

# Human Dignity in the Criminal Process: A Lesson Learned from Torture Case in Germany

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## Abstract

The research aims to analyze the prevising human dignity in the criminal process, especially in cases regarding torture for good purposes. In the interrogation process, the preparator does not give any information about the hostage; at the same time, the hostage's condition becomes critical. Does harm given to the preparator without causing injuries within a short time to save a hostage be accepted and not violate human dignity? The researcher conducts document research and applies a comparative law approach to answer the question. The study compares Indonesian and German legal systems to show the different perspectives on the issue. The research shows that historical and cultural dimensions shape the concept of human dignity in each legal system, and it has a consequence with the idea of proportionally deterring torture for good purpose action. Under Germany's legal system, this action cannot be accepted because human dignity is the supreme value of the Constitution. It is a bit different from the Indonesian legal system, where the concept of human dignity shall maintain a balance between individual and community rights; the action might be accepted with strict requirements.

**Keywords:** Criminal Process, Human Dignity, Proportionality Principle, Torture

## 1. Introduction

Human dignity plays a central role in the criminal process. Human dignity guides the enacting, application, and enforcement of criminal law.<sup>1</sup> However, when states exercise the right to punish crime to maintain social order and protect human dignity, it might threaten the human dignity of criminal perpetrators. Human dignity does not allow law enforcement officers to torture or conduct any cruel conduct in the criminal process. Torture is considered as a violation of human dignity. Torture is often taken to be intimately connected to the humiliation and degradation that torture inflicts.<sup>2</sup>

In 1998, Indonesia ratified the United Nations Convention against Torture and Other Cruel, Inhuman or Treatment or Punishment. The convention prohibits the law enforcement officer from intentionally causing pain or suffering, both physical and psychological, to gain information from that person, including the prime suspect, perpetrator or witness. However, 25 years after the convention was ratified, torture still became a problem in Indonesia's criminal investigation process. According to the Institute for Criminal Justice Reform, torture

<sup>1</sup> Yi-Su Kim, 'Invitation Article: Criminal Justice and Human Dignity in Constitutional Adjudication', *International Journal of Criminal Justice*, 1 (2019), 4-19 <https://doi.org/10.36889/ijc.2019.12.1.4>.

<sup>2</sup> Suzy Killmister, 'Dignity, Torture, and Human Rights', *Ethical Theory and Moral Practice*, 19.5 (2016), 1087-1101 <https://doi.org/10.1007/s10677-016-9725-6>.

during the criminal investigation process has severe consequences in the absence of an affair trial, and, in some instances, it leads to capital punishment for the defendant.<sup>3</sup>

Investigator prohibits particular actions that are categorized as violations of human dignity. The Head of Indonesian National Police Regulation No. 7 of 2006, concerning the National Police Code of Conduct, states that all police members shall not degrade human dignity. Then, The Head of Indonesian National Police Regulation No. 8 of 2009 concerning the Implementation of Human Rights Standards and Principles on National Police Duties restricts investigators to intimidation, threats, physical, psychological or sexual torture to obtain information, explanation or confessions. Violation of the regulation is considered a discipline and ethics violation.

In a situation where the kidnapper victim is in severe danger, the only way to save the victim's life is by forcing the kidnapper to tell the Police the victim's location. Can physical or physiologic pain or suffering without causing injuries within a short time be accepted to keep the victim alive? It becomes an interesting discussion. Article 18 Law No. 2 of 2012 states that Police have the authority to take other responsible actions. These norms can be interpreted as Police having the power to conduct their sources in law enforcement and to serve public order.<sup>4</sup> There are several boundaries to exercising police discretion: it shall not be against the law; based on legal considerations or beliefs that the officer shall require action to prevent other harm; shall be appropriate and based on moral reflection; the step shall be conducted in necessary condition; and respect human dignity.<sup>5</sup> But what are the boundaries of such power?

Indonesia does not have a solid case to refer to that situation. However, Germany has a strong chance regarding this situation. In Daschner Wolfgang and E's case, the German court discussed torture for good purposes with human dignity principles. In another case, Gäfgen v. Germany, the European Court of Human Rights discusses prohibiting inhuman or degrading treatment. Each case discusses proportionality principles between specific state organs to prevent harm to human dignity.

This research aims to analyze the limitation of law enforcement officer authority during the criminal process to preserve human dignity. Significantly, the debate on law enforcement authority to conduct torture for a good purpose with the protection of human dignity. Does harm given to the preparator without causing injuries within a short time to save a hostage be accepted and not violate human dignity? Does harm given to the preparator without causing injuries within a short time to save a hostage be accepted and not violate human dignity? The study will discuss and examine two variables. First, the Protection of human dignity both in Indonesia and Germany. Second the proportionality principle in the criminal process. The different perspectives on human rights between Indonesia and Germany will bring exciting discussions about the limitation of proportionality principles in both countries. Germany's perfective of proper human protection and restriction of proportionality principles can be a lesson learned. However, Indonesia has a different perspective on balancing human rights and legal interests – therefore, the article also discusses the challenge to Indonesia to adopt the norms.

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<sup>3</sup> Adhigama Andre Budiman and others, *Torture in the Cases of Death Penalty in Indonesia* (Jakarta, 2023).

<sup>4</sup> Rizaldy Anggriawan and others, 'The Rising Tide of Financial Crime: A Ponzi Scheme Case Analysis', *Lex Scientia Law Review*, 7.1 (2023) <https://doi.org/10.15294/lesrev.v7i1.60004>.

<sup>5</sup> Ni Ketut Sari Adnyani, 'Kewenangan Diskresi Kepolisian Republik Indonesia Dalam Penegakan Hukum Pidana', *Jurnal Ilmiah Ilmu Sosial*, 7.2 (2021), 135–44 <https://doi.org/10.23887/jiis.v7i2.37389>.

Previous research has discussed torture and human dignity in Indonesia. Putra confers protection of constitutional rights for freedom from suffering in Indonesia.<sup>6</sup> Syafridatati and Saputra discuss the restoration of the rights of torture victims in detention Sijunjung sector police, West Sumatra.<sup>7</sup> Ardyia discusses the legal consequences of ratifying the optional protocol on the convention against torture and its effect on protecting the right to feel safe from torture in Indonesia.<sup>8</sup> However, no previous research discusses good purpose torture, prevention of human dignity and the proportionality principle. Therefore, this research produces novelty.

## 2. Method

The research is a document research. The researcher used secondary data from previously existing data collected from previous research and other data produced not for specific research purposes, such as legislation, regulations and court decisions.<sup>9</sup> To achieve the research purpose, the researcher applies a comparative law approach. It's a systematic study of particular legal traditions and rules on a relative basis, which requires comparing selected aspects, institutions or branches of two or more legal systems.<sup>10</sup> Comparative law aims to discover universal concepts and principles to discover the formulation or verification of natural laws regarding legal phenomena.<sup>11</sup> Germany is chosen as a comparative legal system because it has legal traditions that put human dignity at the highest value and has court decisions that can be a lesson for Indonesia.

The research process begins with manual and computerized searches of rules, books, journals, and past studies on torture and human dignity in Indonesia and Germany. Following that, all acquired data is divided into two groups: Indonesian and German. The author analyzed two groups' data using proportionality principles and compared the analysis results from each group to determine the similarity and difference, then proceeded with further analysis to determine the explanation for the similarity and difference to provide findings.

## 3. Discussion and Analysis

### 3.1. Human Dignity

Human dignity is the recognition that human beings possess a particular value intrinsic to their humanity and, as such, are worthy of respect simply because they are human beings.<sup>12</sup>

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<sup>6</sup> Rommy Patra, 'Perlindungan Hak Konstitusional Untuk Bebas Dari Penyiksaan Di Indonesia', *Jurnal Konstitusi*, 15.3 (2018), 565 <https://doi.org/10.31078/jk1536>.

<sup>7</sup> Refki Saputra and Syafridatati, 'Pemulihan Hak-Hak Korban Penyiksaan Di Tahanan Kepolisian Sektor Sijunjung, Sumatera Barat', *Jurnal Cita Hukum*, 4.2 (2016), 307-22 <https://doi.org/10.15408/jch.v4i2.3688>.

<sup>8</sup> Naura Ardyia, 'Akibat Hukum Ratifikasi Optional Protocol on the Convention Against Torture (Opcat) Dan Pengaruhnya Pada Perlindungan Hak Atas Rasa Aman Dari Penyiksaan Di Indonesia', *Jurnal Hukum To-Ra: Hukum Untuk Mengatur Dan Melindungi Masyarakat*, 9.1 (2023), 10-23 <https://doi.org/10.55809/tora.v9i1.167>.

<sup>9</sup> R Singleton and B C Straits, *Approaches to Social Research* (Oxford: Oxford University Press, 2018).

<sup>10</sup> P De Cruz, *Comparative Law in a Changing World* (London: Taylor & Francis Group, 2015).

<sup>11</sup> W J Kamba, 'Comparative Law: A Theoretical Framework', *The International and Comparative Law Quarterly*, 23.3 (1974), 485-519.

<sup>12</sup> Essien D. Essien, *Handbook of Research on Present and Future Paradigms in Human Trafficking* (Hershey, Pennsylvania: IGI Global, 2002).

However, human dignity is a concept that does not solely focus on defining a person but is also understood as a fundamental value to explain other concepts such as freedom, responsibility and solidarity.<sup>13</sup> The notion of dignity has a universal aspect related to a shared value of humanity. Still, at the same time, it has a context-specific element, which means that human dignity is related to the cultural and institutional frame in which it is embedded.<sup>14</sup> Therefore, a conception of dignity is adopted differently in every legal system.

Indonesia and Germany's legal systems preserve human dignity. Indonesia's and Germany's Constitution mentions respect and Protection of human dignity. However, each legal system adopts different concepts and limitations regarding human dignity. The Indonesian original Constitution is the Constitution of 1945. However, the Protection of human rights under the Indonesian Constitution started in 1998 after the reformation. The Indonesian House of Representatives amended the original Constitution and added a new chapter regarding human protection norms in the Indonesian Constitution in 1945. The word 'dignity' translates as '*martabat*.' The state must ensure people are the ways that can fulfil their dignity. Indonesian Constitution of 1945 preserves human dignity in the context of civil and political rights, such as mentioned in Articles 27 paragraph (1), Article 28, Article 28 C paragraph (2), Article 28 C paragraph (3), Article 28 E paragraphs (1) and (2), and 28 G paragraphs (1) and (2). Indonesian Constitution of 1945 also preserves human dignity in the context of economic, social, and cultural rights, as mentioned in Article 28 H paragraphs (1) and (3), Article 31, Article 32, and Article 34.

Besides that, the amended Indonesian Constitution also mandated the establishment of a new Constitutional Court with the authority to conduct judicial legislation.<sup>15</sup> Establishing a Constitutional Court is an attempt to uphold the principles of the rule of law to protect democracy and citizen's human rights.<sup>16</sup> The Constitutional Court gives an interpretation of the concept of 'dignity.' The Constitutional Court believes that human dignity regarding individual rights should be limited.<sup>17</sup> The Constitutional Court Decision No. 50/PUU-VI/2008 states that a person's reputation is part of human dignity that must be protected because it is part of the constitutional right of citizens guaranteed by the Indonesian Constitution of 1945; therefore, the defamation offence purpose if to safeguard another person human dignity and it shall not consider of violation of human dignity.<sup>18</sup> The decision gives norms that limit the freedom of speech to protect other people's interests. On the contrary, the Constitutional Court takes the position that promotes human dignity in terms of socio-economic and cultural rights.

<sup>13</sup> Antonio Autiero, 'Human Dignity in an Ethical Sense: Basic Considerations', *Interdisciplinary Journal for Religion and Transformation in Contemporary Society*, 6.1 (2020), 9–21 <https://doi.org/10.30965/23642807-00601002>.

<sup>14</sup> Giorgio Resta, 'Human Dignity', *McGill LJ*, 66.1 (2020), 85.

<sup>15</sup> Simon Butt, 'The Indonesian Constitutional Court', in *The Invisible Constitution in Comparative Perspective*, ed. by Rosalind Dixon and Adrienne Stone (Cambridge: Cambridge University Press, 2018), pp. 298–319. Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden: Brill, 2015).

<sup>16</sup> I Dewa Gede Palguna, 'Constitutional Complaint and the Protection of Citizens the Constitutional Rights', *Constitutional Review*, 3.1 (2017), 1 <https://doi.org/10.31078/consrev311>; and Trevor L. Brown and Charles R. Wise, 'Constitutional Courts and Legislative-Executive Relations: The Case of Ukraine', *Political Science Quarterly*, 119.1 (1994), 143–69.

<sup>17</sup> Nadirsyah Hosen, 'Human Dignity in the Jurisprudence of the Indonesian Constitutional Court', in *Human Dignity in Asia Dialogue between Law and Culture*, ed. by Jimmy Chia-Shin Hsu (Cambridge: Cambridge University Press, 2022), pp. 139–59.

<sup>18</sup> Indonesian Constitutional Court Decision No. 50/PUU-VI/2008 dated 5 May 2009 [https://www.mkri.id/public/content/persidangan/putusan/putusan\\_sidang\\_FINAL%20PUTUSAN%2050%20UU%20ITE%202008.pdf](https://www.mkri.id/public/content/persidangan/putusan/putusan_sidang_FINAL%20PUTUSAN%2050%20UU%20ITE%202008.pdf).

The Constitutional Court Decisions No. 101/PUU-XII/2014, No. 199/PUU-XIII/2015 and No. 101/PUU-XIV/2016, the Court stated that the government must establish a social security system that assists people to fulfil their human dignity, as mention in Article 34 Indonesian Constitution of 1945.

Cultural dimension also shapes the limitation of human dignity. Indonesian society is a communal society that prioritizes community. It is reflected in the values of Indonesian society. Koentjaraningrat<sup>19</sup> argues that the cultural significance of Indonesian society contains four meanings. First, humans do not live alone but are surrounded by other communities and societies. Second, human life depends on each other. Third, humans must maintain good relations with each other wherever possible. Fourth, humans act together and together wherever possible. Therefore, Indonesian society's values have a communal orientation. Indonesian society, like other Asian societies, places the community in preference to individuals and proceeds by consensus, not conflict.<sup>20</sup> Consequently, it limits human dignity, where collective concerns precede individual interests.

In the criminal process field, the Indonesian Criminal Procedural Code aims to guarantee and protect human rights and preserve human dignity in the state law framework. Several principles in the Criminal Procedural Code, such as equality before the law, presumption of innocence, speedy trial, and legal aids, apply as a tool to preserve human dignity.<sup>21</sup> Such principles are used to avoid torture in the criminal process. Words torture is not mentioned in the Indonesian Criminal Procedural Code. Still, specific regulations in criminal procedure prohibit law enforcement officers from torturing or conducting any cruel conduct in the criminal justice system process. Examples in the Head of Indonesian National Police Regulation No. 8 of 2009 concerning implementing Human Rights Standards and Principles on National Police Duties restrict investigators from torturing the preparator to obtain information or confessions.

In Germany, reserve human dignity plays a vital role in the German Constitution, known as The Basic Law of the Federal Republic of Germany (*Grundgesetz*). Article 1, paragraph (1) of the Basic Law states, "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." It means human dignity is an absolute right and constitutes the supreme value in the Constitution. Any interpretation of Basic Rights must take into account human dignity.<sup>22</sup> Human dignity cannot be limited or balanced to protect other constitutional rights or public interests.<sup>23</sup> Germany sees human dignity as the ultimate constitutional value; the spirit and essence of the entire Constitution are learned from this value. It reflects the German situation during the Constitution established in 1946. During that

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<sup>19</sup> Eko Handoyo and others, *Studi Masyarakat Indonesia, Studi Masyarakat Indonesia* (Yogyakarta: Ombak, 2015).

<sup>20</sup> Heru Susetyo, 'Human Rights Regime Between Universality and Cultural Relativism: The Asian and Indonesian Experience', *Indonesian Journal of International Law*, 16.2 (2019), 191–209 <https://doi.org/10.17304/ijil.vol16.2.749>.

<sup>21</sup> Panca Sarjana Putra and others, 'Judicial Transformation: Integration of AI Judges in Innovating Indonesia's Criminal Justice System', *Kosmik Hukum*, 23.3 (2023), 233 <https://doi.org/10.30595/kosmikhukum.v23i3.18711>.

<sup>22</sup> Thomas Henne, "The Concept of Human Dignity in The German Constitution" presented on CPG Law Academies: The German Political & Constitutional System, Faculty of Law Thammasat University, Bangkok, 10 October 2023.

<sup>23</sup> A Barak, *In Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Pres, 2015) <https://doi.org/10.1017/CBO9780511979033.045>.



time, Germany was in a condition where human dignity was at its lowest point due to the loss of the Second World War and the Holocaust. The Constitution reflects German's rejection of its Nazi character that serves as a violation of human dignity.

The Federal Constitution Court of Germany (*Bundesverfassungsgericht*) protected human dignity and democracy within Basic Law as a legal foundation. According to The Federal Constitution Court decision, "No single constitutional provision should be taken out of its context and interpreted by it, and it should be in such a way as to render it consistent with the fundamental principles of the Basic Law and the intentions of its framers."<sup>24</sup> In most cases, the Federal Constitutional Court applies the human dignity principle to support and protect human rights in economic, social, and political matters.<sup>25</sup> However, in the Wunsiedel case, the Federal Constitution Court limits individual rights. The Court decided that sedition offences prohibiting a person from disturbing the public peace by approving, glorifying or justifying the National Socialist do not violate freedom of expression, guaranteed in Basic Law because the legislature's motivation supports this view. After all, the statute was explicitly designed as a reaction to specific utterances in the public discourse by supporters of National Socialism.<sup>26</sup>

German Code of Criminal Procedure follows the frameworks of Article 1 paragraph (1) Basic Law. It means that institutions with authority in the criminal process must respect and protect human dignity. It reflects on the truth-finding in the criminal process. Truth finding in the criminal process implies interfering with individual rights. German Code of Criminal Procedure points out that no human being should become a mere object of questioning, a very source of information.<sup>27</sup> Subsequently, every person has a subjective right to be protected against torture during interrogation. Next, the truth-finding process guarantees the perpetrator is convicted based on facts rather than the pre-conceived views of others. Court verdicts must be based on truth, which is a requirement of justice and based on certainty that the perpetrator has been treated as a subject in the criminal process.

Ultimately, history and culture have shaped constitutional values and have consequences in the human dignity concept and limitation. Despite enshrining the preservation of human dignity within its Constitution of 1945, Indonesia's recognition of human dignity is not as prominent as that in Germany. Indonesia's constitutional spirit is based on narration as an independent nation that struggles from colonialization. This spirit is clearly stated in the Preamble Constitution of 1945. Subsequently, the Indonesian constitutional value is about narration to govern its country, as mentioned in early articles of the Constitution 1945. Afterwards, the human dignity aspect did not become necessary until 1998. The reformation spirit is liberation from an authoritarian regime; thus, adding human dignity as part of constitutional value is crucial. Before the reformation, Indonesia had the norm of protecting human dignity in the criminal process field, and reformation gives a positive point. More regulations and standards in the criminal process that respect and protect human dignity, including the torture prohibition. However, human dignity in Indonesia has

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<sup>24</sup> Geraldina Gonzalez de la Vega, 'Two Different Approaches in Constitutional Interpretation with a Particular Focus on Religious Freedom: A Comparative Study between Germany and the United States', *Boletín Mexicano de Derecho Comparado*, 41.122 (2007), 795–833.

<sup>25</sup> Nge Nge Aung, 'The Basis of Constitutional Adjudication in Germany', *Fiat Justisia: Jurnal Ilmu Hukum*, 16.1 (2022), 47–64 <https://doi.org/10.25041/fiatjustisia.v16no1.2419>.

<sup>26</sup> By Mehrdad Payandeh, 'German / European Law Conversation Series The Limits of Freedom of Expression in the Wunsiedel Decision of the German Federal Constitutional Court', *German Law Journal*, 11.08 (2010), 929–42.

<sup>27</sup> Winfried Hassemer, 'Human Dignity in the Criminal Process: The Example of Truth-Finding', *Israel Law Review*, 44.1–2 (2011), 185–98 <https://doi.org/10.1017/S0021223700001011>.

limitations in which collective concerns precede personal rights. Second principles of Pancasila 'just and civilized humanity' which means that human right shall provide balance between individual and community rights.<sup>28</sup> Recognition of individual rights is protected as long as it does not harm the values of society and as long as it can create order and peace in a pluralistic society. Unlike Germany, the story of the defeated century with the holocaust event has shaped constitutional value. Thus, protecting human dignity becomes a supreme value in the Constitution, and it follows with the criminal process field, where human dignity becomes the framework of the German Code of Criminal Procedure.

### 3.2. Proportionality Principle

In German public law, proportionality is designed to measure the legitimacy of all the state organs.<sup>29</sup> Proportionality is a conflict between citizens' fundamental rights and public and state interests<sup>30</sup>. The Federal Constitution Court considers the proportional principle necessary. European Court of Human Rights has adopted this principle. Legitimation of the balanced doctrine is to preserve human dignity as citizens' fundamental rights.

A decision made by the government must be based on proportionality. A public administration uses judgment to overcome concrete regulations that are vague or insufficient. A public administrator will utilize proportionality principles to balance a specific conflict in order to solve a specific problem. Proportionality can influence decision-making in government.<sup>31</sup> If a decision made by a public administrator violates a citizen's basic rights, under German law the Federal Constitution Court has the jurisdiction to review the judgment based on proportionality grounds. In certain circumstances, the Federal Constitutional Court may request that the European Court of Human Rights investigate the matter.<sup>32</sup>

The proportionality principle has two stages. First, establish that state organ action has violated citizens' fundamental rights. Second, the state organs must show that their effort has a legitimate purpose and that infringement is proportional. The proportionality principle has three elements: suitability, necessity and proportionality in the strict sense. All three elements express the idea of optimization.<sup>33</sup> Practicality means that the filtering element is limited to matters considered unsuitable for the purpose or completely unsuitable. Necessity means state organs must choose the least restrictive among equally effective means. The boundary depends on the nature of the citizen's right that must be protected and the severe effect of interference on individuals. State organs are required to demonstrate the existence of the least harmful measure. Proportionality, in the strict sense, demands a proper balance between the

<sup>28</sup> Tanto Lailam and Putri Anggia, 'The Indonesian Constitutional Court Approaches the Proportionality Principle to the Cases Involving Competing Rights', *Law Reform: Jurnal Pembaharuan Hukum*, 19.1 (2023), 110–27 <https://doi.org/10.14710/lr.v19i1.54087>.

<sup>29</sup> Yutaka Arai-Takahashi, 'Proportionality – a German Approach', *Amicus Curiae*, 1999.19 (2012), 11–13 <https://doi.org/10.14296/ac.v1999i19.1458>.

<sup>30</sup> Lailam and Anggia.

<sup>31</sup> Lena Enqvist and Markus Naarttijärvi, 'Discretion, Automation, and Proportionality BT - The Rule of Law and Automated Decision-Making: Exploring Fundamentals of Algorithmic Governance', ed. by Markku Suksi (Cham: Springer International Publishing, 2023), pp. 147–78 [https://doi.org/10.1007/978-3-031-30142-1\\_7](https://doi.org/10.1007/978-3-031-30142-1_7).

<sup>32</sup> Tanto Lailam, 'Peran Mahkamah Konstitusi Federal Jerman Dalam Perlindungan Hak Fundamental Warga Negara Berdasarkan Kewenangan Pengaduan Konstitusional', *Jurnal HAM*, 13.1 (2022), 65 <https://doi.org/10.30641/ham.2022.13.65-80>.

<sup>33</sup> Robert Alexy, 'Constitutional Rights, Balancing, and Rationality', *Habermas and Law*, 16.2 (2020), 265–74 <https://doi.org/10.4324/9781003074977-16>.

injury to an individual and the public interest as a measure. It prohibits those measures where the disadvantage to the individual outweighs the advantage to the public or the third person.

Neils Peterson argues that the proportionality principle has four stages – first, legitimate purpose. A particular legitimate purpose can be accepted, such as the action's interest, the move has discriminated against certain groups, or the activity is conducted to prevent serious harm. Second, there is a rational connection between purpose and fundamental restriction. This means state organs shall consider the sensible relationship between their method or mechanism and the result. Third, fundamental rights shall be restricted. State organs must find other alternative ways or tools to preserve the same effect with minimal or less impact on fundamental rights that have been violated. They were fourth, balancing. State organs shall consider the proportionality between the importance of fundamental rights and the importance of public interest and security.

Concerning human dignity, the German constitution, the Basic Law, considers human dignity the supreme value. Human dignity shall be protected and respectable, but it does not include getting priority over others. Therefore, human dignity is inviolable and thus not subject to proportionality. Indonesia also has a proportionality principle. In Indonesian Constitutional Court Decision No. 9/PUU-VII/2009, the court has admitted the proportionality principles is the constitutional and morality principal Constitution of 1945.<sup>34</sup> The proportionality principle in the Constitution of 1945 highlights the supremacy of law, equality before the law, and human rights to balance using force to maintain public order, national interests, and public morality.

However, the concept of proportionality under the Indonesian legal system differs slightly from German. Indonesian culture, which promotes collectivity and community, has shaped the idea of human dignity. Protecting human dignity under the Indonesian legal system protects individual rights and balances individual rights and community interests. Consequently, the concept of proportionality under the Indonesian legal system must be adjusted. Indeed, human dignity shall be protected, but it does not mean that it is not subject to proportionality. Human dignity may be an exception due to serious harm to the public interest.

### **3.3. Good Purpose Torture and Human Dignity in Criminal Process**

Indonesia does not have case-related torture for good purposes. However, the Indonesia Constitutional Court Decision No. 21/PUU- VI/2008 mentions the right to be free from suffering in criminal process discussions. Bali bombers who had been punished with capital penalty submitted a judicial review regarding the procedure for carrying out the death penalty. Bali bombers argue that execution in Indonesia, which is carried out by firing squad, is considered torture, and execution of the death penalty shall follow the Sharia requirement, carried out by beheading. The court ruled that execution by firing squad is not torture but a natural part of the execution process.<sup>35</sup> The Court believed it was unnecessary to determine whether the right to be free from torture was absolute. Therefore, the issue of whether the right

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<sup>34</sup> Indonesian Constitutional Court Decision No. 9/PUU-VII/2009 dated 25 March 2009 [https://www.mkri.id/public/content/persidangan/putusan/putusan\\_sidang\\_PUTUSAN%20PERKARA%20NO%209%20PUU%20VII%202009.pdf](https://www.mkri.id/public/content/persidangan/putusan/putusan_sidang_PUTUSAN%20PERKARA%20NO%209%20PUU%20VII%202009.pdf).

<sup>35</sup> Indonesia Constitutional Court Decision No. 21/PUU- VI/2008 dated 21 October 2008 [https://www.mkri.id/public/content/persidangan/putusan/putusan\\_sidang\\_PUTUSAN%20perkar%2021.puu.VI.2008\\_Amrozy\\_telah%20baca.pdf](https://www.mkri.id/public/content/persidangan/putusan/putusan_sidang_PUTUSAN%20perkar%2021.puu.VI.2008_Amrozy_telah%20baca.pdf).



to be free of torture that undermines human dignity could be limited by state law is far from settled.

Discussion concerning torture for good purpose, to prevent the death of innocent persons, became interesting in the German Court. The debate of whether this action can be categorized as a violation of human dignity can be found in Daschner Wolfgang and E's case. The case started in 2002 when Magnus Gaefgen kidnapped an 11-year-old boy in Frankfurt. He demanded money from the boy's family to release the boy. Police then arrested Gaefgen when he collected the ransom. During his interrogation, Gaefgen was evasive about his involvement in the abduction and provided no information about the location and condition of the boy. To save the boy's life, the day after the arrest, Frankfurt Police Vice-President Wolfgang Daschner, who was in charge of the interrogation process, ordered that pain be inflicted on the Gaefgen. The pain is given without causing injuries, under medical supervision and subject to prior warning. Then, E, a subordinate police officer, told Gaefgen that the police were prepared to inflict pain on him and that 'he would never forget' if he continued to withhold any information concerning the boy. Under the influence of this threat, Gaefgen gave complete details about the boy, including information that he already killed him in his apartment and hid the boy's body close to a lake near Frankfurt. In 2003, the court declared that Gaefgen was convicted of excessive abduction and murder and gave Gaefgen a life imprisonment sentence.

Although the perpetrator was guilty, the prosecutor charged Daschner Wolfgang, Frankfurt Police Vice-President, and E, a subordinate police officer, with torture case and brought to court. On 20 December 2004, the Regional Court (*Landgericht*) of Frankfurt am Main decided both were guilty. The court argues that the defendant's action was neither a requirement self-defence action nor a defence of another life and justification of necessity action. The court delivers two reasons. First, the court argues that the threat to use force was neither the only nor the least severe means at the disposal; other measures are available, such as confronting the suspect with the siblings of the hostage. Second, the court states that threat to use force infringed upon the dignity of the human being as laid down in the German Constitution and international law.<sup>36</sup> Therefore, the defendants' action violates Article 1 paragraph (1) Basic Law, where human dignity is inviolable, and Article 104 paragraph (1) sentence 2 Basic Law, where persons in custody may not be subjected to mental or physical mistreatment. Therefore, the state authority may not make any person an object, a paragon of fear of pain.<sup>37</sup>

In another case, Gaefgen, the preparator, submitted a claim to the European Court of Human Rights. Gaefgen argues that he was the victim of torture, inhuman or degrading treatment, and unfair trial, as mentioned in Article 3 and Article 6 of the European Convention on Human Rights.<sup>38</sup> The claim was brought to the European Court of Human Rights because the Federal Constitutional Court refused to examine it. Regarding Article 3 of the European Convention of Human Rights, the court states that Gaefgen is not a victim of torture and

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<sup>36</sup> Florian Jessberger, 'Bad Torture - Good Torture?: What International Criminal Lawyers May Learn from the Recent Trial of Police Officers in Germany', *Journal of International Criminal Justice*, 3.5 (2005), 1059-73 <https://doi.org/10.1093/jicj/mqi076>.

<sup>37</sup> Wolfgang Daschner and Case E, 'Respect for Human Dignity in Today's Germany: Regional Court (Landgericht) of Frankfurt Am Main, Decision of 20 December 2004, Daschner Wolfgang and E. Case', *Journal of International Criminal Justice*, 4.4 (2006), 862-65 <https://doi.org/10.1093/jicj/mql071>.

<sup>38</sup> Victoria Cherevach and Bas Megens, 'Case Notes', *Maastricht Journal of European and Comparative Law*, 16.3 (2009), 365-76 <https://doi.org/10.1177/1023263X0901600307>.

inhuman or degrading treatment. The court emphasized the prohibition of torture and inhuman and degrading treatment. The court underlined the high pressure on the police side to save the boy and that only a little bit of paint was given quickly, but that action must not be put into practice. The threats of torture provided by the police caused this mental suffering for Gäfgen, which is considered inhuman treatment. However, Gäfgen is no longer the victim since the national authority has acknowledged the mistreatment and has taken action against police who conduct torture and inhuman and degrading treatment. Next, regarding the unfair trial, the court Gaefgen is not a victim. The court argues that evidence obtained from torture and inhuman or degrading treatment does not automatically make an unfair trial. In fact, in the national court trial, Gaefgen voluntarily made confession about his action because he was remorseful and apologized.

The European Court of Human Rights emphasizes the disproportionate action done by Frankfurt Police, Daschner Wolfgang and E as decided in national court. The court accepted that the police's sole concern was to save the hostage's life.<sup>39</sup> Even though giving minor paint to the preparator is based on sound reason to save the boy's life, it is utterly unsuitable for human dignity. The argument that the omission of torture also infringes on the boy's human dignity cannot be accepted because it creates mental or physical mistreatment of the preparator. The European Court of Human Rights clearly states that "the methods of investigation employed constituted 'ill-treatment' and could not be justified on the ground of 'necessity', which was not a defence to a violation of the absolute protection of human dignity."

Other alternative actions may be used to obtain the same purpose, such as confronting the preparator with the siblings of the hostage. However, whether the alternative action can receive maximum information within a limited time can be debated. Subsequently, the element of necessity cannot be fulfilled. Then, under the German legal system, where individual rights become an essential part of human dignity, there is no proper balance between the injury to an individual and the purpose of saving another person's rights.

In that case, the discussion about the proportional principle may differ under the Indonesian's perfective. Torture, and inhuman or degrading treatment during the criminal process absolutely cannot be accepted. However, consideration must be built regarding the evil action to produce minimal harm. Even though the boy was already dead prior, the preparator was arrested. Minimal paint is given to the preparator quickly, which provides the preparator with information regarding the boy's condition and location. Thus, the police can save the boy's life. Confronting the preparator with the siblings of the hostage can receive maximum information with limited time. Then, the right to be free from torture must properly balance with other individual rights, such as the right to live for the boy and the boy's family. The last point creates differences between Germany and European acknowledgement of human rights. Under the Indonesian legal system, the family as a community has interests that shall be protected. Human dignity shall balance between individual rights and community rights.

Although Indonesia and Germany place differing values on proportionality principles and the protection of human dignity, Indonesia may nevertheless learn from the exercise of police decision in terms of proportionality. Gaefgen's has committed a terrible crime by kidnapping and murdering children, which offends the child family's emotions as well as the public's sympathies. It is difficult to apply police decision in a case that has gained public notice. However, both the German Court and the European Court of Human Rights allow the

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<sup>39</sup> Neil Graffin, 'Gäfgen v Germany, the Use of Threats and the Punishment of Those Who Ill-Treat during Police Questioning: A Reply to Steven Greer', *Human Rights Law Review*, 17.4 (2017), 681–99 <https://doi.org/10.1093/hrlr/ngx030>.

public to exercise proportionality in the police's decision. Daschner and E have both received disciplinary punishments, as well as a fine suspended. This means that the ruling of the Regional Court (*Landgericht*) of Frankfurt am Main determines the improper police decision and emphasizes the preservation of the preparator's right. The European Court of Human Rights highlights the judgment of the Regional Court (*Landgericht*) of Frankfurt am Main as a recognition of a breach of the preparator's right. The protection of preparatory rights is vital under criminal procedural law concepts. The preparator is both an object and a subject with the power to defend his or her rights. In contrast, Indonesia restricts access to police decision. The majority of police decision is based on the Police Code of Ethics Council, which the public does not have unrestricted access to. The proportionality of a police judgment cannot be adequately judged since the board has an interest in and a bias for their colleague. It implies that the preparator's right is readily infringed upon. Public access to the law enforcement decision-making process is critical to preserving human dignity.

#### 4. Conclusion

Human dignity is an essential part of the criminal law process. Torture during the integration process is a violation of human dignity. However, torture for a good purpose, trim paint of torture within a short time to the preparator to save hostage, can be a debate. The historical and cultural dimensions shape the concept of human dignity in each legal system, and it has consequences with the idea of proportionally deterring torture for good purpose action. Germany has strong cases regarding torture for good purposes, such as Daschner Wolfgang and E's case and Gäfgen v. Germany. In both cases, torture purposes are considered a violation of human dignity. That action is disproportional because it does not fulfil the elements of suitability, necessity and proportionality in the strict sense. It will be different if the case happens in Indonesia. Although under the Indonesian legal system, torture is a violation of human dignity and law, torture for good purposes might be accepted with solid criteria. It must strongly analyze whether alternative action has maximal results to prevent severe harm and then give a trim paint quickly to the preparator. If that action is necessary, then torture can be accepted because the right to be free from torture is not only part of human dignity but also must adequately balance with the other individual rights, the right to live for the boy and the victim's family. It is a challenge to the Indonesian legal system to put the same standard of persevering human dignity in torture for good purposes because of historical and cultural background. Therefore, Indonesia has adopted a proportional principle based on national historical and cultural values to deter such cases. Despite the differences in attitude and approach to human dignity and proportionality, there is a lesson to be learned for Indonesia in the exercise of police decision-making in terms of proportionality. Despite the fact that the case was widely publicized, both the German Court and the European Court of Human Rights enable the public to exert proportionality in the police's decision. In contrast to Indonesia, examining police decisions is rarely done and available to the public. As a result, the preparator's right is easily infringed. In the end, public access in order to examine law enforcement decision-making is vital for maintaining human dignity.

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