



INSTITUTE FOR  
CRIMINAL JUSTICE  
REFORM



# THE OVERLOOKED

She in the Vortex of Death Penalty

## The Overlooked: She in the Vortex of Death Penalty

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## Foreword

It seems that the struggle to end the death penalty in Indonesia is still going to be long. However, we must continue to tirelessly be calling for the abolition of this punishment which is contrary to just and civilized humanity.

Quoting from the statement of the UN Special Rapporteur on Extreme Poverty and Human Rights, the **death penalty was reserved for the poor**. The condition of a person's vulnerability, related to an unfortunate social and economic background, will result in a greater chance of being entangled in the vortex of the death penalty. This is further exacerbated by the current state of Indonesia's criminal justice system.

This vulnerability has caused some groups of people to suffer twice as hard. One of them is women. When dealing with the criminal justice system, women who face the death penalty charge are at the highest level of risk. Gender-based discrimination is still real in our criminal justice system.

Gender-based vulnerabilities are also present in the death penalty cases against women: the history as victims of violence, victims of child marriage, victims of exploitation, and entanglement of intimate relationships are clear in the court decisions that we found in this study. This study aims to capture and analyze how gender-based vulnerabilities in the criminal justice system are the most severe punishment in the death penalty context. Under these conditions, this research will also produce recommendations that we hope can be input for future improvements. We specifically provide recommendations to policymakers, judges and law enforcement, independent state institutions, and of course, to fellow civil society.

I especially want to thank the researchers who have worked hard to complete this study. I am proud that the spirit to continue speaking out for justice based on human rights could always be mainstreamed in ICJR's research.

Finally, I sincerely hope that we can continue to voice out needs for justice regardless of gender and the abolition of the death penalty worldwide, especially in Indonesia, to achieve the just and civilized humanity.

**Erasmus A. T. Napitupulu**

Executive Director of ICJR

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# 1. Background

Based on the report of Harm Reduction International in 2021, globally, there are at least 3000 people on death row, it is only for drug offences.<sup>1</sup> Across the world, the death penalty has been abolished by the majority of countries.<sup>2</sup> However, there are several numbers of countries that still have not abolished it. As of December 31st, 2020, a total of 144 countries and/or territories have abolished the death penalty both in law and practice, leaving only 55 countries/territories<sup>3</sup> with it. One of them is Indonesia.

International Human Rights Instrument and UUD 1945 have given reassurance for protection towards people's right to life. There is evidently no international human rights instrument that implicates the legitimization of the use of the death penalty. Many of them are found to be restricting the use of it. Article 6 (2) of ICCPR states that the death penalty could only be imposed for **most serious crimes in countries that have not abolished the death penalty**. Additionally, in Article 6 (6) ICCPR, it has been stipulated that nothing in Article 6 should be invoked to delay or prevent the abolition of such capital punishment.

United Nations (UN) has openly opposed the death penalty for any reason, everywhere.<sup>4</sup> UN Human Rights Council consistently found that people on death row are disproportionately populated by those who are poor and economically vulnerable, members of ethnic minorities, people with intellectual or psychosocial disabilities, foreigners, indigenous people, or those who are marginalized.<sup>5</sup> This is a common thing to be happening across the globe.<sup>6</sup> Lack of language understanding and literacy is often

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<sup>1</sup> Harm Reduction International, 2021, *The death penalty for drug offences in 2020: a snapshot* dalam *The Death Penalty For Drug Offences: Global Overview 2020*.

[https://www.hri.global/files/2021/04/07/HRI\\_Death\\_Penalty\\_Report\\_2020\\_FINAL.pdf](https://www.hri.global/files/2021/04/07/HRI_Death_Penalty_Report_2020_FINAL.pdf), p. 15

<sup>2</sup> In the Annual Report of the Office of the High Commissioner for Human Rights and the Secretary-General of the United Nations at the 44th session of the Human Rights Council September – October 2020, it was confirmed that there is a trend towards a universal abolition of death penalty, and there is also a trend in countries around the world to limit the use of the death penalty and implement safeguards that give protection to people facing the death penalty, see Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, 2020, Human Rights Council Forty-fifth session 14 September–2 October 2020, Question of the death penalty, summary.

<sup>3</sup> 108 countries and/or territories that have abolished the death penalty for all types of criminal acts, 8 countries and/or certain territories for certain types of criminal acts, 28 countries and/or territories that abolished the death penalty in practice, in Amnesty International, 2021, *Death Sentences and Executions*, p. 57

<sup>4</sup> Michelle Bachelet, UN High Commissioner for Human Rights, 2020, *75th session of the UN General Assembly Virtual High-Level Side Event: Death penalty and gender dimension – Exploring disadvantage and systemic barriers affecting death sentences*, <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=26292&LangID=E>

<sup>5</sup> 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>

<sup>6</sup> In India the Center for Equity Studies reported that people on death row mostly come from marginalized groups based on caste, religion, economic vulnerability, educational background and fulfillment of the right to a

faced by those on death row, causing them to face hardship to get their right to effective legal assistance.<sup>7</sup> Additionally, it also caused a violation of their right to a fair trial.<sup>8</sup>

Many UN Experts<sup>9</sup> has continuously stated that people who live in poverty have disproportionately affected by the death penalty.<sup>10</sup> World Coalition Against Death Penalty in 2017 reported that there is an overarching relation between poverty<sup>11</sup> and social and economic discrimination with the death penalty. This relation was found in India, United State of America, Nigeria, and Suadi Arabia. In the relationship between the death penalty and poverty, it was found that people living in poverty face many obstacles, starting from the aspect of lack of financial resources to obtain legal assistance or paying administrative fees and other derivative costs. Their education background also makes it difficult to obtain information.<sup>12</sup> In the particular case of migrant workers, obstacles in the judicial process have

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fair trial. See in: <https://www.newsclick.in/those-death-row-are-most-vulnerable-and-marginalised>, Death Penalty Indian Report reports that 76% of death row inmates are from low caste groups and religious minorities, 74.1% are from economically vulnerable groups, see <https://thewire.in/law/three-quarters-of-death-row-prisoners-are-from-lower-castes-or-religious-minorities>, in the United States this also happens, based on the Equal Justice Initiative report states that death penalty in the United States revolved around the issue of errors of judgment, the majority of convicts come from poor groups, and racial minorities: <https://eji.org/issues/death-penalty/>, in Bangladesh: Death Penalty Project reports 56% of death row inmates drop out of secondary education, 15% have no educational background, only 3 people (7%) complete tertiary education, 71.9% of death row inmates come from economically vulnerable groups: <https://www.deathpenaltyproject.org/wp-content/uploads/2021/06/DPP-Bangladesh-Report-Web-single.pdf>, p. 30, 33.

<sup>7</sup> 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>

<sup>8</sup> 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>

<sup>9</sup> Consists of extrajudicial killings, summary or arbitrary executions, the United Nations Working Group on discrimination against Women, the United Nations Special Rapporteur on the Human Rights of Migrants, the United Nations Special Rapporteur on Extreme Poverty, the United Nations Special Rapporteur on Racism and the Working Group on People of African Descent.

<sup>10</sup> 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>

<sup>11</sup> This report provides a definition of poverty by referring to the definition of the United Nations Committee on Economic, Social and Cultural Rights that poverty is “a human condition characterized by the ongoing or chronic deprivation of resources, abilities, choices, security and power necessary to enjoy an adequate standard of living and other civil, cultural, economic, political and social rights.” (E/C.12/2001/10, para. 8), definition of Philip Alston, Special Rapporteur on Extreme Poverty: a multidimensional phenomenon involving more than just a lack of income, definition of the Inter-American Commission on Human Rights: one of the most alarming human situations related to the fulfillment of rights, poverty reduces people's participation in social life, their access to justice and the effective enjoyment of their rights, contains violations of economic, social and cultural rights generally accompanied by violations of civil and political rights, World Coalition Against the Death Penalty, 2017, DEATH PENALTY AND POVERTY Detailed Factsheet 15th World Day Against The Death Penalty, [https://worldcoalition.org/wp-content/uploads/2020/09/EN\\_WD2017\\_FactSheet-1.pdf](https://worldcoalition.org/wp-content/uploads/2020/09/EN_WD2017_FactSheet-1.pdf)

<sup>12</sup> World Coalition Against the Death Penalty, 2017, DEATH PENALTY AND POVERTY Detailed Factsheet 15th World Day Against the Death Penalty, [https://worldcoalition.org/wp-content/uploads/2020/09/EN\\_WD2017\\_FactSheet-1.pdf](https://worldcoalition.org/wp-content/uploads/2020/09/EN_WD2017_FactSheet-1.pdf)

become common findings.<sup>13</sup> In accordance with this, Philip Alston, Special Rapporteur on Extreme Poverty and Human Rights, has made a statement that the death penalty is ‘reserved for the poor.’<sup>14</sup> The practice of the death penalty is undeniably a form of discriminative practice.

When the death penalty is imposed on women, discrimination that happens is not limited based on their economic situation or social-economic background but also based on their gender.<sup>15</sup> Gender stereotypes, stigma, harmful and discriminative cultural norms, and patriarchy have badly affected women’s access to justice in the case of the death penalty.<sup>16</sup> There is a gender dimension regarding women in the vortex of the death penalty. UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution on Gender-Sensitive Approach to Arbitrary Killings reported that there is a common pattern of women in death row, in which women in death row shows history as a victim of violence and the non-existence of effective legal and other assistance.<sup>17</sup> Additionally, other general factors that are shown in women on death row are the apparent economic dependency, or the fear of losing the right to child-care, the existence of cultural factors that legitimize violence against women, and suffering or stigmatization from divorce.<sup>18</sup> In other cases involving migrant women, it is found that the difficulties they faced differ from the lack of understanding towards the existing law, access to consular, effective legal assistance, and also an interpreter.<sup>19</sup>

Cornell Center on the Death Penalty Worldwide’s Report entitled ‘Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty’ estimated that globally there are at least 500 women on death row (only less than 5% of the total number of people in death penalty). This report found various vulnerability points based on gender in women facing the death penalty:<sup>20</sup>

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<sup>13</sup> *Ibid.*

<sup>14</sup> OHCHR, 2018, *Death row reserved for the poor*, <https://www.ohchr.org/en/newsevents/pages/deathpenaltyisabane.aspx>

<sup>15</sup> Which is defined as a form of difference based on a person's gender, see Glossary and Working Concepts authored by Cornell Center on the Death Penalty Worldwide and Harm Reduction International in [https://worldcoalition.org/wp-content/uploads/2021/07/EN\\_Detailed-Factsheet\\_WD2021\\_v1-2.pdf](https://worldcoalition.org/wp-content/uploads/2021/07/EN_Detailed-Factsheet_WD2021_v1-2.pdf)

<sup>16</sup> The Cornell Center on the Death Penalty Worldwide A Report Of The Alice Project, 2018, *Judged for More Than Her Crime A Global Overview of Women Facing the Death Penalty*, p. 15.

<sup>17</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings, Human Rights Council, Thirty-fifth session, 6-23 June 2017, Agenda item 3, para 41

<sup>18</sup> *Ibid.*

<sup>19</sup> Michelle Bachelet, UN High Commissioner for Human Rights, 2020, *75th session of the UN General Assembly Virtual High-Level Side Event: Death penalty and gender dimension – Exploring disadvantage and systemic barriers affecting death sentences*, <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=26292&LangID=E>

<sup>20</sup> The Cornell Center on the Death Penalty Worldwide A Report Of The Alice Project, 2018, *Judged for More Than Her Crime A Global Overview of Women Facing the Death Penalty*, p. 12-19.

Based on the Type of Crime	Based on Specific Vulnerability
<p>Murder:</p> <ul style="list-style-type: none"> <li>• A murder involving family members</li> <li>• History of gender-based violence</li> <li>• Motivation backed by a history of domestic violence and gender inequality</li> <li>• Element of intimate relationship as a driving factor of crime</li> <li>• History of violence by intimate partners</li> <li>• Child marriage</li> <li>• Lack of effective help from the third party</li> <li>• Economic dependency</li> </ul>	<ul style="list-style-type: none"> <li>• For girls facing death penalty, all the cases found the involvement of: <ul style="list-style-type: none"> <li>○ History of gender based violence</li> <li>○ Sexual assault</li> <li>○ Child marriage</li> </ul> </li> <li>• History of mental health disturbance and intellectual disability</li> <li>• Migrant worker: found violation of fair trial, lack of understanding towards the existing criminal justice process, and several cases involve the murder of their employer</li> <li>• Majority of poor women and members of minority groups<sup>21</sup></li> <li>• In the United States, racial discrimination factor is also apparent</li> </ul>
<p>Drug Offences:</p> <ul style="list-style-type: none"> <li>• Involved in illicit drug trafficking because of needs to improve the social-economic status</li> <li>• Background of social-economic vulnerability</li> <li>• Motivation to please or help man figure</li> <li>• To boost self-confidence</li> <li>• Targeting migrant worker</li> <li>• Victim of fraud</li> </ul>	

Despite the abundance of facts involving women’s vulnerability based on gender discrimination in death penalty cases, such a topic is yet to be discussed in the discourse of abolition of death penalty, especially in Indonesia. The small number of women on death row might be the reason for this theme’s unpopularity. By 2020, in Indonesia, there are 10 women on death row (less than 3% of the total number of people on death row).

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<sup>21</sup> In India, in 2015 women in death row inmates were economically vulnerable, 50% of them never even went to school, 75% did not have a job, 77% victim of child marriage. Poor and illiterate women make up the majority of women on death row in Nigeria, Jordan, Morocco, Pakistan, Uganda and Thailand.

Regardless of this, 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 the death penalty,<sup>22</sup> as in such cases, it becomes vital that all factors surrounding the case be considered.<sup>23</sup> More importantly, cases across the globe found that women got sentenced to the 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.<sup>24</sup>

ICJR's previous study in 2019 discussing women in the vortex of the death penalty in relation to drug offenses found that there are 3 (three) essential patterns of women faced with the death penalty. First, the majority of women faced with the death penalty come from a low-level social-economic background who live as a single parent. Second, most of them are the victim of exploitation. Lastly, their case mostly involved various violations of their right to a fair trial.<sup>25</sup> Since after Reformation in 1998, Indonesia has had no updated comprehensive study that shows the fulfilment of women's procedural rights in the criminal justice system. Hence, this research aims to answer the question of how that vulnerability in women discussed above is shown in court judgments and how the Court responded to such a thing. Lastly, it will also try to answer whether the claim that women are being punished because of their failure to conform with their gender role based on culture and norms could be proven.

## 2. Methodology

Since 2016, ICJR has collected death penalty cases in Indonesia on an internal database system using the method of online media tracking. ICJR defines death penalty case as a case in which people are

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<sup>22</sup> Michelle Bachelet, UN High Commissioner for Human Rights, 2020, *75th session of the UN General Assembly Virtual High-Level Side Event: Death penalty and gender dimension – Exploring disadvantage and systemic barriers affecting death sentences*,

<https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=26292&LangID=E>

<sup>23</sup> Article 197 paragraph (1) letter f explains the judge's obligation to include mitigating reasons in the decision letter, as well *Defendants must be presumed innocent until their guilt has been proved beyond a reasonable doubt, in strict application of the highest standards for the gathering and assessment of evidence. In addition, all mitigating factors must be taken into account, Extrajudicial, summary or arbitrary executions*: Report by the Special Rapporteur, (E/CN.4/1997/60, 24 December 1996), para. 81.

<sup>24</sup> In several cases documented in the Cornell Center On The Death Penalty Worldwide report, women facing the death penalty have been deemed "femme fatale", "child murderers", or "witches", The Cornell Center On The Death Penalty Worldwide A Report Of The Alice Project, 2018, *Judged for More Than Her Crime A Global Overview of Women Facing the Death Penalty*, p. 6, Michelle Bachelet, UN High Commissioner for Human Rights, 2020, *75th session of the UN General Assembly Virtual High-Level Side Event: Death penalty and gender dimension – Exploring disadvantage and systemic barriers affecting death sentences*,

<https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=26292&LangID=E>

<sup>25</sup> Maidina Rahmawati, *Analysing Fair Trial Aspect of Death Penalty for Drug Cases in Indonesia Policy and Implementation: Special Cases on Women*, 2019, p. 8-12 in ICJR, 2020, *Laporan Situasi Kebijakan Hukuman Mati di Indonesia 2020: Mencabut Nyawa di Masa Pandemi*, p. 27.

being charged with death penalty and/or sentenced to death. The initial finding by media tracking was then further verified by cross-confirming with information in: 1) District Court's case tracking information system (*Sistem Informasi Penelusuran Perkara*); and 2) Court judgement attained from Supreme Court's directory of judgments (*Direktori Putusan Mahkamah Agung*). Per August 2021, ICJR internal database has recorded 884 cases of death penalty with the earliest case dated back to 1969 and the latest one in 2021.

From 884 cases in ICJR's internal database, there are 42 death penalty cases identified with women as the defendant. However, as not every case in the internal database is accompanied by the judgment's complete document from the first until the last trial and the time limitation to conduct this research, we decided to limit our research to only 32 cases. All of these 32 cases have at least a district court judgement document. The list of the case is as below:

*Table 1. Data sample of court decision 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
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 analyzing these judgements, there are 2 (two) essential aspects that were given attention: 1) Procedural rights, limited to the aspect of the right to effective defense and legal assistance and 2) Aspect of women's vulnerability. These two issues are going to be highlighted to describe the situation of women in the vortex of the death penalty in Indonesia. The analysis will not only depict the fulfilment of women's procedural right in the criminal justice system as a defendant but also shows how the court address women and their vulnerability in cases regarding the death penalty.

Analysis of aspect of the right to effective defence and legal assistance will touch upon the issue of legal-assistance availability from the level of investigation to the Court. Several part of this study will also assess the quality of defence given in the case, shown from the availability of formal note of objection, a form of memorandum of defense (written or oral), and lastly the appearance of defendant's witness or expert.

The analysis related to the Aspect of Women's Vulnerability highlights the substance of the defence as well as the judge's considerations which specifically discuss issues surrounding the vulnerability of the defendant and the possible stigma attached to them as a woman for violating her traditional gender roles. Aspects of women's vulnerability are closely related to the issue of gender equality, while the cause is rooted in gender-based discrimination. Women become certain groups/people in society who are often exposed to discriminatory treatment and/or require protection and other measures from the Government to avoid exploitation or a harmful environment. At the same time, the stigma aspect as a woman is related to stereotypes/demands given to women because she as a woman with traditional gender roles must comply with social norms pinned to women.

In addition to relying on the two aspects above, this study also specifically discusses interesting findings from the judges' considerations in the death penalty cases. Some of the issues discussed are, for example, the reasons for the judges to reject or impose the death penalty, considerations regarding the problematic 'war on narcotics' narrative, as well as the mitigating factors that must be considered by the judge before imposing the death penalty.

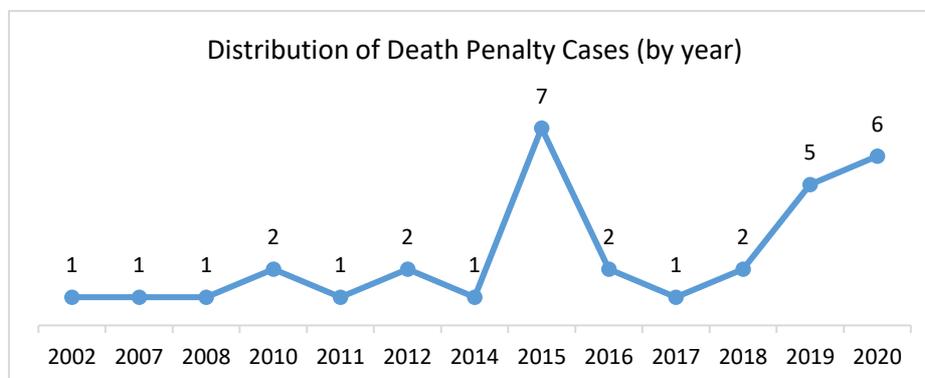
### 3. Findings in Women’s Death Penalty Cases

This section will describe the findings from the research sample data consisting of 32 first-degree judgements in death penalty cases with women as defendant. The descriptions of the findings are grouped into 5 (five) categories, namely: (a) General Demography, (b) the Rights to Defence and Legal Assistance, (c) Vulnerability and Stigmatization against Women, (d) Mitigating Factors Under the Judges’ Considerations, and (e) Judges’ Response to the Death Penalty. Each of these categories is described as follows.

#### A. General Demography

The sample case used in this study is recorded from 2002 until 2020.<sup>26</sup> As illustrated in Graphic 1, most data of the case are registered in 2015. Although there was a decrease in the number of the case after 2015, however, the trend of death penalty cases began to re-increase from 2017 to 2020. The significant spike 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 declaration of 'war on drugs' campaign during the early President Joko Widodo’s regime in 2015 (more on this analysis can be found in the next chapter which discusses specifically on then problem of the 'war on narcotics' narrative).

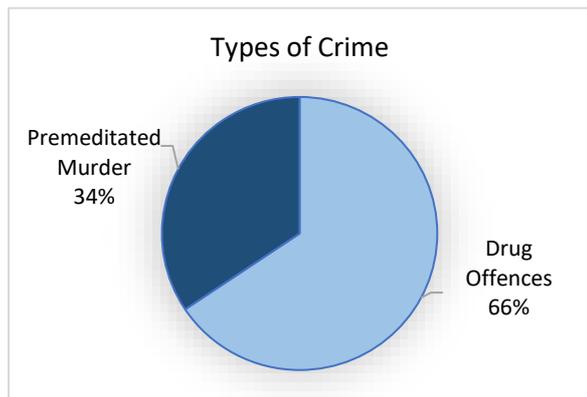
*Graphic 1. Distribution of Death Penalty Cases with Female Defendants by year*



<sup>26</sup> It should be noted that considering the method of selecting the sample which is only limited to the availability of first-level court decision documents, it is very possible that there will be an increase in the number of case year distributions from data that are not included in the research sample. So that in the years that are not listed in Graph 1, namely 2003-2006, 2009, and 2013 it also does not mean that there are no death penalty cases with female defendants at all.

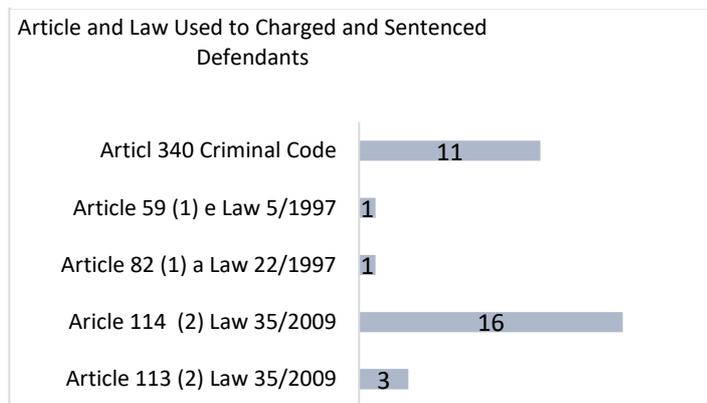
This finding is also backed by other facts shown by the distribution of crime in the data sample. Diagram 1 shows that the majority of death penalty cases with the female defendants were drug-related offences with the percentage of 66% (21 cases), while the rest 34% (11 cases) were premeditated murder.

Diagram 1. Types of Crimes in Death Penalty Cases with Female Defendants



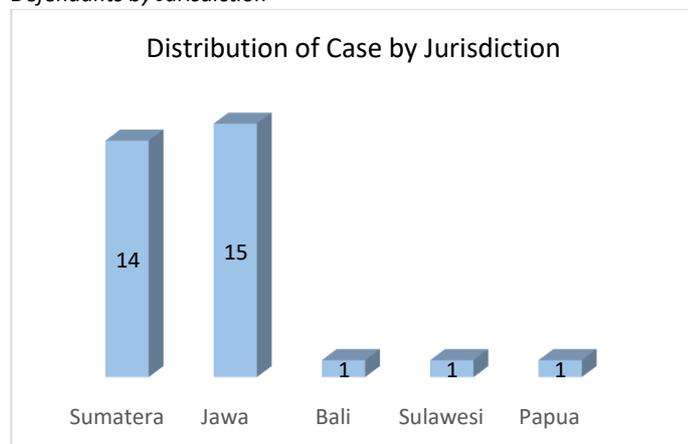
Parallel with that number, the type of article used as basis to charge the defendant and the article in which these women were convicted for are mostly related Law Number 35/2009, specifically under Article 114 (2) and Article 113 (2) with total 19 cases. Furthermore, this number is followed by Article 340 Criminal Code (premeditated murder) in 11 cases. The other two cases were also related to drug offences, however since the case was recorded before 2009, the previous Narcotics Law (Law Number 22/97) and a separate Psychotropic Law (Law 5/1997) were being used instead of Law 35/2009.

Diagram 2. Charge towards Female Defendant on Death Penalty Cases



Next, regarding the distribution of jurisdiction, most sample cases were tried in Sumatera and Jawa, with 14 cases in the former and 15 in the latter. The rest 3 (three) cases in the data sample were found in Bali, Sulawesi, and Papua.

Diagram 3. Distribution of Death Penalty Cases with Female Defendants by Jurisdiction



Sample on this study have also demonstrate that female defendant in death penalty cases' age varies between the youngest of 17 years to the oldest of 56 years when the crime took place. In the age group of 17 to 21 years old, three cases were found with the defendant initial of DDS, DAH, and RN. Moreover, in the age group of 41 to 50 years old, 6 cases were found. 60% of women in this data sample (22 people) are those in productive age (22 to 40 years old).

Diagram 4. Age Distribution of Defendants in Death Penalty Cases with Female Defendants

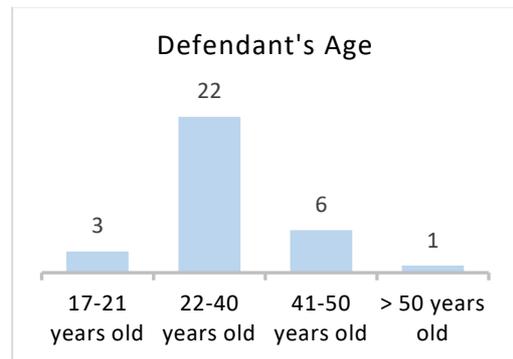
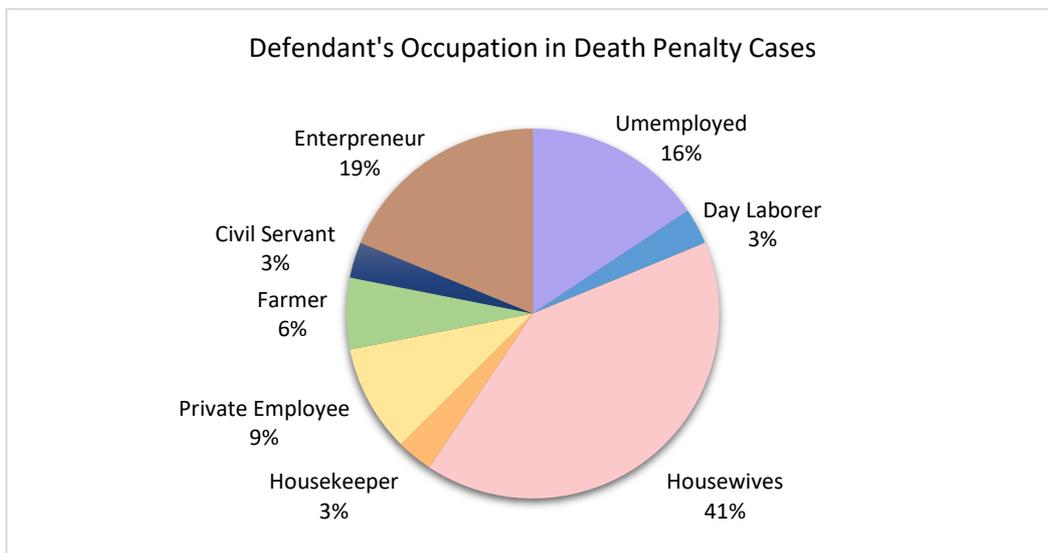


Diagram 5. Occupational Background of the Defendant in the Death Penalty Case with the Female Defendant

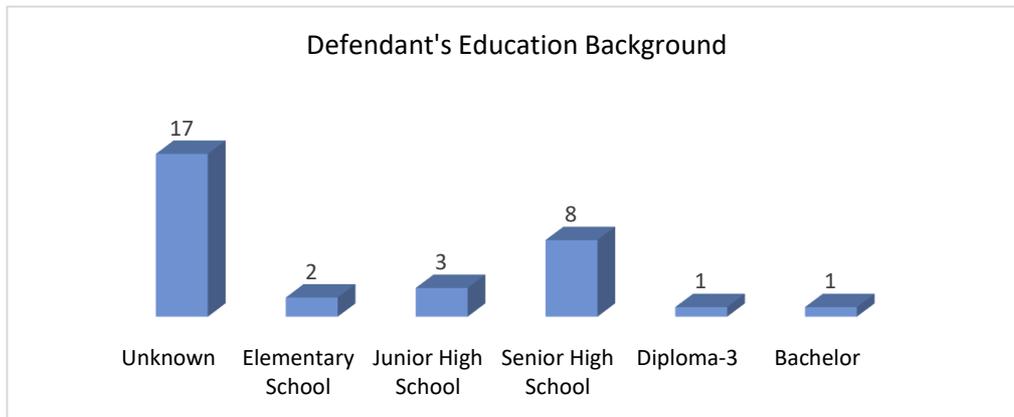


The finding also shows that 41% of the women (13 people) in data sample worked as housewife. If we were not to categorize housewife as a formal profession, the number could be then counted in unity with those who did not work which then shows the percentage of 57%. More than a half population of the sample (18 out of 32 people). Whereas the rest, sorted from the highest percentage to the smallest are: entrepreneur (6 people), private employee (3 people), farmer (2 people), and day labourer (1 person), housekeeper (1 person), and civil servant (1 person). This categorization is made based on the information in the judgement.

Regardless of the limited information provided in the judgement related to the defendant's educational background, this study tries to categorize education background of the defendant based on the available information. As shown in Diagram 6, in 17 of the cases from data sample, no information of education could be found. However, from the rest of data sample we could deduce that the majority of defendant's last education is senior high school. There are only 2 defendants with a background of

junior high school and 3 with elementary school background. Additionally, there are one defendant each with background of Diploma-3 and Bachelor's degree.

*Diagram 6. Educational Background of the Defendant in the Death Penalty Case with the Female Defendant*



In relation to nationality, the majority (91%) of female defendant in this case are Indonesian (29 people). The rest are three foreigners, each from the United Kingdom, Philippines, and Vietnam.

Data sample in this study has also illustrate that the 81% of defendant (26 people) were charged as accomplice in crime (see Diagram 8). Being charged as accomplice means that the defendant is not the only defendant in the construction of the case. This further relates to the importance of the female defendant's role in the crime compared to others. Diagram 9 exhibit the fact that 59% (19 out of 32 people) of women defendant was not the main perpetrator of the crime. In determining the main perpetrator reference are made to the indictment of the case in question. As an illustration, in this case the female defendant only acts as an intermediary for receiving goods in drug-related offences. Alternatively, in cases of premeditated murder, she only assists the main perpetrators in committing criminal acts, not as people who have the initiative or who influence others to commit the crime.

*Diagram 7. Citizenship of the Defendant in the Death Penalty Case with the Female Defendant*

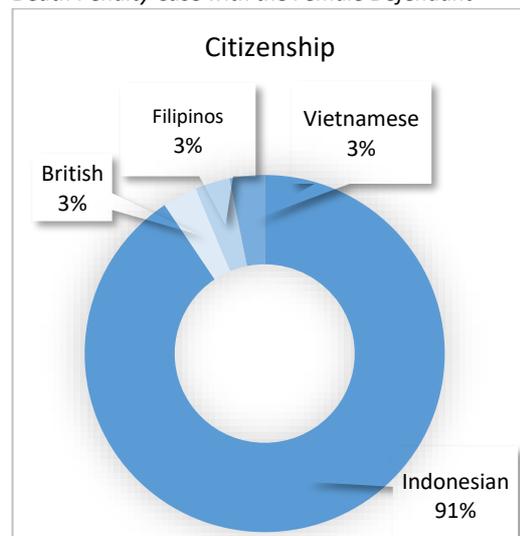


Diagram 9. Existence of Accomplice Article on Indictment

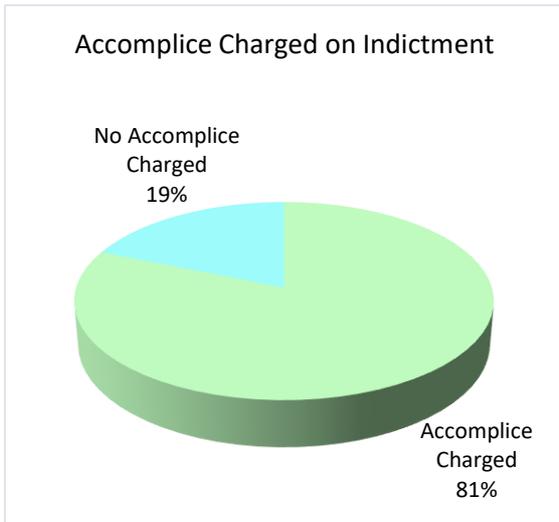
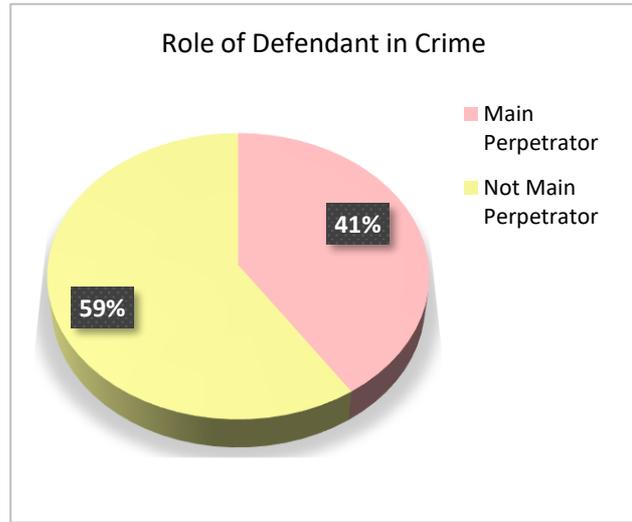


Diagram 8. Role of Female Defendant in Death Penalty Cases



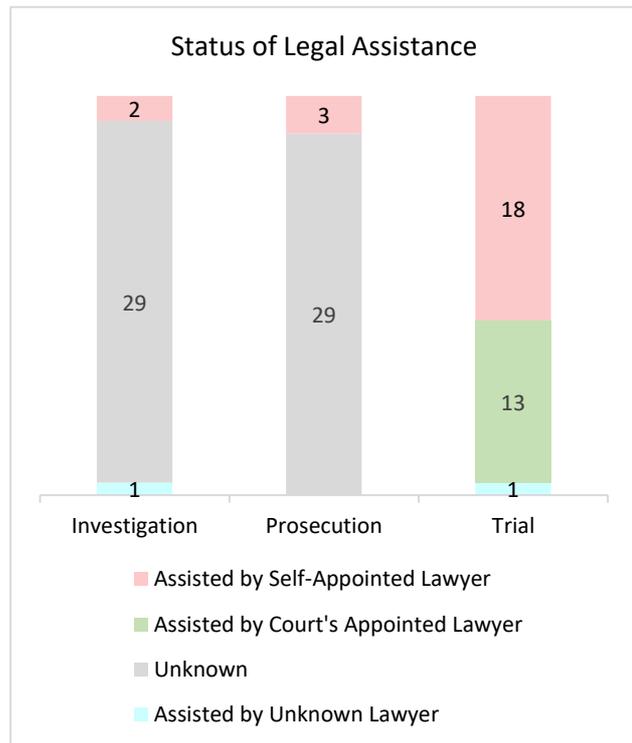
### B. The Rights to Defense and Legal Assistance

Based on the existing first-degree judgment document that is in the sample of this study, information regarding legal assistance in the investigation and prosecution phase was rarely to be found. Hence, the percentage of 'unknown' data in each phase is relatively huge (29 people).

18 out of 32 female defendants were found to appoint their lawyer by themselves during the trial. The rest, based on the date of the letter for Power of Attorney, were shown to have had lawyer since they were detained in investigation stage (2 people) and prosecution stage (3 people).

The number of lawyer's appointments by Court is also significant in the trial phase, which could be found in 13 female defendants in this study's data sample. This type of appointment was given to women who had no access to appoint their lawyer by themselves. Also found in the data sample is one defendant in the investigation phase (TBH case) and one other in the trial (RBS case) who were said to be accompanied by a lawyer in the judgement document, but with no clear explanation whether the lawyer was appointed by the judge or by themselves.

Diagram 10. Status of Legal Assistance in Death Penalty Cases with Female Defendants



Findings regarding the chance to defend themselves in Court will also be discussed in this aspect of access to legal assistance. The chance to defend themselves in this matter was analyzed from three elements (seen in Diagram 11, Diagram 12, and Diagram 13). First is the existence of defense’s witness or expert. Second, the submission of the formal note of objection. Third, submission of defendant’s memorandum of defense whether it is in written or oral form by the defendant themselves or by their lawyer.

This study indicates that only 5 (five) out of 32 female defendants presented defense witnesses in the trial. Whereas none of them presented expert on their behalf. Finally, only 5 (five) people presented formal note of objection to answer Prosecutor’s indictment towards them.

Diagram 12. Defence by Presenting Defence Witness or Expert Witness in Cases of Death Penalty with Female Defendants

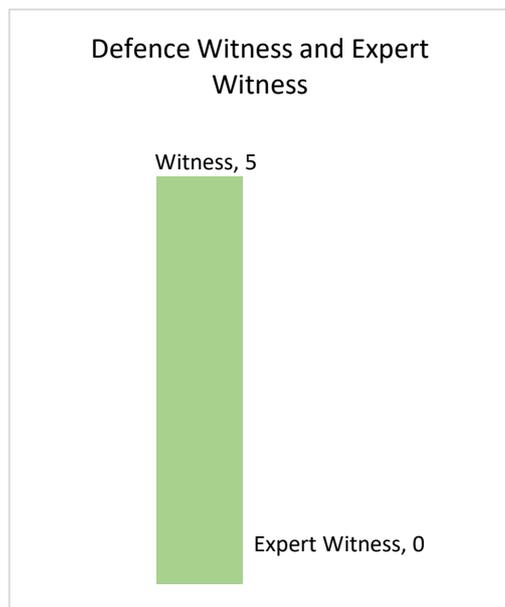


Diagram 13. Defence through Note of Objection Submission in Cases of Death Penalty with Female Defendants

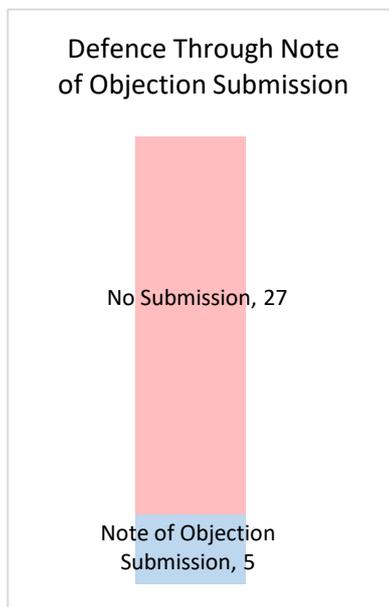
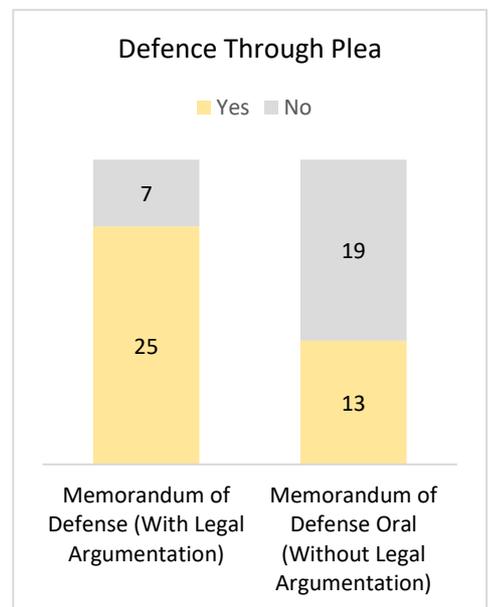


Diagram 11. Defence through Plea in Cases of Death Penalty with Female Defendants



Finally, in relation to the submission of memorandum of defense, most of the female defendant (25 defendants) submitted them in a written form, containing legal argumentation that was made by their lawyer. While the oral form without any legal argumentation was mostly given by the defendant directly in the Court, found in 13 women. However, the number of female defendants who did not submit any kind of plea document, neither in writing nor in oral, is bigger, as it is found in 19 defendants.

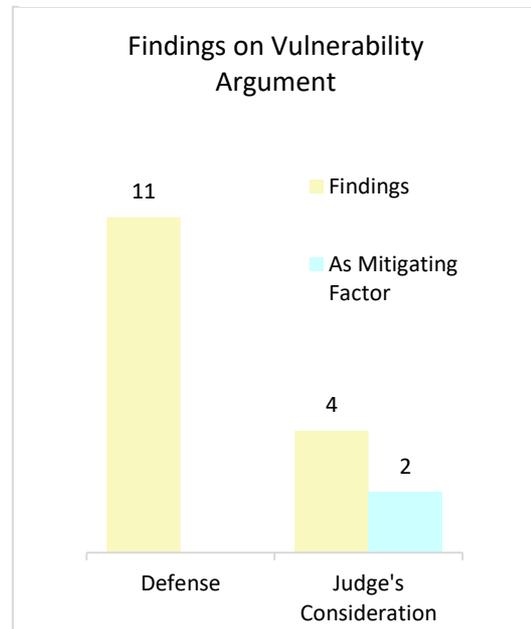
Furthermore, this study tried to look in the judgement the consideration given by the judge related to the issue of procedural rights fulfilment in death penalty cases involving women. Nonetheless, such consideration could not be found in any of the 32 data samples that were analyzed.

### C. Vulnerability and Stigma against Women

As seen in Diagram 14, there are 11 findings of defense that substantially discuss the aspect of women's vulnerability, given by both the defendant themselves or their lawyers. This could be found in the case of SM, RS, NA, THW, IR, LJS, TBH, YR, RBS, THR, and MRW. Whilst the consideration related to such thing in the judgement could only be seen in four defendant's cases: THW, YR, RBS, and MRW. In two other cases, under the initial of THW and RBS, the aspect of vulnerability was also used as a mitigating factor in sentencing.

However, women's vulnerability is not always reflected in the defense and judges' considerations. Thus, the total number of findings on gender-based

Diagram 14. Findings on Vulnerability Aspect of Female Defendants in Death Penalty Cases



vulnerabilities is overall on 13 cases, accumulated from statements in the legal defense, judge's considerations, and other parts of court decisions (such as indictments, testimony of witnesses and defendants). The forms of vulnerability could be categorized into three types (see Diagram 16): committed a crime for protecting the family (found in one defendant under the initial of LJS), experience as a victim of violence (found in five defendant under the initial of DDS, MN, SZ, YR, ZH), and involved in intimate relationships: involved in criminal acts committed by her partner in intimate relationships (found in eight defendant under the initial of MU, JLC, RS, NA, DDS, THW, DAH, JML). Description of each of the categories will be further discussed in the analysis part below.

Diagram 16. Forms of Findings Regarding Vulnerability as Women in Death Penalty Cases with Female Defendants

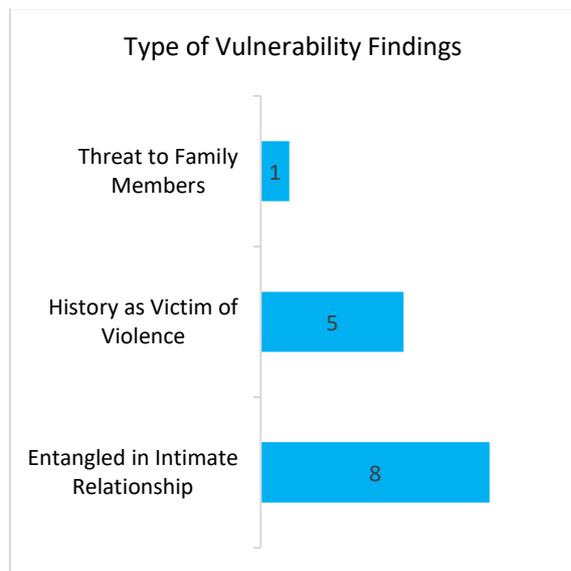
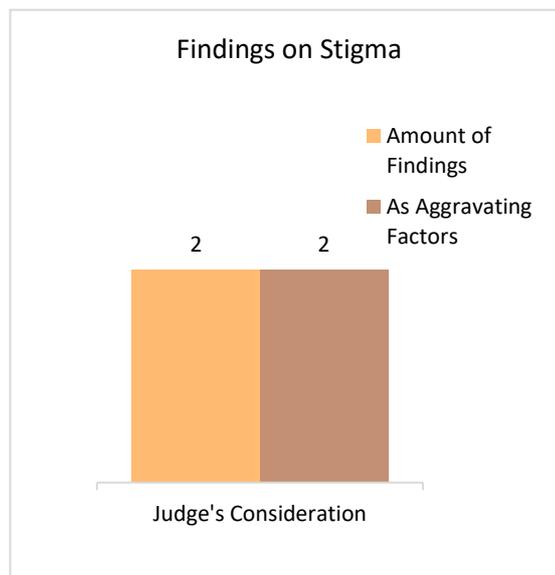


Diagram 15. Findings of Stigma as Women in Death Penalty Cases with Female Defendants

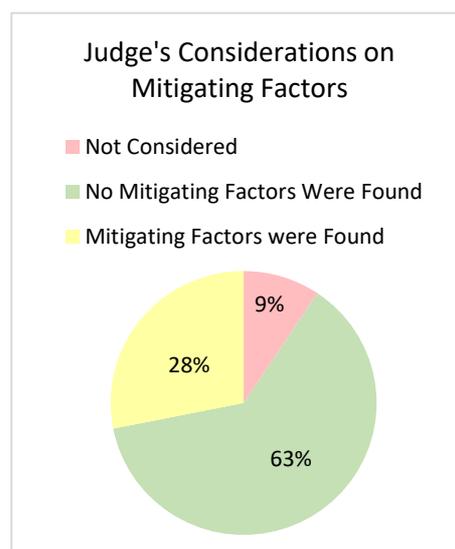


In the issue of stigmatization, it is found that in two cases (initial MM and ZH) judges made such stigma in their judgement’s consideration. The stigmatization given to MM by the judge is related to her role as a well-known parent, while in the case of ZH, the stigmatization was given based on ZH’s role as a wife. Even further, in these two cases, those kinds of stigmatization were considered to be aggravating elements for sentencing.

**D. Mitigating Factors Under the Judges’ Considerations**

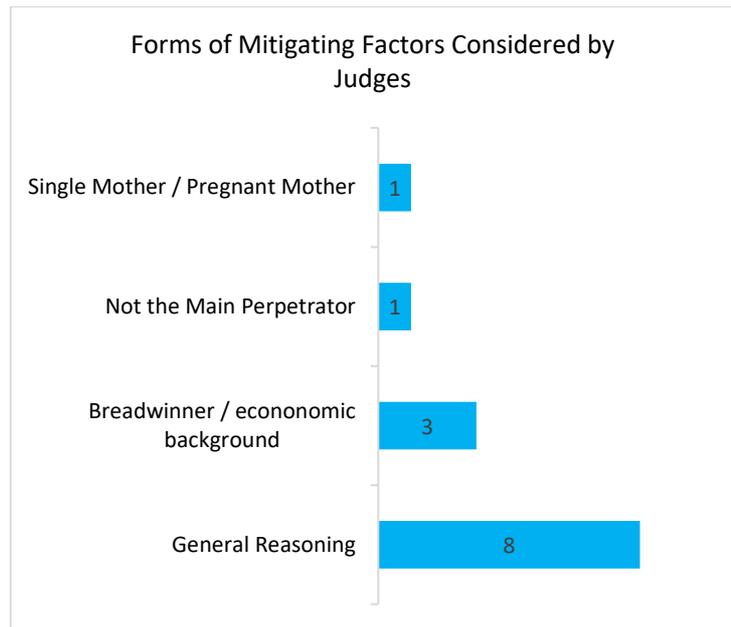
This study also explores specifically findings related to mitigating factors considered by judges in relation to the sentencing of death penalty towards female defendant. As illustrated in Diagram 17, there are 91% or 29 judgements where judges mentioned mitigating factors in the death penalty cases. In those 29 judgments, judges found the said mitigating factors in 28% cases (9 female defendants), whilst 63% other cases (20 female defendants) judges examined that there was no mitigating factor found. The rest 6% (3 decisions) in case of EL, IR, TDT, the judge did not even mention the issue of mitigating factors.

Diagram 17. Judge's Considerations on Mitigating Factors in Death Penalty Cases with Female Defendants



The judges' considerations regarding mitigating reasons consist of general reasons such as 'the defendant are polite, cooperative, regrets his actions, and has never been convicted' (against 8 female defendants) as well as specific reasons (total found against five female defendants). As shown in Diagram 18, the specific mitigating reasons, for example regarding the role of the defendant as a single parent and pregnant (against one female defendant THW) and the role of the defendant in a criminal act that is not

Diagram 18. Forms of Mitigating Factors Considered by Judges in Death Penalty Cases with Female Defendants

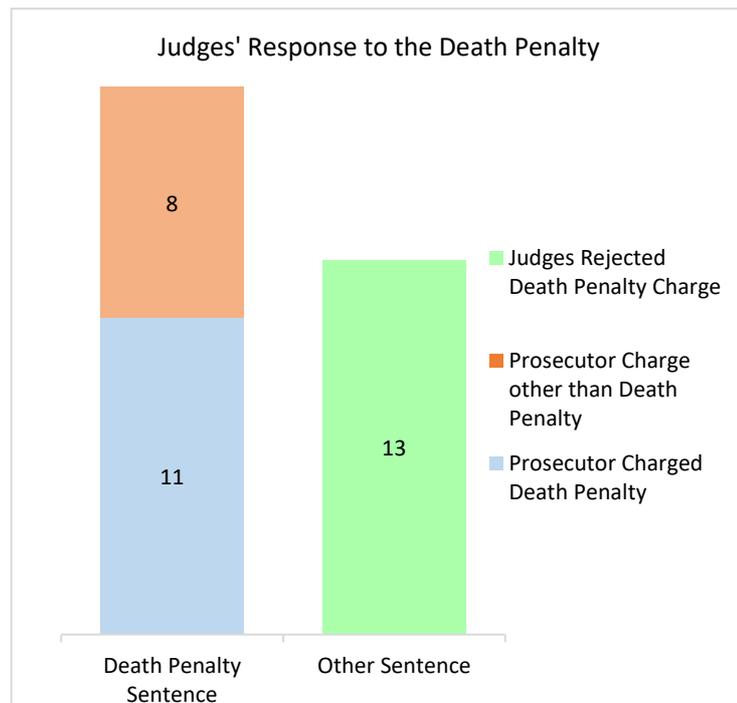


the main perpetrator (against one female defendant DAH). In addition, the judge also considered the economic condition of the defendants who were the backbone of the family, namely the three female defendants JML, RBS, and WL.

**E. Judges' Response to the Death Penalty**

From all of the sample in this study, every defendant were found guilty of the crime charged to them and eventually sentenced to punishment. Diagram 19 shows the comparison of the number of death penalty sentences with other types of sentences. Judges rendered the death penalty to 19 female defendants (60%), while 13 other female defendants (40%) were sentenced with other types of punishment in the first instance trial. Diagram 19 also shows the response of the judges to the death penalty

Diagram 19. Judges' Response to the Death Penalty



charges by prosecutor. In 13 out of a total of 32 female defendants in the sample of this study, the

judges refused to sentence the defendant with death penalty, so they were ultimately sentenced to punishment other than the death penalty. Then from a total of 19 other defendants who were sentenced to death, 8 of them (42%) were not charged with death penalty by the prosecutor, while the other 11 people (57%), the judge granted the death penalty that the prosecutor seeks. The description of judges' considerations in refusing or imposing the death penalty in this context is discussed further in the following section.

## 4. Analysis

This part will analyze further the findings that have been described in the above part. This analysis will be divided into 8 (eight) issues: (a) Women's Vulnerability, (b) Role in Criminal Acts, (c) C. Fulfilment of the Rights to Legal Assistance and Defence, (d) Stigmatization towards Women's Traditional Role, (e) the Absence of Judges' Considerations on Mitigating Factors, (f) the Problematic Narrative of 'War on Drugs' in the Judges' Considerations, (g) Judges' Considerations to Refuse the Imposition of the Death Penalty, and (h) Judges' Considerations to Impose the Death Penalty.

### A. Women's Vulnerability

Women have often become the perpetrator of non-violent crime.<sup>27</sup> The driving factor and pattern of crime that women often do differ from man.<sup>28</sup> Regarding women's vulnerability in the death penalty, as it has been explained before in the background of this study, prior studies have mapped several kinds of vulnerability of women who is in the vortex of death penalty.

In the indexing of the Court's decision, vulnerability aspects that are included in the classifications are:

1. Experience as a victim of violence
2. Involved in intimate relationships: involved in criminal acts committed by her partner in intimate relationships
3. Committed a crime for protecting the family

Other types of vulnerability, especially one that is closely related to social-economic background, will be outlined in a different part of this sub-section.

#### 1) Experience as a Victim of Violence

There are 5 (five) cases in which the history as victim of violence was found in the female death penalty defendant: case of DDS, MN, SZ, YR, ZH. All of these are premeditated murder cases.

It is important to note that among all of these cases, case of DDS presented one of the most important findings in this study: during the time of the crime, she was still 17 years old. In accordance with Article 6(5) ICCPR, death penalty shall not be imposed on to crime committed by someone below 18 years old. Additionally, Article 3f Law Number 11/2012 (Law of Juvenile Justice System) has clearly emphasized that children are not allowed to be sentenced with death penalty or life sentence.

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<sup>27</sup> Penal Reform International dan Thailand Institute of Justice, *Global Prison Trends 2019*, p. 20, [https://cdn.penalreform.org/wp-content/uploads/2019/05/PRI-Global-prison-trends-report-2019\\_WEB.pdf](https://cdn.penalreform.org/wp-content/uploads/2019/05/PRI-Global-prison-trends-report-2019_WEB.pdf) accessed on 28<sup>th</sup> March 2020.

<sup>28</sup> Prison Reform Trust, *Why focus on reducing women's imprisonment?*, (London, 2017), [http://www.prisonreformtrust.org.uk/Portals/0/Documents/Women/why%20women\\_final.pdf](http://www.prisonreformtrust.org.uk/Portals/0/Documents/Women/why%20women_final.pdf)

**Case of DDS:** The description of the Prosecutor's indictment explained that DDS was involved in the murder of three children, initiated by her husband, Delfi. DDS had refused the husband's order to wrap a cloth around the victim's neck, but DDS was threatened that if she did not do it, her neck would be the one wrapped instead.<sup>29</sup> In the statement, DDS also stated that there she and her husband got divorced in July 2013, with the cause of it being which Delfi's violent attitude and other economy-related problem as Delfi did not have any job.<sup>30</sup> This statement regarding her divorce was also confirmed in the judge's consideration.<sup>31</sup> DDS also admitted that she felt threatened by her husband<sup>32</sup>, but in the judge's consideration, the threat was treated as a mere word and even blamed DDS for not reporting it.<sup>33</sup> Further in the judgments, DDS was blamed as she was deemed to fail preventing or hindering her husband's intentions to murder those children.<sup>34</sup> The panel of judges further cornered DDS with the following statement:

*“Even if she felt stressed and threatened, the least she could do was not to help him killed those children. Or at least, after the event took place (the murder), she should have reported the crime to the police.”<sup>35</sup>*

With this simple analysis, the judge conclude that DDS has agreed to the murder and has cooperate and worked together with her husband.<sup>36</sup> Even the narration of blaming DDS was supported by the conditions where this case has received public attention, which then become the reason the judge sentenced the death penalty.<sup>37</sup> Conditions where there is a history of violence were not considered as mitigating reasons by the judge.

**Case of MN:** The Prosecutor's indictment describes that MN was often the object of anger and violence of her husband. Her husband then becomes the victim of the murder in MN's case. This fact that her husband used to be violent was regarded in the judgement as a fact of the case.<sup>38</sup> In this murder, MN was getting help from her close friend. In the indictment and the fact of the case, it is said that after the murder took place, her friend threatened her not to tell anyone or her kids would be killed.<sup>39</sup> The statement in which MN stated that she often becomes her husband's victim of violence, did not make it to the consideration. Additionally, no witness was able to support that claim, even though the judges have declared it as the fact of the case. No witness was able to describe further the violence that MN

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<sup>29</sup> District Court Siak Decision Number. 371/Pid.B/2014/PN.Sak.

<sup>30</sup> *Ibid.*, p. 21.

<sup>31</sup> *Ibid.*, p. 28.

<sup>32</sup> *Ibid.*, p. 24.

<sup>33</sup> *Ibid.*, p. 28.

<sup>34</sup> *Ibid.*, p. 32, 33.

<sup>35</sup> *Ibid.*, p. 33.

<sup>36</sup> *Ibid.*, p. 33, 34, 36.

<sup>37</sup> *Ibid.*, p. 37-38.

<sup>38</sup> District Court Rokan Hilir Decision Number 480/Pid.B/2018/PN.Rhl p. 21-22.

<sup>39</sup> *Ibid.*, p. 24.

received from the victim. The existence or non-existence of history of violence was only be discussed limitedly by a witness who stated that during the time of marriage, MN has left the house and took her husband's money with her four times.<sup>40</sup> However, there is no effort made to understand the underlying cause of all MN's actions and tracked it back to the violence by her husband.

**Case of SZ:** The crime was done by putting grenade in the car with six members of the first wife of her unregistered husband's (*siri husband* – they were married by religion but did not register their marriage to the state) other marriage. In the indictment, the prosecutor only mentioned that SZ were annoyed with her husband's kid because her home was often being thrown at. However, SZ has then confirmed in her statement that her husband's kid has come to her to mock, kick, hit, and threat her with knife. During their marriage, SZ has often been terrorized, mocked, belittled, and humiliated by the family of her husband's first wife, which then made SZ offended and resented them.<sup>41</sup> However, this fact was not taken into account by judges in their consideration, even though towards SZ, they did not impose death penalty.

**Case of YR:** The indictment did not touch upon the fact that the marriage of YR and her husband is no longer in a good term. However, in YR's statement, it is mentioned that her relationship with the husband is no longer viable and they were often involved in a fight.<sup>42</sup> YR also explained that whenever there was a problem and she asked for a divorce, her husband would threaten to kill her.<sup>43</sup> Unfortunately, these facts were never discussed by judges in their consideration before sentencing her.

**Case of ZH:** The prosecutor in their indictment stated that ZH marriage was no longer in a good term and ZH has suppressed anger and disappointment inside her towards the husband who then becomes her murder victim. ZH killed her husband with her close friend.<sup>44</sup> Defense witness stated that the marriage of ZH and her husband was not harmonious anymore and her husband often acted in a violent attitude towards her. Not only that, ZH's husband often had sex with other women<sup>45</sup>, and once he almost sexually assaulted her sister. ZH also stated that he also tried to sexually assault her first child.<sup>46</sup> His violent attitude and mouthy behavior have been confirmed in judges' consideration.<sup>47</sup> Even though the panel of judges has confirmed that ZH's husband has a history of violence, but in their consideration, the panel of judges did not consider this at all, instead the panel of judges stated that ZH should respect

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<sup>40</sup> *Ibid.*

<sup>41</sup> District Court Simpang Tiga Redelong Decision Number.75/Pid.B/2016/PN Str, p. 47-48.

<sup>42</sup> District Court Manokwari Decision Number 173/Pid/B/PN.Mnk, p. 105.

<sup>43</sup> *Ibid*, p. 115.

<sup>44</sup> District Court Medan Decision Number 907/Pid.B/2020, PN.Mdn. p. 8.

<sup>45</sup> *Ibid*, p. 78-79.

<sup>46</sup> *Ibid*, p. 84.

<sup>47</sup> *Ibid*, p. 97.

and love her husband.<sup>48</sup> In the defense, it was also stated that ZH still had two dependent children, but this condition was not considered by the judge at all. There was also no mitigating reason considered by the judge. Furthermore, the judge stated that ZH did not need to explain the history of violence she experienced because according to them, instead of trying to explain things, she should be sorry.<sup>49</sup>

## **2) Involved in intimate relationships: involved in criminal acts committed by her partner in intimate relationships**

In the discourse on the vulnerability of women to the death penalty as described in the background section, it was found that women committing criminal acts are often has the intention to please or help other parties who are generally male figures in the relationship. Often the figure is present in the context of an intimate relationship. In 32 women's death penalty decisions, there are 8 cases showing this phenomenon, which occurred in the cases of MU, JLC, RS, NA, DDS, THW, DAH, and JML.

**Case of MU:** Her involvement in the illicit drug trafficking began with his meeting with Jerry, a Canadian citizen who she later had a relationship with and went vacation with, promised to be married and given money regularly. During a meeting in Nepal, she was given a fairly heavy bag by someone who claimed to know Jerry. She then returned to Indonesia without Jerry by bringing the bag, which resulted in her being arrested for the possession of heroin. In their consideration, the judge did not at all consider the entanglement of this intimate relationship that occurred to MU.

**Case of JLC:** In the illicit drug trafficking involving JLC, her role is only to assist her husband, who is the head of the trafficking network in Indonesia. However, there was no prosecution against her husband. Even her husband's testimony in the trial was very minimal. There was no information that was able to explain the narcotics distribution network led by her husband and his network. In imposing death penalty to her, the judge did not at all consider the bigger role of JLC's husband.

**Case of RS:** Her role is only as a liaison between her husband who is a foreign citizen and two delivery couriers. RS was given some money and orders by her husband. Her husband is the boss of the illicit drug trafficking business and is related to Uche, who lives in Thailand but has never been able to appear in Court.

**Case of NA:** In committing crime of illicit drug trafficking, NA is not the party that controls the business, but her husband, Ramli, is. NA was only invited by her husband to be involved in a series of transaction activities carried out by him. The one who made transactions and met people to deal with was Ramli.

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<sup>48</sup> *Ibid*, p. 128.

<sup>49</sup> *Ibid*, p. 129.

In fact, in order to prove NA's involvement, judges have to describe instead the actions and roles of Ramli and did not describe at all the specific actions committed by NA.

**Case of DDS:** The person who initiated the murder was Delfi, her husband. All the planning, execution, until the attempt to hide the traces was done by Delfi. DDS obeyed her husband's words and orders for fear of being threatened of murder . The entanglement of DDS in this situation did not make the judge consider lesser sentence for her.

**Case of THW:** She met a foreign citizen named Dhani who was interested in her and later had intimate relationship with. Dhani offered THW the job of delivering samples of goods from China. THW was suspicious at first, but because of her feeling towards him, THW did not refuse. During the trial, THW was also pregnant with Dhani's child, while Dhani was never presented in Court. Fortunately, different from other cases, in this case, the vulnerability aspect of THW who was pregnant with Dhani's child was used by the judge not to impose a death penalty on her.

**Case of DAH:** DAH was involved in an intimate relationship with another perpetrator, Eze Cebastine. This relationship has caused DAH to comply with requests from other perpetrators in the illicit drug trafficking, by being a receiver of the drug. She even changed her name to be involved in the network. In the judgment, DAH's insignificant role is the reason for not imposing the death penalty

**Case of JML:** She is in marital status with the victim. However, based on the testimony of the witness who is the main perpetrator of the crime, JML often quarrelled with her husband. This leads JML to end up having an intimate relationship with the main perpetrator. The main perpetrator is the one who eventually prompted to kill JML's husband. In this case, the judge considered that JML had participated in the crime of killing another person because JML did not try to prevent, warn, or cancel the perpetrator's intention to kill the victim who was her husband.

### **3) Entangled in Crime to Protect Family**

**Case of LJS:** She was forced to follow the orders from the drug dealer because Julian threatened her that her son would be killed. LJS in her statement stated that in her home country she had reported Julian to the police, but the report was not processed because there were no injuries found in his son. The defendant followed Julian's orders solely to protect his son. However, the judge did not consider this vulnerability at all. Instead, judges imposed the death penalty even though the Prosecutor did not demand such sentence to be imposed. LJS's statement regarding his son's condition was considered as an excuse by the judge and used as an aggravating factor.

### **4) Other Forms of Women's Vulnerabilities**

There were also other vulnerabilities found that were not indexed in court decisions, namely:

**Women as victims of child marriage.** Based on the statement of DDS' husband in Court, it was stated that the husband and DDS had been married religiously but not reported to the state (*siri* marriage) since 2012.<sup>50</sup> This implies that the marriage between DDS and her husband took place when DDS was 17 years old.

**Women as victims of domestic violence.** In quite number of cases, up to 4 cases, especially the case of murder in DDS, MN, SZ, ZH, the female defendant were all victims of domestic violence. Unfortunately, domestic violence was never considered by the judges as mitigating factor.

### **B. Role in Criminal Acts**

Of the 32 data sample, 13 women (41%) were identified as the main perpetrators, while the majority of women facing prosecution or sentence of death penalty, up to 19 women (59%) were not the main perpetrators. This shows that although most of the women facing the death penalty are not the main perpetrators, law enforcement officials still persistently trying to impose death penalty on these women.

### **C. Fulfilment of the Rights to Legal Assistance and Defence**

The right to legal assistance and to file a defence is included as the components of the right to a fair trial that must be protected for everyone who is tried in the criminal justice system. The right to legal assistance and to file a defence is prescribed in Criminal Procedure Code as well as other international human rights instruments which have been ratified by Indonesia such as the International Covenant on Civil and Political Rights (ICCPR) which was ratified through Law No. 12 of 2005.

Despite the prescription of right to legal assistance<sup>51</sup> and the right to have a proper time and facility to prepare for defence, including the right to bring forward defence witness,<sup>52</sup> Criminal Procedure Code still does not guarantee a higher standard of protection of these rights for people who are charged with the death penalty. The existence of this safeguard is vital considering that the death penalty is – by law – could only be imposed to the most heinous crime and its nature is irreversible. Thus, it must be imposed with a high level of caution in trying criminal cases involving death penalty. Several international human rights instruments recommended the provisioning of legal assistance from the early phase of criminal process, with a higher safeguard compared to other cases that does not involve

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<sup>50</sup> District Court Siak Decision Number. 371/Pid.B/2014/PN.Sak, p. 15 and 20.

<sup>51</sup> Article 54 – 57 Law 8/1981 (Criminal Procedural Law).

<sup>52</sup> Article 51, 54, 65, 70, 72, 155(2)b, 182(1)b Law 8/1981.

death penalty as a punishment. This includes the specific safeguards regulating the proper time and facility given to prepare for defence.<sup>53</sup>

The absence of such safeguards for death penalty cases has resulted in ineffective fulfilment of the rights to legal aid in practice, especially suffered by the defendants facing death penalty. The descriptions below illustrate this claim. In many cases included in the data sample of this research, we found that the defendants and their lawyers did not take the opportunity to present a defence, for example by filing formal note of objection, pleadings, or defence witnesses. As the Criminal Procedure Code does not stipulate that these procedures are mandatory in death penalty cases, hence in the practice, the standard of providing defence is treated just as in general criminal cases.

### **1) Appointment of lawyer by the defendant themselves did not guarantee the quality of effective legal assistance**

As described in the data findings above, the majority of the defendant's lawyer status at the trial level shows the independent appointment by the defendant (56% or as many as 18 defendants). Interestingly, even if the defendant appoints her own lawyer, this does not mean that the defence given by his legal adviser were carried out effectively. Although, it is widely known that when the opportunity for defence was not used effectively, the female defendant has a high potential to be entangled with the death penalty.

Of the total 18 defendants who appointed their own lawyer, only 4 defendants (JLC, TBH, YR, and THR) whose lawyer took the opportunity to file a formal note of objection to refute the charges from prosecutor. Likewise, the submission of a memorandum of defense as the defendant's last resort to defend himself in Court was also done only in four defendant's cases. We also found that in 5 (five) defendants (ZH, MU, EL, WSA, and AK), the legal advisors did not present a written memorandum of defense containing legal arguments. The submission of such plea was only done verbally by the five defendants.

A total of 5 (five) death penalty cases with female defendants (ZH, SM, THW, SZ, and MM) are known to have presented defence witnesses in the trial. These five defendants are also known to have appointed their own lawyer at the trial level. In fact, two of them, THW and SZ, have been accompanied by their lawyer since the investigation phase. This is known from the date of the power of attorney which refers to the date of their detention at the investigation level. THW, for example, appointed her

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<sup>53</sup> Economic and Social Council, *Resolution No. 1984/50 on the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, 25 Mei 1984; Economic and Social Council, *Resolution No. 1989/64 on the Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, 25 Mei 1989; dan Economic and Social Council, *Resolution No. 1996/15 on the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, 23 July 1996.

legal advisor based on a special power of attorney dated January 5th, 2015, while she was detained since January 4th, 2015. While SZ was found to have appointed his lawyer based on a special power of attorney dated September 26th, 2016, while she was in police detention since September 19th, 2016.

However, in terms of filing a defence document, none of the five defendants' legal counsel (in ZH, SM, THW, SZ, and MM cases) filed a formal note of objection. Regarding the pleading, one of the defendants ZH, was found to have only presented the plea orally at the trial, while his legal advisor did not submit the plea in writing.

In this case of ZH, the prosecutor charged him with life imprisonment but the judge later sentenced him to death. The findings from the ZH case, which is a case of premeditated murder, are important to show how an indication of poor quality of defence has potentially resulted in the defendant being sentenced to death penalty.

## **2) Defendants who come from lower middle-income family have less access to the rights to legal assistance and effective defence**

As many as 13 defendants (40%) in 13 cases was found with lawyers appointed by the judges. Appointment by judges refers to Article 56 paragraph (1) of the Criminal Procedure Code which states that if the defendant is could not afford to appoint lawyer or does not have his own legal counsel while he is charged with the death penalty or any crimes punishable with a minimum sentence of 15 years in prison, the official responsible for each phase is obliged to appoint a legal counsel for them. When a case is in the trial stage, the judge in this case has the authority to appoint legal counsel for the defendant. The defendant is also not burdened with the cost of legal assistance services at all in this mechanism of appointing legal counsel as confirmed by Article 56 paragraph (2) of the Criminal Procedure Code.

Observing the career background of the 13 female defendants, it could be seen that a total of 7 defendants, have no income as 5 (five) of them are housewives and two others are unemployed. Meanwhile, the other 3 (three) defendants work in sectors with lower-middle income such as day laborers (one defendant) and farmers (two defendants). Then the other 3 (three) defendants are self-employed but the amount of income and type of work they carried on could not be clearly ascertained through the court decisions.

In carrying out defence, no defence witness was presented in the death penalty cases where the lawyer was appointed by the judge (13 cases). Additionally, only 1 (one) of the 13 female defendants whose legal counsel was appointed by the judge filed a formal note of objection to refute the public prosecutor's indictment, which could be found in the case of DAH. However, as for the memorandum

of defense with legal arguments, almost in all cases (11 out of a total of 13 cases), the legal counsel submitted written pleas, except for the cases of DDS and RN.

In both of DDS and RN case, the judge ends up sentencing them with death penalty. However, these two cases did have different kind of charge from the prosecutor, as in RN's illicit drug case, the prosecutor did demand her to be sentenced with death penalty, while in the DDS's case (premeditated murder) the prosecutor only demanded her to be sentenced with life imprisonment.

Finally, from the aforementioned analysis, it could be pointed out that majority of the female defendant in death penalty case who did not have income at all or at least a stable one tends to not be able to appoint their own lawyer. This then leads to the appointment of lawyer by the judge. However, the existing fact shows that the defence provided by judge-appointed lawyer inclined to not be sufficiently effective. This was shown by the fact that there is almost no formal note of objection being filed nor defence witness be presented by these lawyers at the trial. Besides missing those opportunities to defence their client, such as in DDS case, the lawyer even did not file any written defence/plea document, which then lead to the downfall of the case, widening the chance of women to be sentenced to death.

#### **D. Stigmatization towards Women's Traditional Role**

Women are less likely to commit crimes, be arrested, and imprisoned than men,<sup>54</sup> this is a fact that sticks in the minds of society.<sup>55</sup> This fact then transformed into a form of expectation towards every woman, that is then transmitted through the media every single day and has been maintained from time to time.<sup>56</sup> Through this kind of identification process, expectations towards women and social roles of women have formed a stereotype that 'women are not criminals.' Women are expected to be adaptable, friendly, nurturing, selfless and must fulfil certain gender roles, namely being good mothers.<sup>57</sup> When these expectations are not met, this stereotype then attaches a stigma to women who commit criminal acts.

Based on the findings in this study, there were three cases in which judges stigmatized female defendant, as they were seen to be violating their role as women (see case of ZH and MM). In the case

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<sup>54</sup> See DANA M. BRITTON, *THE GENDER OF CRIME* 63 (2011); GLAZE & KAEBLE, *supra* note 1, at 6; Darrell Steffensmeier & Emilie Allan, *Gender and Crime: Toward a Gendered Theory of Female Offending*, 22 ANN. REV. SOCIOLOGY 459, 460 (1996).

<sup>55</sup> Myrna S. Raeder, *Gender and Sentencing : Single Moms, Battered Woman, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 909 (1993)

<sup>56</sup> See Pauline K. Brennan & Abby L. Vandenberg, *Depictions of Female Offenders in FrontPage Newspaper Stories: The Importance of Race/Ethnicity*, 2 INT'L J. Soc. INQUIRY 141, 145 (2009); Raeder, *supra* note 6, at 909.

<sup>57</sup> See Alice H. Eagly & Valerie J. Steffen, *Gender and Aggressive Behavior: A MetaAnalytic Review of the Social Psychological Literature*, 100 PSYCHOL. BULL. 309, 310 (1986); Alice H. Eagly, *The His and Hers of Prosocial Behavior: An Examination of the Social Psychology of Gender*, 64 AM. PSYCHOLOGIST 644, 645 (2009)

of ZH, the stigma was used as an aggravating factor to sentence ZH to death penalty. The judges were of the view that the defendant role as a wife should bring them perennial responsibilities to love and respect her husband and wife should be able to create order in the family. In the case of drug offences, the defendant MM, who was a parent, were demanded by the judges to be 'a role model for her children.'

#### **E. The Absence of Judges' Considerations on Mitigating Factors**

In Article 197 Paragraph (1) (f) Criminal Procedural Code it is explained it is explained that a judgment should contains articles that are used as the basis for sentencing and articles of legislation that form the legal basis of the decision, accompanied by aggravating and mitigating factors leading to the defendant's sentence. Article 197 paragraph (2) of Criminal Procedural Code also states that because of not fulfilling the provisions in paragraph (1) letters a, b, c, d, e, f, h, i, j, k and l, the decision will be null and void. In addition, Article 14 (2) of the ICCPR highlighted that people who are accused of a crime has the right to be presumed innocent until proven by law.

However, in the 32 cases studied in this research, there are found judgments that did not mention mitigating factors for the defendant to not be imposed death penalty. It could be seen in the case of TDT, EL and IR. Despite the failure to include mitigating factors, in the case of EL, the judges in the end did not sentence her with death penalty, but a life-sentence instead. Contrary to this case, in TDT and IR, judges in district court still chose to impose death penalty to her, following the demand of the prosecutor. In this cases, the decision was made without considering the mitigating factors or circumstances related to the defendant, as instructed by Article 197 paragraph 1 of the Criminal Procedural Code. This shows that there are still numbers of judges who do not pay attention to the Criminal Procedural Code, especially related to article 197 paragraph 1. Consequently, following the failure to adhere with the said article, the decision should be declared null and void.

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

On June 26th 2015, President Joko Widodo declared a call for war on Narcotics at the climax of the International Anti-Narcotics Day Commemoration (HAN).<sup>58</sup> President Joko Widodo's call to take steps to eradicate drugs with more intense, crazier, and more comprehensive measures<sup>59</sup> directly influence the surging of number in inmates and death row inmates in correctional facilities (Lapas) throughout

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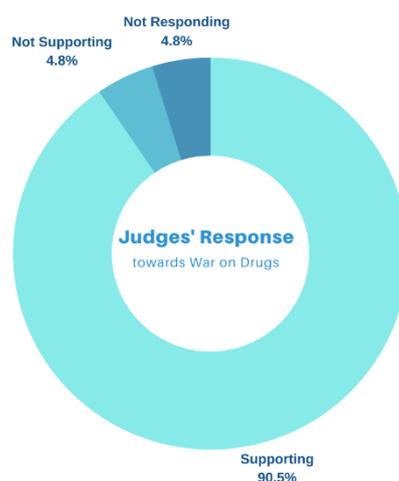
<sup>58</sup> Joko Susilo, 'Presiden nyatakan perang terhadap narkoba' *Antaranews* (Jakarta, 26 Juni 2015) <<https://www.antaranews.com/berita/503644/presiden-nyatakan-perang-terhadap-narkoba>> accessed 28 September 2021.

<sup>59</sup> Lily Rusna Fajirah, 'Jokowi Nyatakan Perang terhadap Bandar Narkoba' *Sindonews* (Jakarta, 24 Februari 2016) <<https://nasional.sindonews.com/berita/1088003/13/jokowi-nyatakan-perang-terhadap-bandar-narkoba>> accessed 04 Oktober 2021.

Indonesia. As of July 7th, 2021, prisons across Indonesia were populated by 253,938 people, when its capacity should be only for 135,981 people. This resulted in a 87% prison overcrowding in correctional facilities.<sup>60</sup>

In decisions related to the death penalty, both in the indictment, charge, or even judgement, the war on drug has often become a point of consideration. Out of 21 data sample of court decisions with drug-related cases in this study, there was only 1 court decision that did not raise this issue on the considerations at all. Meanwhile, the narratives such as 'not supporting government programs on the war on drugs' have become the aggravating factor in the other 19 court decisions (90.5%).

Diagram 20. Judge's Response on the Narrative of War on Drugs in Court Decisions



Not only judgements that referred to war on drugs as the right approach to illicit drug trafficking in Indonesia, there is also a reasonable judgement that did not take such narrative without any further contextualization. In MRW case, one of the judges' mitigating considerations to not impose death penalty to her was because the imposition of the death penalty merely on the basis that her action has hindered Government of Indonesia's program was not appropriate and not considered a comprehensive reasoning. The panel of judges filled by the presiding judge, Erintuah Damanik, S.H., M.H., and the member judges, Johny J.H. Simanjuntak, S.H., M.H. and Tumapunili Marbun, S.H., M.H., also considered aspects of legal certainty, expediency, and fairness which were overlooked by judges' considerations in other decisions. MRW was later not sentenced to death, and was sentenced to life imprisonment as she was found guilty of the crime she was charged with.

<sup>60</sup> ICJR, IJRS, LeIP, ICJR, IJRS, dan LeIP dukung Perpanjangan Kebijakan Pemberian Hak Asimilasi di Rumah, Namun Tidak Cukup Untuk Atasi Darurat Pandemi di Rutan dan Lapas, (ICJR, 2021) < <https://icjr.or.id/icjr-ijrs-dan-leip-dukung-perpanjangan-kebijakan-pemberian-hak-asimilasi-di-rumah-namun-tidak-cukup-untuk-atasi-darurat-pandemi-di-rutan-dan-lapas/>> accessed 28 September 2021.

*"In his charges the Prosecutor did not consider comprehensively why the Defendants should be sentenced to the death penalty, but the Prosecutor in his demand has asked for death penalty on the Defendants only based on aggravating things, namely: The actions of the Defendants hindered the Government's Program in eradicating drugs and the actions of the defendants can damage the next generation of the nation;" – Mitigating Consideration in the Case of MRW<sup>61</sup>*

Judges also reasoned that they would not impose the death penalty on the defendant by citing the decision of the Supreme Court of the Republic of Indonesia No. 39 PK/Pid.Sus/2011 which states that the death penalty is contrary to Article 28 I of the 1945 Constitution and Article 4 of Law Number 39 of 1999 concerning Human Rights.

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

Based on the data sample in this study, there are 13 out of the 32 cases in which the judge refused to impose the death penalty to the defendant and did not fulfil the demands from the prosecutor. Most of the judges gave reasons that were clear enough to be reflected in their considerations in their decisions, although in some other cases there was no reason for the judge's refusal that can be found in their considerations.

Some of the reasons for the judge's refusal to impose the death penalty, among others are because the defendant is not the main perpetrator, there is no evidence of a deterrent effect from the death penalty, consideration of the purpose of punishment, the background of the defendant (e.g. having economic problems, holding status as a single parent, being the backbone of the family), redemption with the victim's family. There are also general reasons given in the form of mitigating factors towards the defendant (e.g. the defendant was honest, regretted his actions, and was cooperative in the trial). Each of the judges' considerations can be described as follows.

#### **1) The defendant is not the main perpetrator of the crime**

Judges in considering the case of DAH refused to sentence her with death penalty as requested by the prosecutor as they considered the role of the defendant in the case. The judge was of the view that the defendant was a victim of an international syndicate whose role was only to receive packages and not to distribute them, so that by considering the aspect of justice, the death penalty was inappropriate and unfit to be imposed on the defendant. Excerpts from the judge's consideration in the decision are:

*"...In this case the Panel of Judges disagrees with the sentence demanded by the Prosecutor, which is death penalty, because the Defendant's role is only as a victim of an international syndicate, and only limited to receiving parcels and does not participate in distributing it. The fair and justifiable punishment is not the one that takes the life of the Defendant but one that would still give her the opportunity to correct her mistakes and in accordance with the sense of justice that prevails in society and justice for the defendant herself...<sup>62</sup>*

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<sup>61</sup> District Court Medan Decision Number 2345/Pid.Sus/2016/PN MDN, p. 68 – 69.

<sup>62</sup> District Court Jakarta Selatan Decision Number 1166/Pid.Sus/2015/PN Jkt.Sel, p. 39.

## 2) No evidence of deterrent effect

In the case of a drug offence with the defendant NA, the judges in their consideration stated that to impose a sentence, the juridical aspect and also other aspects, namely aspect related to justice, psychological aspects, educational aspects and religious aspects where the defendant live and raised, aspects of the defendant's figure, aspects of the philosophy of punishment in order to create justice and avoid disparities in punishment, aspects of the ideal model of the criminal justice system for Indonesia needed to be considered. Based on these aspects, the panel of judges stated that the imposition of death penalty was not appropriate. The judges also stated:

*"... That there is no single study states that the death penalty can yield deterrent effect against illicit drug trafficking criminals."*<sup>63</sup>

## 3) Contradiction with the objective of sentencing

Judges in the case of MN, rejected the demands of the Prosecutor to impose the death penalty on the consideration that the purpose of sentencing was not for retaliation. The Judges stated that the defendant's actions did not have to be repaid with the deprivation of the life of the defendant, namely the death penalty. The death penalty is more appropriate for cases of crimes against human rights. The following is an excerpt from the judge's consideration in the case:

*"against the demand of death penalty by the Public Prosecutor, in the opinion of the judges, basically the objective of sentencing is not for retaliation. This means that the actions of the defendant and witness Desemriadi Aruan or Adi (a separate prosecution) murdering the victim, Mangandar Tua Sihalo, should not be repaid by sentencing the defendant to death penalty. Although in Indonesia the death penalty still existed, but in the opinion of the the Judges it is more appropriate to apply it to against gross violation against human rights, crimes against humanity: genocide and terrorism. In this case, the fact that the Defendant's actions have not fulfilled the elements in such heinous crime, death sentence becomes inappropriate to be imposed to the defendant."*<sup>64</sup>

## 4) Suffered from living in a low-economic family

In the illicit drug case of RBS, judges considered that the purpose of sentencing was not retaliation, but that sentencing aims to have a deterrent effect and provides a lesson for all parties. Judges argues that there must be a commitment from all elements of the nation and institutions and so that the fight of illicit drug offences should not only be focused on the perpetrator. In addition, the panel of judges also considered and made mitigating factors that the defendant did so because of economic pressure. Here is the judge's full opinion:

*"(In relation to the) defence given by the defendant's lawyer, especially related to her role in destroying the future generation and the defedant's structural poverty, the Judges argue in accordance with the fact of the case, that the defendant did her action because she has received Rp20.000.000,- (two million rupiah – or approximately one thousand four hundred USD). Hence,*

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<sup>63</sup> District Court Banda Lhokukon Decision Number 90/Pid.Sus/2015/PN Jkt. LSK, p. 50.

<sup>64</sup> District Court Jakarta Selatan Decision Number Nomor 1166/Pid.Sus/2015/PN Jkt.Sel, p. 39.

*the judges agree with the defendant lawyer's argument especially regarding the structural poverty;*

*Regarding sentencing (as in the argument of the defendant's lawyer), the Judges agreed that the purpose of punishment is not as retaliation it aims to deter and serves as a lesson for all parties that drugs can damage everything. Thus, there must be a commitment from all elements of the nation and institutions, so that the fight against illicit drug trafficking does not only focus on the perpetrators but also in the system. Especially in this case, where it is necessary to ask why drugs can go through the Philippine airport and Kuala Lumpur airport while the Standard Operation Procedure at every airport should have been the same across the world. We are worried that Indonesia will become a global drug market if the Standard Operation Procedure is not applied professionally in every country."*<sup>65</sup>

#### **5) Suffered from living as single parent**

In the illicit drug trafficking case of THW, the judges in their consideration stated that punishment would be considered based on sociological, psychological aspects, and a sense of justice by looking at mitigating and aggravating factor in the defendant.

Judges considered that there should be people who have a bigger role to be sentenced, namely Dani and JIM who handed over the drugs to THW in Ghuang Zo. They should have been severely punished because they belonged to an international network of illicit drug trafficking.

#### **6) Building positive relationships with towards victim's family**

In the case of YR, the panel of judges in their consideration stated that for the sake of her future, the Defendant needs to be given a proper and fair sentence, so that it can improve the defendant's behaviour and lead her to be a good member of society again. In addition, the judge also considered that the defendant's children at the trial stated that they had clearly forgiven her biological mother and still needed the defendant's love and presence as their mother. The following is an excerpt from the judge's consideration in the case:

*"For the sake of the defendant's future, it is necessary to give an appropriate and fair punishment, so that she can improve her behavior and be a good citizen again.*

*The crime committed by the Defendant on the victim's family, especially the children of the Defendant and Victim has clearly caused deep trauma and resulted the loss of affection from their beloved father in a pathetic way. However, the Defendant's children at the trial has stated explicitly that they had forgiven the Defendant, as she is his mother and they still need affection from the Defendant as a mother and does not want to lose the defendant, so the Defendant's children beg for clemency to the Court."*

#### **7) Role as breadwinner**

In the murder case with defendant JML, during the trial the panel of judges considered the purpose of the punishment which should not be for revenge but instead for education and development so that

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<sup>65</sup> District Court Semarang Decision Number 295/Pid/Sus/2012/PN.SMG, p. 50-51.

the defendant could repel their mistake and eventually change their behaviour. The judges in the end did not sentence her with death penalty, and only sentenced JML to 20 years in prison on a mitigating factor: the situation of the defendant who still has dependent children.

*“Mitigating factors: That the Defendant has dependent children” – Mitigating factors the JML case*

MRW, the defendant that managed to ‘escape’ from death penalty sentence and was in the end sentenced to life imprisonment also showed the aspect of "the backbone of the family" as a basis for not imposing death penalty. The judges heard the written legal defence (*Pleidoi*) submitted by MRW, and considered it, by the exact word of the Court, as a ‘clementie’ (because it did not directly relate to the contents of the indictment, but contains a request for consideration from the psychological and sociological perspective of the Defendant). MRW in the ‘clementie’ stated that she has realized the wrong in her actions and made promise that she would not repeat them. She also said that she has 2 (two) small children who are dependent to her.

*“The application dated December 15th, 2016, basically requested that the Defendants be sentenced to the lightest sentence on the grounds:*

- 1. The defendants have realized their mistake and promised not to do it again;*
- 2. The defendants are married (husband and wife) and have 2 (two) young dependent children; Considering, because the plea from the Defendants' lawyer and the plea from the Defendants did not include any substance to refute prosecutor's indictment, the Judges concluded that the plea given was in the form of a Petition ('Clementie'), therefore this petition requesting the Judge to sentence the defendants with the lightest punishment as possible really came from their deepest conscience without injuring the meaning of justice, benefit and legal certainty, and thus will be considered simultaneously with the psychological and sociological aspects” - Judges' considerations in MRW's case<sup>66</sup>*

## **8) General mitigating factors**

In the case of FT and WL, explanations regarding mitigating factors in the Court's decision, could be categorized as it presented the same pattern. The usual mitigating factors used are: the defendant was "polite", "honest", "regretted her actions", and "has family dependents to her".

The prosecutor charged both WL and FT for death penalty, but the judge decided differently, sentencing WL with life imprisonment – although she was the main perpetrator – and 20 years prison time for FT, as the judge believed that FT was not the mastermind of this criminal incident and was only a courier. In FT's case, the judges highlighted that demanding death penalty was felt quite excessive and it did not reflect the justice for the defendant.

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<sup>66</sup> District Court Medan Decision Number 2345/Pid.Sus/2016/PN MDN, p. 67.

## 9) No specific reasoning of mitigating factors

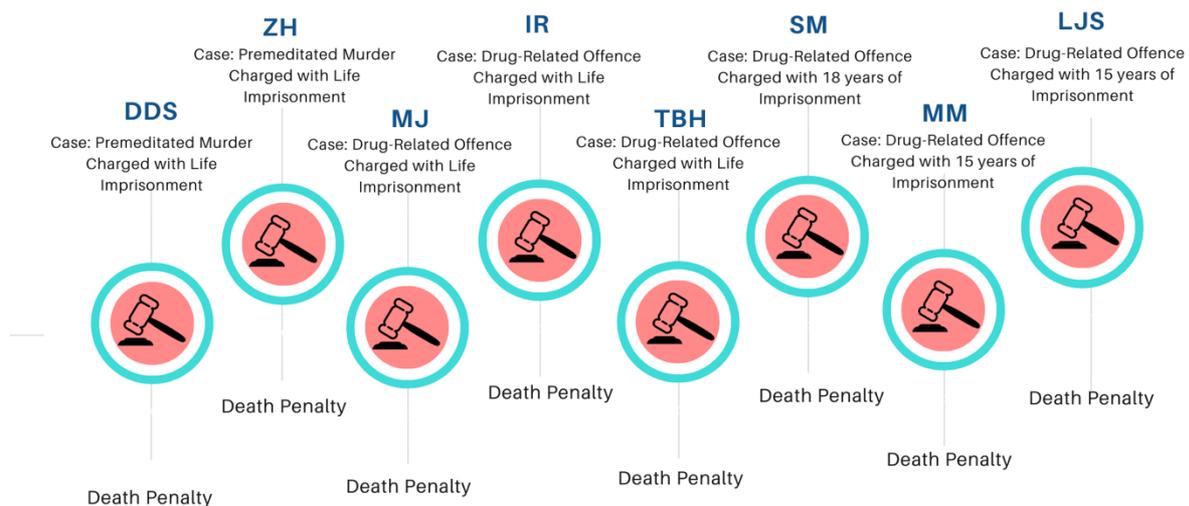
Based on the 32 decisions examined in this study, there are 3 decisions for which the death penalty charge was not granted by the judge. However, in the decision, the panel of judges did not explain the grounds for rejecting the death penalty charge. This could be found in the case of SZ, WSA and EL.

### H. Judges' Considerations to Impose the Death Penalty

In this report, there are 8 (eight) cases of women who were not charged with death penalty by the Prosecutor, but instead only with life imprisonment, 18 years imprisonment and 15 years imprisonment. However, in the decision, the judges decided to do 'ultra petita'<sup>67</sup> by sentencing them with the death penalty. Of these 8 (eight) cases (see Chart 1), the majority committed illicit drug trafficking offences (6 cases) and the other 2 (two) cases are involving premeditated murder.

Chart 1. Female Defendants who were Sentenced to Death without Being Charged with Death Penalty

#### Female Death Penalty Convicts who was Sentenced without Being Charged with Death Penalty



#### 1. The death penalty was considered constitutional

In the case of DDS, the judges ruled that death penalty is still a constitutional punishment to be imposed and it is needed to punish heinous crimes. Further the judges said that death penalty should be imposed to someone who committed such crime that creates disorder, chaos, and massive loss to people.<sup>68</sup>

<sup>67</sup> Ultra Petita is the imposition of a decision by the judges on a case that exceeds the demands or charges submitted by the prosecutor or makes a decision on a case that is not requested by the public prosecutor.

<sup>68</sup> District Court Siak Decision Number 371/Pid.B/2014/PN.Sak, p. 38.

## 2. The death penalty as a punishment for indecent acts committed by women

In case of ZH, the judges explained the aggravating factors for death penalty by stigmatizing ZH, mentioning that ZH has the obligation to love and respect her husband. ZH were also judged for having relationship other than the one with her husband, which then be considered as inappropriate. Even further, the judge went to explore the history of ZH's sexual relationship with that other person.

## 3. War on drugs and xenophobic narratives

While in case of MJ, the judges did not touch upon the aspect of vulnerability that was included in MJ's defence. The judges ruled that for MJ to be a courier in illicit drug trafficking had directly contribute to damaging the younger generations. The reason for judges to sentence her to death penalty was closely related to the war on drugs narrative. Additionally, the judges also deployed xenophobic narrative by stating in their judgment:

*“....to deter other Foreign Citizens from bringing illegal drugs to or conduct illicit drug trafficking in the jurisdiction of Indonesia, especially in enormous quantities.”<sup>69</sup>*

Similar considerations are also given in SM's case, even though SM is Indonesian. The judges reasoned their consideration based on the grounds that there is involvement of a foreigner and SM has succeeded in acting as a courier in illicit drug transaction for 5 (five) times.<sup>70</sup> The same thing also happened in the MM case, where the narrative of the war on drugs was also deployed as an aggravating reason for judges to impose the death penalty, relating it with the involvement of international networks and repeated transaction.<sup>71</sup>

In the case of IR, the death penalty was imposed by the judge on the grounds of war on drugs. Further, the judges also based their sentence on the ground that the defendant's act was not corresponding to the Government's program in eradicating illicit drug trafficking and that her act has contributed in destroying the nation's future generation.<sup>72</sup>

In the LJS case, the judge rejected the prosecution's 15-year prison demand for the defendant on the grounds that the public prosecutor did not elaborate on the aggravating reasons to support that sentence. According to the judge, severe punishment should be imposed to the defendant, to break the chain of illicit drug trafficking. They also stated that LJS needs to be removed from society. The judge argued LJS's statement that used her child's condition as a mitigating reason should not be considered.<sup>73</sup>

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<sup>69</sup> District Court Sleman Decision Number 385/PID.B/2010/PN.SLMN, p. 27.

<sup>70</sup> District Court Sleman Decision Number 410/Pid.B/PN.Slm, p. 35-36.

<sup>71</sup> District Court Pinrang Decision Number 09/Pid.B/2015/PN.Pin.

<sup>72</sup> District Court Surabaya Decision Number 2451/Pid.sus/2015/PN.Sby, p. 68.

<sup>73</sup> District Court Denpasar Decision Number 901/Pid.Sus/2012/PN.Dps, p. 34-35.

#### 4. Unclear reasoning in imposing the death penalty

In the TBH case, the judge outlined the purpose of the punishment, which was not for revenge or based on hatred, but as a legal action that should be educational, in which it should include the aim to educate the community, based on the value of legal and social or community justice. However, the confusing part is that despite all those considerations, in the end, the sentence given to the defendant is death penalty.<sup>74</sup>

Based on the analysis above, it could be pointed out that gender aspects are rarely considered in the trial involving women. This finding is parallel to what was reported by Cornell Centre on the Death Penalty Worldwide: that women as defendants receive severe punishments because there is no acknowledgment of how gender and culture of patriarchy affect how and why women commit a crime.<sup>75</sup> The judicial process in women's cases tends to ignore other actors who influence women to commit crimes.<sup>76</sup> In the context of Indonesia, the report also states that in general, the Indonesian criminal justice system fails to consider gender violence and other mitigating evidence to effectively determine the degree of wrongdoing, coercion, or other issues of intent.<sup>77</sup>

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<sup>74</sup> District Court Boyolali Decision Number 139/Pid.Sus/2011/PN.Bi, p. 43, 45.

<sup>75</sup> Cornell Center on the Death Penalty Worldwide, 2018, Judged for More Than Her Crime A Global Overview of Women Facing the Death Penalty, hlm. 8 in Adhigama A. Budhiman, et.al, *Laporan Situasi Kebijakan Pidana mati di Indonesia 2020: Mencabut Nyawa di Masa Pandemi*, Jakarta: ICJR, p. 27.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*, p. 26-27.

## 5. Conclusion and Recommendation

### A. Conclusion

The death penalty is created for the most vulnerable and marginalized groups in society. Death row population is consistently filled with the poor, economically vulnerable, ethnic minorities, people with intellectual and psychosocial disabilities, foreign nationals, indigenous persons, or member of marginalized communities. People living in poverty are disproportionately affected by the death penalty. There is a strong relation between poverty and socioeconomic discrimination with the death penalty.

The death penalty is 'reserved for the poor'. The use of death penalty has been proven to cause discrimination. When the death penalty is imposed against women, the discrimination is not only related to poverty and socio-economic background, but also about gender-based discrimination.

This study which examined 32 district court death penalty case's decision involving women as the defendant in Indonesia from 2002-2020 found:

- Women in the vortex of death penalty in Indonesia come from illicit drug trafficking offences and premeditated murder.
- Most women in the vortex of death penalty are of productive age (22-40 years).
- Most women in the vortex of death penalty neither have work nor an income.
- Most women in the vortex of death penalty are not the main perpetrators in the crime.
- There is a vulnerability of women in the vortex of death penalty, ranging from their history as victims of violence, their entanglement in exploitative intimate relationships, committing criminal acts under threat, to being victims of child marriage.
- Narratives of war on drugs are used inconsistently in the application of the death penalty for women and causes discrimination towards women in the vortex of death penalty.
- There are several considerations given by judges to reject the imposition of death penalty based on gender and socio-economic background.
- However, it is common that gender-based vulnerability aspects and socio-economic background to not be used as a reasoning to reject the imposition of death penalty.
- The defendant's own appointment of legal counsel does not automatically reflect the quality of an effective defence.
- It is difficult for female defendants who come from the lower middle class to gain access to the right to legal assistance and an effective defence.

## **B. Recommendation**

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. Take steps to amend the law, aiming to abolish the death penalty by prioritizing the perspective of human rights and humanity in accordance with the values of Pancasila and the Constitution;
2. Encourage criminal procedural law reform to be more attentive to gender-based vulnerabilities and socio-economic backgrounds of people facing the death penalty and inside the criminal justice system in general;
3. Encourage criminal procedural law reform 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 criminal procedural law reform to include training on gender-based violence with module including but not limited to domestic violence and the tendency of coercive control that makes women commit crimes that can be punished by the death penalty;
5. Conduct studies and or assessments of the conditions of people in death row, and make sure that their opportunity to obtain clemency or commutation from the President must be available as much as possible.

### **For Law Enforcement Institutions and Supreme Court:**

1. Establish internal guidelines on mainstreaming of gender perspectives in the case-handling;
2. Ensure the conduct of training on gender-based violence and its relationship to a person's tendency to commit a crime;
3. Ensure that the handling of each cases considers the traumatic experiences of women both in the process of prosecution or sentencing;
4. In the spirit of abolishing the death penalty, in the current conditions, the Supreme Court should ensure that judges' shares the same high standards (legal unity) in the examination of cases charged with the death penalty;
5. In the spirit of abolishing the death penalty, in the current situation, the Attorney General's Office, and the Indonesian National Police, capacity building programs 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 of criminal justice system to ensure human rights mainstreaming;
3. Optimize the monitoring of criminal justice system to ensure the mainstreaming of a gender perspective in criminal justice practices, especially in the 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 21<sup>st</sup> century!

## Authors' Profile

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## ICJR Profile

Institute for Criminal Justice Reform, abbreviated as ICJR, is an independent research institution focusing on criminal law reform, criminal justice system reform, and legal reform in general in Indonesia.

One of the most crucial issues that is experienced by Indonesia during this transition period is reforming the legal system and criminal justice system into a more democratic direction. In the past, criminal law and criminal justice system were used as a tool to support the governing authoritarian power, in addition to being used as social engineering tools. Now is the time for the orientation and instrumentation of criminal law as a tool power to be shifted as a tool to support the work of democratic political system and respecting human rights. This is the challenge in the path to restoring criminal law and the criminal justice system during the transition period.

To answer the abovementioned challenge, it is necessary to make planned and systematic measures to resolve such a situation. A grand design for criminal justice system reform and legal reform must be initiated. The criminal justice system has been known to be placed in the strategic place for the framework to build the Rule of Law and respect towards human rights. Democracy can only function well with the concept that Rule of Law is institutionalized. Criminal justice system reform that is human rights-oriented is a “conditio sine qua non” with the process of democratization institutionalization during the transition period.

The measures in conducting legal transformation and criminal justice system to be more effective are currently ongoing right now. However, the measures must generate wider support. The Institute for Criminal Justice Reform is taking the initiative to support those measures, providing support in the context of building respect towards the Rule of Law and at the same time building human rights culture within the criminal justice system. This is the reason for ICJR’s existence.

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