

Overview on Death Penalty in Indonesia



ICJR
Institute for Criminal Justice Reform

Prepared and Drafted By:

Erasmus A.T. Napitupulu
Researcher Associate

Editor:

Anggara
Senior Researcher Associate

Translators:

Pirhot Nababan
Robert F. Sidauruk

Cover Design:

Antyo Rentjoko

Photo:

Gustaf Eriksson / Creative Commons Attribution-Share Alike 3.0
Unported (CC BY-SA 3.0)



This work is licensed under a Creative Commons Attribution 3.0 Unported License.

Published by:**Institute for Criminal Justice Reform**

Jln. Cempaka No. 4, Pasar Minggu

Jakarta Selatan 12530

Phone/Fax: 021 7810265

Email: infoicjr@icjr.or.id

<http://icjr.or.id> | @icjrid

Foreword

During President Joko Widodo administration, Indonesia decided to execute the death convicts involved in narcotics crime. The first batch of the execution was organized on 18 January 2015, and the second batch was on 29 April 2015.

Before executing these death convicts, President Joko Widodo has asserted his position, which is rejecting every pardon request from death convicts in narcotics crime. However, the President's did not give due consideration on these requests. The rejection fails to consider unique aspects and characteristics of each padon petitioner. In addition, the rejection was given without proper explanation from the President. Rejection to the pardon petition was rendered without even reading the pardon petition.

Such problem was caused by the shortcomings in the Indonesian criminal justice system, currently stipulated under the Criminal code and several other laws. The current system has many flaws, and one of which is the failure to protect human rights. It is evident when the judicial institution sentenced Yusman Telambanua—a minor—with capital punishment. Yusman and Rasulah Hia—also a death convict—were allegedly tortured by the investigator, and to make things worse, they did not have proper legal assistance. Unfortunately, when they obtained legal assistance, their lawyer asked the court to sentence them to death.

Based on the review of the Institute for Criminal Justice Reform (ICJR), there are 13 laws that incorporate capital punishment. The Draft Bill on Criminal Code (RKUHP), which has been submitted by the government to the parliament, is still incorporating death penalty. The only difference under RKUHP lies in the limitation of death penalty implementation.

The effort to eliminate capital punishment from the Indonesian criminal justice system is still facing many challenges. Therefore, ICJR and other non-governmental organizations are encouraging the revision on both Criminal Procedural Law and Criminal Code. As of now, the revision to both legislation is still discussed at the House. ICJR will also encourage the government and the parliament to strengthen human rights protection within the Indonesian criminal justice system.

The rights to fair trial is better implemented in every provision of criminal justice system legal framework, and not merely stipulated in academic papers.

Jakarta, June 2015

Institute for Criminal Justice Reform

Table of Contents

1. Overview on Death Execution in 2015	5
1.1. First Batch Execution	5
1.2. Second Batch Execution	5
2. Case Review is Tightened to Ease Death Penalty?	6
3. Problems in Granting Pardon	7
4. Current Indonesian Legal Framework	8
5. Death Penalty under the Draft Bill on Criminal Code (RKUHP)	9
6. ICJR's Research on 42 Death Penalty Decisions: Indonesia Does Not Implement Fair Trial	10
6.1. Torture/Intimidation	10
6.2. Access to Legal Aid/Lawyer	11
6.3. The Use of "Witness to Their Own Case": Violation of Non-Self Incrimination Principle	12
6.4. The Use of Investigator as Witness: Perpetuate the Violent Practice during Investigation	13
6.5. Death Row Inmate: Minors	13
6.6. The Absent of Main Defendant	14
6.7. Inconsistency of the Supreme Court Decisions	14
7. Conclusion and Recommendation	17
7.1. Conclusion	17
7.2. Recommendation	18
ICJR Profile	19

1. Overview on Death Execution in 2015

In 2015, Indonesia has executed all convicts in narcotics cases. The government claimed that the execution is a proof that the government is declaring war on drugs and narcotics distribution. President Joko Widodo said that capital punishment is a form of state responsibility to protect Indonesia's future generations.

1.1. First Batch Execution

Execution on first batch of convicts was conducted on Sunday, 18 January 2016. Six convicts, most of them foreigners, were the first group of death convicts executed by the government since the moratorium was implemented in 2008. President Joko Widodo, in December 2014, rejected all pardons submitted by the death convicts. The names of these convicts are:

- 1) Marco Archer Cardoso Moreira (Brazilian)
- 2) Namaona Denis (Malawian)
- 3) Daniel Enemu a.k.a Diarrassouba Mamadou (Nigerian)
- 4) Ang Kiem Soei a.k.a Kim Ho a.k.a Ance Tahir a.k.a Tommi Wijaya (Dutch)
- 5) Tran Thi Bich Hanh (Vietnamese)
- 6) Rani Andriani a.k.a Melisa Aprilia (Indonesian)

Five death convicts, were shot in Nusakambangan, 00.30 WIB. They were Marco Archer Cardoso Moreira (Brazilian), Namaona Denis (Malawian), Daniel Enemu a.k.a Diarrassouba Mamadou (Nigerian), Ang Kiem Soei a.k.a Kim Ho a.k.a Ance Tahir a.k.a Tommi Wijaya (Dutch), and Rani Andriani a.k.a Melisa Aprilia (Indonesian). Ten minutes after the execution, they were all declared dead, approximately 00.41.¹ Another death convict, Tran Thi Bich Hanh (Vietnamese), was executed in Boyolali, Central Java, at 00.46 WIB, time of death at 01.21 WIB, 35 minutes after the execution.²

1.2. Second Batch Execution

Second batch execution was planned for 10 death convicts. At the time of execution, only 8 of them were executed. The government organized the execution on Wednesday, 29 April 2015, around midnight. Two death convicts of whom the execution was suspended were Serge Areski Atlaoui (French) and Mary Jane Fiesta Veloso (Filipino). At 00.35 WIB, the execution was started, and all of death convicts were declared dead at 01.02 WIB.³ These death convicts are:

- 1) Myuran Sukumaran (Australian)
- 2) Andrew Chan (Australian)
- 3) Martin Anderson (Ghanaian)
- 4) Zainal Abidin bin Mgs Mahmud Badarudin (Indonesian)
- 5) Raheem Agbaje Salami (Spanish)

¹ Detikcom, "6 Napi Meninggal Seketika Usai Dieksekusi, Lalu Dipastikan Oleh Dokter", <http://news.detik.com/read/2015/01/18/095815/2806406/10/6-napi-meninggal-seketika-usai-dieksekusi-lalu-dipastikan-oleh-dokter?n991104466>

² *Ibid*

³ Detikcom, "Begini suasana sebelum dan sesudah bali nine cs dieksekusi mati", <http://news.detik.com/read/2015/04/30/152231/2902629/10/begini-suasana-sebelum-dan-sesudah-bali-nine-cs-dieksekusi-mati>

- 6) Rodrigo Gularte (Brazilian)
- 7) Sylvester Obiekwe Nwolise (Nigerian)
- 8) Okwudili Oyatanze (Nigerian)

2. Case Review is Tightened to Ease Death Penalty?

After the Constitutional Court (MK) rendered Decision No. 34/PUU-XI/2013 (Decision),⁴ petition for case review (Peninjauan Kembali/PK) under the Indonesian Criminal Procedural Law (KUHP) can be submitted multiple times. According to MK, substantial truth implies the sense of justice, while procedural law implies legal certainty in which disregard justice. MK asserted that for the purpose of justice in criminal cases, if there is any new evidences (novum), limitation on case review contradicts the just principle.

The decision resulted in many responses, from the government, and also the Attorney General Office (AGO). According to the AGO, the decision will hamper the execution towards death convicts, because they may submit another case review during the process. Representing the government, Tedjo Edhi, Coordinating Minister of Politics Law and Security, said that the Decision will lead to legal uncertainty, and therefore the government recommended to amend the Decision.⁵

To discuss this problem, the government, AGO, and Supreme Court held a meeting on 9 January 2015 at the Ministry of Law and Human Rights Office.⁶ As a result, the Supreme Court issued Circular No. 7 of 2014⁷ (Circular) to overcome such problem, stating that a case review petition based on new evidence may only be submitted once. However, case review petition based on contradiction between judicial decisions may be submitted more than once.

Hoping to solve the problem, the Circular created more problems. It shows the lack of obedience to the Decision. MK itself consider the Circular unconstitutional. The Supreme Court stands firm in its position, stating that the Circular is merely issued to maintain legal certainty, and also other provisions regarding the limitation on case reviews are still applicable, namely Article Article 24 (2) of Law No. 48 of 2009 on Judicial Power; and Article 66 (1) of Law No. 14 of 1985 on Supreme Court, as amended by Law No. 5 of 2004 and Law No. 3 of 2009.

On 17 April 2014, civil societies coalition, consisting of ICJR, Elsam, Imparsial, HRWG, LBH Masyarakat, and Setara Institute submitted a judicial review petition on the Circular to the Supreme

⁴ Document available at

http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_1651_34%20PUU%202013-telahunca-6Maret2014.pdf

⁵ Detikcom, "Putusan MK Soal PK Berkali-kali diubah ini kata Menko Tedjo",

<http://news.detik.com/read/2015/01/03/162828/2793267/10/putusan-mk-soal-pk-berkali-kali-diubah-ini-kata-menko-tedjo>

⁶ Jawa Pos, "Bahas PK Lebih dari Sekali, Menkum HAM Undang Pakar",

<http://www.jawapos.com/baca/artikel/11252/Bahas-PK-Lebih-dari-Sekali-Menkum-HAM-Undang-Pakar>

⁷ Document available at http://bawas.mahkamahagung.go.id/bawas_doc/doc/sema_07_2014.pdf

Court, in regard to the limitation on case review petition that can only submitted once based on new evidence.⁸

3. Problems in Granting Pardon

President's authority to grant pardon is stipulated under Article 14 (1) of the 1945 Constitution. This authority is further stipulated under Law No. 22 of 2002 on Pardon (Pardon Law), lastly amended by Law No. 5 of 2010. The Pardon Law is the parameter to assess President's discretion in using his pardon power.

There is a fundamental problem under the current Pardon Law, due to the lack of provisions regarding the President's obligation:

- 1) Thoroughly consider every pardon request, including the special aspect and characteristic of each pardon request;
- 2) Giving proper explanation when approving or rejecting a pardon.

The lack of such provision has created a possible abuse of power by the President, whom may approve or reject a pardon request without proper assessment, or even may not giving proper consideration in approving or rejecting pardon, which is a right entitled to the petitioner. The President may abuse this power and missed the original objective of the pardon.

Pardon power for the President is a given authority—including the responsibility. For the petitioner, pardon is a right, and a mechanism to beg for redemption. Specific to death convict, pardon has greater objective and value: he has the chance to live.

For the public in general, pardon is a form on whether a convict can stay as a part as a society or not. Therefore, proper assessment and consideration when approving and rejecting a pardon are essential and cannot be set aside.

In a more normative way, pardon is a way to give human nature for the government. The ground to approve or reject a pardon is no longer a legal matter. On the other hand, due to the fact that the assessment cover non-legal matter, the President must thoroughly examine each pardon request, including the specific character of each petitioner, before rendering its decision to approve or reject the pardon request and give the proper explanation.

With such effort, the right of each pardon petitioner can be fulfilled. This will also show the human side of a government. Not to mention that the petitioner is a convict and yet a human. Do not treat them as numbers. Treat them as people.

On May 2015, civil societies alliance that concern about the death penalty submitted a judicial review petition of the Pardon Law to MK.⁹ The petition asked MK to declare that Article 11 (1) and (2) of the Pardon Law must be interpreted as follows:

⁸ KOMPAS.com, "Koalisi Anti Hukuman Mati Gugat Surat Ederan MA terkait Pembatasan PK", <http://nasional.kompas.com/read/2015/04/17/12363731/Koalisi.Anti.Hukuman.Mati.Gugat.Surat.Edaran.MA.Terkait.Pembatasan.PK>

⁹ MK, "Uji Materi UU Grasi, Aktivis Perbaiki Pokok Permohonan dan Kedudukan Hukum", <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=11013#.VXVpMidzXIU>

- 1) The President gives his decision upon pardon request after take into account Supreme Court's consideration and conduct assessment over the petition and petitioner
- 2) Presidential decree can be inform of approval or rejection, with proper explanation.

4. Current Indonesian Legal Framework.

The first legislation in Indonesia that stipulates capital punishment is the Criminal Code (KUHP), which has been implemented since 1918—the Dutch Colonial era. The Netherland itself has erased capital punishment since 1870. In addition to KUHP, other laws are also stipulating provisions on capital punishment. The details are as follows:¹⁰

Laws and Regulations	Provisions
KUHP	Article 104 Article 111 (2) Article 124 (3) Article 140 Article 340 Article 365 (4) Article 444 Article 368 (2).
Military Criminal Code	Article 64 Article 65 Article 67 Article 68 Article 73 (1)-(4) Article 74 (1) and (2) Article 76 (1) Article 82 Article 89 (1)-(2) Article 109 (1)-(2) Article 114 (1) Article 133 (1)-(2) Article 135 (1)-(2) Article 137 (1)-(2) Article 138 (1)-(2) Article 142 (2).
Law No. 12/Drt/1951 on Firearms	Article 1 (1)
Presidential Determination No. 5 of 1959 on Attorney General's Authority to Add Punishment on Crimes that Threaten Basic Needs	Article 2
Government Regulation in lieu of Law No. 21 of 1959 on Adding Punishment on Economic Crime	Article 1 (1)-(2)
Law No. 31/PNPS/1964 on Atomic Power Basic Provisions	Article 23
Law No. 4 of 1976 on Amendment and Additional Articles on KUHP in regards to Aviation Crime and Crimes on Aviation Facilities	Article 479 (k) (2) Article 479 (0) (2)
Law No. 5 of 1997 on Psychotropics	Article 59 (2)
Law No. 22 of 1997 on Narcotics	Article 80 (1)-(3) Article 81 (3) Article 82 (1)-(3) Article 83
Law No. 31 of 1999 on Corruption Eradication	Article 2 (2)

¹⁰ Elsam, *Menggugat Relevansi Praktik hukuman Mati di Indonesia*, Asasi Nov-Des 2014, pg. 14.

Law No. 26 of 2000 on Human Rights Court	Article 36 Article 37 Article 41 Article 42 ayat (3)
Law No. 15 of 2003 on Terrorism Eradication	Article 6 Article 8 Article 9 Article 10 Article 14 Article 15 Article 16
Law No. 35 of 2014 on the Amendment to Law No. 23 of 2002 on Children Protection	Article 89 (1)

5. Death Penalty under the Draft Bill on Criminal Code (RKUHP)

Since 1987, 189 individuals were sentenced to death, and until January 2015,¹¹ there are still 133 death convicts waiting for the execution by the AGO.¹² Fourteen death convicts, all of them are narcotics cases, have been executed in 2015.

It should be noted that in 2015, the government has planned to discuss the Draft Bill on Criminal Code (RKUHP), and it has been prioritized under the 2015 National Legislation Program at the House of Representatives. While KUHP is the ground to impose capital punishment, the government is planning to limit death penalty.

Article 87 of RKUHP states that death penalty may be used alternatively, as a last resort to protect the society. The limitation on death penalty is evident under Article 89, which states that death execution can be suspended for 10 years (probation), under the following conditions:

- a. The public reaction against the convict is not excessive;
- b. The convict showing his/her regret and there is a chance to correct it;
- c. The convict's position is lack of importance; and
- d. There are reasons to suspend the execution.

If the convict shows good attitude during the probation, the sentence can be altered into life sentence or 20 years of imprisonment. If the probation fails, the execution can be conducted, and the pardon is rejected by the President.

Article 90 RKUHP further stipulatest that if the death convict's pardon is rejected and the execution is not conducted within 10 years, the death penalty can be changed into life sentence.

Seeing better provisions under RKUHP, the government must implement a moratorium on death penalty until RKUHP's discussion is finished at the House, in order to maintain consistency of government policy regarding capital punishment.

¹¹ [Hukumanmati.web.id](http://hukumanmati.web.id), "Hukuman Mati Dapat Kurangi Kejahatan, Mitos!", <http://hukumanmati.web.id/hukuman-mati-dapat-kurangi-kejahatan-mitos/>

¹² [Okezone.com](http://news.okezone.com/read/2015/01/21/337/1095128/133-terpidana-mati-belum-dieksekusi), "133 Terpidana Mati Belum Dieksekusi", <http://news.okezone.com/read/2015/01/21/337/1095128/133-terpidana-mati-belum-dieksekusi>

6. ICJR's Research on 42 Death Penalty Decisions: Indonesia Does Not Implement Fair Trial

Pursuant to Article 6 (2) in conjunction with Article 14 of the International Covenant of Civil and Political Rights (ICCPR), countries that still using death penalty, must implement fair trial. Every rights in each process must be ensured without any exception.¹³ Fair trial is mandatory in every justice system that still adhere death penalty. Amnesty International reported that Indonesia is amongst the few countries that do not implement fair trial principle to ensure death convict's rights, and implement other international provisions.¹⁴

After Indonesia announced that is has implemented fair trial principle on all death convicts, an interesting finding was discovered on the decision regarding Yusman Telambanua. The case involving Yusman, who was at the time is a child, and his in law Rasulah Hia, were sentenced to death. Many believed that Yusman and Rasulah were tortured by investigator, and the case has been modified. Both of them did not obtain legal counsel, even their legal counsel asked the court to impose them with death penalty.

Yusman and Rasulah's case may be the tip of the iceberg on fair trial problem in Indonesia. The standards in imposing death penalty that have been regulated at international level based on human rights, is a serious challenge for Indonesia. To this end, ICJR takes the initiative to conduct a study on several decisions regarding capital punishment to see the implementation of fair trial within the Indonesian criminal justice system. Finds of the study are as follows:

6.1. Torture/Intimidation

The Indonesian Criminal Procedural Law (KUHAP) does not explicitly prohibit torture, especially for the purpose to gather evidence. The lack of legal consequences from the violation of Articles 52¹⁵ and 117¹⁶ of KUHAP against criminal justice process, particularly evidences, has made those articles merely normative provision that will not affect the rule of evidence. In addition, the phrase "...legal evidences..." under Article 183 KUHAP¹⁷ that should be the basis to prohibit the use of evidence gathered from torture, is not further stipulated under KUHAP.

ICJR finds 42 cases, and 11 of them involve torture and intimidation from the law enforcers. Claims on torture and intimidation are also coming from the witnesses during trial, for the purpose to ease the examination process.

¹³ Mufti Makarim, *Beberapa Pandangan Tentang Hukuman Mati (Death Penalty) Dan Relevansinya Dengan Perdebatan Hukum Di Indonesia*, Elsam, available at <http://referensi.elsam.or.id/wp-content/uploads/2014/12/BEBERAPA-PANDANGAN-TENTANG-HUKUMAN-MATI-DEATH-PENALTY-DAN-RELEVANSINYA-DENGAN-PERDEBATAN-HUKUM-DI-INDONESIA.pdf>

¹⁴ Amnesty International, *Death Sentences And Executions 2014*, available at <https://www.amnesty.org/en/documents/act50/0001/2015/en/>

¹⁵ Article 52 KUHAP : " In examinations at the stages of investigation and court examination, a suspect or a defendant shall have the right to freely give information to an investigator or a judge"

¹⁶ Article 117 KUHAP : " The testimony of a suspect and or a witness to an investigator shall be given without any pressure from anyone whomsoever and or in any form whatsoever."

¹⁷ Article 183 KUHAP : "A judge shall not impose a sanction upon a person unless there are at least two legal evidence to base his conviction that a criminal act has truly occurred and that it is the defendant who is guilty of committing it"

Under Supreme Court Decision No.. 2253 K/PID/2005, sentencing Zulfikar Ali to death, the convict and several witnesses even confessed that they have been intimidated and tortured by the investigator. They even retracted their statement during police examination (BAP). When Zulfikar Ali's attorney attached the record during trial in the cassation documents, it is discovered that the convict, witness Ginong Pratidina, and witness Gurdip Singh, retracted their BAP due to "physical and psychological pressure during investigation".

On another case, under the consideration of Case Review Decision of Hillary K. Chimezie, with registration No. 45 AnPK/Pid.Sus/2009,:

Considering that during investigation upon witnesses IZUCHUKWU OKOLOAJA and MICHAEL TITUS IGWEH who explained that the investigator has committed violence, and causing their statement with lack of objectivity and the fact the "witness to their own case" or key witness MARLENA and IZUCHUKWU OKOLOAJA a.k.a KHOLISAN NKOMO died during police custody;

These matters must be considered by the panel of case review in deciding this case, even though from the formal point of view, the statement of those persons were under oath;

On the same case, Timur P Manurung, member of the panel, included the fact that there was occurred intimidation and torture towards the witness, which caused the witness died.

"... Considering that the statement from key witness number 2 MARLENA (deceased) during trial, was only read, and nevertheless it did not relate to the case review petition in the related activities, and both witnesses MARLENA and IZUCHUKWU OKOLOAJA died due to violence when they were under police custody, and this situation is not acceptable, considering that the witness stated that intimidation and physical violence were occurred;..."

Torture and intimidation towards death convict, witness, and law enforcers can be seen from other cases.

6.2. Access to Legal Aid/Lawyer

Under the human rights framework, one of the most important elements of the criminal justice system is access to legal aid or lawyer. From 42 decisions, there are 7 cases in which the defendants (now death convicts) did not obtain any counseling from lawyers. The fact shows that the absence of lawyer most occurred during investigation and prosecution, both of which are important in preparing defense. There are also 11 cases from 42 decision that unknown whether the death convicts were counseled by a lawyer or not. ICJR categorizes these cases as "questionable", as the decision stated that there is an indication of the lack of legal aid, such as formal procedure problem. This also includes the procedure in submitting legal action, which is common due to the lack of legal knowledge from the death convicts as well as the lack of legal aid.

Under Decision No. 503 K/Pid/2002, involving Zainal Abidin, the lawyer was just involved in the criminal justice process in few days after the examination was conducted.

"On the front page and the first paragraph, it is written that on Thursday, 21 December 2000, 12.00 WI, etc...and the last part of the BAP's page 6, it is noted that the Defendant during the examination was attended by a legal counsel, whereas the legal counsel was just

only accompanied the Defendant Mgs. Zainal Abidin bin Mgs. Mahmud Badaruddin on 23 December 2000 with special power of attorney."

In addition to the lack of legal aid and lawyer availability, the quality of legal aid is also concerning. On Gunung Sitoli District Court Decision No. 07/Pid.B/2013/PN-GS, involving death convict Rusula Hia, and Decision No. 08/Pid.B/2013/PN-GS, involving death convict Yusman Telaumbanua, the legal counsel to both death convicts did not give any defense. The legal counsels, namely Laka Dodo Laila, SH, MH dan Cosmas Dohu Amazihono, SH, MH., even asked their client to be sentenced to death.

"...Considering that in the defense the defendant admitted the mistake and asked the Panel of Judges to give the least punishment, while the defendant's legal counsel asked the Panel of Judges to impose death sentence, considering what they have done was ruthless and sadistic..."

6.3. The Use of "Witness to Their Own Case": Violation of Non-Self Incrimination Principle

Witness to their own case is one of the most reliable evidence possessed by the prosecutor as in several cases, the prosecutor is in lack of evidence material or witness to support their cases. In death sentence cases, the Court should have the chances to verify various evidences to give the confidence for the judge before rendered the death sentence, and not only for fulfilling the formality requirement. ICJR found that there are high number of cases where the defendant is forced to testify against his own cases, from 42 court decision researched by ICJR, 17 of it is determined base on the testify of the defendant.

In the Supreme Court Decision No. 2253 K/PID/2005 with Zulfikar Ali as the defendant, the prosecutor called Gurdip Singh as the witness, in which Gurdip Singh was also involved in the same cases. In the cassation petition of Zulfikar Ali, it is stated that Gurdip Singh is accepted to witness against the death penalty charged to Zulfikar Ali as he was promised a leniency of the charges:

"...Gurdip Singh as the key witness in this case has revoked his testify and declared that he was forced to mention the cassation applicant as the owner of the heroin as he was promised by the investigators a leniency of the criminal charged but latter was turned down..."

ICJR noted that the use of Witness to His Own Case as the strategy to "bring into conflict one defendant with others" in which is not only found in the case of Zulfikar Ali, but also in the Supreme Court Decision No. 18.PK/Pid/2007 with the case review applicant is Humprey Ejike a.k.a Doctor, the advocate of Humprey delivered a letter from one of the witness in Humprey's case:

"Affidavit of witness UGOCHUKINU IBIAM OKORO, dated 6 June 2004 (current serving imprisonment in Cipinang Correction Center), declared that KELLY is upset with the case review applicant as she suspect that the applicant was framing KELLY to get caught by the police, the applicant is even is suspected as the person who gave information to the police on the involvement of KELLY in drug cases, therefore she frame the applicant by instructing If any to put / store narcotics in a restaurant and report to the police for the applicant is arrested".

6.4. The Use of Investigator as Witness: Perpetuate the Violent Practice during Investigation

Investigator as the witness is commonly used if the defendant declared that there was a violent and suppress during the draft of investigation report. In other words, the defendant refuses to admit to the trueness of the investigation report made by the investigator. Therefore, to counter the defendant's argument, the prosecutors may call investigator to present their own case. Despite this customary, in several cases the prosecutor is actually has prepared the investigator as witness from the beginning of the case.

In the Supreme Court Decision No. 254 K/PID/2013 with Rahmat Awali a.k.a Awif a.k.a Drego and Krisbayudi a.k.a Kris Bin Suherman as the defendant, investigator is used to testify there is no violence has taken place during the investigation process afer both of the defendant, in which one of them is charges for death penalty, admitted that the they have been tortured and intimidated during the investigation. As it become obvious, an investigator will never admit that there has been violence conducted towards the defendant during the investigation process, this valueless testimony is used by the Supreme Judge to declare no violence has taken place and sentence the defendant to death.

6.5. Death Row Inmate: Minors

ICJR noted that from 42 decisions, there are at least three decision in which the death row inmates is juvenile and still in the transition age from a children to become a juvenile around 18 years old, and three death row inmates were 19 years old when performing the criminal offence.

In the Supreme Court Decision No. 1835 K/PID/2010 with Herri Darmawan a.k.a Sidong Bin Firdaus as the convict, he was sentenced to death for premeditated murder. In cassation level, his application was refused and the Supreme Court confirm the death sentence, although there was a dissenting opinion from Judge Agung Surya Jaya who stated:

The defendant is 19 years old is embodied that his in a transition phase for entering a juvenile life. Everyone in this transition phase is in fluctuating and unstable state of mind. Any act by people in this group of age is commonly influenced by emotional and spontaneous background, and it is not aware of the consequences of his act.

In other Supreme Court Decision No. 28 PK/Pid.Sus/2011, defendant Scott Anthony Rush has better fortune. The judge in Rush's cases took different path from the judge in Herri Darmawan's cases. Rush was sentenced to a lifetime imprisonment, and in his decision, the Judge stated:

"...to impose death penalty to applicant of case review / defendant when he was 19 years old during the criminal offence and now has reached 26 years old, as a person who has been used as the medium by international narcotic syndicate by promising the defendant to travel to Bali, it must be viewed as injustice, therefore the death sentence imposed to the applicant of case review / defendant should be reconsidered pursuant to his act and role in the case.."

*"The applicant of the case review/Defendant is **considered too young, which is 19 years old, hence there are number of leniency can be granted** in accordance with Article 197 (1) (f) of the KUHAP (Indonesian Criminal Law Code)".*

Beside the two cases above, there is also Gunung Sitoli District Court Decision No. 08/Pid.B/2013/PN-GS with the death row inmate Yusman Telaumbanua. In his decision, the judge does not consider the age of Yusman that is still 19 years old, the judge is even impose death sentence, beyond the prosecutor's charge which is a lifetime Imprisonment. At present, there is a new fact has been discovered that Yusman was 16 years old when committing the criminal offence.

6.6. The Absent of Main Defendant

Death penalty is the most severe punishment in Indonesia, therefore it should only imposed to the one who found guilty and has the biggest role in a criminal offence. In organized or grouped crime, the prosecutor must identify the main defendant of the case. However in practice, the death penalty is also imposed to a defendant who has insignificant role, and even does not involve in designing the crime. Most of the main defendant is still fugitive and has not been arrested just yet. From 42 decisions, there are 9 decisions where other defendant is still fugitive, whether as the main defendant or still other role.

ICR found that, there are number of decisions that were clearly stated that the death row convicts are not the main defendant, this fact in number of times is ignored by the judge in the court. In Scott Anthony Rush's cases, the death row convict and applicant to case review No. 28 PK/Pid.Sus/2011, was sentenced to death by district and high court, before the Supreme Court admitted his role as a courier.

In other narcotic case, Ranni Andriani a.k.a Melisa Aprillia in the Supreme Court Decision No. 11 PK/PID/2002, admitted that she was only a courier instructed by other defendant, Ola, and she was also using the Article 57 of Law No. 22 of 1997 on Narcotics, which is allow her as justice collaborator, by revealing the drug traffic network, but this fact is not considered by the Judge at the district court and cassation level. The similar issue is also occured in Marry Jane Fiesta Veloso's cases in the Supreme Court Decision No. 987 K/Pid.Sus/2011, where Marry Jane was sentenced to death as a narcotic courier, but until now it is remain unclear who instruct Marry Jane and to whom the narcotic will be delivered.

6.7. Inconsistency of the Supreme Court Decisions

Article 183 KUHAP stated that *"A Judge must not impose criminal penalty to someone unless there are at least two valid evidence and believe that a criminal offence has been occured and the defendant is in guilty of such criminal offence"*.

The Article 183 of KUHAP binds every judges in the District Court to take into consideration evidences presented in the court room. The imposition of penalty, including the severity of the penalty is in the authority of District and High Court judges or known as *Judex Facti*. The *Judex Facti* has the authority to examine facts and weight the penalty that will be imposed to the defendant.

On the other side, if there is a mistake in implementing the law by *Judex Facti*, the Supreme Court as *Judex Juris* has the authority to verify the decision of the District and High Court. A cassation aims to

correct the mistake by the lower court, create new law, and maintain the uniform application of the law.¹⁸

The severity of the penalty is in the authority of the *Judex Facti*, as depicted in the Supreme Court Decision No. 39 PK/Pid.Sus/2011 with the applicant of the case review is Hanky Gunawan a.k.a Hanky, in its decision, the M. Imron Anwari, Achmad Yamanie and M. Hakim Nyak Pha as the judges stated:

“...In accordance with the prevailing Supreme Court jurisprudence, the severity of the penalty is become the authority of the Judex Facti, and not Judex Juris...”

In this decision, the Supreme Court allowed the case review and imposed 15 years imprisonment and fine for IDR 500 million, subsidiary 4 months of Imprisonment. The applicant of the case review was sentenced to 15 years imprisonment and fine for IDR 500 million, subsidiary 4 months of Imprisonment by the District Court, and 18 years imprisonment and fine for IDR 600 million, subsidiary 6 months of Imprisonment at the High Court, and death sentence in the cassation at the Supreme Court. In case review proceeding, the Supreme Court held that the *Judex Juris* (the Supreme Court at cassation proceeding) should not impose more severe punishment compared to the lower court.

However, the Supreme Court decision that declared the severity of penalty is the authority of the Supreme Court does not implemented on another Supreme Court Decision. In the Decision No. 15 PK/Pid/2004 with the case review applicant Raheem Agbaje Salami, the Supreme Court at the cassation level impose death sentence to the applicant, after being charged from life time imprisonment and 20 years of imprisonment by the District and High Court respectively. In his case review application, advocate for Raheem Agbaje Salami stated:

“In the Supreme Court Decision dated 16 November 1999 No. 1195/Pd/1999, the Supreme Court has GO BEYOND ITS AUTHORITY AND DOES NOT EXPRESSLY ELABORATE the reationaly taken by the Supreme Court to change the 20 year imprisonment penalty imposed by the High Court of Jawa Timur dated 12 July 1999 No. 160/Pid/1999/Pt.Sby, with death penalty, whereas such changes is not the authority of the Supreme Court in cassation level, hence the Supreme Court at this cassation level has contradict the Article 30 of Law No. 14 of 1985 on Supreme Court”

In the Decision, Supreme Court judge at the case review proceeding of Rahem Agbaje Salami responded that:

“Arguments made by the defendant can not be justified, as it is not the basis in subbmitting case review as stated in Article 263 (2) (a) (b) and (c), of KUHAP...”

Furthermore, in its several decisions, the Supreme Court use the constitutional reason to cancel the death penalty over a defendant. However, this is contrast to several other Supreme Court Decision that determine the death penalty is in accordance with the constitution of Indonesia. In Hanky Gunawan a.k.a Hanky, the Supreme Court judge considered:

¹⁸ Yahya Harahap, *Pembahasan Permasalahan Dan Penerapan KUHAP : Pemeriksaan Sidang Pengadilan, Banding, Kasasi dan Peninjauan Kembali*, Sinar Grafika, 2008. page 539 – 542

- *Article 3 of the Declaration of Human Rights stated: "everyone has the right to life, liberty, and security of person".*
- *The death penalty is in contradiction with Article 28 (1) of 1945 Constitution and violate Article 4 of Law No. 39 of 1999 on Human Rights stated: "Right 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."*
- *The phrase cannot be limited under any circumstances by anyone can be viewed as cannot be limited or neglected by anyone including the officer and court.*
- *As there is a mistake by the court in the cassation proceeding No. 455K/Pid.Sus/2007 dated 20 November 2007, and for justice and human rights, the cassation decision is annulled by the judges at the case review;*

Based on the consideration above, the judge at the case review believe that there is enough reason to annulled the Supreme Court Decision No. 455 K/Pid.Sus/2007 dated 28 November 2007, in conjunction with Surabaya High Court Decision No. 256/Pid/2007/Pt.SBY, dated 11 July 2007, in conjunction with Surabaya District Court No. 3412/Pid.B/2006/PN.SBY dated 17 April 2006 and the Supreme Court will organize re-trial for the case.

A constitutional and human right reason are also used in other cases, in the Decision No. 45 PK/Pid.Sus/2009¹⁹ with Hillary K. Chimezie as the applicant to the case review, the judge held that:

"Despite the argument above, in regards to the decision of Judex Juris towards the defendant (application for the case review) in the form of death penalty, the judge considered as follows:

Death penalty is in contradiction with Article 28 A of 1945 Constitution (every person has the right to preserve their life), beside its also in contradiction with Article 1 (1) in conjunction with Article 4 of Law No. 39 of 1999 on Human Rights, Article 3 of 10 Declaration of Human Rights "everyone has the right of life, liberty and security of person".

In previous decision, the Supreme Court Judge admitted that there has been violation during the investigation and case framing by the investigators. In the decision, there is a dissenting opinion from Judge Agung Timur P Manurung, who contended that the defendant should be relieve from any charges as there is sufficient evidence of fabricated case and violence by the investigator. However, two other judges decided to change the punishment from death penalty to 12 years of imprisonment. This case review decision is rendered in 6 October 2010, almost a year before Hanky Gunawan's case, delivered by the same judges with the Hanky Gunawan' case, namely Imron Anwari and Timur P Manurung dan Suwardi.²⁰

It is important to note that the Supreme Court declared the death penalty is in contradiction with constitution in the case review application of Hanky Gunawan dated 16 Agustus 2011, previously in case review decision of Hillary K. Chimezie dated 6 October 2010 is contrast with the Supreme Court Decision No. 25 PK/Pid/2012 dated 5 July 2012 on the case of Very Idham H a.k.a Ryan, in which the

¹⁹ Arsil, *Pembatalan Hukuman Mati oleh MA atas Dasar Inkonstitusionalitas Pidana Mati : Anotasi Atas Beberapa Putusan Penting Mahkamah Agung*, LeIP, 2012

²⁰ *Ibid*

Supreme Court refused to cancel the death penalty based on any ground, the judges were comprised of Artidjo Alkotstar as the chief judge, and Salma Luthan and T. Gayus Lumbuun as the member of the judge.

The refusal by the Supreme Court judges on the notion that the death penalty is in contradiction with the constitution and violate human rights can be found in number of decision. In case review decision No. 38 PK/Pid.Sus/2011 with the applicant Myuran Sukumaran, the Supreme Court refuse the application on the ground that the death penalty is still applicable in Indonesia. This is despite the fact that the judges for Myuran Sukumaran's case, namely M. Imron Anwari, Suwardi and Achmad Yamanie, is the same composition of judges in canceling the death penalty imposed to Hanky Gunawan (member of the judges: M. Imron Anwari, Achmad Yamanie and M. Hakim Nyak Pha) and Hillary K. Chimezie's case (member of the judges: M. Imron Anwari, Suwardi and Timur P. Manurung). In its decision, the Supreme Court judges held that:

*"...Although Article 28 (1) of the 1945 Constitution declared that the right of life is a non-derogable right that cannot be limited in any circumstances and TAP MPR No. XVII/MPR/1998 declared that the human right covers the right to life and pursuant to Part II Article 6 (1) of Law No. 12 of 2005 on the Ratification of International Covenant on Civil and Political Rights, stated: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life, **however in Article 6 (2) its stated that In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime;...**"*

The inconsistency of the Supreme Court decision can also be found in Decision No. 144 PK/Pid.Sus/2012 with the case review applicant Okwudili Ayotanze. The Judge refused the applicant on 4 January 2012, or five month after the Hanky Gunawan's case, with composition of the judge was M. Imron Anwari, Suwardi, SH and Achmad Yamanie. Also, cassation decision No. 1069 K/Pid/2012 with the death row inmate Asep Dudung Budiman, dated 8 August 2012 or less than a year after the Hanky Gunawan's case. Asep Dudung Budiman was sentenced to death from the District court up to the Supreme Court, although has used the human rights ground as a defence, however the judges at the Supreme Court that, in which the same composition with the Hanky Gunawan's case, namely Nyak Pha and Achmad Yamanie, still impose death penalty to the defendant.

7. Conclusion and Recommendation

7.1. Conclusion

From the above discussion, several things can be concluded, namely:

1. In essence, Indonesia criminal procedural law does not differentiate the justice system between defendant that is charged with death penalty. In almost provision in the criminal procedural law in Indonesia, the same standard of trial is granted to all defendant regardless the charges
2. There is still an issue on the implementation of fair trial principle in criminal case in Indonesia, especially toward a person who charged with death sentence. This is evident by number of death penalty cases, in which issue on the ineffective access to legal aid/assistance, lack of proof

by the prosecutor, violence during the investigation process, and inconsistency between the decision made by the Supreme Court.

3. The administratif issue in which the formality requirement is seemed to be more prioritized compared to the material truth of the case is still apparent by the issuance of several regulations by the Supreme Court. The Supreme Court Circular Letter No. 7 of 2014 and other similar regulations is constituted an obstruction for society to access justice and has become a serious issue needs to be addressed.

7.2. Recommendation

From the above conclusion, several recommendation is available, namely:

1. Urges the government to review all the death sentence decision, to ensure the decision is in accordance with fair trial principle and universal principle on death penalty.
2. Urges the government to suspend the execution to all the death row inmates and the imposition of death penalty while waiting for a new set of criminal procedural law that company with the fair trial principle. Alternatively, the government may accelerate the discussion of amendment to KUHAP to determine new standard for justice system, especially towards death row inmates.
3. Urges the Supreme Court to revoke Supreme Court Circular Letter No. 7 of 2014 that sets limitation for justice seeker. Case Review should be regulated more comprehensive in KUHAP or specific law on case review to avoid unclarity of limitation as currently occurred.

ICJR Profile

Institute for Criminal Justice Reform (ICJR) is an independent research institution focused on criminal law reform, criminal procedural law reform, and other general law reform in Indonesia.

One of the most crucial issue faced by Indonesia in the current transition era is to reform law and justice system towards a democratic way. In the past, criminal law and criminal procedural law is used as tool for dictatorial ruler by the authority and also as tool to manipulate the society. Now is the time to change the criminal law as tools of dictatorship to become tools for accelerating a democratic political system that preserve the human right. This is the challenge faced during reforming the criminal and criminal procedural laws in the current transition era.

To answer the challenges, a well planned and systematic effort is needed. A grand design to reform criminal justice system is needed to be initiated. A criminal justice system has the significant role to develop the Rule of Law and recognition of human rights protection. This is due to the reason that democracy can only be effectively functioning if there is a strong institution for implementing the Rule of Law. Criminal justice reform that uphold the protection of human rights is constituted "*conditio sine quo non*" to the democratization of institution in the current transition era.

Efforts to transform criminal law and criminal justice procedure is currently taking place. However, such efforts must be supported with holistic movement. Institute for Criminal Justice Reform (ICJR) is in the progress to initiate such movement. Providing support to develop recognition of the Rule of Law principle, and in the same time establishing the strong culture of human rights protection in a criminal justice system. This is become the reason of ICJR's presence.

Office

Jl. Cempaka No 4, Pasar Minggu, Jakarta Selatan 12530

Phone/fax (62-21) 7810265

e: infoicjr@icjr.or.id

w: <http://icjr.or.id>

t: @icjrid