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Why Constitutional Courts Back Death Penalty? Insights from Indonesia and South Korea

Article	Abstract
Author Andy Omara^{1*}, Faiz Rahman² ¹ Faculty of Law, Universitas Gadjah Mada, Indonesia ² Leiden Law School, Universiteit Leiden, the Netherlands Corresponding Author: *Andy Omara, Email: andy.omara@mail.ugm.ac.id Data: Received: Mar 11, 2024; Accepted: Nov 24, 2024 Published: Nov 27, 2024 DOI: 10.24090/volksgeist.v7i2.10773	This article explores the paradoxical affirmation of the death penalty by the Constitutional Courts in Indonesia and South Korea, despite constitutional guarantees for the right to life and the fundamental right of human dignity. Through historical and content analyses, it explores how these courts interpret these rights in relation to the death penalty and why they affirm it constitutional. Both countries recognise the nonderogable nature of these rights, yet their Constitutional Courts allow for legal restrictions. Constitutional Court's decision to impose limitations on nonderogable rights demonstrates their preference for maintaining a cautious and conservative approach. The examination of Constitutional Courts' decisions reveals that the debate over the death penalty's constitutionality extends beyond legal considerations, involving political dynamics and historical factors. This article underscores the complex interplay between constitutional guarantees, judicial interpretation, and sociopolitical contexts in shaping the countries' human rights protection trajectories, especially in the context of nonderogable rights. It also highlights the crucial role of Constitutional Courts in safeguarding the right to life, as their decisions can significantly impact human rights protection in these countries. Keywords: <i>Constitutional court; death penalty; nonderogable rights.</i>

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INTRODUCTION

The protection of human rights indeed became one of the main reform agendas of the Indonesian constitutional transition from an authoritarian to a more democratic state.¹ The inclusion of a specific chapter on human rights during the second amendment of the 1945 Constitution marked a significant milestone in safeguarding human rights within the Indonesian Constitution, as it represents “a radical shift in Indonesia’s constitutional philosophy from essentially authoritarian

¹ See, e.g., Denny Indrayana, “Indonesian Constitutional Reform 1999- 2000, An Evaluation of Constitutional Making in Transition,” *Asia Law Review* 5, no. 1 (2008): 96; Moh. Mahfud MD, “Politik Hukum Hak Asasi Manusia Di Indonesia,” *Jurnal Hukum IUS QUIA IUSTUM* 7, no. 14 (2000): 20–21, <https://doi.org/10.20885/iustum.vol7.iss14.art1>.

to a more liberal-democratic model”.² The human rights reform was further reinforced by the establishment of the Constitutional Court under the third amendment of the 1945 Constitution as one of the guardian institutions.³

Moreover, the second amendment of the 1945 Constitution also incorporates the nonderogable rights, which include the right to life and six other rights.⁴ Nonderogable rights refer to rights that may not be subject to any derogation under any circumstances, even in times of emergency.⁵ Article 28I paragraph (1) of the 1945 Constitution explicitly mentions that these rights “*cannot be reduced under any circumstances*”. The inclusion of nonderogable rights in the current Constitution plays a significant role in human rights protection, as nonderogable rights are constitutionally protected in all circumstances.

This article focuses explicitly on the right to life as one of the nonderogable rights protected under the 1945 Constitution, with particular emphasis on the constitutional review of death penalty provisions as one of the criminal punishments under the Indonesian Criminal Code. It is crucial as the death penalty is regarded as “the ultimate violation” of human dignity, as it is inherently torturous in nature.⁶ With the existence of the Constitutional Court, which functioned as the protector of human rights,⁷ it becomes crucial how the Court might interpret the constitutionality of death penalty provisions against the nonderogable rights under the 1945 Constitution.

As a comparison, this article examines how the South Korean Constitutional Court interprets the constitutionality of the death penalty. The discussion of South Korea is relevant, considering Indonesia and South Korea share similar historical and political trajectories. First, both countries experienced the constitutional transition from authoritarian to democratic.⁸ One of the main agendas of both constitutional transitions in South Korea and Indonesia was to promote democracy and better protect human rights.⁹ Moreover, the South Korean Constitution also stipulates that the state has to guarantee the fundamental rights of individuals. Second, during the democratic transition, both South Korea and Indonesia also established a Constitutional Court as a new judicial institution beside the Supreme Court.

² See, e.g., Ross Clarke, “Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials,” *Asian Law Journal* 5 (2003): 2–3.

³ See, e.g., Mahkamah Konstitusi Republik Indonesia, *Laporan Tahunan Mahkamah Konstitusi Republik Indonesia* (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2006), 29. Apart from the Constitutional Court, the Human Rights Commission was also established under the 1999 Human Rights Law as one of the guardian institutions.

⁴ The nonderogable rights are regulated in Article 28I paragraph (1) of the 1945 Constitution, which include the right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on the basis of retroactive laws.

⁵ See, e.g., Human Rights Committee, “International Covenant on Civil and Political Rights - General Comment No. 36: Article 6 (Right to Life)” (United Nations, 2018).

⁶ See, e.g., John Bessler, “Human Dignity and the Law’s Evolution: Prohibiting Capital Punishment through a Jus Cogens Norm,” in *The Death Penalty’s Denial of Fundamental Human Rights: International Law, State Practice, and the Emerging Abolitionist Norm* (Cambridge University Press, 2022), 223.

⁷ See, e.g., Mahkamah Konstitusi Republik Indonesia, *Laporan Tahunan Mahkamah Konstitusi Republik Indonesia*.

⁸ Chaihark Hahn, “Constitutional Court of Korea: Guardian of the Constitution or Mouthpiece of the Government?,” in *Constitutional Courts in Asia: A Comparative Perspective*, ed. Albert H. Y. Chen and Andrew Harding (Cambridge University Press, 2018), 141.

⁹ Indrayana, “Indonesian Constitutional Reform 1999- 2000, An Evaluation of Constitutional Making in Transition”; Mahfud MD, “Politik Hukum Hak Asasi Manusia Di Indonesia”; Hahn, “Constitutional Court of Korea: Guardian of the Constitution or Mouthpiece of the Government?”

Moreover, during the Indonesian constitutional amendments, South Korea was specifically mentioned as one of the references of countries that established Constitutional Court besides European countries.¹⁰ The reference to South Korea is also apparent if comparing the authorities held by both Constitutional Courts. Hence, this comparison could provide valuable insights into how post-authoritarian democracies in Asia deal with human rights issues and the role of Constitutional Courts as one of the guardian institutions in shaping the debates.

Existing literature shows numerous studies on human rights, particularly concerning the death penalty issue. Most studies discuss the debate over the policy and the implementation of capital punishment in Indonesia. Colman Lynch's article on *Indonesia's Use of Capital Punishment for Drug-Trafficking Crimes: Legal Obligations, Extralegal Factors and the Bali Nine Case*¹¹ argues that while Indonesia had a constitutional obligation to end death penalty under its Constitution, the Court finds the ambiguity of the constitutional provisions to declare that capital punishment remains constitutional. Eddy Rifai, in *An Analysis of the Death Penalty in Indonesia Criminal Law*, finds a gap between the death penalty execution and the legal policy of death penalty execution in Indonesia. The frequent delays in death penalty execution often resulted in double punishments for convicts' imprisonment and capital punishment.¹²

A collaborative study by Nelvitia Purba and others¹³ analyses whether the implementation of the death penalty is legitimate. Their analysis shows that the death penalty is in accordance with the Constitution and other relevant laws and International Covenants. In contrast, Butt argues that the execution of the death penalty on Hanky Gunawan is considered unconstitutional because the right to life is absolute.¹⁴ In *A Key Domino? Indonesia's Death Penalty Politics*,¹⁵ Dave McRae assesses dynamic policies of the death penalty in Indonesia. His study shows two competing arguments for greater use of capital punishment and its abolition.¹⁶

Some studies concerning the existence of the death penalty in South Korea tend to believe that there is a tendency for South Korea to move from a proponent of the death penalty to an abolitionist of the death penalty since there has been a moratorium on the death penalty since 1997. These include A study by Byung-Sun Cho on South Korea's changing capital punishment policy,¹⁷ A study by Eunsuhk Choi, Shanhe Jiang, E. Lambert on Reasons for South Korean attitudes towards the

¹⁰ Tim Penyusun Naskah Komprehensif, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, Dan Hasil Pembahasan 1999-2002 – Buku VI Kekuasaan Kehakiman (Edisi Revisi)* (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008), 370.

¹¹ Colman Lynch, "Indonesia's Use of Capital Punishment for Drug-Trafficking Crimes: Legal Obligations, Extralegal Factors, and the Bali Nine Case," *Columbia Human Rights Law Review* 40, no. 2 (2009): 523–93.

¹² Eddy Rifai, "An Analysis of the Death Penalty in Indonesia Criminal Law," *Sriwijaya Law Review* 1, no. 2 (2017): 190–99, <https://doi.org/10.28946/slrev.Vol1.Iss2.44.pp191-200>.

¹³ Nelvitia Purba et al., "Death Penalty and Human Rights in Indonesia," *International Journal of Criminology and Sociology* 9 (2020): 1356–62, <https://doi.org/10.6000/1929-4409.2020.09.156>.

¹⁴ Simon Butt, "Asia-Pacific Judicial Responses to the Death Penalty in Indonesia," *Alternative Law Journal* 39, no. 2 (2014): 134–35, <https://doi.org/10.1177/1037969X1403900215>.

¹⁵ Dave McRae, "A Key Domino? Indonesia's Death Penalty Politics," Lowy Institute for International Policy, 2012.

¹⁶ McRae. See also Elisabeth Kramer and Claudia Stoicescu, "An Uphill Battle: A Case Example of Government Policy and Activist Dissent on the Death Penalty for Drug-Related Offences in Indonesia," *International Journal of Drug Policy* 92 (2021): 5, <https://doi.org/10.1016/j.drugpo.2021.103265>; Abdul Jalil Salam and Zahlul Pasha Karim, "Death Penalty in Indonesia: Revisiting the Debate Between the Retentionist and the Abolitionist," *Lentera Hukum* 8, no. 1 (2021): 117, <https://doi.org/10.19184/ejhl.v8i1.20138>.

¹⁷ Byung Sun Cho, "South Korea's Changing Capital Punishment Policy: The Road from de Facto to Formal Abolition," *Punishment and Society* 10, no. 2 (2008): 171–205, <https://doi.org/10.1177/1462474507087198>.

death penalty: exploring the nexus between strong public support and history of misapplication,¹⁸ and A study by Kyungyeol Lee on Judicial Murder: The Argument for Abolition of the Death Penalty.¹⁹ Despite strong public support concerning the abolition of the death penalty, formally the South Korean Law adopts the death penalty as one type of punishment.

From a comparative perspective, Yingyos Leechainan and Dennis R. Longmire's study shows the use of capital punishment for drug trafficking is disproportionate to the gravity of drug-related offences, based on three grounds, namely, the questionable consideration of drug trafficking as the most serious crimes, the consideration that the use of death penalty for drug offences is an arbitrary exercise, and the potential risk for wrongful conviction when using a death sentence.²⁰ They added that in four countries, Singapore, Malaysia, Indonesia, and Thailand, there is a tendency to be reluctant to carry out executions for drug trafficking even though they continue to sentence a large number of drug-related offenders to death annually.²¹ Nopriandi and Ardhiansyah's study²² compares the paradigm of the death penalty between Indonesia, Saudi Arabia, and China. Their study shows that in these three countries, there is a tendency for capital punishment to remain applicable.

Unlike Nopriandi and Ardhiansyah's finding, Andrew Novak in *The Future of the Mandatory Death Penalty in Malaysia and Singapore: Asian Values and Abolition in Comparative Perspective, with Implications for Indonesia*,²³ indicates there is a shift from mandatory to discretionary capital sentencing. This is because of the existence of a constitutional system in these three countries. Novak added that there was increased pressure from foreign nations through reciprocal treatment toward Indonesian citizens abroad.²⁴ Furthermore, Daniel Pascoe, in *Three Coming Legal Challenges to Indonesia's Death Penalty Regime*, shows the potential legal challenges: (1) the length of time; (2) the procedural changes; and (3) the relationship between judicial review proceedings and clemency petition.²⁵ This study discusses the benefits and potential legal and political challenges petitioners must overcome.

The abovementioned studies are essential for the current study for three critical reasons. First, the existing studies will be used as the foundation of the present study. Second, this present study will

¹⁸ Eunsuhk Choi, Shanhe Jiang, and Eric G. Lambert, "Reasons for South Korean Attitudes towards the Death Penalty: Exploring the Nexus between Strong Public Support and History of Misapplication," *International Journal of Comparative and Applied Criminal Justice* 43, no. 1 (2019): 61–76, <https://doi.org/10.1080/01924036.2017.1391107>.

¹⁹ Kyungyeol Lee, "Judicial Murder: The Argument for the Abolition of the Death Penalty Law," *Comparative Criminal Law Research* 17, no. 4 (2015): 139–72.

²⁰ Yingyos Leechainan and Dennis Longmire, "The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia and Thailand: A Comparative Legal Analysis," *Laws* 2, no. 2 (2013): 138, <https://doi.org/10.3390/laws2020115>.

²¹ Leechainan and Longmire, "The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia and Thailand: A Comparative Legal Analysis."

²² Tedy Nopriandi and Risky Fany Ardhiansyah, "Paradigm of Death Penalty (Comparative Study in Indonesia, Saudi Arabia and China)," *Lampung Journal of International Law* 2, no. 1 (2020): 57–68, <https://doi.org/10.25041/lajil.v2i1.2032>.

²³ Andrew Novak, "The Future of the Mandatory Death Penalty in Malaysia and Singapore: 'Asian Values' and Abolition in Comparative Perspective, with Implications for Indonesia," *The Indonesian Journal of International & Comparative Law* 1 (2014): 303–13.

²⁴ Novak. See also Dave McRae, "Indonesian Capital Punishment in Comparative Perspective," *Bijdragen Tot de Taal-, Land- En Volkenkunde* 173, no. 1 (2017): 20–21, <https://doi.org/10.1163/22134379-17301002>.

²⁵ Daniel Pascoe, "Three Coming Legal Challenges to Indonesia's Death Penalty Regime," *Indonesian Journal of International & Comparative Law* 2, no. 2 (2015): 239.

expand the discussion on the constitutionality of the death penalty in Indonesia and South Korea by critically analysing both the constitutional guarantee of the right to life and human dignity against the adoption of the death penalty. The Indonesian Constitutional Court's decision on Narcotic Law, which confirms the constitutionality of capital punishment, and the Constitutional Court of South Korea's decisions on the constitutionality of the death penalty will be substantially discussed. Finally, this study will complement the existing scholarly discussions on the constitutionality of the death penalty in Indonesia after the Constitutional Court decision on Narcotic Law.

Based on the backdrop and the development of literature presented above, this paper aims to answer two important questions: How do the Constitutional Courts in these two jurisdictions interpret human dignity and the right to life as opposed to the death penalty? Why do these two Constitutional Courts declare the death penalty consistent with the Constitution even though the Constitution guarantees human dignity and the right to life? The paper aims to answer these questions and prove that the Courts may interpret the constitutional guarantee of nonderogable rights and fundamental rights differently.

The paper is structured as follows: Part 1 introduces the topic and discusses the literature on the adoption of the death penalty in Indonesia and South Korea. Part 2 provides the research methods. Part 3 starts by comparing the right to life in the Indonesian and the South Korean constitutions, including when and how such provisions are inserted in the Constitutions. The discussion continues by analysing the constitutional review of the death penalty in Indonesia and South Korea and its further impact on its constitutionality. This includes examining the constitutional court decision and its implication for the constitutionality of capital punishment in Indonesia and South Korea. Part 4 concludes the article.

RESEARCH METHODS

This paper aims to study in detail the Indonesian Constitutional Court's decision on Narcotic Law and the South Korean Constitutional Court's decisions on the validity of capital punishment and its consequences on the constitutionality of capital punishment in both Indonesia and South Korea. In line with this purpose, the article utilises specific evidence, i.e., textual and historical approaches. Textual analysis is believed to be the best method to understand judges' thoughts.²⁶ Historical analysis is employed to understand the adoption of capital punishment in Indonesia, including the inclusion of nonderogable rights in the most recent Constitution. In the South Korean case, this study is essential to understand the Court's attitude regarding the constitutionality of the death penalty.

ANALYSIS AND DISCUSSION

The Adoption of the Death Penalty in Indonesia and South Korea

Indonesia inherited capital punishment from the Dutch colonial Government. While the death penalty was abolished in the Netherlands in 1870, it remained practised in Indonesia.²⁷ Under

²⁶ Mitchel de S.-O.-l'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press, 2009), 11.

²⁷ Deasy Simandjuntak, "Spectacle of the Scaffold? The Politics of Death Penalty in Indonesia," *ISEAS Yusof Ishak Institute* 46 (2015): 5.

the Soekarno and Soeharto administrations, the death penalty was applied for murder, terrorism, treason, and drug trafficking. Even though currently some crimes such as espionage, some military offences, war crimes, and the use of chemical weapons may invoke the death penalty as a discretionary punishment.²⁸ The execution of the death penalty heavily depends on the judicial discretion.²⁹ In 2005, Indonesia ratified the International Covenant on Civil and Political Rights (ICCPR), which limits the death penalty to only the most serious crimes.³⁰ For Indonesia, the implementation of capital punishment is intended to serve as a deterrent and, simultaneously, to demonstrate governmental political authority. This occurs despite significant challenges within judicial institutions and heightened external pressure against the practice of the death penalty from foreign nations.³¹

Similarly, South Korea practised capital punishment since time immemorial. During the Japanese occupation of Korea, the death penalty was routinely used to suppress Korean nationalism.³² After gaining its independence, South Korea supported capital punishment. The Korean Criminal Code recognised the death penalty for crimes against the national interest, murder, robbery, and theft of national treasures.³³ Authoritarian governments also utilised the death penalty against those who refused to comply with state political principles.³⁴ In 1948, the Government issued the National Security Law, which also applied the death sentence for those who showed any acts “supporting” communist North Korea.³⁵ In practice, despite the South Korean Government’s significant economic growth, the death penalty was frequently imposed on political dissidents in the name of stability.

Things significantly changed after Kim Dae-Jung held office in 1998—his personal experience as a death row survivor possibly a decisive factor in rejecting the death penalty.³⁶ Kim refused to sign death warrants. He commuted the sentences on death row to life imprisonment. The progressive leadership of Kim Dae-Jung and his successor, Roh Moo-hyun, provided a new direction for abolishing the death penalty. President Lee Myung-bak, however, is a political conservative and an evangelical Christian who was likely to oppose the abolition of the death penalty.³⁷ However, as

²⁸ Simandjuntak, “Spectacle of the Scaffold? The Politics of Death Penalty in Indonesia.”

²⁹ Simandjuntak.

³⁰ Law No. 12 of 2005 on the Ratification of the International Covenant on Civil and Political Rights (ICCPR) (Indonesia, 2005).

³¹ Yu Sin Huong and Ying Hooi Khoo, “Human Rights, State Sovereignty, and the Death Penalty: Indonesia’s Diplomacy Approach on Bali Nine,” *Journal of International Studies* 15, no. 1 (2019): 15; McRae, “Indonesian Capital Punishment in Comparative Perspective.”

³² Sangmin Bae, “South Korea’s De Facto Abolition of the Death Penalty,” *Pacific Affairs* 82, no. 3 (2009): 411.

³³ Bae, “South Korea’s De Facto Abolition of the Death Penalty.” See also Sangmin Bae, “International Norms, Domestic Politics, and the Death Penalty Comparing Japan, South Korea, and Taiwan,” *Comparative Politics* 44, no. 1 (2011): 48–49, <https://doi.org/10.5129/001041510X13815229366525>.

³⁴ Kuk Cho, “Death Penalty in Korea: From Unofficial Moratorium to Abolition?,” *Asian Journal of Comparative Law* 3, no. 1 (2008): 12, <https://doi.org/10.2202/1932-0205.1090>; Bae, “South Korea’s De Facto Abolition of the Death Penalty”; Cho, “South Korea’s Changing Capital Punishment Policy: The Road from de Facto to Formal Abolition.”

³⁵ Bae, “South Korea’s De Facto Abolition of the Death Penalty”; Cho, “Death Penalty in Korea: From Unofficial Moratorium to Abolition?”

³⁶ See also Byung Sun Cho, “The Death Penalty in South Korea and Japan: ‘Asian Values’ and the Debate about Capital Punishment?,” in *Capital Punishment: Strategies for Abolition*, ed. Peter Hodgkinson and William A. Schabas (Cambridge University Press, 2004), 259, <https://doi.org/10.1017/CBO9780511489273.011>; Bae, “South Korea’s De Facto Abolition of the Death Penalty.”

³⁷ Bae, “South Korea’s De Facto Abolition of the Death Penalty.”

the public support level for the death penalty in South Korea is also high, coupled with the weak opposition level, it could affect the effort to abolish the death penalty.³⁸

Comparing the Right to Life in the Indonesian and South Korea Constitutions

The term nonderogable rights is relatively new in Indonesia. It was first adopted in 1998 in the MPR decree XVII/MPR/1998 on Human Rights. Article 37 of this MPR Decree stipulates “*the rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances.*”³⁹ One year later, Law 39/1999 on Human Rights stipulates a similar provision. Article 4 of this Law explains “*the rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances by anyone.*”⁴⁰ Moreover, the Elucidation of Article 73 of Law 39/1999 explicitly stated that the limitations of human rights do not apply to nonderogable rights by considering the Elucidation of Article 4 and Article 9.⁴¹

The nonderogable rights are finally adopted in the updated 1945 Constitution. Article 28I paragraph (1) stipulates “*the rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances.*”⁴² It basically reiterates Article 37 of the 1998 MPR Decree.

How do we understand nonderogable rights among other human rights? Tom Farer, in *the Hierarchy of Human Rights*,⁴³ placed Nonderogable Rights in the paramount of the hierarchy of human rights, followed by Civil and Political Rights (1st generation of rights), Economic, Social, and Cultural Rights (2nd generation of rights) and Solidarity rights (3rd generation of rights, i.e., minority rights, the right to development). Nonderogable rights are the clearest example of the hierarchical nature of human rights norms.⁴⁴

The inclusion of nonderogable rights occurred in the second constitutional amendment in 2000. There was a significant demand for the human rights provision to be inserted in detail in the updated Constitution. Incorporating elaborate human rights provisions in the new Constitution reflects a strong commitment from the Government to protect human rights, considering such details and elaborate provisions on human rights that were absent in the previous Constitution. For some constitutional drafters, it is important to acknowledge minority rights, a right to life, a right to justice, and a right to information, and also to include nonderogable rights. There was

³⁸ Choi, Jiang, and Lambert, “Reasons for South Korean Attitudes towards the Death Penalty: Exploring the Nexus between Strong Public Support and History of Misapplication.”

³⁹ See Article 37 of MPR Decree No. XVII/MPR/1998 on Human Rights (Indonesia, 1998).

⁴⁰ See Article 4 of Law No. 39 of 1999 on Human Rights (Indonesia, 1999).

⁴¹ See Elucidation of Article 73 of Law No. 39 of 1999 on Human Rights.

⁴² See Article 28I paragraph (1) of the 1945 Constitution of the Republic of Indonesia (Indonesia, 1945).

⁴³ Tom Farer, “The Hierarchy of Human Rights,” *American University Law Review* 8, no. 1 (1992): 116.

⁴⁴ Koji Teraya, “Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights,” *European Journal of International Law* 12, no. 5 (2001): 919.

also a proposal that a new constitution includes six basic principles,⁴⁵ including the nonderogable rights principles. There is no clear explanation as to why the updated Constitution should include nonderogable rights other than because such rights are mentioned in the International Covenant on Civil and Political Rights (ICCPR)⁴⁶ and UHDR.

Unlike the most recent Constitution of Indonesia, which expressly determines the right to life as a nonderogable right, the right to life is not explicitly mentioned in the Korean Constitution.⁴⁷ Some scholars refer to Article 10 as the basis for protecting the right to life.⁴⁸ Article 10 stipulates, “*All citizens shall be assured of their human dignity and worth and shall have the right to pursue happiness. It shall be the duty of the state to confirm and guarantee the fundamental and inviolable human rights of individuals.*”⁴⁹ The article is also used by the South Korean Constitutional Court as the constitutional basis when reviewing the constitutionality of the death penalty, as discussed below. Such wordings provide room for interpretation as to whether the death sentence is constitutional. Furthermore, Article 10 also indicates the nonderogable nature, considering that it refers to human dignity and worth as “*inviolable human rights of individuals*”, even though the Court states otherwise.⁵⁰

Table 1. *Comparison of the Right to Life in the Indonesian and South Korean Constitutions*

	Indonesia	South Korea
Article on the right to life	Explicit: <i>“the rights to life, ... are all human rights that cannot be limited under any circumstances by anyone.”</i>	Implicit <i>“All citizens shall be assured of human dignity and worth ... It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.”</i>
Expression of Nonderogability	Explicit	Explicit

Source: Compiled by Authors, 2024.

⁴⁵ First, the document should take into account the domestic and international covenants concerning human rights, especially those that have been ratified by Indonesia. Second, it should also include the principle of nonderogable rights. Third, it should contain rights to development such as a right to pursue a good living, the right to obtain a healthy environment, and customary/adat rights. Fourth, the new provisions should contain a gender equality principle, guarantee equality [principle], no discrimination based on sex or gender, and women’s rights. Fifth, it should ensure children’s rights, such as the right to get a good education and the right to be loved. And the last principle is that there should be a limitation in exercising rights.

⁴⁶ Tim Penyusun Naskah Komprehensif, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, Dan Hasil Pembahasan 1999-2002 – Buku VIII Warga Negara Dan Penduduk, Hak Asasi Manusia Dan Agama (Edisi Revisi)* (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), 169.

⁴⁷ Whiejin Lee, “The Enforcement of Human Rights Treaties in Korean Courts,” in *Asian Yearbook of International Law*, ed. Seokwoo Lee and Hee Eun Lee (Brill, 2020), 104–5, <https://doi.org/10.1163/9789004415829>; Dong Heub Lee, “Development and Current Situation of the Constitutional Adjudication in Korea,” *Seoul Law Journal* 53, no. 2 (2012): 23–24; Bae, “South Korea’s De Facto Abolition of the Death Penalty.”

⁴⁸ See, e.g., Jimmy Chia Shin Hsu, “Right to Life and Capital Punishment in Transnational Judicial Dialogue,” *Asian Journal of Comparative Law* 16, no. 2 (2021): 333–34, <https://doi.org/10.1017/asjcl.2021.22>; Lee, “The Enforcement of Human Rights Treaties in Korean Courts.”

⁴⁹ See Article 19 of The Constitution of the Republic of Korea (South Korea, 1987). See also Article 34.

⁵⁰ The Constitutional Court acknowledges that a person’s life is ideally deemed to have absolute value. However, the Court argues that the Constitution does not expressly recognise absolute basic rights. Constitutional Court of Korea, Decision No. 22-1(A) KCCR 36, 2008Hun-Ka23 (2010).

The South Korean Criminal Code, however, stipulates that the death penalty is one type of punishment. It means the lawmakers support the existence of the death penalty for certain crimes. This was backed by strong public support for the death penalty,⁵¹ resulting in the reluctance of legislators to join the abolitionist movement, which might jeopardise their candidacy as they clashed with public opinion.⁵² Nevertheless, there have been several attempts to abolish the death penalty in the legislation.⁵³ Therefore, it might be the main reason why the Korean Constitutional Court becomes the central legal avenue to test the constitutionality of the death penalty.⁵⁴ However, it seems the Court is reluctant to declare that the death penalty goes against the Constitution in consideration of citizens' protection and human rights against brutal criminals.⁵⁵

Constitutional Review of Death Penalty Compared

Judicial Review of Narcotic Law and Its Impact on Capital Punishment in Indonesia

The story began when nine Australian citizens⁵⁶ went to Bali in 2005. There was a piece of information from the Australian Police to the Indonesian Police that these nine individuals planned to smuggle heroin to Bali. The Indonesian Police were aware of this situation and took necessary action to deal with these individuals. Indonesian Police finally caught the nine Australian citizens with the allegation of possessing and smuggling heroin to Bali. They were charged with violating Articles 82 (1) (a) and 78 (1) (b) of the 22/1997 Narcotic Law. Article 82 (1) (a) stipulates anyone who “*imports, exports, offers for sale, traffics, sells, purchases, or exchanges of a category I narcotic shall be punished with death, life in prison or up to twenty years in jail and a fine of up to one billion rupiah.*” In addition, Article 78 (1) (b) stipulates that those who possess or control a category one narcotic in plan form shall be punished for ten years in jail and a fine of five hundred million rupiah maximum.

The District Court of Denpasar Bali sentenced Andrew Chan and Myruan Sukumaran to death, while the other seven were sentenced to life imprisonment. The Appellate Court upheld the death sentence but reduced the imprisonment of five out of the seven from life imprisonment to twenty years. The Supreme Court rejected the appeals of Andrew Chan and Myuran Sukumaran and increased the punishment of four of the Bali Nine members from 20 years in jail to death. The final Supreme Court decision left 3 of the nine individuals on death row, five with life imprisonment and one with a twenty-year jail sentence.

In 2007, Chan and Sukumaran submitted a petition⁵⁷ to the Constitutional Court. In a separate petition, Scott Anthony Rush also submitted a similar petition to the Constitutional Court, arguing that some provisions⁵⁸ in the Narcotic Law contradict some Articles of the 1945 Constitution,

⁵¹ Choi, Jiang, and Lambert, “Reasons for South Korean Attitudes towards the Death Penalty: Exploring the Nexus between Strong Public Support and History of Misapplication.”

⁵² Bae, “South Korea’s De Facto Abolition of the Death Penalty.”

⁵³ Cho, “Death Penalty in Korea: From Unofficial Moratorium to Abolition?”

⁵⁴ Bae, “South Korea’s De Facto Abolition of the Death Penalty.”

⁵⁵ Shim Woo-hyun, “Constitutional Court Begins Third Review of Death Penalty,” *The Korea Herald*, July 2022; Hsu, “Right to Life and Capital Punishment in Transnational Judicial Dialogue.”

⁵⁶ Andrew Chan, Si Yi Chen Michael Czuga, Renae Lawrence, Tan Duc Thanh Nguyen, Metthew Norman, Scott Rush, Martin Stephens and Myuran Sukumaran

⁵⁷ Constitutional Court of the Republic of Indonesia, Decision No. 2-3/PUU-V/2007 on the Review of Law No. 22 of 1997 on Narcotics (2007).

⁵⁸ Articles 80(1) a, 80(2) a, 80 (3) a, 81 (3) a. 82 (1) a, 82 (3)a of Law 22/1997 on Narcotic. These provisions mention capital punishment which essentially in contradiction to the 1945 constitution Articles 28A, 28 I (1) and 28I (4).

including Articles 28A and 28I(1). Article 28A stipulates, “*Every person shall be entitled to live and be entitled to defend his/her life and living.*” Further, Article 28I (1) states, “*The right to life, the right not to be tortured, are human rights that cannot be reduced under any circumstances whatsoever.*” According to the petitioners, these two articles are clear that the right to life cannot be derogated under all circumstances. In addition, the Articles are also applicable to every person, not only Indonesian citizens. Therefore, there should not be any debate concerning the illegality of the death penalty anymore since the right to life prevails in any circumstances. The death penalty was both inhumane and ineffective.⁵⁹ Its execution is final and irrevocable since it puts an end to the right to life and other personal rights.⁶⁰ It is a cruel penalty.⁶¹

The petitioners argue that the Law on Constitutional Court, which narrows petitioners only to Indonesians, is in contradiction to the Constitution. This is because Article 28A of the Constitution mentions “every person,⁶²” not “every citizen.⁶³” Therefore, the provision applies to everyone regardless of their nationality. The foreign nationality of the petitioners should not be the determining factor in rejecting the petition. The petitioners further argue that international covenants such as the ICCPR and the UDHR acknowledge the importance of the right to life as a nonderogable right and aim to abolish the death penalty.⁶⁴ Worldwide, there is a tendency to abolish the death penalty.⁶⁵ The deterrent effect of capital punishment is also questionable.⁶⁶ Finally, the petitioners contended that the death penalty is contrary to the philosophical aspect of punishment in Indonesia since it has shifted from retributive to restorative justice.⁶⁷

In its reply, the Government stated that foreign nationals do not have legal standing since the Narcotic Law limits the potential petitioners to Indonesians only. The Government provided a statistic that shows the tendency that crime related to narcotics is increasing in Indonesia. Yet the Government also acknowledges more and more countries have abolished the death penalty. Finally, the government provided significant reasons why it is important to implement capital punishment consistently as a deterrent. The Government’s reply is also supported by experts’ opinions, which state that the death penalty may be imposed for serious crimes.

The Constitutional Court, in the 5-4 decision, weighs both “particularly serious crime” and “the most serious crime” under the ICCPR.⁶⁸ Referring to the UN Convention Against Illicit in Narcotic Drugs and Psychotropic Substances 1988, the Court stated that several articles on Law 22/1997 on Narcotics mirror the above Convention. This is because these two crimes are able to “*adversely affect the economic, cultural and political foundation of society and will carry out a danger of incalculable gravity*”.⁶⁹ As a result, the Court declared that the capital punishment

⁵⁹ Constitutional Court of the Republic of Indonesia, Decision No. 2-3/PUU-V/2007 on the Review of Law No. 22 of 1997 on Narcotics.

⁶⁰ Constitutional Court of the Republic of Indonesia.

⁶¹ Constitutional Court of the Republic of Indonesia.

⁶² Article 28A stipulates “every person shall be entitled to live and be entitled to defend his/her life and living.”

⁶³ Article 27 (2) stipulates, “every citizen shall be entitled for work and a living that is decent for humanity.”

⁶⁴ Second Optional Protocol of the ICCPR. See also Constitutional Court of the Republic of Indonesia, Decision No. 2-3/PUU-V/2007 on the Review of Law No. 22 of 1997 on Narcotics.

⁶⁵ Constitutional Court of the Republic of Indonesia.

⁶⁶ Constitutional Court of the Republic of Indonesia.

⁶⁷ Constitutional Court of the Republic of Indonesia.

⁶⁸ Constitutional Court of the Republic of Indonesia.

⁶⁹ Constitutional Court of the Republic of Indonesia.

mentioned in Law 22/1997 was constitutional. Drug smuggling and other drug-related crimes are considered serious crimes and, therefore, can be sentenced to death.

In addition, the Court also referred to the UN Convention 1988, which stated that the state party “*may adopt stricter of sever measure than those provided by this Convention if...such measure is essential to prevent and suppress of illicit traffic.*” The Court interpreted this by concluding that imposing the death penalty would be legitimate, as suggested by the Convention.⁷⁰ However, in the official interpretation of the right to life in General Comment No. 36 on Article 6 of the ICCPR, it is explicitly stated that crimes not resulting directly to and intentionally in death, including drug offences, can never justify the imposition of the death penalty, even within the framework of Article 6 of the ICCPR.⁷¹

Furthermore, it can be said that the Court declares the death penalty is constitutional for two important reasons. First, Article 28J (2) of the 1945 Constitution allows human rights limitation, including the right to life. The nonderogability of the right to life can be limited because the Narcotics case presented to the Court satisfied “serious crime,” which under the UN Convention can be the reason to restrict nonderogable rights. Second, the death penalty for drug smugglers is punishable because it significantly affects the economic, cultural, and political foundation of society and carries out incalculable gravity, which fits with the criteria of “the most serious crime.” Nevertheless, the Court’s interpretation is inconsistent with the official interpretation of the right to life in the ICCPR as presented in the General Comment, which explicitly states that drug offences are not “the most serious crime”.⁷²

How did the Court Interpret the Nonderogability of the Right to Life Under the 1945 Constitution?

The nonderogability of the right to life is constitutionally guaranteed. It means their existence is absolute since it cannot be derogated in any circumstances. The judicial interpretation, however, is that such a right is not absolute. It is possible to limit such rights despite their status. The Court’s interpretation is based on the Court’s finding that there is no intention from the constitutional drafters to differentiate between derogable and nonderogable rights. In addition, the Court also utilised systematic interpretation to conclude that Article 28A can be limited by any Article afterward, specifically Article 28 J (2) of the 1945 Constitution. These two modes of interpretations are somehow different from the practice of judicial activism which often carried out by the constitutional court in some judicial review cases.⁷³

Referring to the discussion during the amendment, the constitutional drafters actually intended to insert provisions concerning nonderogable rights. For instance, Valina Singka Subekti from

⁷⁰ Constitutional Court of the Republic of Indonesia. Nevertheless, the inclusion of drug offences as the “most serious crime” has been subject for scholarly debates for decades. See e.g., Yuber Lago, Fajar Sugianto, and Syofyan Hadi, “Death Penalty in Indonesia Legal System: Fallibility and the Commitment to International Covenant on Civil and Political Rights,” *Technium Social Sciences Journal* 52 (2023): 122.

⁷¹ See Paragraph 35 of the General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (CCPR/C/GC/36, 30 October 2018).

⁷² See Paragraph 35 of the General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (CCPR/C/GC/36, 30 October 2018).

⁷³ Riris Ardhanariswari, Eko Nursetiawan, Syarafina Dyah Amalia, Enny Dwi Cahyani, Rozlinda Mohamed

Fadzil, “Upholding Judicial Independence Through the Practice of Judicial Activism in Constitutional Review:

^A Study by Constitutional Judges,” *Volksgeist*, 6, no. 2 (2023):183.

Utusan Golongan (region delegates) Fraction argued that derogable rights, including the right to life, should be formulated and emphasised that those rights are protected by the state and cannot be limited under any circumstances.⁷⁴ Similar views were presented, for instance, by Slamet Effendy Yusuf from Golkar Party Fraction and Hendy Tjaswadi from TNI/Polri Fraction, who stated that nonderogable rights are important and should be included in the Constitution.⁷⁵

Nevertheless, there were no substantial debates on derogable and nonderogable rights. The issue raised was concerning the limitation of human rights in general. For instance, Anwar Arifin from Golkar Fraction stated that Article 28J on the limitations of human rights should be retained to ensure that people are also obliged to respect the human rights of others.⁷⁶ Dewa Gede Atmadja, the invited academic expert from Udayana University, stated that human rights can only be limited based on public order, decency, and fundamental things to protect the wider community's interests through law (*undang-undang*).⁷⁷ The limitation for nonderogable rights was only mentioned once in the Closing of the Comprehensive Document (*Naskah Komprehensif*) of the amendments of the 1945 Constitution, which states that the limitations of human rights according to Article 28 J is also toward nonderogable rights.⁷⁸ However, it should be noted that no explicit debate is presented in the Comprehensive Document.

Concerning the reference to Article 28 J (2), which provides limitations for human rights, again, the Court did not offer full consideration in a way that there are two different sets of rights in the Constitution, i.e., derogable and nonderogable rights. Article 28 J (2) should only be directed to derogable rights, not nonderogable ones. It means nonderogable rights still cannot be derogated in any circumstances whatsoever, as clearly stated in the Constitution. As aforementioned, it should be noted that the limitations for nonderogable rights using Article 28 J (2) were only the interpretation of the Comprehensive Document Revision Drafting Team, as there is no explicit discussion concerning the limitations of nonderogable rights presented in the Comprehensive Document. Considering the absence of debate between derogable and nonderogable rights during the constitutional drafting, such court opinion is questionable to be used as the argument to validate the practice of the death penalty in Indonesia. This is because the provision of the Constitution the Court refers to is crystal clear. There is no need to provide further interpretation or to find other sources if the Constitution already provides clear provisions.

Moreover, from four Constitutional Justices presenting their dissenting opinion, three Justices provide arguments on the nonderogability of the right to life. More interestingly, they not only present their arguments based on the legal history of the constitution drafting and international legal instruments but also relate the issue to the fundamental philosophy of the state, morality, and religion. For instance, Justice Achmad Roestandini interprets the concept of nonderogability in a strict textual manner. He argues that the right to life, described as a right that “*cannot be subjected to any derogation in any situation*,” is absolute and, therefore, cannot be restricted based on Article 28J (2) of the Constitution. Hence, it is not subject to restriction based on Article 28J (2)

⁷⁴ Tim Penyusun Naskah Komprehensif, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, Dan Hasil Pembahasan 1999-2002 – Buku VIII Warga Negara Dan Penduduk, Hak Asasi Manusia Dan Agama* (Edisi Revisi).

⁷⁵ Tim Penyusun Naskah Komprehensif.

⁷⁶ Tim Penyusun Naskah Komprehensif.

⁷⁷ Tim Penyusun Naskah Komprehensif.

⁷⁸ Tim Penyusun Naskah Komprehensif.

of the Constitution.⁷⁹ His interpretation draws upon the systematic framework of the ICCPR, which delineates nonderogable rights. Furthermore, he invokes the principle of constitutional supremacy, asserting that if Article 28I (1) explicitly prohibits derogations from the right to life under any circumstances, then the imposition of the death penalty, which aims to end a person's life, would be deemed unconstitutional.⁸⁰

Similar standing can also be found in Justice Laica Marzuki's dissenting opinion. Justice Marzuki stated that the right to life cannot be restricted by (Narcotics) Law (as a lower-level regulation), as *"the basic rights directly bind the three branches of government to obey and respect them."*⁸¹ He also mentioned that Article 28J (1) of the 1945 Constitution (and Article 29 (2) of UDHR) cannot be used, even though he did not further explore this statement. Justices Marzuki also emphasised that the death penalty cannot be reinstated if the convicted individual is subsequently proven to be not guilty. He also referenced the Cairo Declaration on Human Rights in Islam, underscoring the prohibition against taking life except for reasons prescribed by Sharia.⁸²

Lastly, Justices Maruarar Siahaan states that the death penalty is essentially inconsistent with the basic philosophy of nation and state, international human rights instruments, and scientific research in criminology and sociology on the purpose of criminal punishment. While it is apparent in the context of international human rights instruments, Judge Siahaan asserted that the death penalty contradicts the fundamental philosophy of the nation and state outlined in the Preamble of the 1945 Constitution, as the Preamble embodies principles that mandate the Government and other states authorities to *"uphold humanitarian ethics that honour human dignity and the nation's deeply ingrained civility, representing the noble moral aspirations of the populace."*⁸³ Moreover, using historical and comparative examples, he also noted that the "deterrent effect" of the death penalty has not been successful in completely reducing the criminal acts that are intended to be combated.⁸⁴ Justice Siahaan also observed that even there was a lack of explanation in the constitutional drafting minutes regarding whether the restriction under Article 28J (2) is explicitly intended to justify the death penalty.⁸⁵ Hence, Justice Siahaan contends that the death penalty in the Narcotics Law fails to align with the norms of the 1945 Constitution. Moreover, even if it is understood that the right to life is not interpreted as absolute and can be restricted, this restriction cannot be interpreted as the state's right to take away life and, therefore, cannot also be interpreted as giving the authority to the Government and the legislative to regulate and impose the death penalty.⁸⁶

The South Korean Judicial Approach to the Constitutionality of Death Penalty

The constitutionality of the death penalty has been questioned several times. In 1996 and 2010, the Court confirmed the constitutionality of the death penalty.⁸⁷ However, the Court did not reach

⁷⁹ See Constitutional Court of the Republic of Indonesia, Decision No. 2-3/PUU-V/2007 on the Review of Law No. 22 of 1997 on Narcotics.

⁸⁰ See Constitutional Court of the Republic of Indonesia.

⁸¹ See Constitutional Court of the Republic of Indonesia.

⁸² See Constitutional Court of the Republic of Indonesia.

⁸³ See Constitutional Court of the Republic of Indonesia.

⁸⁴ See Constitutional Court of the Republic of Indonesia.

⁸⁵ See Constitutional Court of the Republic of Indonesia.

⁸⁶ See Constitutional Court of the Republic of Indonesia.

⁸⁷ Lee, "The Enforcement of Human Rights Treaties in Korean Courts."

a unanimous decision in either decision. In the 1996 decision, the Court reached a 7-2 decision, while in 2010 was a 5-4 decision. However, to declare the death penalty unconstitutional, the Court is required to achieve 6 out of 9 Justices. The death penalty, according to Article 66 of Criminal Law, is defined as the most severe form of punishment. It is mentioned that “*the death penalty shall be executed by hanging at a prison.*” The Constitution does not expressly mention whether the death penalty is needed. Yet it acknowledged its existence in Article 110 (4): “*military trial under extraordinary martial law may not be appealed... except in the case of the death penalty.*”

Judicial review concerning the validity of capital punishment can be seen in the 2010 Court decision.⁸⁸ The Constitutional Court of South Korea was requested to review the constitutionality of capital punishment. The questions examined by the Court are as follows: (1) whether the right to life can be subject to a general statutory constraint under Article 37 Section 2 of the Korean Constitution; (2) whether the death penalty is incompatible with the principle of proportionality and its restraint on the right to life; and (3) whether the death penalty is inconsistent with Article 10 of the Constitution, which guarantees human dignity and worth.⁸⁹ Although the 2010 5-4 decision held that the death penalty is constitutional, this decision has three concurring opinions, three dissenting opinions from three constitutional Justices, and one partial unconstitutionality opinion.⁹⁰ The Court declared that even though the Constitution does not directly recognise or prohibit the death penalty, it should be considered implicitly recognised by the Constitution through interpretation connected with other provisions.⁹¹

While the Court acknowledges that a person’s life is ideally deemed to have absolute value, the Constitution does not expressly recognise absolute basic rights, and it also stipulates that people’s freedom and rights may be restricted only when necessary for national security, the maintenance of law and order or for public welfare under Article 37 Section 2, and thus, it might be limited to protect others’ life.⁹² It has the same value or public interests with the same importance. It is also noted that the death penalty is applicable only for cruel and heinous crimes. Based on this argument, the Court held that the death penalty does not necessarily violate the constitutional principle of proportionality, complying with all the elements of the legitimacy of purpose, appropriateness of means, the least restrictive means, and balance between legal interests.⁹³ Furthermore, the Court maintained that since the death penalty does not exceed the scope of constitutional restraint, the mere fact that it deprives the criminal of the right to life does not automatically constitute a violation of human dignity and value as outlined in Article 10 of the Constitution.⁹⁴ The Court added the importance of having a proper proportionality between the criminal conduct and the corresponding penalty, and thus, careful consideration is required in sentencing a death penalty.⁹⁵

Furthermore, it is intriguing to understand the Justices’ stance on the right to life in the context of the death penalty. Justice Kang-kook Lee presented a concurring opinion, asserting that while Justice Lee recognises the constitutionality of the death penalty, it should only be applied in exceptional situations when deemed unavoidable. Justice Kang-kook Lee emphasised that such imposition must

⁸⁸ Constitutional Court of Korea, Decision No. 22-1(A) KCCR 36, 2008Hun-Ka23.

⁸⁹ Constitutional Court of Korea.

⁹⁰ Constitutional Court of Korea.

⁹¹ Constitutional Court of Korea.

⁹² Constitutional Court of Korea.

⁹³ Constitutional Court of Korea.

⁹⁴ Constitutional Court of Korea.

⁹⁵ Constitutional Court of Korea.

align with principles of justice and equity, adhering to the standards of proportionality and the least restrictive means.⁹⁶ Justice Hyeong-ki Min also shares similar standing and argues for minimising the scope and types of crimes subject to the death penalty, urging legislative efforts to enhance the overall system by seeking public consensus and drawing inspiration from foreign legislation, with the potential repeal of challenged laws or provisions.⁹⁷ Another constitutional Justice presenting a concurring opinion, Justice Doo-hwan, argues that the great concern regarding the death penalty is not its existence *per se* but its abuse or misuse, and thus, all the criminal procedures revolving around the death penalty should be carefully reviewed.⁹⁸

Justice Dae-hyen Cho, who presented the partial unconstitutionality opinion, argues that the death penalty “*does not satisfy the elements of Article 37 Section 2 of the Constitution to justify the deprivation of life but only violates the essential aspects of the right to life.*”⁹⁹ Furthermore, Justice Cho stated that the death penalty is constitutionally acknowledged as an exception, applicable solely in military trial cases under a state of emergency martial law, as outlined in Article 110 Section 4 of the Constitution. Therefore, it is not deemed unconstitutional when applied to a case falling within the situations described in the exception clause of Article 110 Section 4 of the Constitution.¹⁰⁰ The standing is similar to what Justice Kang-kook mentioned regarding imposing the death penalty in rare circumstances and when it is unavoidable.

Three Constitutional Justices, Hee-ok Kim, Jong-dae Kim, and Young-joon Mok, presented dissenting opinions and agreed that the death penalty is unconstitutional and violates human dignity and worth and the right to life. Justice Hee-ok Kim highlighted that the Constitution is drafted to reiterate human dignity and worth and protect the right to life, and thus, opposes the death penalty as it views offenders solely as objects for revenge or tools for public interest and crime prevention, contradicting Article 10.¹⁰¹ Jong-dae Kim criticises the aspect of proportionality, as he argues that upon the imposition of a death sentence, the conditions where the interests of national security or the victim’s life are balanced against the offender’s life do not exist anymore.¹⁰² Meanwhile, Justice Young-joon Mok emphasised that the right to life is absolute and cannot be constitutionally restricted.¹⁰³ Justice Mok further stated that the death penalty violates the principle of the least restrictiveness, and it seems to be an inappropriate method for achieving its legislative purpose, given its diminished practical effectiveness, especially since an international human rights organisation has categorised South Korea as ‘abolitionist in practice.’¹⁰⁴

Apart from the abovementioned court decision, the death penalty has not been practised in almost 25 years. It is, therefore, important to question whether capital punishment needs to be regulated in legislation. South Korea has its firm stand on the moratorium of the death penalty as an “abolitionist in practice,” as mentioned by Justice Young-joon above. On a social level, however, there are differing views. Some support the practice of capital punishment, and others oppose the implementation of such punishment. There is an increasing number of calls for resumption of

⁹⁶ Constitutional Court of Korea.

⁹⁷ Constitutional Court of Korea.

⁹⁸ Constitutional Court of Korea.

⁹⁹ Constitutional Court of Korea.

¹⁰⁰ Constitutional Court of Korea.

¹⁰¹ Constitutional Court of Korea.

¹⁰² Constitutional Court of Korea.

¹⁰³ Constitutional Court of Korea.

¹⁰⁴ Constitutional Court of Korea.

executions. Furthermore, aside from the evident international pressure advocating for the abolition of the death penalty in South Korea, it underscores the significant role played by the Constitutional Court at the domestic level. Despite the differing views among the Constitutional Judges, as explained above, the 2010 decision, with a 5-4 ruling, further questioned the need for the death penalty. Even the three Constitutional Justices who provided concurring opinions emphasised that the death penalty should only be imposed in exceedingly exceptional and restrictive circumstances, highlighting the importance of proportionality. This suggests that if alternative punitive measures can achieve the intended purpose, there is no necessity to resort to the death penalty. Additionally, it underscores the Constitutional Court's ongoing recognition that the death penalty may potentially violate the right to life.¹⁰⁵ The comparison between the South Korean and Indonesian Constitutional Court's approach is presented below.

Table 2. *Comparison of the Indonesian and South Korean Constitutional Court Approach on the Constitutionality of Death Penalty*

	Indonesia	South Korea
Reasons for justifying limitation to the right to life	1. The constitutional drafters did not intend to differentiate between derogable and nonderogable rights. Therefore, limitations under Article 28 J also apply to “nonderogable rights”. 2. From the Indonesian historical constitutionalism perspective, human rights have not been viewed as absolute. 3. Society's perspective should be considered alongside individual rights. 4. The Court argues that international law does not forbid the death penalty, particularly for serious crimes.	1. The Constitution does not expressly recognise absolute basic rights. 2. The right to life can be limited for national security, law and order, or public welfare purposes. 3. The death penalty does not inherently violate human dignity or constitutional limits. 4. Death penalty complies with constitutional principles of proportionality, purpose legitimacy, appropriateness, minimal restriction, and legal balance. 5. The main issue of the death penalty is the potential for misuse, not its existence per se. Thus, all related procedures should be thoroughly reviewed, and careful consideration should be taken into account in sentencing.
Reasons for limiting the death penalty	1. Death penalty should be a special, not primary, punishment. 2. Death penalty should include a 10-year probation, allowing commutation to life imprisonment or 20 years for good behavior. 3. Death penalty should not be applied to minors. 4. Executions should be postponed for pregnant women until after childbirth and for mentally ill individuals until recovery.	1. Applicable only for particularly cruel, heinous crimes, unavoidable, exceptional cases. 2. Constitutionally, it's an exception, limited to military trials under martial law.

¹⁰⁵ Bae, “South Korea's De Facto Abolition of the Death Penalty.”

	Indonesia	South Korea
Reasons for favouring the nonderogability of the right to life	1. The right to life is absolute and cannot be restricted under Article 28J (2) of the Constitution. 2. The right to life binds all branches of government; the death penalty cannot be reinstated if the person is later proven innocent. 3. The death penalty is inconsistent with national philosophy, international human rights, and criminological research. 4. It contradicts the nation's fundamental philosophy as stated in the Preamble of the 1945 Constitution. 5. The death penalty has not proved to deter criminal acts effectively.	1. The Constitution emphasizes human dignity and the right to life, opposing the death penalty as it treats offenders as mere tools for public interest and crime prevention. 2. Once a death sentence is given, balancing national security or the victim's interests against the offender's life no longer applies. 3. The death penalty breaches the principle of minimal restriction and is seen as an unsuitable method to achieve its legislative goals.

Source: Compiled by Authors, 2024.

Even though South Korea is categorised as a *de facto* abolitionist, the constitutional interpretations seem to favour the constitutionality of the death penalty. Meaning that it could be conducted under very specific conditions, such as “particularly cruel, heinous crimes, unavoidable, exceptional cases”. It is similar to the Indonesian Constitutional Court, which states that the death penalty can be used for “the most serious crimes.” However, it should be noted that what these conditions mean still could be broadly interpreted by the state. Furthermore, the examination of decisions concerning the constitutionality of the death penalty in South Korea and Indonesia illustrates a multifaceted issue that extends beyond purely legal considerations, as the debate is intricately linked to political dynamics and historical context. It can be seen, for instance, by Indonesia's references to its historical constitutionalism that perceives human rights as not absolute and South Korea's consideration for national security, law and order, or public welfare.

CONCLUSION

The paper has explained the long history of the death penalty in Indonesia and South Korea and how it connects with the constitutional guarantee of the right to life. While there is a significant constitutional guarantee on the right to life in Indonesia and South Korea, will such strong constitutional commitment be interpreted differently by the other branches of Government, including the Court? The paper concludes that the constitutional guarantee of the right to life will not automatically be translated into the same fashion by other branches of Government. The case of judicial review of the death penalty in Indonesia and South Korea explains this situation. The Courts declared that the practice of the death penalty in both countries remains constitutional despite the crystal-clear provisions of the Constitution regarding the nonderogability of the right to life. Courts in both jurisdictions find specific ways to interpret the constitutional provisions other than employing a textual approach. The Courts utilised the relevant international covenants such as ICCPR and the minutes of the constitutional amendments to find the original intent of the framers of the Constitution to conclude that even though the constitutional provision stipulates that the right

to life is a nonderogable right, it was not the intention of the constitutional drafters. Moreover, the international covenants do not prohibit the adoption of the death penalty for serious crimes.

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