

EXECUTIVE SUMMARY

Research Report Publication in Commemorating World Day Against the Death Penalty 2021

“The Overlooked: She in the Vortex of Death Penalty”

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1. Background

Experts from the United Nations on various issues¹ stated that people living in poverty are disproportionately affected by the death penalty.² Philip Alston, Special Rapporteur on Extreme Property and Human Rights has made a statement that death penalty is ‘reserved for the poor’. The practice of death penalty is undeniably a form of discriminative practice. When death penalty is imposed towards women, discrimination that happened was not limited based on their economic situation or social economic background, but also based on their gender. Gender stereotype, stigma, dangerous cultural norms and patriarchy, have badly influenced women’s access to justice in the case of death penalty.

However, despite of the abundance of fact involving women’s vulnerability based on gender discrimination in death penalty cases, such topic is yet to be discussed in the discourse of death penalty abolition, especially in Indonesia, due to the small number of women in death row (less than 3%). Nonetheless, it is important for us to discuss this matter as it is not often that the history of violence in women be considered as the mitigating factor to not impose death penalty. As in such cases it becomes vital that all factor surrounding the case be considered. More importantly, cases across the globe found that women got sentenced for death penalty not only because of the crime they committed, but also because of their ‘failure’ to maintain their normative image as women in accordance with their gender-role.

Since after Reformation in 1998, Indonesia has no updated comprehensive study that shows the fulfilment of women’s procedural rights in criminal justice system. Hence, this research aims to answer the questions of how those vulnerabilities in women as discussed above are reflected in court judgments and how the Court responded to such thing, and whether women are actually being punished because of their failure to conform with their gender role based on cultural norm.

2. Methodology

Out of 884 cases in ICJR’s internal database, there are 42 death penalty cases in Indonesia that identify women as the defendant who were charged and/or sentenced to death. However, the judgement’s documents could not be retrieved in complete from the first instance to the last stage of trial for each case. Thus, we decided to limit our research to only 32 cases where the first instance’ court decisions are available. All cases are listed as follows.

Tabel 1. Data sample of court decisions on the death penalty cases with female defendants in Indonesia

No.	Case Code	Court Decisions’ Registration Number	District Court (PN)	Types of Crimes
1	TBH	139/PID.SUS/2011/PN.BL	PN Boyolali	Drug-related crimes
2	SMA	9/Pid.B/2019/PN Cbi	PN Cibinong	Premeditated Murder

¹ Terdiri dari Pelapor Khusus *extrajudicial killing, summary or arbitraty executions*, Kelompok Kerja PBB tentang diskriminasi terhadap Perempuan, Pelapor Khusus PBB tentang Hak Asasi Manusia Migrants, Pelapor Khusus PBB tentang Kemiskinan Ekstrem, Pelapor Khusus PBB tentang Rasisme dan Kelompok Kerja tentang Orang Keturunan Afrika,

² Michelle Bachelet, 2019, *Human Rights Council holds high-level panel on the death penalty, in particular with respect to the rights to non-discrimination and equality*, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24215&LangID=E>

3	LJS	901/PID.SUS/2012/PN.DPS	PN Denpasar	Drug-related crimes
4	BL	63/Pid.B/2007/PN.GS	PN Gunung Sitoli	Premeditated Murder
5	MZY	24/Pid.Sus/2020/PN Idi	PN Idi	Drug-related crimes
6	FT	23/Pid.Sus/2020/PN Idi	PN Idi	Drug-related crimes
7	JLC	1346/PID.B/2008.PN.Jkt.Bar	PN Jakarta Barat	Drug-related crimes
8	DAH	1166/Pid.Sus/2015/PN Jkt.Sel	PN Jakarta Selatan	Drug-related crimes
9	AK	55/Pid.B/2020/PN JKT.SEL	PN Jakarta Selatan	Premeditated Murder
10	RS	1646/Pid.Sus/2015/PN. JKT. UTR.	PN Jakarta Utara	Drug-related crimes
11	NA	90/Pid.Sus/2015/PN.LSK	PN Lhoksukon	Drug-related crimes
12	JML	127/Pid.B/2019/PN LSK	PN Lhoksukon	Premeditated Murder
13	YR	173/Pid.B/2017/PN Mnk	PN Manokwari	Premeditated Murder
14	ZH	907/Pid.B/2020/Pn Mdn	PN Medan	Premeditated Murder
15	MRW	2345/Pid.Sus/2016/PN MDN	PN Medan	Drug-related crimes
16	RN	2279/Pid.Sus/2020/PN Mdn	PN Medan	Drug-related crimes
17	THR	56/Pid.B/2019/PN Pga	PN Pagar Alam	Premeditated Murder
18	YS	1983/Pid.Sus/2020/PN Plg	PN Palembang	Drug-related crimes
19	MM	09/Pid.B/2015/PN.Pinrang	PN Pinrang	Drug-related crimes
20	MN	480/Pid.B/2018/PN Rhl	PN Rokan Hilir	Premeditated Murder
21	RBS	295/PID.SUS/2012/PN.SMG	PN Semarang	Drug-related crimes
22	DDS	371/Pid.B/2014/PN Sak	PN Siak	Premeditated Murder
23	SZ	75/Pid.B/2016/PN Str	PN Simpang Tiga Redelong	Premeditated Murder
24	SM	410/Pid .B/2010/PN.Slmn	PN Sleman	Drug-related crimes
25	MJ	385/PID.B/2010/PN.SLMN	PN Sleman	Drug-related crimes
26	THW	120/Pid.Sus/2015/PN Smn	PN Sleman	Drug-related crimes
27	TDT	2450/Pid.Sus/2015/PN.SBY	PN Surabaya	Drug-related crimes
28	IR	2451/Pid.Sus/2015/PN SBY	PN Surabaya	Drug-related crimes
29	EL	1883/Pid.Sus/2019/PN Sby	PN Surabaya	Drug-related crimes
30	WSA	1884/Pid.Sus/2019/PN Sby	PN Surabaya	Drug-related crimes
31	MU	140/Pid.B/2002/PN.Tng	PN Tangerang	Drug-related crimes
32	WL	59/Pid.B/2018/PN Mrt	PN Tebo	Premeditated Murder

In analysing these judgements, there are 2 (two) essential aspects that were given attention: 1) Procedural rights, limited only to issues on the right to effective defence and legal assistance and 2) Aspect of women's vulnerability. In addition to relying on those two aspects, this study also specifically discusses interesting findings from the judges' considerations in the death penalty cases, for example, the reasons for the judges to reject or impose the death penalty, considerations regarding the 'war on drugs' narrative, as well as the mitigating factors considered by the judges.

3. Findings in Women's Death Penalty Cases

The descriptions of the findings are grouped into 5 (five) categories:

A. General Demography

- The sample data used in this study are court decisions recorded from 2002 until 2020. A significant increase occurred in 2015 (7 cases) while previously in 2002-2014 it was found only around 1-2 cases per year. It could indicate a correlation with the surge of 'war on drugs' campaign during the early President Joko Widodo's regime in 2015.
- Majority of cases were drug-related offences (66% - 21 cases), while the rest (34% - 11 cases) were premeditated murder.
- Most cases were found in Sumatera and Java (14 cases in the former and 15 in the latter). The rest 3 (three) cases were found in Bali, Sulawesi, and Papua.
- The youngest female defendant was 17 years while the oldest was 56 years when the crime took place. More than 60% of women charged with the death penalty in this data sample (22 people) are those in productive age (22 to 40 years old).
- Majority of defendants (57%) (18 out of 32 people) are unemployed or housewives, entrepreneurs (6 people), private employees (3 people), farmers (2 people), and the other three people are day laborer, housemaid, and civil servant.
- Based on court decisions containing information on educational history (15 cases), most of the defendants have a high school education background (8 defendants).
- Majority of defendants are Indonesian (29 people - 91%), while the remaining 3 people are foreign nationals from the UK, the Philippines, and Vietnam.
- Majority of defendants (81% - 26 people) were charged as accomplice in crime. Most cases were involved more than one perpetrators, 59% - 19 female defendants were not the main perpetrators.

B. The Rights to Defence and Legal Assistance

- Most defendants (18 people) appointed their own legal counsel during trial stage, 2 people had access to legal assistance since the detention period during police investigation and 3 people since being detained at the prosecution office.
- The number of legal counsels appointed by the panel of judges is quite significant during trial stage (13 people), occurred when defendants are unable to appoint their own legal counsel.
- Only 5 defendants presented a de charge witnesses (defense witnesses) at the trial.
- Only 5 defendants filed a formal note of objection to refute prosecutors' indictment.
- Majority defendants (25 people) filed a written legal defense prepared by their legal counsel.
- Defense presented orally were found quite a lot (in 13 cases), yet mostly were not presented (19 people).

C. Vulnerability and Stigma towards Women

- There were 11 defendants filed a defense regarding the vulnerability of women, while findings in the judge's consideration were only found in 4 defendants.
- There were 2 defendants facing gender-based stigma written in the judge's consideration while it also being used as aggravating factors.

D. Mitigating Factors Under the Judges' Considerations

- In 91% - 29 cases there were considerations of mitigating factors, consisting of 67% - 8 cases where judges found mitigating factors, but in 24% - 21 cases the judges stated that they did not find any mitigating factors.
- In 9% - 3 cases, judges failed to consider mitigating factors.
- General mitigating factors such as 'the defendant is polite, cooperative, showing remorse, and has never been convicted' were found in 8 cases.
- Specific mitigating factors included: the role of the defendant as a single parent and being pregnant (1 person), not being the main perpetrator (1 person), being the breadwinner of the family (3 people).

E. Judges' Response to the Death Penalty

- Total number of defendants sentenced to death was 60% - 19 people while the 40% - 13 people were rendered other types of punishment because the judges rejected the death penalty charge brought by prosecutors.
- Out of 19 people who were sentenced to death, 8 of them (42%) were not charged with the death penalty, while towards 11 people (57%), the judges granted the death penalty charge brought by prosecutors.

4. Analysis

The argument of problem analysis is divided into the following 8 (eight) issues:

A. Women's Vulnerability

- The aspects of female vulnerability are grouped into three types, namely:
 1. Experience as a victim of violence, found in 5 defendants of premeditated murder cases:
 - **DDS case:** victim of domestic violence by her husband, committed murder because of a threat from her husband, but not being considered as a mitigating factor. DDS just 17 years old when committing a criminal offense, should not be on death row.
 - **MN case:** victim of physical violence by her husband who was then a victim in the murder crime committed by MN. The record of violence is not being considered during her trials and there was no defense witness presented to verify the violence.
 - **SZ case:** often being terrorized, scolded, insulted, and humiliated by the family of her husband's first wife, SZ felt hurt and vengeful. But even when SZ was prosecuted to death this was not being considered in the trials.
 - **YR case:** often asked for a divorce but answered with death threats from her husband, this is not a consideration of the judge in delivering the case.
 - **ZH case:** the panel of judges has confirmed that ZH's husband has a record of violence against her, but in the judge's consideration, the judges did not consider it at all. Instead, the panel of judges stated that ZH should respect and love her husband. ZH still has two dependents, but her position is not being considered by the judges at all. The judges stated that ZH should not need to explain the history of violence that she experienced because she should be showing remorse instead.
 2. Involved in intimate relationships: involved in criminal acts of other parties in intimate relationships (8 defendants: MU, JLC, RS, NA, DDS, THW, DAH, JML with the majority of

drug-related crimes). Women committing criminal acts are often following others, generally male figures, most often in the context of intimate relationships, for example:

- Promised to be married and make a living by foreigners so that she was willing to deliver bags which were then found containing heroin from Nepal (MU case)
 - Helping her husband who was the head of the drug dealer network in Indonesia (JLC case)
 - As a liason between her husband and two couriers to deliver drugs (RS case)
 - Willing to receive packages of drugs and to be involved in drug dealing by changing her name (DAH case)
 - Urged by her husband to be involved in a drug transaction. In the trials, the panel of Judges even trying the acts committed by her husband, and did not heavily argue on her acts (NA case)
 - Followed her husband's orders for fear of being threatened with death (DDS case)
 - Involved in an intimate relationship with a foreigner who offered her a job, underwent her trials while pregnant with the child of the same man who misled her (THW case)
 - Involved in an intimate relationship with the main perpetrator who killed her husband (JML case)
3. Committed a crime for protecting the family (LJS case): forced to follow orders from drug traffickers because they threatened her child would be killed. Her position and vulnerability were not considered at all by the judges, and they even imposed the death penalty even though it was not in the prosecution. LJS's explanation about her child's condition was considered as an alibi by the judges and it was used as an aggravating factor.
- There are also other vulnerabilities found that are not indexed from these court decisions, namely: (1) Women as victims of child marriage (DDS case) and (2) Women as victims of domestic violence (DDS case, MN case, SZ case, ZH case).

B. Role in the Criminal Acts

- Although most women who face the death penalty are not the main perpetrators, law enforcement officials still prosecute or rendered the death penalty for them.

C. The Rights to Defense and Legal Assistance

- Even if the defendants appointed her own legal counsel, it does not necessarily mean that the legal assistance is provided effectively. Out of 18 women defendants who appointed their own legal counsel, only 4 defendants submitted formal note of objection to refute prosecutors' indictment; there are 5 defendants whose legal counsel did not submit a written legal defense (a plea document with legal arguments).
- Findings in ZH case: even though the defendant submitting defense witness and appointing her own legal counsel, her lawyer still did not submit a written legal defense/plea document, she instead only delivered the defense orally. The prosecutor charged her with life imprisonment but later she was sentenced to death by the judges. This indicates that poor quality of the defense could potentially result in the defendant being sentenced to death.
- A total of 13 defendants (40%) had their legal counsel appointed by the court with the following social status, a total of 7 defendants having no income (*e.g.* housewives (5

defendants) and unemployed (2 defendants)), while the other 3 defendants also worked in lower-middle-income sectors (such as day laborer and farmers).

- Only 1 of the 13 female defendants whose legal counsel assigned by the court filed a formal note of objection towards prosecutor's indictment.
- Most of the female defendants who are not having an income at all or stable or fixed income are in a situation of not having the resources to choose their own legal counsel.
- The defense made by legal counsel appointed by the judges turned out to be less effective. For example, in DDS case (not filing a formal note of objection, defense witnesses, and written legal defense/plea document) where the defendant was prosecuted with life imprisonment, the legal counsel was in fact agreed with the prosecutor, but then the judges sentenced her to death.

D. Aspect of Stigmatization towards Women's Traditional Role

- There were 2 cases in which the judges' considerations contained stigma of women failing to fulfil their gender roles (MM case and ZH case). In the judges' perspective, MM should be a role model for his children, while ZH should be loving, respecting her husband and keeping her family well-ordered.

E. Judges' Considerations on Mitigating Factors

- in 3 court decisions, judges did not include considerations on mitigating factors that should have been a mandatory step before imposing the death penalty (TDT case and IR case: the judges imposed the death penalty and EL case: the judges did not grant the death penalty charge). According to the Article 197 paragraph 2 of the Criminal Procedure Code, court decisions that do not formally include considerations on mitigating factors should be declared null and void.

F. The Problematic Narrative of 'War on Drugs' Campaign in the Judges' Considerations

- From a total of 21 cases of drug-related crimes in the data sample, there are 19 cases where the judges considered the government's narrative campaign of the war on drugs as a basis for aggravating factors and only one particular case of drug-related crimes in which the judges in their consideration did not discuss this narrative at all.
- Meanwhile, in the other case of drug-related crimes, namely the MRW case, the judges stated that the death penalty charged against MRW would not be comprehensively considered if it was only relied on the argument hindering such government's agenda/campaign. The narrative was then used as mitigating reason instead.

G. Judges' Considerations to Refuse the Imposition of the Death Penalty

- Judges refused to grant the death penalty charges were found in 13 cases
- Some of the reasons for the judges rejecting the imposition of the death penalty, among others, because the defendant is not the main perpetrator (DAH case), there is no evidence of a deterrent effect of the death penalty (NA case), considering the objective of sentencing (MN case), socioeconomic background of the defendant (ex: living in a low-economic family (RBS case), being a single parent (THW case), being the breadwinner of the family (JML case, MRW case), maintaining positive relations with the victim's family (YR case), other general

reasons as a basis for mitigating factors such as the defendant being well behaved and cooperative during trial, showing remorse (THW case, DAH case, RN case, JML case, RBS case, YR case, WL case, FT case).

- In several other cases, the judges did not mention any particular reasons for refusing the death penalty charges (SZ case, WSA case, EL case).

H. Judges' Considerations to Impose the Death Penalty

- There are 8 cases (6 cases of Narcotics and 2 cases of premeditated murder) where although the defendants were not charged with the death penalty (ex. life imprisonment, 18 years of imprisonment, and 15 years of imprisonment), yet the judge sentenced them to death.
- Judges' reasons to impose the death penalty includes the idea that it's constitutional and necessary for barbaric acts (DDS case), stigma against women (ZH case), xenophobic in the context of the war on drugs (MJ case), involvement in illicit drug-trafficking networks (SM case, IR case, MM case, LJS case).

5. Recommendations

According to the findings and analysis in the present research, we propose recommendations as follows:

For Policy Makers (Government and the House of Representatives):

1. Propose law changes aimed at abolishing the death penalty with the spirit of protecting human rights and humanity that is just and civilized in accordance with the values of Pancasila and Constitution;
2. Encourage reform of criminal procedure law at the statutory level, paying attention to gender-based vulnerabilities and socio-economic backgrounds of people facing the death penalty and criminal justice system;
3. Encourage reform of criminal procedure law at the statutory level to better guarantee the protection of fair trial rights and procedural rights, including the rights to legal counsel and defence, of the people charged with the death penalty, by setting a higher standard of protection compared to the safeguard applied for those charged with other types of punishment;
4. Encourage reform of criminal procedure law at the statutory level to include mandatory trainings/certifications for law enforcement officers and judges in handling women facing the death penalty involving gender-based violence, domestic violence and the tendency of coercive control;
5. Conduct a study and assessment of the conditions of death row inmates, the opportunities to obtain clemency or pardon from the President must be available as much as possible.

For Law Enforcement Institutions and Supreme Court:

1. Establish internal rules or guidelines on mainstreaming gender perspectives in case-handling;
2. Carry out trainings on gender-based violence and its relationship to a person's tendency to commit a crime;
3. Ensure that traumatic experiences of women are being taken into account in handling cases at the stage of prosecution as well as sentencing;

4. In the spirit of abolishing the death penalty, in the current situation, the Supreme Court ensures legal unity in courts decisions so that a higher standard in handling death penalty cases is fulfilled;
5. In the spirit of abolishing the death penalty, in the current situation, the Attorney General's Office and the Indonesian National Police ensure that capacity building are conducted and internal rules setting higher standards in handling cases punishable by the death penalty are available.

For Independent Human Rights Monitoring Institutions (National Commission on Human Rights, National Commission on Violence against Women, Indonesia Child Protection Commission):

1. Optimize the monitoring mechanisms in detention centres to perform assessment on people facing the death penalty;
2. Optimize the monitoring mechanisms in criminal justice system to ensure human rights mainstreaming;
3. Optimize the monitoring mechanisms in criminal justice system to ensure mainstreaming of a gender perspective in criminal justice practices, especially in death penalty cases.

For Academics:

1. Promote research and discussions in the academic sphere on the root causes of gender-based discrimination causing women to commit criminal acts;
2. Promote research and discussions in the academic sphere on the death penalty cases and their relations with the issue of vulnerabilities in society.

For Local Civil Society Groups and International Communities:

1. We are not alone, let's keep the spirit to speak up that there is no place for death penalty in this 21st century!