OVERCOMING THE EXECUTION IN LIMBO:

Review on the Death Penalty Policy in Indonesia in 2017

In Commemoration of the 15th Year
of Anti-Death Penalty Day
in Indonesia in 2017

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1. Introduction

Every 10th of October, the world is commemorating the Anti-Death Penalty Day. This commemoration is determined during a congress held in Rome on May 2002 by number of organizations which are against the implementation of death penalties. This year remarks the 15th year of the international commemoration in reminding the practice of live deprivation in the name of law.

The recent death penalty execution in Indonesia is occurred in 2016 towards 4 death row inmates, after previously in 2015, Indonesia has executed 14 death row inmates. On 2017, the Attorney General Office of the Republic of Indonesia is continuing its plan to perform subsequent execution. As of now, there are at least 165 people is listed in the death penalty execution waiting list.[1]

For the purpose of commemorating the Anti-Death Penalty Day on 10 October 2017, Institute for Criminal Justice Reform (ICJR) present the updates on several legal policies in Indonesia related to the death penalty. This update is performed by ICJR since 2015 until now. On 2017, ICJR has monitored the new trend on the deliberation death penalty policy and trend of court decision on death sentencing.

2. Death Penalty Portrait: Indictment, Death Sentence, and Execution Waiting Period in 2017

2.1. Indictment and Death Penalty Sentence Trend in Indonesia in 2017

Based on the monitoring conducted by ICJR, throughout January until September 2017, there are 46 case which involve death penalty indictment and sentencing. Within these particular time, there are 40 of death indictments were requested by Public Prosecutors, 31 death penalty sentences were imposed by Courts, regardless the facts that some of cases were not indicted with death penalty, and 26 decisions were both Public Prosecutors and Courts indicted and imposed with death penalty. In 2017, the number of indictments and sentences which are requested or imposed death penalty are still high. The high number of death penalty indictments and sentences trend is depicted by the table below:

Table 1. Indictments and Death Sentencing Trends in 2017

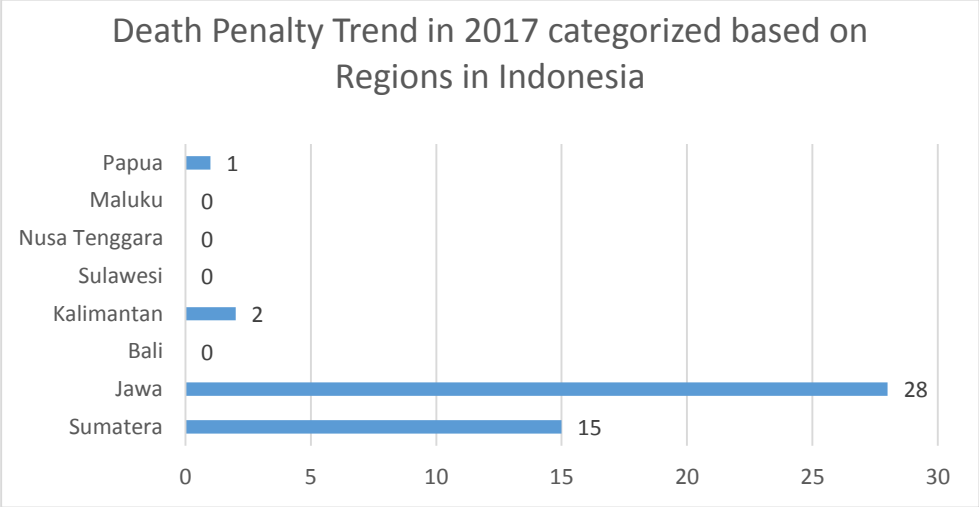
Indictments and Death Sentencing Trends in 2017	January – September 2017
Death Penalty Indictments	40 cases
Death Penalty Sentences	31 cases
Death Penalty Indictments and Sentences	26 cases

*) Source: Monitoring Report of ICJR in 2017

The spread of regions where the death penalty is imposed is also become an interesting fact, Jawa island remains the region with the most death penalty sentences being imposed, amounting to 28 cases, followed by Sumatera with 15 cases, Kalimantan with 2 cases, and Papua with 1 case. Meanwhile, there is not death penalty cases were found in Sulawesi, Bali, and Nusa Tenggara.

[1]Gathered from Data of Death Row Inmates in Indonesia, Directorate General of Correctional System (Ditjenpas) at the Ministry of Law and Human Rights, SDP (Sistem Database Pemasyarakatan), dated 12 October 2017

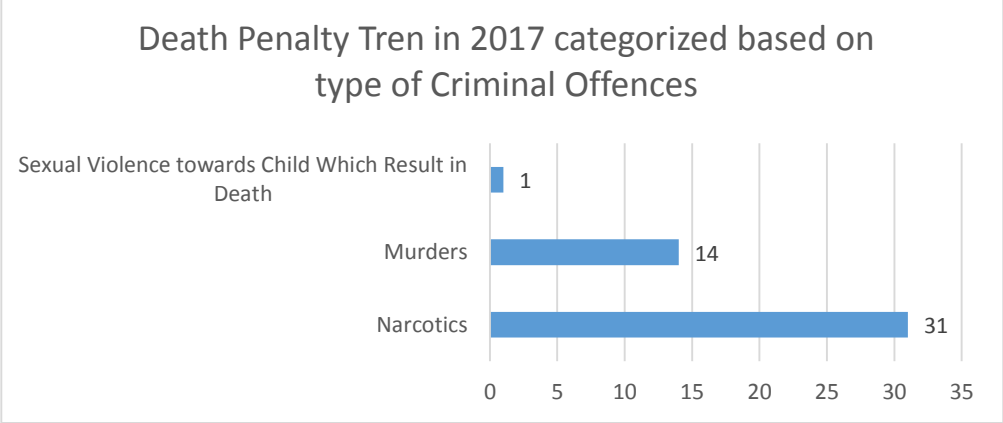
Graphic 1. Death Penalty Trend in 2017 categorized based on Regions in Indonesia



*) Monitoring Report of ICJR, 2017

Throughout 2017, the imposition of death penalty sanction according to the type of cases is still dominated by Narcotics-related offences with 31 cases, followed by murder with 14 cases, and 1 case of child-sexual violence which result in death. The domination of narcotic-related offences is primarily suggested due to the campaign and jargon of the government on wars against narcotics.

Graphic 2. Death Penalty Trend in 2017 categorized based on type of Criminal Offences



*) Monitoring Report of ICJR, 2017

Although the Government Regulation In lieu of Law which introduced chemical castration as a new form of sanction was relatively new passed on May 2016, and latter enacted as a law on October 2016, the District Court of Sarong, West Papua, has used the regulation as the basis to impose death penalty based on Decision No. 82/Pid.Sus/2017/PN. The Accused was sentenced on August 2017.

The Public Prosecutor of Sorong indicted the Accused with Law on Child Protection which was recently being passed, by charging the Accused with: First, Article 81 (1), (3), and (5)[2] of Law No. 17 of 2016, in conjunction with Article 76D[3] of Law on Amendment to Law No. 23 of 2002 on Child Protection. The Article is used by Public Prosecutor as the basis for the indictment. Second, the Accused was indicted with death penalty.[4]

The Decision shows that the use of death penalty based on Government Regulation In lieu of Law which introduced chemical castration as a new form of sanction has been implemented in Papua in 2017, and has become the trend among Public Prosecutor to be used in their bill of charge and indictment. Although, in the end of the case, the Panel of Judges choose to sentence the Accused with life imprisonment, and dismiss the request of Public Prosecutor to impose death penalty towards the Accused.

2.2. The Waiting of Execution by Death Row Inmates in Correctional Center

According to data provided in the Correctional Center Database System (Sistem Database Pemasyarakatan/SPD) at the Directorate General of Correctional Center (Direktorat Jendral Pemasyarakatan/Ditjenpas) of the Ministry of Law and Human Rights, which has been analized by ICJR, there are 165 of Death Row Inmates in Indonesia which are currently waiting for the executon as of October 2017.

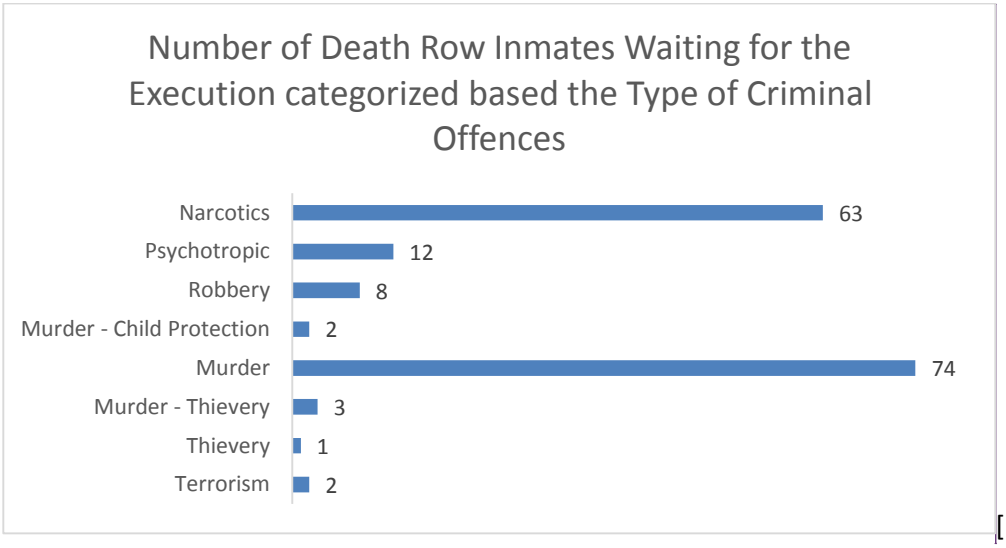
The death row inmates which were charged for murder is dominating the waiting list amounting to 74 people. Although most of the death penalty sentences were mostly imposed towards narcotics-related offence, the waiting list for the death row inmates of this criminal offence is ranked in 2nd position, with 63 of death row inmates.

[2] The sanction for child sexual abuse offence will subject to additional punishment if it conducted by parent/guardian/or other family members of the victims [Paragraph (3)].

[3] The additional punishment will be imposed if the offence result in more than 1 (one) victims, serious injury, mental disorders, infectious diseases, impairment or losses to the reproduction, and/or death.

[4] The charge and indictment of the case are interesting. In the indictment, Public Prosecutor used Article 81 (1), (3), and (5) of the Second Amendment to Law on Child Protection (Government Regulation In lieu of Law which introduces chemical castration). However, the Article 81 (5) has incorporated “death penalty” sanction for the offences. If the Public Prosecutor has strong believed in their case to impose “death penalty” in their indictment, therefore the Article 81 (5) should be the primary charge, which is followed by Article 81 and 76D related to child sexual abuse, as the original criminal offence.

Graphic 3. Number of Death Row Inmates Waiting for the Execution categorized based the Type of Criminal Offences



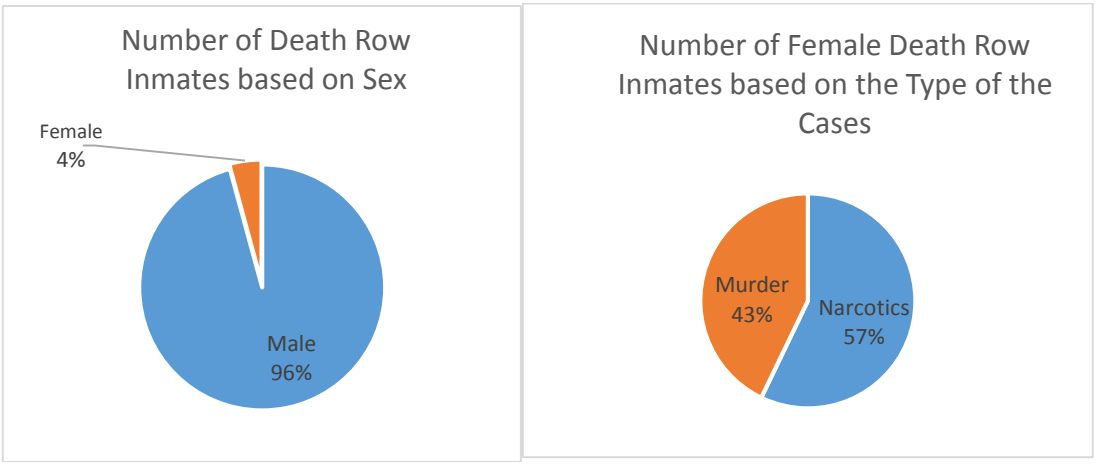
[RFS1]

*) Source : Correctional Center Database System (Sistem Database Pemasyarakatan/SPD) at the Directorate General of Correctional Center (Direktorat Jendral Pemasyarakatan/Ditjenpas) of the Ministry of Law and Human Rights, dated 12 Oktober 2017

For the record, the 3rd position is filed by Psychotropic-related offences, in other words, if the number of death row inmates for narcotics and psychotropic-related offences are combined, thus the amount of death row inmates for drugs-related offences, including narcotics and psychotropic is reaching 75 people, which constitutes the highest number of death row inmates based on the type of criminal offences.

Besides the number of the cases, the categorization of death row inmates according to the sex is also noteworthy. From 165 death row inmates, there are 7 female death row inmates. The narcotic case is still become the criminal offence which contributes most of the death row inmates, amounting to 4 people, while the rest of the 3 is sentenced for murder case. The modus operandi in using female as victim in organized narcotic-network is one of the main contribution that led to the death penalty sentence to female.

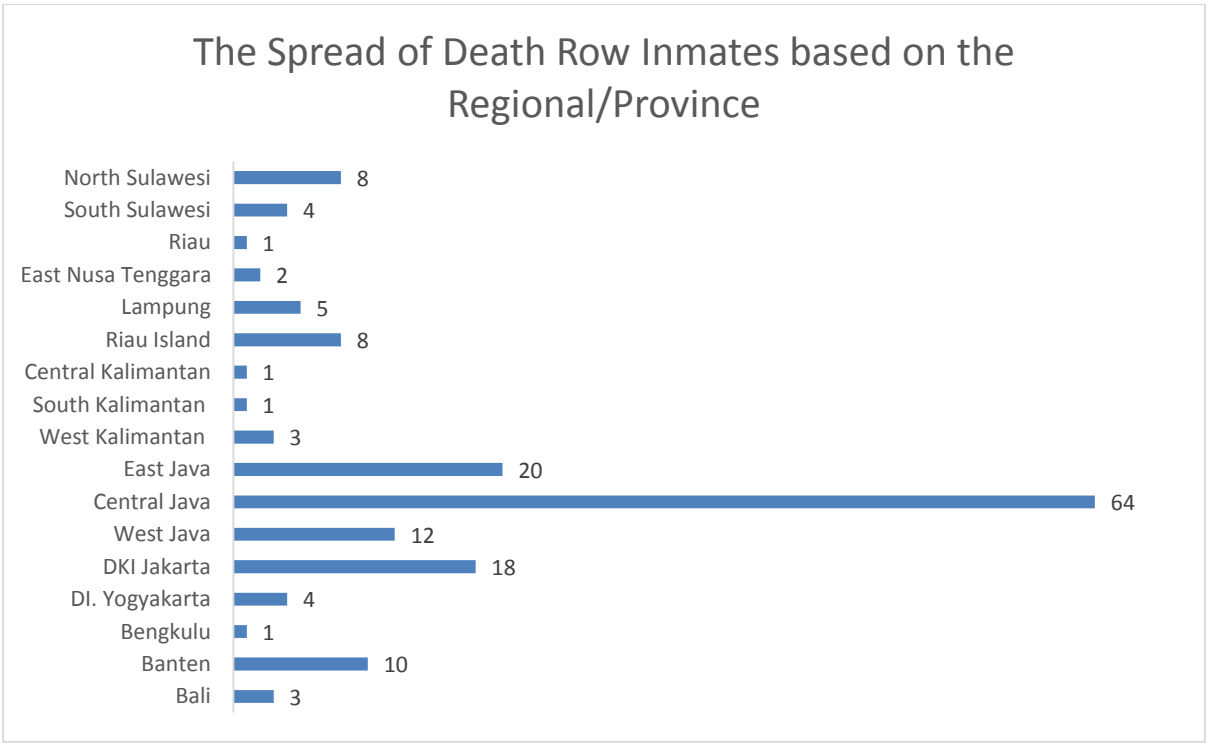
Graphic 4. Number of Death Row Inmates Waiting for the Execution categorized based on Sex and Case



*) Source : Correctional Center Database System (Sistem Database Pemasyarakatan/SDP) at the Directorate General of Correctional Center (Direktorat Jendral Pemasyarakatan/Ditjenpas) of the Ministry of Law and Human Rights, dated 12 Oktober 2017

In respect to the location of Death Row Inmates, the Central Java is the region with the most number of Death Row Inmates in Indonesia, amounting to 64 people. This is due to the fact that most of the Death Row Inmates in Indonesia has been sent to Nusa Kambangan, Cilacap, in Central Java. Nusa Kambangan is the main correctional center for death row inmates and the place of execution.

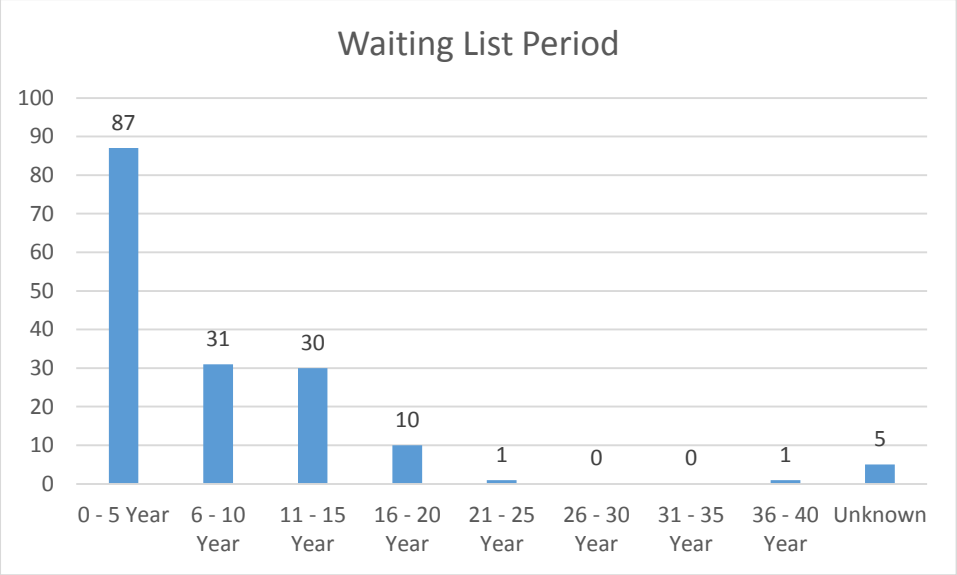
Graphic 5. The Spread of Death Row Inmates Waiting for the Execution



[RFS2]*) Source : Correctional Center Database System (Sistem Database Pemasyarakatan/SDP) at the Directorate General of Correctional Center (Direktorat Jendral Pemasyarakatan/Ditjenpas) of the Ministry of Law and Human Rights, dated 12 Oktober 2017

In addition to the abovementioned data, one of the most important phenomenon of the implementation of death penalty is the waiting list condition. During this situation, the inmates are in uncertain position waiting for the execution. The Government does not have a rigid formula on inmates that will be executed, based on the data below, the waiting list period of the death row inmates significantly varies.

Graphic 6. Waiting Time of the Execution



[RFS3]

*) Source : Correctional Center Database System (Sistem Database Pemasyarakatan/SDP) at the Directorate General of Correctional Center (Direktorat Jendral Pemasyarakatan/Ditjenpas) of the Ministry of Law and Human Rights, dated 12 Oktober 2017

In regard to the waiting list period and its correlation with the concept of torture, Special Rapporteur of United Nation on Torture and other cruel, inhuman or degrading treatment or punishment, Juan Mendez, in his report stated that the new chapter of contention on the legality of death penalty must be pictured by taking into account the human dignity and prohibition of torture and arbitrary action.[5] According to Juan Mendez, the practice of death penalty may result in torture and arbitrary action due to the death row phenomenon and the method of execution which cause in pain and inhuman feelings.[6]

The death row phenomenon or death row syndrome is the combination of situations experienced by death row inmates while waiting for the execution, which culminate in serious mental traumatic and detrition in physical condition during in the correction center. This phenomenon is caused by the state of waiting the execution in considerable lengthy period and the solicitudes of the execution. According

[5] ISHR, Special Rapporteur says death penalty may amount to torture or cruel, inhuman or degrading treatment diakses pada http://www.ishr.ch/news/special-rapporteur-says-death-penalty-may-amount-torture-or-cruel-inhuman-or-degrading.
[6] ISHR, Ibid.

to Cunningham and Vixen, other factors that may contribute to mental traumatic including the limited environment, arbitrary rules, harassment, and the feeling of being isolated with others.

3. Position of Indonesia in International Global Community

3.1 United Nation Mechanism: Universal Periodic Review (UPR)

On May 2017, Indonesia has received number of recommendations from 193 of United Nation members regarding the Human Rights issues in Indonesia. The process which is known as Universal Periodic Review (UPR) is the only mechanism where every nation is given the opportunity to discuss and provide recommendation to other nation for developing the human rights. After the review process, every nation will announce the UPR result which consists of accepted or noted recommendations. Every nation is expected to implement the UPR result, especially the accepted recommendations. Although such recommendation is non-binding in nature to the addressed country, this constitutes a political commitment of the said country.

Civil society organization or non-governmental organization (NGO) may perform a follow-up of the UPR result. The follow-up action is the core activity of every civil organization in ensuring the nations will implement the UPR result before the next round of UPR is held. In this case, every NGO plays important role to monitor and remind the political commitment of the country which has been agreed in the UPR recommendation. Additionally, the NGO also serves as the bridge for general society to disseminate the information in regards to the UPR result through national discussion.

On 19 September, the UPR Result from Indonesia towards the received recommendations has been announced in the United Nation Human Rights Council No. A/HRC/36/7/Add.1. This report consists of UPR Result or recommendations which has been accepted and noted by Indonesia. Several recommendations, including ratification of Optional Protocol to the Convention against Torture, other Cruel, Inhuman or Degrading Treatment or Punishment (OP CAT) has been agreed to be implemented by Indonesia. OPCAT is a supplement instrument of its principal Convention against Torture, other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The key of OPCAT is the protection and prevention of any abuse towards inmates during the detention period and the establishment of national prevention mechanism.

Besides the issue on Torture, several members of United Nation were also showing their concern towards the death penalty execution in Indonesia. This can be seen from the recommendation submitted by Republic of Moldova, Hungarian, Romania, Slovakia, and Ireland, which encouraged Indonesia to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights (OP2 ICCPR).

During the 3rd round of UPR section for Indonesia, there are 13 articles of recommendations provided to the country which related to the death penalty, and Indonesia was choosing to Noted several of the said recommendations, as detailed below:

141.4 Sign and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Republic of Moldova); Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Hungary);

141.5 Continue the process of ratification of international human rights instruments, in particular the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty and, as a first step, establish a moratorium on executions (Romania);

141.46 Abolish the death penalty (Angola); Abolish the death penalty for all crimes and in all circumstances (Portugal);

141.47 Abolish the death penalty for drug trafficking offences (Spain); End the continued imposition of the death penalty mostly for drug-related offences (Liechtenstein);

41.48 Abolish the death penalty and consider commuting all death sentences imposed on persons convicted of drug offences (Chile);

141.49 Enhance safeguards on the use of the death penalty, including: adequate and early legal representation for cases which could attract the death penalty; non-application of the death penalty to those with mental illness; revising the Criminal Code to accord with relevant international human rights laws and obligations; and reinstating a moratorium on the use of the death penalty (Australia);

141.50 Pending abolition, establish an independent and impartial body to conduct a review of all cases of persons sentenced to death, with a view to commuting the death sentences or at least ensuring fair trials that fully comply with international standards (Belgium);

141.51 Abolish the death penalty, establish a moratorium on executions and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Slovakia);

141.53 Re-establish an official moratorium on the use of the death penalty (Montenegro); Re-establish a moratorium on the death penalty with the aim of abolishing it (Slovenia); Re-establish a moratorium on executions with a view to abolishing the death penalty (Brazil); Re-establish a moratorium on the application of the death penalty with a view to its abolition (Mexico); Reintroduce immediately a moratorium on executions with a view to abolishing the death penalty (Sweden);

141.54 Establish a moratorium on executions with a view to abolishing the death penalty (Norway); Establish an immediate moratorium on the death penalty (United Kingdom of Great Britain and Northern Ireland); Establish an official moratorium on executions, with a view to abolishing the death penalty (Switzerland); Establish an official moratorium on the death penalty with a view to abolishing it (Panama); Establish a moratorium on executions with a view to abolishing the death penalty (France); Take urgent measures to establish a formal moratorium on executions of persons sentenced to death (Argentina); Establish a moratorium on executions as a first step towards the abolition of the death penalty (Belgium) (Iceland); Establish a moratorium on the application of the death penalty with a view to abolishing it (Germany); Introduce a moratorium on executions as an intermediate step towards the abolition of the death penalty, reforming the Criminal Code (Spain);

141.55 Put in place a moratorium on executions, with a view to ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty and consider ratifying the Optional Protocol to International Covenant on Economic, Social and Cultural Rights, the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, the Convention relating to the Status of Refugees and its 1967 Protocol, as well as the Rome Statute of the International Criminal Court (Ireland);

Interestingly, based on this UPR Result, 2 out of 13 recommendation which related to death penalty are actually supported by Indonesia, namely:

141.52 Consider establishing a moratorium on executions with a view to abolishing the death penalty (Austria); Consider establishing a de jure moratorium on capital punishment and commute the existing death sentences (Italy); Consider reverting to the moratorium on executions and take steps towards the abolition of the death sentence (Namibia);

141.60 Ensure the respect of the right to a fair trial, as provided by article 14 of the International Covenant on Civil and Political Rights, including the right to appeal for persons sentenced to death (Republic of Moldova);

In contrast with United Nation resolutions, the recommendations from UPR are technically cannot be refused or in other words, a country cannot in position against the recommendations. The country may only choose to support or noted the recommendations.

Both recommendations which are supported by Indonesia contain the implementation of death penalty moratorium in Indonesia and rights for fair trial and access to legal action for people who being indicted for death penalty or for death row inmates. Although the UPR Result ends with the "noted" respond from Indonesia towards the recommendations, Indonesia has chosen to support recommendation from Austria, Italia, and Namibia to consider in implementing death penalty moratorium until further measures to abolish death penalty are taken. Through this recommendation support, Indonesia is actually intended to abolish death penalty although its currently being deliberated. This become an important duty for NGO in Indonesia to follow-up the UPR by monitoring and encouraging for Article 141.52 of the recommendation to be discussed for the purpose of Indonesian position in International community.

3.2 United Nation Human Rights Council Resolution

Besides UPR, mechanism mandated by United National Human Rights Council is the issuance of United Nation Human Rights Council Resolution. Indonesia as member of United Nation Human Rights Council has the opportunity to attend and participate in the voting towards the resolutions that will be adopted by the United Nation Human Rights Council. On 29 September 2017, during the 36th Regular Session Human Rights Council the Draft Resolution of A/HRC/36/L.6 is adopted. This resolution contains the refusal on the use of death penalty as a form of punishment for Religious Conversion, Defamation, Adultery, and Homo Sexual criminal offences. In several voting sessions related to Death Penalty by United Nation Council Resolution, Indonesia is always in "Against" or refusing position, however during the L.6 resolution, Indonesia was choosing to Abstain.

Having represented by Permanent Mission of the Republic of Indonesia (Perutusan Tetap Republik Indoneia/PRTI), Hasan Kleib expressed that Indonesia will choose to Abstain for this Resolution due to the reason that Death Penalty is still part of positive law in Indonesia, and also underlined the effort by Indonesian government to develop positive law, including the revise the Criminal Code, which under the Draft Bill on Criminal Code, death row inmates may be granted leniency in the form of lower sentence.

> Hasan Kleib: "Mr. President, Indonesia will vote Abstain on the Draft Resolution L.6 regarding the question on the death penalty. As a sovereign State Indonesia would like to reiterate that Death penalty is still a part of its positive law. We would like to point out the fact that there is no emerging

international consensus or inter-governmental agreement on the prohibition of death penalty and each State is free to exercise its rights to implement its positive law as it sees fit in accordance to international obligation. In Indonesia, Death Penalty applies only as a last resort after taking into account the existing safeguards and it is only applied to the most serious crime. It is also worth stating that in accordance with the decision taken by Indonesia's constitutional court, as the highest law-making authority and Indonesia's narcotic emergency status, drug offences are still considered as one of the most serious crimes in Indonesia. Indonesia also continues to improve the implementation of its positive law. One aspect of such improvements is reflected in Indonesia's effort to revise its criminal code. In the revision of the criminal code, the possibility of commutation or a change of punishment to a lesser one for Death Penalty convicts as determined by an independent team is now being considered as an option. I thank you Mr. President."[7]

4. Policy Development on Death Penalty

Throughout 2017 there are a potential for the addition of certain criminal offences which will subject to death penalty as incorporated in Draft Bill on Criminal Code (37 offences), Draft Bill in Terrorism (2 offences), and Draft Bill on the Elimination of Sexual Violence (1 offence).[8] The addition of these type of criminal offences may contribute to the current excessive number of criminal offences punishable by death penalty, after in 2016 death penalty was introduced in Government Regulation In lieu of Law on Amendment to Law on Child Protection. The potential for the addition of death penalty punishment towards certain type of criminal offences show a new phenomenon, in one side there will be a strengthening in death penalty by switching it as special alternative criminal, but on the other side, there are certain new types of criminal offence punishable by death penalty. This is not in line with the international provisions on human rights on the limitation of type of criminal offence punishable by death penalty.

4.1 Death Penalty during the Deliberation of Draft Bill on Criminal Code in 2015-2017

Draft Bill on Criminal Code which prepared by the government is still incorporating death penalty as one of the punishment. The deliberation on Death Penalty in Book I of the Draft Bill on Criminal Code is conducted on 18 January 2016 towards Problem Inventory List No. 36 (Article 89 until 92 of Draft Bill on Criminal Code) in Criminal Code. Under the agreement between working committee of Draft Bill on Criminal Code, Commission III of the House of Representative and the Government, death penalty is still acknowledged as "special main criminal punishment" and will be exercised with alternative means of punishments.

The decision on death penalty is formulated in specific manner by using selective implementation in determining type of criminal offences that will subject to death penalty. However, the so called selective

[7] UN Web TV, A/HRC/36/L.6 Vote Item:3 - 40th Meeting, 36th Regular Session Human Rights Council <http://webtv.un.org/watch/ahrc36l.6-vote-item3-40th-meeting-36th-regular-session-human-rights-council/5592217906001/#> diakses 06 Oktober 2017

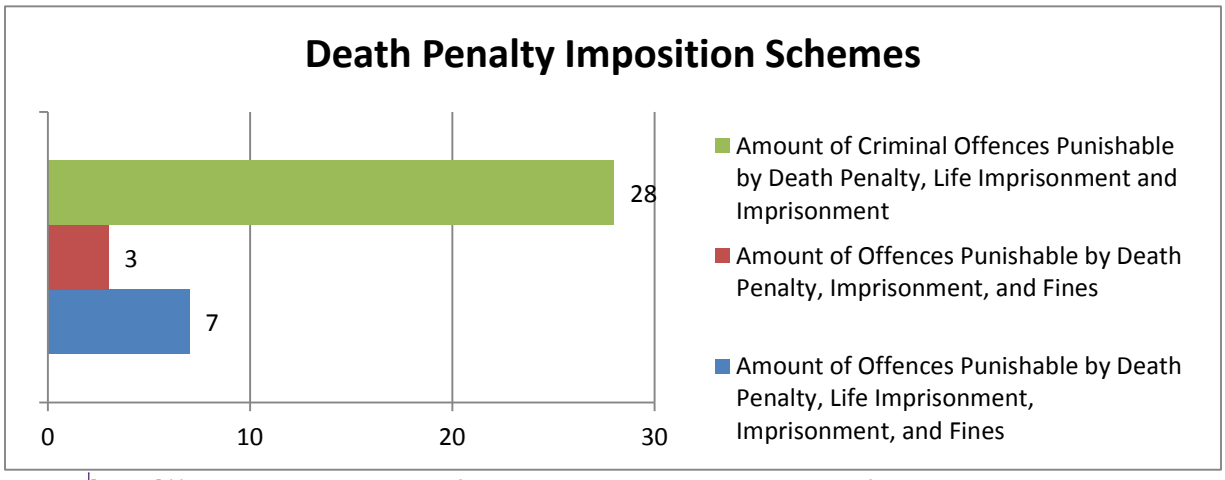
[8] In the Problem Inventory List of Draft Bill on the Elemination of Sexual Violence prepared by the Government on 24 May 2017, Article 48 paragraph (4) in connecton with Article 5 Letter d, in connection with Article 9 use the pharese sexual torture offences, howver there is no clear element of torture as referred to in these articles, as it only states "sexual intercourse which was preceded or followed by action in torturing the victim" whereas the term of "violence" in UNCAT is specifically only referred to the act of physical or mental violence which is performed to gather information, confession for the purpose of investigation by state official, more over if there is a potential of death penalty for sexual torture offences, then the term of torture must be defined first.

implementation is still in doubt due to the excessive number of type of criminal offence punishable by death penalty in Draft Bill on Criminal Code. The amount of criminal offence punishable by death penalty in Draft Bill on Criminal Code reaching 37 types of offence.[9] In Draft Bill on Criminal Code there are three alternative schemes of the imposition of death penalty, namely:

a. Death penalty or life imprisonment or imprisonment;
b. Death penalty or imprisonment and fines;
c. Death penalty or life imprisonment or imprisonment and fines.

The imposition scheme of death penalty under the Draft Bill on Criminal Code is implemented by using alternative imposition, which is different compared to the current Criminal Code, which impose death penalty sanction through the following formula: a) death penalty as the most severe punishment; b) death penalty is used as a form of additional punishment for qualified criminal offences; c) death penalty with an alternative means of punishment in the form of life imprisonment and 20 years of imprisonment punishment. It is difficult to understand the reasons for these three-alternative impositions of death penalty. The most possible preseason that the drafter of Draft Bill on Criminal Code was unintentionally incorporated these three schemes when they directly adopting the criminal offences regulated outside the Criminal Code into the Draft Bill on Criminal Code.

Graphic 7. Death Penalty Scheme in Draft Bill on Criminal Code 2015-2017



[RFS4]*) Source: Distribution of Death Penalty Punishment in Draft Bill on Criminal Code and its Implication, ICJR, 2016

Working committee at the House of Representative has agreed upon the formulation of Article 89 of Draft Bill on Criminal Code, which states that the death penalty will be imposed in alternative manner as the last resort in protecting the society. Specific to Article 90 of the Draft Bill on Criminal Code, it has been agreed that:

1. The death penalty may be executed after the clemency application submitted by the death row inmates is refused by the President.
2. The execution of death penalty as referred to in paragraph (1) will not be performed in front of the public.

[9] Anggara at all, Distribusi Ancaman PidanaDalam R KUHP dan Implikasinya, Jakarta : ICJR, 2016, hlm. 12.

3. The execution of death penalty will be performed by shooting the death row inmates to death by firing squad.
4. The execution of death penalty towards pregnant woman or mentally ill person will be postponed until the woman gives birth or the mentally ill person is cured.

Based on the monitoring activity by ICJR, there is no faction at the House of Representative which against the implementation of death penalty in Book 1. This is also supported by the Problem Inventory List of the Draft Bill on Criminal Code, where all the faction at the House of Representative agreed on the formulation proposed by the government.

Although the death penalty has been transformed into a specific alternative punishment, the provisions on death penalty in Draft Bill on Criminal Code will culminate in considerably massive issues. For instances, Article 91 (which later changed to Article 101) states that the execution of death penalty may be postponed through the imposing probation period for 10 (ten) years, if: a) the reaction by the society towards the death row inmates is not massive; b) the death row inmates shows a sense of regret and there is a hope for improvement; c) the role of the death row inmates in the participating to the criminal offences is not substantial; and d) there are compelling reasons.

The 10 year of waiting period as the basis to consider whether or not changing the death penalty to life imprisonment or to become 20 years of imprisonment is considered a lengthy period, and neglect the psychologic pains of the death row inmates. This waiting period will lead to another new problem, which commonly known as death row phenomenon. The death row phenomenon is a combination of situation experienced by the death row inmates as the result of the execution waiting period and will lead to severe mental trauma and degradation of physical condition in the correctional center. This phenomenon is caused by the state of lengthy waiting period for the execution and the anxiety in waiting for the execution, the limited environment, arbitrary rules, harassment, and the feeling of being isolated from other people. Besides, there is no guarantee that even if the 10 years waiting period has been reached the sanction will be changed to life imprisonment.

Draft Bill on Criminal Code is still unable to fulfil its mandates to perform the democratization, harmonization, and adaption of the international law provisions. The excessive amount of criminal offences punishable by death penalty and imprisonment indicate that the Draft Bill on Criminal Code has not yet aligned with the international provisions on human rights, mainly on the provisions related to lowering the criminal offences punishable by death penalty. Although the implementation of the death penalty will be formulated in strictly manner, the rights to life constitutes a protected right and shall not be reduced in any situation based on the 1945 Constitution. Therefore, imposing provisions on death penalty in the Draft Bill of Criminal Code is in contradiction with the constitution and undermine the ultimate purpose of punishment as a method of rehabilitation or the required means of punishment by modern society.

Table 2. Changes on Death Penalty Provisions in Book I of Draft Bill on Criminal Code

Problem List	Article in Draft Bill on Criminal Code	Deliberation Result
30	Article 67 Death Penalty is a main sanction with special nature and will be indicted with other alternative means of punishments	Article 67 (1) In the event of serious criminal offence which endanger and harm the society, a death penalty may be indicted as an additional punishment,

		by formulating it with other alternative means of punishment in the form of life imprisonment or 20 (twenty-year) of imprisonment. (2) Death penalty as referred to in paragraph 1 (one) is has special in nature and must be indicted with other alternative means of punishment. Elucidation: Death penalty is set in specific article to show that this punishment has specific nature. Compared to other punishment, death penalty is the most severe form of punishment. Therefore, must always be indicted with other alternative means of punishment, namely life imprisonment or 20 (twenty-year) of imprisonment. Article 67 has been moved to become Article 69A
	Article 101 (Originally Article 91) (1) The execution of death penalty may be postponed with probation period for 10 (ten) years, if: a. the reaction by the society towards the death row inmate is not massive; b. the death row inmate shows a sense of regret and there is a possibility for improvement; c. the role of the death row inmates in the participating to the criminal offences is not substantial; and d. there are compelling reasons. (2) If the death row inmates, during the probation period as referred to in paragraph (1a), shows commendable attitude and actions, the death penalty may be changed to life imprisonment or maximum of 20 (twenty) years of imprisonment based on the decree by ministry whose responsible on law and human rights affairs. (3) If the death row inmates, during the probation period as referred to in paragraph (1a), does not show	Article 101 (Originally Article 91) (1) If the clemency application is refused the execution of death penalty may be postponed through a probation period for 10 (ten) years, if: a. the death row inmate shows a sense of regret and there is a possibility for improvement; b. the reaction by the society towards the death row inmate is not massive; and c. there are compelling reasons. (1a) The probation period of 10 (ten) years is commenced 1 (one) day after the clemency application is refused. (2) If the death row inmates, during the probation period as referred to in paragraph (1), shows commendable attitude and actions, the death penalty may be changed to life imprisonment or maximum of 20 (twenty) years of imprisonment based on a Presidential Decree. (3) If the death row inmates, during the probation period as referred to in paragraph (1a), does not show any

	any commendable attitude and actions, and there is no possibility for improvement, the death penalty may be executed based on the order of Attorney General.	commendable attitude and actions, and there is no possibility for improvement, the death penalty may be executed based on the request of Attorney General.
	Article 102 (Originally Article 92) If the clemency of the death row inmates is refused and the death penalty is not executed for 10 (ten) years for reasons other than the death row inmate is escaping, the death penalty may be changed to life imprisonment based on a Presidential Decree.	Article 102 (Originally Article 92) (1) If the requirements as referred to in Article 101 paragraph (1) fail to be fulfilled, the death penalty is executed based on the order of Attorney General. (2) If the death penalty is not executed for 10 (ten) years for reasons other than the death row inmate is escaping, the death penalty may be changed to life imprisonment based on a Presidential Decree.

4.2 Death Penalty during the Deliberation of Draft Bill on Terrorism

The government strengthens the provision of Article 6 and Article 14 of the Law on Terrorism (Law No. 5 of 2003) which impose death penalty as one of the type of punishment for terrorism criminal offence. In Draft Bill on Terrorism, the addition of death penalty is set in Article 14 which is imposed for criminal offence for arranging terrorism. Article 14 shows stricter government action towards master mind of terrorism criminal offence.

Table 3. List of Death Penalty Sanction in Draft Bill on Terrorism in 2016

No.	Article	Type of Offences
1	Article 6	Whoever intentionally by using Violence or Threat which: a. result in terror situations or fear of people in widespread; b. result in massive casualties, deprivation of independence, or lost in life or assets of others; and/or c. result in damage or destruction of Strategic Vital Objects, natural environment, public facility, and/or international facility, shall be punished by death penalty, life imprisonment, or a minimum of 4 (four) and a maximum of 20 (twenty) years of imprisonment.
3	Article 14	Whoever intentionally arrange other to perform Terrorism Criminal Offence as referred to in Article 6, Article 7, Article 8, Article 9, Article 10, Article 10A, Article 12, Article 12A, and Article 12B, shall be punished by death penalty, life imprisonment, or 20 (twenty) years of imprisonment.

Based on the monitory report of ICJR during the mapping of Problem Inventory List of Draft Bill on Terrorism at the House of Representative, there were 6 factions agreed on the formulation of Draft Bill which impose death penalty, namely: FPDIP, FGolkar, FGerindra, FPKB, FPKS and FPPP. Meanwhile, other faction such as FPAN was asking for further discussion. FNasdem encouraged the abolition of minimum imprisonment and silent on the death penalty provision. FHANURA did not make any comment. FDemokrat did not propose any suggestion.

Towards Article 14, during the mapping of the Problem Inventory List, there were 8 (eight) factions agreed to preserve the death penalty, namely: FPDIP, FPG, Polka, FPD, FPAN, FPKS, FPPP and FNasdem. FPKB which previously agreed on the death penalty in Article 6, turned to propose the abolition of death penalty in Article 14. Meanwhile, Fauna was abstained.

Article 6

Whoever **intentionally** by using Violence or Threat which:

a. result in terror situations or fear of people in widespread;
b. result in massive casualties, deprivation of independence, or lost in life or assets of others; and/or
c. result in damage or destruction of Strategic Vital Objects, natural environment, public facility, and/or international facility,

shall be punished by death penalty, life imprisonment, or a minimum of 4 (four) and a maximum of 20 (twenty) years of imprisonment.

Based on the monitoring report of deliberation by Working Committee at the House of Representative regarding Article 6, all the member of the Working Committee seemed to be in common consensus the death penalty. The Working Committee was only making minor comment on the phrase "intentionally" to be aligned with the formulation set in the Draft Bill on Criminal Code. Meanwhile, the death penalty issues have never been discussed.[10]

The same situation also occurred during the deliberation of Article 14, the Working Committee has never discussed the death penalty provision, and raised notes on several formulations and changes to the phrases instead.

Article 14

Whoever intentionally arrange other to perform Terrorism Criminal Offence as referred to in Article 6, Article 7, Article 8, Article 9, Article 10, Article 10A, Article 12, Article 12A, ~~and~~ Article 12B, **and Article 13A** shall be punished by death penalty, life imprisonment, or 20 (twenty) years of imprisonment

The formulation of Article 14 is pointed out by the Working Committee by taking the concept of Article 292 of the Draft Bill on Criminal Code, which latter agreed by the Working Committee with additional notes that is; the term "arrange" must be followed with a specific formulation, additionally the terms "**intentionally arrange**" must be further clarified. Similarly, the phrase "failed arrangement" has been copy-pasted from Article 163 bis of Criminal Act Law (Article 292 of Draft Bill on Criminal Code) to become Article 14 paragraph (2). Meanwhile, in regards to the Criminal Sanction), the Working Committee is agreed to be aligned with Draft Bill on Criminal Code.

[10] Based on Monitoring Report of ICJR entitled Deliberation of Draft Bill on Eradication of Terrorism, 30 March 2017.

4.3 The Present of Death Penalty during the deliberation of Draft Bill on the Elimination of Sexual Violence

In 2017 the Legislative Body at the House of Representative has finally completed the deliberation of Draft Bill on the Elimination of Sexual Violence. Afterwards, the House of Representative initiated and proposed the Draft Bill to the Government on 6 April 2017, through a letter number LG/06211/DPR RI/IV/2017. In responding this letter, on 2 June 2017, the President Joko Widodo issued letter number R.25/Pres.06/2017, which assigned Ministry of Woman Empowerment and Child Protection, Ministry of Health, Ministry of Social Affair, Ministry of Interior Affair, Ministry of State Apparatus Empowerment and Bureaucracy Reform, and Ministry of Law and Human Rights, to represent the government in the deliberation of Draft Bill on the Elimination of Sexual Violence.

Following the issuance of the letter from the President, the Problem Inventory List of Draft Bill on the Elimination of Sexual Violence was concluded on 24 May 2017. The government version of Problem Inventory List incorporated death penalty as a form of sanction for perpetrators of Sexual Torture, which is set in Article 48.

Table 4. Death Penalty Sanction for Sexual Torture Criminal Offence in Government's Problem Inventory List

Chapter XII **Criminal Provisions**
....
Article 48
(1) Whoever violates provision as referred to in Article 5 paragraph (2) letter d, shall be punished with a minimum of 3 years and a maximum of 15 years of imprisonment.
(2) In the event that the criminal offence as referred to in paragraph (1) is committed by parent, guardian, or family-related parties, babysitter, teacher, teaching staff, apparatus or officer who responsible in woman and child affairs, public official or is committed by more than one person simultaneously, the criminal sanction is added for 1/3 (third) of the punishable sanction as referred to in paragraph (1).
(3) In addition to the perpetrators as referred to in paragraph (3), the additional of 1/3 (third) of the punishable sanction is also imposed to perpetrators who previously have been committed criminal offence as referred to in Article 48 or other type of criminal simultaneously.
(4) In the event that criminal offence as referred to in Article 48 result in casualties caused by cruel or inhuman torture, the perpetrators shall be punished by death penalty, life imprisonment, or 20 (twenty) years of imprisonment.

Chapter IV **Prohibited Acts**
Article 5
(1) Every person is prohibited to commit Sexual Violence.
(2) The sexual violence as referred to in paragraph (1) comprises of: a. Molestation; b. Sexual exploitation;

c. Sexual under violence, threat of violence, or deceit; d. Sexual torture.
.....
Article 9
Act as referred to in Article 5 letter d is in the form of sexual intercourse which was preceded or followed by action in torturing the victim.

The Problem Inventory List of the government, specifically on the prohibited acts, does not provide detail clarification on the definition of sexual torture, neither the explanation on the methods in performing sexual torture. There is no detail explanation on the element of torture in this article, as it merely states "sexual intercourse which was preceded or followed by action in torturing the victim ", whereas the term of "torture" in UNCAT is specifically only referred to the act of physical or mental torture which is performed to gather information, confession for the purpose of investigation by state official. This detail is not found in the Problem Inventory List of Draft Bill on the Elimination of Sexual Violence prepared by the government. Moreover, Indonesia has never specifically regulated criminalization towards torturing act until present, thus there is no specific national regulatory framework that can be use as the reference. If there is an apparent possibility of imposing death penalty towards sexual torture crime, therefore it must be first clarified the terms torture in clear manner and it is also required in depth ground for imposing the death penalty for sexual torture crime by the government.[11]

5. Clemency Issues for Death Row Inmates

5.1. The Respond of the President of the Republic of Indonesia

Based on Constitutional Court Decision No. 56/PUU-XIII/2015, the Constitutional Court has determined that in issuing Presidential Decree relating to clemency, the President is bound by provisions of Article 11 paragraph (11) of Law on Clemency, which requires the consideration provided by the President must be a reasonable consideration. The Constitution Court perceived that the Consideration must be obtained through reasonable intellective process.

Although dismiss the petition of the applicants which were asking for the incorporation of phrase "reasonable consideration" in Article 11 paragraph (1) of the Clemency Law, the Constitutional Court declared that if the President fails to consider the clemency application in reasonable manner, thus such action, according to the Constitutional Court constitutes violation of Article 11 paragraph (1) of the Clemency Law. In other words, it has become the obligation of the President to issue decision based on reasonable consideration.

Throughout 2017, President Joko Widodo has refused one clemency application which was submitted by death row inmates on drugs-related offences, Gurip Singh (India). Previously, the President has turned down all the clemency application submitted by death row inmates for drugs-related offences. However, the President allowed on clemency application submitted by Dwi Trisna Firmansyah, death row inmates for murder cases through Presidential Decree No. 18/G/2015.

[11] Maidina and Supriyadi, Progress report of Draft Bill on the Overcome of Sexual Violence, ICJR, 2017.

The respond by the President in refusing clemency application submitted by death row inmates for drugs-related offences raised number of questions. This shows that the President has failed to give reasonable consideration for each case, or chose to be willfulblind on the humanity issues which might attached to each of the case. Philosophical wise, clemency is a form of humanity action as it serves as compassion and forgiveness granted by the Head of State to a convict.[12] Therefore, consideration on humanity ground which addressed individually in subjective manner must be provided, therefore the concept one size fit all which was implemented towards convicts for drugs-related offences by the President should not be applied.

Previously, the State Secretary Ministry, Pratikno, denied the claim that the President has refused the clemency application without reasonable consideration. Pratikno argued that the President has received complete considerations from number of institutions in regards to each applicant of clemency who indicted with death penalty.[13] However, the willfulblind of the President towards drugs-related cases was perceived during public lecture at Universitas Gadjah Mada, on December 2014. During that occasion, the President stated that he will refuse the clemency application submitted by 64 death row inmates for drugs-related cases.[14] This is also confirmed by Ministry of Law and Human Rights, Yasonna Laoly, on March 2015, who stated that the President has allowed clemency application submitted by Dwi Trisna Firmansyah on the ground that the cases was not drug-related offences.[15]

These facts show that the President does not have to read or prepare reasonable consideration towards death row inmates for narcotic cases, as the President has chosen to be willful blind by guarantying will refuse all the clemency application submitted by death row inmates for narcotic cases. Clearly, this contradict Article 11 paragraph (1) of the Clemency Law and Constitutional Court Decision No. 56/PUU-XII/2015.

5.2 Public Access towards Clemency Decree for Death Row Inmates

On 11 May 2016, the Public Information Commission has rendered its decision on the information dispute between ICJR against the State Secretary Ministry, related to the availability of Presidential Decree on clemency for death row inmates. In Decision No. 58/XII/KIP-PS-A-M-A/2015, it has been declared that the Presidential Decree which contains the refusal of clemency application from death row inmates must be available for public.[16] In responding this decision, the Ministry of State Secretary submitted appeal application to High Administrative Court of Jakarta.

This decision settled the public information dispute on the Presidential Decree on clemency, in which the Government through Ministry of State Secretary argued that the Presidential Decree on clemency is a classified documents and exempt from the provisions of the disclosure of public information based on

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[12] JCT Simorangkir, Rudy T Erwin, and JT Prasetyo, Kamus Hukum (Jakarta, Bumi Aksara, 1995), Page 58.

[13] Jokowi Terima Pertimbangan Lengkap Sebelum Tolak Grasi Terpidana Mati, See http://nasional.kompas.com/read/2015/03/02/16032521/Jokowi.Terima.Pertimbangan.Lengkap.Sebelum.Tolak.Grasi.Terpidana.Mati

[14] Jokowi Tolak Permohonan Grasi 64 Terpidana Mati Kasus Narkoba, See http://regional.kompas.com/read/2014/12/09/16545091/Jokowi.Tolak.Permohonan.Grasi.64.Terpidana.Mati.Kasus.Narkoba

[15] Menkum HAM jelaskan alasan Jokowi beri grasi pembunuh berencana, See https://www.merdeka.com/peristiwa/menkum-ham-jelaskan-alasan-jokowi-beri-grasi-pembunuh-berencana.html

[16] Supriyadi W. Eddyono, at all, 2016 Death Penalty Update in Indonesia, Jakarta: ICJR, 2016, Page 20.

Ministry of State Secretary Regulation No. 2 of 2016 on Guidance for the Implementation of Security Classification and Archive at the Ministry of State Secretary, which was promulgated on 9 February 2016. Furthermore, on 5 April 2016, the Ministry of State Secretary has performed Consequences Test towards the Presidential Decree on clemency, which result in the decision that the documents were classified.

In fact, Article 16 paragraph (1) of Public Information Commission Regulation No. 1 of 2010 on Standard for Public Information Services, states that the Public Information and Documentation Management Officer (PPID) must perform consequence test based on ground set in Article 17 of Law on Freedom of Public Information, before declaring a public information as classified information.

Article 8 paragraph (4) letter b of Public Information Commission Regulation No. 1 of 2010 on Standard for Public Information Services, states "[…] perform the consequence test which might arise as referred to in Article 19 of Law on Freedom of Public Information, before declaring certain public information as classified".

Based on this regulation on the mechanism of public consequences test, if the Presidential Decree on clemency is considered as classified, the Ministry of State Secretary should has had performed the consequence test and establish the Ministry of State Secretary Regulation No. 2 of 2016 on Guidance for the Implementation of Security Classification and Archive at the Ministry of State Secretary, long before the original copy of the said Presidential Decree is requested by public. In fact, the request for the Presidential Decree on clemency of death row inmates by ICJR has been submitted on September 2015, while the consequences test by Ministry of State Secretary and the Ministry of State Secretary Regulation were prepared after the examination of evidence held at the Central Information Commission on February and April 2016. Therefore, the ground to categorize the Presidential Decree on clemency as classified document by the Ministry of State Secretary is not relevant and without sufficient ground, as the consequences test was performed backdated.

Unfortunately, in appeal case registered under No. 1/G/KI/2016/PTUN-JKT, the panel of judges at the High Administrative Court of Jakarta annul the Central Information Commission Decision No. 58/XII/KIP-PS-A-M-A/2015 and refuse the facts related to the consequences test and universal principles of freedom of information, which essentially believes that all the information is accessible by public.

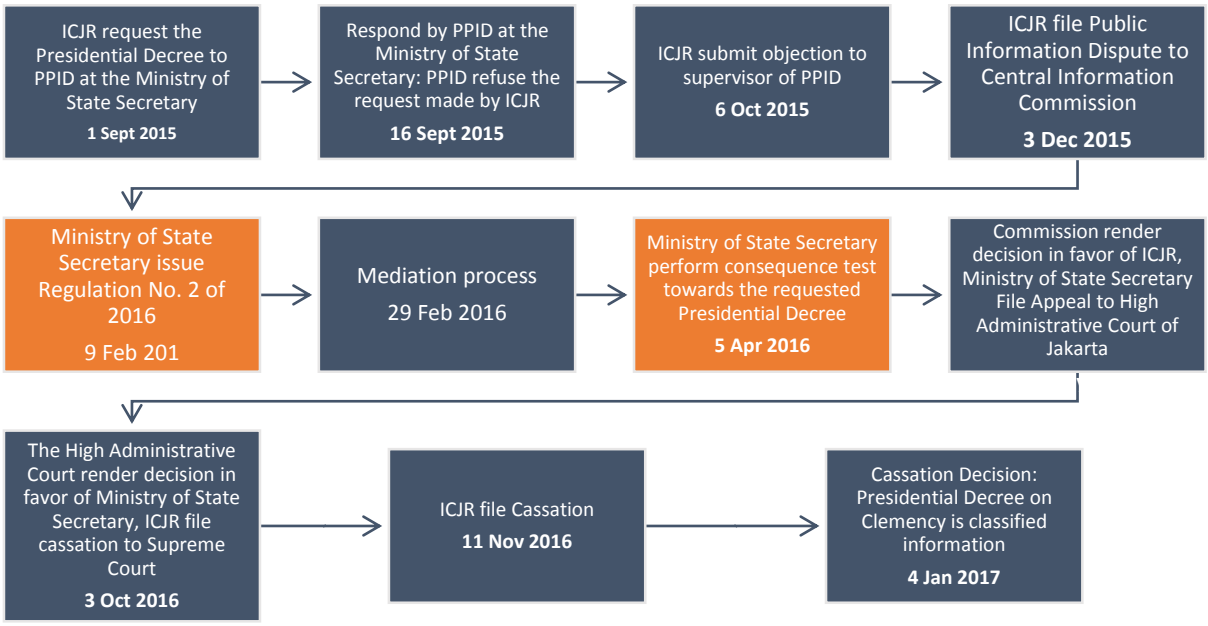
On 1 November 2016, ICJR registered the cassation application of public information dispute to Supreme Court. The purpose of the freedom of information process towards the Presidential Decree on clemency is for the basis of ICJR in research the death penalty in Indonesia and for the society to understand the preparation of policy by the President, policy programs of the President, and process in preparing Presidential Decree, as well as the ground for issuing a Presidential Decree, including to know the original copy of the Presidential Decree on clemency, which should not be left undisclosed or classified without clear reason[17]. The rights to access the said information is set under Article 3 of Freedom of Public Information Law, which essentially ensure the rights of the citizens to access the reasons in determining public policy.

On 4 January 2017, the Supreme Court has rendered its decision in regards to the disclose of Presidential Decree on clemency as public information. In the Decision No. 568 K/TUN/2016, the panel of judges held that the implementation of law in classifying the Presidential Decree on clemency for

[17] Ibid.

death row inmates by High Administrative Court of Jakarta was in accordance with laws without any erroneous. Therefore, the access of public to laws and regulations in Indonesia, including Presidential Decree, in examining the anatomy and ground on whether or not a clemency by death row inmates is accepted, is closed.

Graphic 8. Chronology and the Process of Adjudication for the Settlement of Public Information Dispute on the Request of Presidential Decree on Death Row Inmates Clemency



6. Case Review Issues

6.1 The Continuing Restriction in Exercising Protected Rights under the Constitution

The Constitutional Court through its Decision No. 34/PUU-XI/2013, has declared that the number of application that can be submitted for case review in criminal case should not be restricted. Through this Decision, the Constitutional Court held that Article 268 paragraph (3) of Law No. 8 of 1981 on Criminal Procedure Code, which was only allowed the case review application can only be submitted once, does not have legal binding power. Consequently, convicts may submit more than one case review application provided satisfy all the requirement. In its Decision, the Constitutional Court emphasized that the justice cannot be restricted by time or formality requirement, including to limit the number of case review application that can be submitted, as there is a possibility of discovering new substantial evidence after the decision on the previous case review application has been rendered.

Constitutional Court Decision No. 34/PUU-XI/2013 which has changed the previous customary of criminal justice is responded seriously by the Attorney General Office and government. The Attorney General Office perceived that the Decision will hamper the death penalty execution towards certain convicts as they may submit case review for the second time.

In following up the issue, the Government, Attorney General Office, and Supreme Court were organized a meeting on 9 January 2015 at the Ministry of Law and Human Rights' office. The Supreme Court was

finally issued Supreme Court Circular No. 7 of 2014, which essentially emphasized that the case review application on the ground of new evidence being discovered can only be submitted once, while case review on the ground conflict of court decisions may be submitted more than once.

The issuance of Supreme Court Circular No. 7 of 2014 has resulted in a new and complex issue. On January 2015, Arief Hidayat, A judge at Constitutional Court, who was also presided as Deputy Chief Justice at the Constitutional Court, stated that the respond by Supreme Court in issuing Supreme Court Circular No. 7 of 2014 is a form of non-compliance to the Constitutional Court Decision, and also considered as disobedience of the court decision. The Supreme Court has considered violating the constitution.[18]

The Supreme Court is in believe that the restriction on the submission of case review can also be found in Article 24 paragraph (2) of Law No. 48 of 2009 on Judiciary Power (Judicial Power Law), and Article 66 paragraph (1) of Law No. 14 of 1985 on Supreme Court, as amended several times by Law No. 5 of 2004 and Law No. 3 of 2009 (Supreme Court Law), thus the Supreme Court considered that the Constitutional Court Decision does not annul the restriction of case review application stated in Article 24 paragraph (2) of Judiciary Power Law, and Article 66 paragraph (1) of the Supreme Court Law. This logic become the basis for the Supreme Court to proceed with the case review submission restriction, namely single submission rule.

The Constitutional Court latter respond the logic of Supreme Court in its Circular No. 7 of 2014 through 2 (two) decisions, namely Decision No. 66/PUU-XIII/2015 dated 7 December 2015, and Decision No. 45/PUU-XIII/2015 dated 10 December 2015.[19]

In these decisions, the Constitutional Court held that the judicial review applications submitted by the applicant is related to the restriction of case review submission which is regulated in other laws, other than Law No. 8 of 1981, which has been responded by the Constitutional Court through Decision No. 34/PUU-XI/2013. The Constitutional Court declared that its decision is applicable with under certain necessary changes (mutatis mutandis) to the object of the judicial review application, namely Article 66 of the Supreme Court Law, and Article 24 paragraph (2) of the Judiciary Power Law.

In other words, Article 66 of the Supreme Court Law, and Article 24 paragraph (2) of the Judiciary Power Law, which regulated the limitation of submission of case review application as the basis for Supreme Court Circular No. 7 of 2014, is no longer valid. Therefore, the Supreme Court Circular No. 7 of 2014 does not have its legal basis to be enforced, and should be revoked.

However, since the overlapping policy on case review submission restriction by Supreme Court and Constitutional Court, the Supreme Court has yet to revoked and annulled the its Circular No. 7 of 2014. Practically, this has resulted in legal uncertainty, especially on death penalty cases.

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[18] Hukumonline.com, MK Nilai MA Langgar Konsepsi Negara Hukum, diakses pada 3 Oktober 2017, See http://www.hukumonline.com/berita/baca/lt54aaac4f8e2fb/mk-nilai-ma-langgar-konsepsi-negara-hukum

[19] Constitutional Court Decision No. 66/PUU-XIII/2015, Seehttp://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/66%20PUU%202015-UU_MA_&_UU_Agraria-Tidak_Diterima-telahucap-7Des2015-qrcode-%20wmActionWiz.pdf Constitutional Court Decision No. 45/PUU-XIII/2015, See: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/45_PUU-XIII_2015.pdf

In the Investigation Result of Ombudsman No. 0793/LM/VIII/2016/Jkt, prepared for Humprey Ejike Jefferson, the Ombudsman declared that:

The District Court of Central Jakarta has decided to not forward the case [review application] of Humprey Ejike Jefferson to Supreme Court, however did forward the second case review applications submitted by Eugene Ape, which later registered under No. 89PK/Pid.Sus/2016 at the Supreme Court, although both of the case [case review] applications were submitted after the Constitutional Court Decision No. 34/PUU-XI/2013 dated 6 March 2014.

This fact shows that the Supreme Court Circular No. 7 of 2014 is not only in contradiction with the Constitutional Court Decision, but also has resulted in legal uncertainty in Indonesia criminal law system.

6.2 Supreme Court Circular Number 1 of 2012: Limitation towards the Access in Submitting Case Review Application

One of the most crucial issues relating to case review besides the restriction above is the access limitation in submitting the case review application. Until present, the Supreme Court has yet to revise Supreme Court Circular No. 1 of 2012 on the Submission of Case Review Application in Criminal Case, which essentially regulates that the submission of case review must be presented directly the applicant of the case review, and cannot be delegated by advocate or legal counsel, in the Circular its states that:

> "…Based on the abovementioned provisions and provision of Article 265 paragraph (2) and (3) of the Criminal Procedure Code, the Supreme Court held that the request for case review to the Supreme Court can only be submitted by the convicts itself or his/her heirs. The request for case review which submitted by the attorney at law of the convicts without the present of the convicts will be declared unaccepted and the case will not be forwarded to the Supreme Court…"

The Supreme Court Circular No. 1 of 2012 shows the administrative and formality requirement still become the main focus by the Supreme Court. This Circular was issued due to the controversy of case review application which was submitted by death row inmates which curranty escaping.[20]

The Supreme Court Circular No. 1 of 2012 has become one size fit all policy for parties which are intended to submit case review application. Although the main target of this Circular is applicant who are in prison break and wish to submit case review, ultimately the Circular has significant impact to other parties. One of the consideration used by the Supreme Court in determining the case review applicant from death row inmates or other applicant is whether the application is in accordance with the standard procedure or the convicts are not in escape.

To present in person for submitting case review application is not an easy task, due to the complexity procedure for approval if the applicant is a convict, therefore he/she will require attorney to at least handle the administrative matters and approval for leave. Further, the complexity will be greater if the applicant is a death row inmates, as most of them has been relocated to Nusa Kambangan correctional

[20] See Sikap MA Terbelah Tentang Pengajuan PK oleh Advokat, Accessed on http://www.hukumonline.com/berita/baca/lt4b9a65f16afe3/sikap-ma-terbelah-tentang-pengajuan-pk-oleh-advokat

center, therefore to administer their own case review application in their original District Court jurisdiction, will result in high cost as well as complexity on approval procedure. This situation is also in contradiction with the low-cost principle of criminal justice system. Moreover, not every convict, especially death row inmates, are fortune enough to cover the case review expenses.

Supreme Court Circular No. 1 of 2012 has also lead to issue on rights for legal aid. The presentation of advocate, especially for underprivileged people or death row inmates is critical, therefore limitation of rights and authority of advocate in assisting the client is a serious issue. Further, this is also violating the rights of people for legal aid and the rights of advocates to represent their client which is protected by the law.

7. Recent Issues on Death Penalty in Indonesia

7.1 Yusman Telaumbanua's Case: the Face of Fair Trial in Indonesia

On 17 August 2017, Yusman Telaumbanua is officially release from prison after receiving Independence Day remission. The death row inmates for meditated murder receive the release after the Supreme Court annulled his death sentence and changed it to 5 years of imprisonment. KontraS was assisting Yusman to submit case review to the Supreme Court on July 2016, in the month where the Government perform the third-batch of death row inmate execution.

Although his death sentence has been annulled by Supreme Court, Yusman is still found liable for involving in meditated murder. Until the report is presented, ICJR is unable to analyze further Yusman's case as the original copy of the case review decision from the Supreme Court cannot be accessed by public.

However, there are several important notes form Yusman's cases, namely:

First, Yusman was the first child who was sentenced for death. Yusman was never been undergone juvenile trial as mandated by Law No. 3 of 1997 on Juvenile Court, a law in which applicable during the first trial of Yusman's case at District Court of Gunung Sitoli, however Yusman's case shows that there is no guarantee that the law enforcement in Indonesia will take precautions actions in handling child as offender.

Second, Yusman's case reflects the poor balance between rule of evidence and defense in Indonesia criminal justice system. Additionally, in regards to the legal aid and advocate assistance, the quality of legal aid is also need to be highlighted. The attorney of Yusman, namely Laka Dodo Laila, S.H., M.H and Cosmas Dohu Amazihono, S.H., M.H., were asking for their client to be sentence to death:

> "…Considering, that in his personal defense the accused has admitted guilty and asked for the panel of judges for the lightest punishment, however the Attorney of the accused has different opinion and asked for the panel of judges for to impose death penalty to the accused for the cruel and sadistic wrong doing of the accused along with other parties."

This practice is in contradiction with Article 54 in connection with Article 56 of Criminal Procedure Code, which states that suspect or accused which is charged with death penalty must be accompanied with attorney. In regards to Article 54 of the Criminal Procedure Code, the attorney is not only required to present in the court room, but also to ensure the interest of defense of the suspect or accused.

In International level, Indonesia's regulatory framework on fair trial provisions is still below the standard. According to the International Covenant on Civil and Political Rights (ICCPR), any person who are detained or charged for criminal offences has the rights for attorney during the detention, trial, and appeal period.[21] United Nation Economic and Social Council states that a person who are facing death penalty indictment must be "provided with adequate assistance of counsel at every stage of the proceedings".[22] United Nation Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions states that at all stages the defendants charged with capital offences must be accompanied with competent and effective defense lawyers and state-funded legal aid.[23]

In other words, the poor regulatory framework on legal aid and adequate attorney in Indonesia is potentially and inevitable will result in unfair trial, which surely should not be the basis for court in imposing death penalty.

Third, Yusman informed that torture action is one of the method in obtaining confession from the accused. In the report prepared by KontraS, Yusman was 16 years of age when he was asked to admit 19 years of age by the investigator. In return, Yusman was promised an assistance during the trial by the investigator. However, in front of the Public Prosecutor, Yusman admitted that he was 16 years of age. Consequently, Yusman was tortured and finally agreed to manipulate his age to become 19 years of age.

The confession and facts of the involvement of torture to obtain statement from the accused is not a new phenomenon in Indonesia's criminal justice system, in fact, it also occurred in other heavy cases which involves death penalty. These facts and indicators are often conveyed in several court decisions.

On Supreme Court Decision No. 2253 K/PID/2005 rendered to death row inmates, Zulfikar Ali, Zulfikar and other witnesses informed that he has been intimidated and tortured by investigators. As the result, they jointly agreed to revoke all of their statement made in the Minutes of Investigation. In the electronic recording which was presented by the attorney of Zulfikar Ali in the Cassation memo, it was revealed that the death row inmates, Ginong Pratidina (witness), and Gurdip Singh (witness) revoked their statement made in the Minute of Investigation due to "physical and mental pressure during the investigation stage".

In the case review Decision No. 18.PK/Pid/2007 rendered for case review applicant, Humprey Ejike a.k.a Doctor, there was a witness who present during the torture was performed towards the accused. The torture, according to the witness, was conducted to obtain confession and information from the applicant of case review.

> "affidavit of DENNIS ATTAH, (currently service jail time at Cipinang Correctional Center) which stated that during the investigation of the applicant of case review at Polda Metro Jaya in Mr. Hendra Jhoni's office, the police was beating the applicant of case review for hours, in fact the applicant of case review was not allowed to sit and instead was ordered to remain standing,

[21] Articlel 14 paragraph (3) letter (d), ICCPR, Principle 1 – Bsic Principle of Role of Lawyers, Article 7 paragraph (1) Letter (c), African Charter, Article 8 Paragraph (2) Letter (d) and (e), American Convention, Article 6 Paragraph (3) letter (C), European Convention.

[22] ECOSOC Resolution 1989/64, 24 May 1989, Dok.PBB E/1989/INF/7, Page 128, see also Protection towards Death Penalty.

[23] Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions E/CN.4/1996/4, paragraph 547.

handcuffed, and blindfolded, and the feet of the applicant of case review was clamped, and it appeared that the applicant of case review was exhausted. Every time the applicant of case review did not know the answer to the investigator's question, he was beaten to bleed, until finally the police direct their investigation to the confession that made by the applicant of case review, in which the material has been fabricated by the police."

In the consideration part of the case review decision for Hillary K. Chimezie No. 45 PK/Pid.Sus/2009, the indication of torture is depicted as follows:

> "During the investigation on supporting witnesses, namely IZUCHUKWU OKOLOAJA and MICHAEL TITUS IGWEH, who stated that there was violence from the investigators, therefore his statement was not objective and has been fabricated by the officers, and towards the crown and key witness who possess valuable information, namely MARLENA and IZUCHUKWU OKOLOAJA a.k.a KHOLISAN NKOMO, were declared death during the detention period by the Police; These facts should be considered by the panel of judges in case review trial before deciding this case, although formality speaking, the statements made by the said deceased witnesses were made under oath."

On the same case, one of the supreme Judge, Timur P. Manurung, admitted the presence of intimidation and torture toward the witness, which result to death.

> "…that the information of key witness number 2, MARLENA/deceased during the trial, was only read-out, however, even though the statement was only read-out, there is no connection to the actions of the applicant of the case review/the accused, and both witnesses, namely MARLENA and IZUCHUKWU OKOLOAJA, has death caused by violence of the Police investigators during in detention period, thus such information should not be admitted, moreover, the witnesses were also contended that during the detention period by the investigators, witnesses received intimidation and physical violence.."

Pictures of several decisions above show that the current practice of Indonesian justice system is still unable to ensure the fair defense and rule of evidence before the judges. The current violence during investigation stage indicates that Indonesian legal system is still far from ideal for imposing death penalty.

7.2 Ombudsman Decision on Humprey's Case: When the rights are (No Longer) Valuable to be Protected during the Death Penalty Execution

LBH Masyarakat as legal counsel of Humprey Ejike Jefferson submitted a report on non-procedural compliance and maladministration as well as violation of rights of death row inmates during the third-batch of death penalty execution on 29 July 2016. LBH Masyarakat along with Civil Society Coalition for Abolition of Death Penalty (Koalisi Masyarakat Sipil untuk Hapus Hukuman Mati/HATI) submitted a report on the third-batch of death penalty execution which performed under the authority of Attorney General Office to Ombudsman on 8 August 2016.

There were two main arguments submitted in regards to the allegation of maladministration during the third-batch execution. First, according to Constitutional Court Decision No. 107/PUU-XIII/2015, Article 7 paragraph (2), of Clemency Law was declared in contradiction with 1945 Constitution and does not have legally binding power, thus there is no time limitation for submitting clemency application. Further,

based on Article 13 of Law No. 2 of 2002, in connection with Article 5 of Clemency Law state that "specific for death row inmates, legal counsel or family of the accused which has submitted clemency application, the execution of death penalty shall not be performed before the Presidential Decree in refusing the clemency application is received by the accused."

The report states that the clemency is submitted by Humprey Ejike Jefferson on Monday (25 June 2016), Sack Osmane on Wednesday (27 July 2016), and from the information gathered, Freddy Budiman was submitted the clemency application on Thursday (28 July 2016). Therefore, with the submission of the clemency application, the Attorney General Office should not continue the execution as until the designated execution day, the death row inmates have yet to receive the Presidential Decree to respond their clemency application.

Second, on Tuesday, 26 July 2016, around 15:00 WIB, the death row inmates receive the announcement on their final and binding decision, therefore an "execution notification" was presented. Based on Article 6 paragraph (1) of Law No. 2/PNPS/1964 on Procedure for the Execution of Death Penalty, "on three times of twenty-four hours (72 hours) before the execution of death penalty, the prosecutors must notify the death row inmates on the execution of such penalty".

According the abovementioned Article, the execution notification should be presented on Friday, 29 July 2016, in afternoon (around 15:00 WIB) at the earliest, not Friday, 29 July 2016, in early day. Therefore, the third-batch execution by Attorney General Office on Friday, 29 July 2016, in early day is unlawful and illegal execution.

Regardless the non-compliance to two abovementioned provisions, the Attorney General Office continued the execution, which kill four death row inmates, namely Humphrey Ejike a.k.a Doctor (Nigeria), Seck Osmane (Senegal), Freddy Budiman (Indonesia), and Michael Titus Igweh (Nigeria).

The Ombudsman is finally conclude examining the report and the result was announced to public on 28 July 2017. In its final examination, the Ombudsman, through report No. 0793/LM/VIII/2016/Jkt, is essentially accept all the argumentation prepared by the applicant. In the final report, there are several important points rendered by the Ombudsman. First, in regards to the clemency, the Ombudsman states that:

> "in regard to the execution of death penalty by public prosecutor, Ombudsman held that it has violated the provisions of laws and regulations as referred to in the Constitutional Court Decision No. 107/PUU-XIII/2015 dated 15 June 2016, which states that Article 7 paragraph (2) of Law No. 5 of 2017 on the Amendment to Law No. 22 of 2002 on Clemency, is in contradiction with 1945 Constitution, and does not have legally binding power in relation to the limitation of the submission of clemency application which was only can be submitted 1 (one) year after the final and binding court decision is rendered, therefore the argument saying "the submission time period which considerably close to the execution time" should not be used as the basis to perform the execution, as it creates legal uncertainty.."

Second, in relation to the execution time, the Ombudsman states:

> "in regard to the execution process of Humprey Ejike Jefferson which was performed before the period of three times of twenty-four hours after the execution notification is matured, such action is not in accordance with Article 6 paragraph (1) of Law No. 2/PNPS/1964 on Procedure

> for the Execution of Death Penalty. If there was other consideration to perform the execution any time earlier, the Prosecutor must notify the death row inmates and/or his/her attorney, even though such action is not regulated under any provision. This has resulted in uncertain information to the family of the death row inmates."

Additionally, Ombudsman also raised important notes in relation to the refusal of case review application by District Court of Central Jakarta, specific to the difference in submitting case review by Humprey, the Ombudsman states:

> "in regard to the second submission of case review application, Ombudsman considered that there was different treatment between death row inmates when submitting for Case Review for the second time. The District Court of Central Jakarta decided not to forward the case of Humprey Ejike Jefferson to the Supreme Court, however did forward the second case review application submitted by Eugene Ape, which later is processed under registration No. 89PK/Pid.Sus/2016 at the Supreme Court, whereas both were submitted after the Constitutional Court Decision No. 34/PUU-XI/2013, dated 6 March 2014. The court, indeed, has the authority to make consideration, however it should be bear in mind that the different treatment must be supported with reasonable ground as to what extent such differentiation is needed. Until present, the Complainant has never received adequate clarification on such differentiation of treatment between Humprey Ejike Jefferson and Eugene Ape, other than the information on the provisions on Case Review."

Based on the opinion by Ombudsman, there was, indeed, maladministration in the case of Humprey. First, Ombudsman states that the execution should not be performed as Humprey is in the process of submitting clemency. Second, the execution should be performed 72 hours after the notification is communicated, in fact, Humprey was executed before the designated time period under laws and regulations. Third, the refusal of case review application submitted by Humprey is considered a discrimination action, as the Court has refused the case review of Humprey on the ground which violates the laws.

The fault was fatal as it resulted in the execution of Humprey without first undergone every procedure, although considered slim, but there is a chance for him to survive, and other three death row inmates. The decision of Ombudsman on Humprey's case shows Indonesia has violated human rights and failed to preserve fair trial principle in relation to death penalty.

8. **Death Penalty Execution Track Record**

According to the monitoring performed by ICJR, the Goverment's standing point towards death penalty over the last one year, both by the government and law enforcer, are depicted as follows.

11 October 2016
"Public Prosecutor will continue the execution of death penalty as such punishment constitutes positive law in Indonesia, and must be performed by the prosecutors as the executors" - Kapuspenkum Kejagung (Head of Central Legal Information at Attorney General Office), M Rum.

10 January 2017

"The government has successfully handled the release of 71 Indonesian Citizens from death penalty" – Ministry of Foreign Affairs, Retno L. P. Marsudi

01 February 2017
"We are relentless when it comes to extraordinary crimes, as long as the positive law is still allowed for death penalty, we will charge for it" – Attorney General, HM Prasetyo

22 February 2017
"It will be performed [the execution], but the time remain uncertain" - Attorney General, HM Prasetyo

23 February 2017
"We support it, especially towards narcotics-related convicts, so it can be accelerated" – Head of Public Relation Division at National Narcotics Agency, Kombes Slamet Pribadi

29 March 2017
"There is no moratorium, it just a matter of time" - Attorney General, HM Prasetyo

29 March 2017
" In Indonesia, there are still circles who support the death penalty, as well as people who against it, we (the government) will find the middle way" – Ministry of Law and Human Rights, Yasonna Laoly

21 April 2017
The implementation of death penalty would probably be discussed. We always discuss it along with countries which support the abolition of death penalty" – Director of human Rights and Humanity at the Ministry of Foreign Affairs, Dicky Komar

05 June 2017
"Not yet. We wait for the good time for the execution" - Attorney General, HM Prasetyo

28 July 2017
Ombudsman of the Republic of Indonesia concluded that the execution of Humprey Ejike Jefferson was not in accordance with the prevailing provisions"- Commissioners of Ombudsman, Ninik Rahayu

28 July 2017

“We have complied with all the provisions. Regardless the recommendation from the Ombudsman, public persecutor as the executor has provide all the legal rights to the death row inmates” - Kapuspenkum Kejagung (Head of Central Legal Information at Attorney General Office), M Rum.

13 August 2017

“We are also expected for the execution to be held sooner, why not? But the new provision introduced by the Constitutional Court, stating the clemency application can be submitted more than once, or multiple time, and there is no time period for submission. This is another issue” - Attorney General, HM Prasetyo

24 August 2017

The imposition of criminal sanction to child from Nias, North Sumatera, is not in accordance with laws. We hope it will never happen again” - Ministry of Law and Human Rights, Yasonna Laoly

19 September 2017

I have asked Jampidum and Jampidsus, we are going to request for a directive from the Supreme Court and Constitutional Court for the purpose of clarity, otherwise there is No. certainty, we cannot perform a final and binding decision, in the meantime the convicts are trying to gain some time” - Attorney General, HM Prasetyo

03 October 2017

"In regards to large number of un-executed drugs-dealers? Asked the Attorney General" – President of the Republic of Indonesia, Jokowi

04 September 2017

“Life imprisonment, in my opinion, would not be costly, as it merely matters of foods during the service time. For death penalty, one death row inmate usually requires budget up to IDR 250 million. That is expensive. So to execute 10 people, lets calculate how much State money is required for the convicts.” - Kajati Jawa Timur (Chief of East Java Prosecutor Office), Maruli Hutagalung

Based on the above monitoring, it can be concluded that both Government and Attorney General Office are still persisting to implement death penalty. This is also supported by the statement made by the Attorney General which declare there will be no moratorium of death penalty. Additionally, this is also

supported with the statement made by National Narcotics Agency which stated that the execution, especially towards death row inmates for narcotic cases, must be accelerated. Even though based on the monitoring, the death penalty does not result in the decrease of criminality number in Indonesia.

Indonesian government is also considered has practiced double standard, by glorifying the successful release of the 71 Indonesian citizens from death penalty, but on the other hand is still implementing death penalty in Indonesia, this has become center of discussion in international level. The perspective towards death penalty, for the past several times, has also culminated in polemic. This is because there is a statement from the public prosecutor stating that the execution of death penalty is costly thus burdening the State budget in considerable amount. The Attorney General Office is also tending to disobey the decision made by the Constitutional Court relating to the clemency.

There are at least 2 (two) noteworthy aspects on the implementation of death penalty in Indonesia, namely the imposition of death penalty on a child (Yusman Telaumbanua's case), in which Telaumbanua was 15 – 16 years of age when being sentenced to death. In fact, Article 6 paragraph (5) of the 1966 International Covenant on Civil and Political Rights (Indonesia has ratified this covenant), states that death sentence shall not be imposed on person below 18 years of age. Fortunately, the death penalty on Yusman Telaumbanua was annulled by Supreme Court. Second aspect is on the execution of death by Attorney General Office which was performed not in accordance with the standard procedure and involved maladministration based on the examination and evaluation by Ombudsman (case of Humprey Ejike Jefferson). Although the Attorney General Office has denied this contention, however the facts show that the Attorney General Office has executed death row inmates which currently submitting clemency application, also the said execution was performed towards Humprey with less than 72 hours since the notification is presented. The Attorney General also shows the reluctant to evaluate the performance of his officers in performing death penalty execution as well as in judicial system in general, on one side the Attorney General is in doubt due to the Constitutional Decision, but on the other side, is insisted to continue the execution.

9. **Recommendation**

Towards Indonesian policy on Death Penalty in 2017, ICJR recommends the following matters:

1. President Joko Widodo must immediately evaluate the performance of Attorney General, especially in relation to the non-compliance of standard procedure and maladministration in performing the third-batch execution pursuant to the decision of Ombudsman. Additionally, the Government must also evaluate the last two execution batch to examine any possibility of other non-compliance.
2. During the state of uncertainty and doubt for the execution, the Government must perform death penalty moratorium to avoid greater violation of human rights.
3. Since the judiciary system and law enforcement are yet able to ensure the fair trial and human rights protection, the Government must perform moratorium of death penalty indictment and the Supreme Court must perform moratorium of all death penalty sentence. Prosecutors and Supreme Court may still charge and sentence other highest criminal sanction, namely life imprisonment.
4. Based on the facts that the violence of human rights has occurred in several death penalty cases, the Government must establish independent team to examine and review decisions which impose death penalty to inspect the potential of unfair trial or erroneous in rendering death sentence.
5. Supreme Court must revoke Supreme Court Circular No. 7 of 2014, which has been limiting the constitutional rights of death row inmates to submit case review application. Further, Supreme

Court must evaluate Supreme Court Circular No. 1 of 2012, which imposes limitation for death row inmates to access the case review application.

6. President must provide reasonable consideration in writing through Presidential Decree on clemency to ensure the President comply with Constitutional Court Decision No. 56/PUU-XIII/2015 and Article 11 paragraph (1) of Clemency Law.

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Profile of Institute for Criminal Justice Reform

Institute for Criminal Justice Reform or ICJR, is an independent research institution on criminal law reform, criminal justice reform, and general law reform in Indonesia.

One of the crucial challenges that Indonesia has to encounter during its transition era is reforming the law and criminal justice in line with the democratic direction of the nation. In the past, criminal law and criminal justice had been the supporting tools of authoritarian rule, and also utilized in the interest of social engineering. Now, it is time to change the orientation and instrument of criminal law as tools of authoritarian power, to supporting tools for the democratic political system and for the protection of fundamental human rights. These are the challenges in reforming the criminal law and criminal justice during the current transition stage.

Therefore, to respond to the aforementioned challenges, Indonesia needs well-planned and systematic reform efforts. A grand design of reform in criminal justice and law in general should be initiated. The criminal justice system has been a strategic key point in establishing the Rule of Law framework and respect for human rights. Furthermore, to have a proper functioning democracy, the concept of the Rule of Law must be institutionalized. Thus, the reform of criminal justice system to orient it towards human rights protection is the *"conditio sine quo non"* along with the process of institutionalized democratic reform of the transition era.

Steps in transforming law and criminal justice system to be more effective is currently in progress. However, such measure must be supported with wider involvement. **Institute for Criminal Justice Reform** (ICJR) is taking the initiative to support those measures. Provide support to establish a recognition towards Rule of Law and simultaneously preserve the human rights culture within the criminal justice system. These are the reason of existence of ICJR.

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