observations, will impose a sentence according to the indictment and the demands of the public prosecutor.

Given this explanation, the sentencing process carried out by judges often aligns with the direction and objectives of the prosecution's policy. The severity of the sentence and how judges weigh various factors are ultimately closely tied to what the prosecutor sets forth in the indictment and their sentencing recommendations.[39] This approach is also similar to the sentencing process in the Netherlands.[40]

Based on IJRS research, the results of a regression analysis comparing prosecutors' sentencing recommendations with the prison sentences actually imposed by judges indicate a very strong influence (74%) of the latter on the former.[41] Similar results were also found in drug abuse cases, where there was a strong correlation between the prosecutor's charges and the length of prison sentences imposed by judges, at 56.4%.[42] The same phenomenon occurs in the Netherlands. According to Julia Fionda, in practice, judges in the Netherlands place significant weight on the prosecutor's charges.[43]

The fact that the public prosecutor's demands play a central role in determining the amount and type of sentence imposed by judges influences how the Netherlands intervenes in its sentencing trends. In

39 Article 232 paragraph (3) Law No. 25 of 2025 on Criminal Procedure Code

40 Wetboek van Strafvordering (the Netherlands' Criminal Procedure Code), Art. 348.

41 Matheus Nathaniel et al., Penelitian Disparitas dan Kebijakan Penanganan Perkara Narkotika di Indonesia, (Jakarta: IJRS 2022) pg.78.

42 Ibid, pg. 100.

43 Julia Fionda, Public Prosecution and Discretion: A Comparative Study, Oxford University Press, New York, 2003, pg. 104.

the Netherlands, intervention in sentencing trends is considered more effective if conducted through prosecution guidelines.[44] Besides the fact that judges ultimately tend to follow the prosecutor's demands, the hierarchical culture of *the Openbaar Ministerie* is also considered more appropriate than establishing guidelines for judges, who are culturally more free, unbound, and independent in interpreting them according to their own understanding.[45]

Thus, the link between the prosecutor's demands and the judge's decision is inseparable from the sentencing process. Good and proportionate demands will open the potential for good decisions. As exemplified by the prosecution guidelines in the Netherlands, interventions to address positive sentencing trends in Indonesia are also expected to be effective through the existence of prosecution guidelines.

Ultimately, it is crucial for relevant policymakers to promote the establishment of prosecution guidelines in the context of cases carrying the potential for the death penalty, to promote uniformity in prosecution policies. Prosecution guidelines do not essentially promote uniformity in the penalties imposed, but rather facilitate the task of public prosecutors and encourage a unified approach in prosecuting cases carrying the potential for capital punishment.

b. Sentencing Guidelines

Not only do prosecutorial policies and processes need to be improved by the Attorney General's Office, but judicial policies also need to be harmonized by the Supreme Court. Because in a verdict, a person's fate and even life are determined by the judge. When a judge makes a decision, many factors will naturally influence him or her. These influences can come from within the judge himself or from outside. As explained previously, judges are essentially ordinary human beings like everyone else, with varying backgrounds, cultures, education, and personal perspectives. Furthermore, judges themselves can

44 Ibid

45 Ibid, pg. 105.

independently issue and determine their verdicts based on their personal thoughts, observations, and beliefs. Therefore, there is a high possibility of differences in perspectives and considerations in deciding a case. This situation opens up the possibility of disparities in sentencing,[46] particularly in cases that carry the potential for the death penalty.

However, how and in what manner a judge renders a decision is, of course, governed by the law. As long as it does not conflict with the law, a judge has the discretion to determine the content of their decision. Various rules, ranging from laws and government regulations to the Supreme Court's internal rules, serve as guidelines for judges in adjudicating a case. In certain types of cases, sentencing guidelines are also available to assist judges in examining and adjudicating cases, as well as reducing disparities in sentencing. The existence of sentencing guidelines essentially serves as a tool to help judges avoid difficulties in adjudicating a case.

For example, in the United Kingdom, sentencing guidelines are used by judges as a guide to ensure a consistent approach in similar cases.[47] This situation could certainly apply in Indonesia as well, in the context of cases where the death penalty may be imposed. Before a judge determines whether a case warrants the death penalty, there must be a consistent and logical approach to determining the degree of culpability for the criminal act committed by the perpetrator.

In the Indonesian context, based on the research team's interviews,[48] sentencing guidelines can be useful in providing judges with guidance on which criminal offenses warrant the death penalty. This guidance is not limited to the type of criminal offense but also extends to assessing the degree of culpability involved in the offense. For example, while premeditated murder carries the death penalty as a potential

46 Gabriel Hallevy, 2013, The Right to Be Punished: Modern Doctrinal Sentencing, Springer, Verlag Berlin Heidelberg, pg. 108.

47 Sentencing Council, (tt), About Sentencing Guidelines, https://sentencingcouncil.org.uk/about-sentencing/about-sentencing-guidelines/#:~:text=Sentencing%20guidelines%20help%20make%20sure,of%20justice%20to%20do%20so., accessed on 26 November 2025.

48 Interview of the Research Team with Arsil (LeIP), 10 November 2025.

sentence, a judge's decision to impose the death penalty depends on numerous factors during the trial. With sentencing guidelines that provide guidance for judges, murders involving more than 2–3 victims can be categorized as particularly severe, allowing judges to directly impose the death penalty. This also applies to other crimes such as rape, kidnapping resulting in the victim's death, and so on.

With sentencing guidelines in place, judges are not required to be bound by the prosecutor's recommendations and have their own guidelines to ensure consistency and uniformity in the application of the law. Sentencing guidelines are expected to assist and guide judges on how they should consider various factors during trials involving cases where the death penalty may be imposed.

Conversely, judges who feel that their decisions are not bound by the prosecution's demands ultimately also have a more consistent guide through sentencing guidelines. With sentencing guidelines in place, consistency and uniformity in the application of the law, particularly in cases where the death penalty may be imposed, can be maintained.

F. Unanimous Decision on the Imposition of the Death Penalty

Essentially, the death penalty is the most severe punishment that can be imposed on a person. This punishment deprives a person of their most fundamental right: the right to life. Therefore, it is crucial for judges to impose the death penalty only in situations and under circumstances where there is absolute certainty, or beyond a reasonable doubt, that the maximum penalty is warranted.

One country known to require a unanimous decision by judges when imposing the death penalty is Taiwan. Since September 2024, the Constitutional Court of Taiwan has ruled that the death penalty is constitutional subject to certain strict limitations, including: the requirement that the defendant be represented by legal counsel during both the first-instance trial and the appeal process; the requirement for a defense statement during the appeal hearing; and a

unanimous decision by a collegial panel of professional judges in imposing the death penalty.[49] The imposition of the death penalty in Taiwan has essentially declined sharply since various international human rights instruments were incorporated into national law. However, with this ruling, the Constitutional Court of Taiwan has contributed to the strict limitation of the use of the death penalty.[50]

These restrictions essentially provide a mandate and guidelines for courts in Taiwan regarding the circumstances under which they may impose the death penalty. The requirement for a unanimous decision by the panel of judges also serves as a standard that must be met if the death penalty is to be imposed. Such restrictions are a manifestation of the protection of the defendant's rights during the trial process. Furthermore, these strict restrictions are accompanied by the strengthening of due process of law, including restrictions on the imposition of the death penalty for defendants with psychosocial disabilities. [51]

In addition to Taiwan, another country that also requires a unanimous verdict for the imposition of the death penalty is the United States. Federal courts and some state courts require a unanimous jury verdict for the imposition of the death penalty. Essentially, this requirement aligns with the principle that the death penalty can only be imposed if there is not even the slightest doubt on the part of the jury or the judge. In the case of Hurst v. State (2016), the Florida Supreme Court stated, "...that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous." However, if there is any doubt among the jurors, the judge may not impose the death penalty, and life imprisonment may be imposed instead. This is as affirmed in the United States Code, Title 18, Criminal Procedure Code, Section 3594, which states: "Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law..."

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49 Constitutional Court of Taiwan, 2024, Summary of TCC Judgment 113-Hsien-Pan-8 (2024): The Constitutionality of the Death Penalty Case, https://cons.judicial.gov.tw/en/docdata.aspx?fid=5535&id=355776, accessed on 25 November 2025.

50 Szu-Yu Chen, 2025, The Death Penalty in Taiwan: An Overview and the Impact of 113-Hsien-Pan-8, University of Nottingham Taiwan Research Hub, https://taiwaninsight.org/2025/03/14/the-death-penalty-in-taiwan-an-overview-and-the-impact-of-113-hsien-pan-8/, accessed on 09 March 2026.

51 Human Rights Watch, 2025, Taiwan: Top Court Upholds Death Penalty with Protections, https://www.hrw.org/news/2024/09/23/taiwan-top-court-upholds-death-penalty-protections, accessed on 25 November 2025.

From the above explanation, it can be concluded that the death penalty must be imposed without the slightest hesitation. The practice of unanimous verdicts, as exemplified in the two countries mentioned above, demonstrates that, as an irreversible punishment, a unanimous verdict is an important measure in minimizing errors in sentencing.

Under current practice, there are no detailed regulations governing the requirement for a unanimous decision when a panel of judges decides to impose the death penalty. Provisions regarding unanimous decisions could be established in legislation to provide legal certainty and serve as a standard reference for judges in adjudicating cases where the death penalty may be imposed.

CHAPTER III
Closing

1. Conclusion

a. Restrictions on the Imposition of the Death Penalty as a Minimum Alternative in Indonesia

The 2023 Criminal Code reflects a shift in the Indonesian government's legal policy regarding the application of the death penalty, introducing a probationary mechanism that allows death row inmates to avoid execution by having their sentence commuted to life imprisonment. Nevertheless, the 2023 Criminal Code still allows judges to impose the death penalty as a potential criminal sanction for certain types of crimes. Meanwhile, universally applicable human rights standards require countries that still maintain the death penalty in their legal systems to apply it only to criminal acts involving the intentional taking of a life. Its application must also not be arbitrary. Given the current situation and conditions, where there are no specific standards or principles that judges must consider, the use of the death penalty is highly dependent on judicial discretion. Therefore, to prevent the arbitrary use of the death penalty, Indonesia needs to establish mechanisms to limit its imposition, ensuring that judges are authorized to impose the death penalty only for specific types of criminal acts and against specific categories of offenders. Specific standards or principles for considering the imposition of the death penalty are essential to ensure legal certainty and compliance with applicable human rights standards. Furthermore, the consequences of carrying out the death penalty are permanent (resulting in the loss of the condemned person's life), so judges must exercise the utmost caution and give special consideration when imposing it.

As explained above, various countries have implemented their own restrictions. Countries such as India and Japan apply general restrictions, under which all

types of criminal cases must meet specific standards before the defendant can be sentenced to death. However, there are also countries like Singapore that have specific standards for certain criminal offenses, such as drug-related crimes. Both of these options can be applied simultaneously, where there are general standards that judges must adhere to when imposing the death penalty, and there are also specific standards for certain types of crimes.

The implementation of specific standards must be tailored to the nation's interests, based on the number of cases. Criminal offenses with a high number of death penalty charges require the establishment of standards more urgently than those with no such cases. In Indonesia itself, the two types of crimes with the highest number of death sentences are drug-related crimes and premeditated murder. However, in addition to these, it would also be advisable to establish specific standards for cases of high complexity, particularly for organized crimes. Organized crime involves many parties in committing the crime, but not everyone involved has the same role or level of involvement. To avoid excessive sentencing, the imposition of criminal sanctions for organized crimes must take the defendant's role into account. Organized crimes such as terrorism and drug trafficking often involve individuals who lack in-depth knowledge of the criminal acts being committed and who merely act in accordance with the instructions of their leaders or at the request of their superiors in exchange for a specific payment. Consequently, the imposition of the death penalty would be highly excessive if applied to those who are not even aware of the far-reaching consequences of their actions.

b. Safeguards for the procedural rules governing cases in which the death penalty may be imposed

As previously mentioned, neither the 2023 Criminal Code nor the 2025 Criminal Procedure Code is yet sufficient in providing protection for cases that could potentially result in the death penalty. The imposition of the death penalty is, in essence, the most severe punishment that deprives a person of their most fundamental human rights; therefore, the adjudication of such cases must be accountable, proportionate, and firmly grounded in human rights principles. Furthermore, the imposition of the death penalty in various countries is carried out strictly, adhering to the principle of due diligence, and beyond a reasonable doubt. It is crucial at every stage of the proceedings to ensure that an individual's rights are not violated and that no other actions occur that could undermine the rights of a person facing the potential imposition of the death penalty. The death penalty is a final form of punishment that cannot be reversed. Once a person has been executed, all possibilities for further corrective processes are also closed.

The existence of specific examination methods and standards, as outlined above—such as the use of Social Inquiry Report, the addition of a column for special considerations for prosecutors and judges, and guidelines for prosecution and sentencing—are approaches that can be adopted from best practices in various countries. These measures essentially not only assist prosecutors and judges in their duties but also serve to ensure consistency and uniformity in the application of the law.

In addition, increasing the number of judges and requiring unanimous decisions by the panel of judges are measures that can be taken to minimize errors during proceedings. As is well known, judicial decisions possess extraordinary binding force and finality. It is hoped that involving more judges and requiring unanimous decisions by the panel of judges will serve as realistic steps to reduce potential errors.

2. Recommendations

The following recommendations are addressed to law enforcement and judicial institutions:

a. The Attorney General's Office is developing guidelines containing standards or principles for the application of the death penalty (at the prosecution stage) in cases where the 2023 Criminal Code provides for the death penalty, particularly those cases that are frequently heard in court. Factors that may be considered for inclusion in the guidelines include, but are not limited to:

i. Level of cruelty and brutality of the crime committed by the perpetrator;
ii. The perpetrator's personal circumstances, including socioeconomic and cultural background along with psychological condition;
iii. The perpetrator's potential for character or behavioral improvement;
iv. The absence of mitigating circumstances or reasons from the perpetrator's personal aspects or from the criminal incident, including the context surrounding the incident;
v. That there is no alternative punishment less severe than the death penalty to address the crime committed by the perpetrator;
vi. The amount of evidence in the case of a narcotics crime;
vii. The significance of the perpetrator's role in the case of an organized crime; or
viii. The perpetrator's cooperation and role in fully disclosing facts regarding the crime, such as information regarding the involvement of other perpetrators or confidential information previously unknown to law enforcement.

In addition to the factors mentioned above, there are several procedural aspects that could be adopted from other countries and incorporated into the internal rules or policies of the Attorney General's Office, including:

i. The addition of a special consideration section containing strong and logical reasons why the defendant is being charged with a capital offense in every indictment in which the defendant is to be charged with the death penalty;

ii. The use of community research conducted by the Correctional Agency by the Public Prosecutor as a social inquiry report during the prosecution phase;
iii. The need for the Attorney General's Office to issue prosecution guidelines for cases that could result in the death penalty

b. The Supreme Court should develop guidelines containing standards or principles for the imposition of the death penalty (at the sentencing stage) in cases where the 2023 Criminal Code provides for the death penalty, particularly those cases that are frequently heard in court. Factors that may be considered for these guidelines include, but are not limited to:

i. Level of cruelty and brutality of the crime committed by the perpetrator;
ii. The perpetrator's personal circumstances, includion socioeconomic and cultural background along with psychological condition;
iii. The perpetrator's potential for character or behavioral improvement;
iv. The absence of mitigating circumstances or reasons from the perpetrator's personal aspects or from the criminal incident, including the context surrounding the incident;
v. That there is no alternative punishment less severe than the death penalty to address the crime committed by the perpetrator;
vi. The amount of evidence in the case of a narcotics crime;
vii. The significance of the perpetrator's role in the case of an organized crime; or
viii. The perpetrator's cooperation and role in fully disclosing facts regarding the crime, such as information regarding the involvement of other perpetrators or confidential information previously unknown to law enforcement.

In addition to the factors mentioned above, there are several procedural aspects that could be adopted from other countries and incorporated into the internal rules or policies of the Supreme Court, including:

i. The addition of a special consideration section containing strong and logical reasons why the defendant is being charged with a capital offense in every indictment in which the defendant is to be charged with the death penalty;

ii. The use of community research conducted by the Correctional Agency by the Public Prosecutor as a social inquiry report during the prosecution phase;
iii. The need for the Supreme Court to issue prosecution guidelines for cases that could result in the death penalty in order to ensure consistency in the application of the law.
iv. Increasing the number of judges in cases where the death penalty may be imposed, given that the Judicial Power Act does not set a maximum limit on the composition of the judicial panel;
v. The requirement for a unanimous verdict in cases involving the death penalty ensures that there is no doubt regarding the imposition of the sentence (beyond a reasonable doubt).

c. The Government and the House of Representatives should amend the Criminal Code and the Criminal Procedure Code to ensure they provide adequate legal tools for cases where the death penalty may be imposed. Furthermore, the Government and the House of Representatives must review the structure of court proceedings, taking into account the circumstances of defendants who are at a disadvantage from the outset.

Thus, the recommendations for adding certain procedures and mechanisms are expected to provide the widest possible scope for avoiding errors. Ultimately, this research provides policymakers with alternative options to consider the use of specific procedures and mechanisms that can reduce errors during the investigation and trial processes. Any violation of the rights of the accused or convicted person would certainly serve as a negative record and a bad precedent for the enforcement of law in Indonesia.

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