INSTITUTE FOR CRIMINAL JUSTICE REFORM

Series 2: ICJR Thematic Report on Death Penalty

Torture in the Cases of Death Penalty in Indonesia:

ONE TOO MANY

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Torture in the Cases of Death Penalty in Indonesia: "One Too Many"

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Foreword

The death penalty remains to be a historical liability and a hindrance to legal reform in Indonesia even though there has been a political will from the government to moderate Indonesian criminal law through the ratification of the new Criminal Code on December 6, 2022. Despite this, criticism of the existing regulations must still be voiced. To ensure continuous understanding and discourse regarding the abolition of death penalty, since 2021 ICJR has published an annual thematic report in addition to the annual case data report. For this year, the ICJR centers on the theme of torture to point out that the criminal justice system in Indonesia has thus far been unable to ensure adequate protection of the rights of people facing the death penalty, especially concerning the issue of torture.

Interesting findings ranging from torture in the judicial process to the death row phenomenon, which is categorized as a form of torture, have been recorded in the practice of capital punishment in Indonesia. On the aspect of the right to a fair trial, there has also been no evidence of the fulfillment of the right to a fair trial at a higher standard compared to other criminal cases as mandated in various international human rights instruments.

At the same time, Indonesia passed a new Criminal Code on 6 December 2022, which will be effective for another 3 years. In the latest Criminal Code, there is moderation regarding capital punishment, such as a probationary period and opportunities for direct commutation of capital punishment to other types of punishment and special criminalization for acts of torture. However, other broader issues, such as the death row phenomenon and acts of torture by law enforcement officials, are not yet included in the priority list by the government of Indonesia. In addition, the draft amendment to the Criminal Procedure Code has not been discussed by the government of Indonesia.

We thank all the parties who contributed to this report, especially the ICJR researchers who have completed this report. Finally, we dedicate this research to anti-death penalty activists who never stop fighting for the issue. We will achieve victory in time because we are not alone in this winding journey.

Jakarta, 16 December 2022

Erasmus A.T. Napitupulu
Executive Director of ICJR

1. Introduction

As of May 2022, as many as 144 countries and territories in the world have abolished the death penalty. The global debate regarding capital punishment has yet to be resolved. Article 6 paragraph (1) of the International Covenant on Civil and Political Rights (ICCPR) protects a person's right to life, but Article 6 paragraph (2) does not explicitly explain that the practice of capital punishment is a violation of that right to life. It is explained in paragraph (2) of the article that in countries that have not abolished the death penalty, death penalty decisions can only be imposed for some of the most serious crimes, and this sentence can only be imposed based on a final decision handed down by a competent court. This article does not agree that capital punishment is permissible but does not emphasize that capital punishment is contrary to international human rights law either. However, it is important to note that based on research conducted by Juan E. Méndez, who is the UN Special Rapporteur on torture, and other forms of cruel, inhuman or degrading treatment or punishment, international standards, and practice have led to efforts to state that the death penalty per se is a violation of international human rights.[1]

According to the research conducted by Mendez, it can be concluded that criminal standards and practices in fact demonstrate that the implementation of the death penalty will not be separated from violations of human rights. ***The ability of States to impose the death penalty without violating the prohibition of torture and other cruel, inhumane, and degrading treatment is becoming increasingly restricted.***[2] The implementation of capital punishment fails to respect the physical dignity of human beings, causing physical and mental suffering, which in turn can result in violations of the prohibition against torture and the anti-torture convention.[3]

Various reports on the implementation of capital punishment internationally have reported the inevitability of torture in the implementation of capital punishment. The European Union states that the death penalty is a path built out of torture. In many cases, physical and psychological torture was experienced in obtaining confessions in death penalty cases, leading to inhumane practices.[4] There is a clear association between the practice of torture and the execution of capital punishment, both in the context of criminal justice, for example, in the effort to obtain confessions, and in the occurrence of the death row phenomenon.[5]

In the Indonesian context, those two problems regarding torture are evident as well. ICJR's research in 2019 entitled "Menyelisik Keadilan yang Rentan: Hukuman Mati dan Fair Trial di Indonesia" reviews findings on allegations of torture in death penalty cases. From a total of 306 court decisions examined, ICJR found 23 claims of torture, submitted by both the accused and witnesses at trial. However, only 10 claims, consisting of 7 claims by the accused and 3 claims by witnesses, were finally examined or

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[1] Juan E. Méndez, *The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment* in Human Rights Brief 20, No.1, 2012, pp. 2-6

[2] *The ability of States to impose the death penalty without violating the prohibition of torture and CIDT is becoming increasingly restricted. Ibid.*

[3] *Ibid.*

[4] https://www.eeas.europa.eu/eeas/death-penalty-degrading-path-marked-torture_en?s=186

[5] https://www.ohchr.org/en/press-releases/2022/10/un-experts-warn-associated-torture-and-cruel-punishment

considered by the judge.[6] Out of a total of 10 claims of torture examined, none of them was declared proven; instead, 4 claims of torture were denied or declared not proven. These findings indicate how problematic the process of examining allegations of torture is.

Forms of torture in the judicial process also occur, such as psychological pressure and severe physical violence, and are often experienced by defendants and witnesses during investigative examinations, particularly when they are asked for information in the Minutes of Examination (*Berita Acara Pemeriksaan/BAP*) which are processed without the assistance of a legal counsel. In this case, torture is often carried out to obtain confessions or information according to the wishes of the investigator.

We also need to emphasize that the permissibility of the continued implementation of death penalty must be accompanied by the obligation to fulfill the right to a fair trial in applying cases. Unfortunately, violations of the right to a fair trial, for example, the right to legal aid, evidence that is beyond reasonable doubt, as well as the presence of witnesses and mitigating experts, are frequently violated.

In the process of carrying out capital punishment for death row inmates, there have been violations of the anti-torture convention regarding the prohibition of inhumane and degrading treatment. Bad treatment of death row inmates occurs in the form of the following but is not limited to excessive restrictions on the movement of death row inmates, either through seclusion or permission to walk outside the cell which is only given one hour per day, insufficient intake of nutritious food, limited visiting times from family or legal counsel, excessive use of handcuffs and restraining devices, disproportionate disciplinary measures, lack of periodic physical and psychological health care, and limited access for death row inmates to books and other activities within the prison. This kind of treatment that takes place during the waiting period that is too long has debilitating effects on the mental and physical health of the death row inmates. In some cases, severe psychological pressure can also emerge as a result of the imposition of a sentence in an unfair trial, resulting in an unreasonable death penalty compared to the crime committed.[7] This report will present once again evidence that capital punishment cannot be avoided from the occurrence of torture, as stated by Mendez: "***The ability of States to impose the death penalty without violating the prohibition of torture and other cruel, inhumane, and degrading treatment is becoming increasingly restricted***".

[6] https://icjr.or.id/wp-content/uploads/2019/01/Menyelisik-Keadilan-Yang-Rentan.pdf
[7] https://icjr.or.id/wp-content/uploads/2022/03/ICJR-Fenomena-Deret-Tunggu.pdf

2. Research Method

This study aims to explore the findings of torture in the most recent death penalty cases. To obtain the latest data, considering the limited time in conducting research, the decisions used as sample data in this study were restricted to cases registered in 2021. Based on the database of death penalty cases managed internally by ICJR, there were 91 death penalty cases throughout Indonesia with case registration numbers in 2021.

We define death penalty cases as cases that entail death penalty indictments and/or sentences. Data on death penalty cases were collected through case tracking on various online reports. The initial findings from online news media were further confirmed to ensure the accuracy of the data obtained with information from the following two sources: (1) Case Tracing Information System (*Sistem Informasi Penelusuran Perkara/SIPP*) – the website of each district court that heard the case; and, (2) documents of court decisions obtained from the website of the Directory of Supreme Court Decisions (https://juangan3.mahkamahagung.go.id/).

Of the total 91 death penalty cases registered in 2021, almost all of them do not have permanent legal force, partly because they are awaiting the reading of the first-level decision or are in the process of filing legal action. As of January 2022, at least 85 cases out of a total of 91 cases have been decided at the first level. However, out of a total of 85 cases, there are only 59 cases whose first-instance decision documents are available. Defendants in two of these cases were not prosecuted to death but were only sentenced to death at the legal effort level. To ensure the uniformity of the sample data in this study, which are decisions that meet the criteria of "prosecuted and/or sentenced (at the first level) with death penalty", these two cases were not included in this study. Thus, the data selected for this research consist of as many as 57 first-level decisions with 69 defendants in the following list:

Table 1 List of Sample Data of Court Decisions

Case Code	**Case Registration Number**	**District Court**	**Type of Cases**
T1	1286/Pid.Sus/2021/PN Mdn (Defendant 1)	Medan District Court	Narcotics
T2	1286/Pid.Sus/2021/PN Mdn (Defendant 2)	Medan District Court	Narcotics
T3	1286/Pid.Sus/2021/PN Mdn (Defendant 3)	Medan District Court	Narcotics
T4	1286/Pid.Sus/2021/PN Mdn (Defendant 4)	Medan District Court	Narcotics

T5	119/Pid.Sus/2021/PN Kla (Defendant 1)	Kalianda District Court	Narcotics
T6	119/Pid.Sus/2021/PN Kla (Defendant 2)	Kalianda District Court	Narcotics
T7	119/Pid.Sus/2021/PN Kla (Defendant 3)	Kalianda District Court	Narcotics
T8	168/Pid.Sus/2021/PN Bls (Defendant 1)	Bengkalis District Court	Narcotics
T9	168/Pid.Sus/2021/PN Bls (Defendant 2)	Bengkalis District Court	Narcotics
T10	570/Pid.Sus/2021/PN Jkt.Pst (Defendant 1)	Jakarta Pusat District Court	Narcotics
T11	570/Pid.Sus/2021/PN Jkt.Pst (Defendant 2)	Jakarta Pusat District Court	Narcotics
T12	124/Pid.Sus/2021/PN Bna (Defendant 1)	Banda Aceh District Court	Narcotics
T13	124/Pid.Sus/2021/PN Bna (Defendant 2)	Banda Aceh District Court	Narcotics
T14	124/Pid.Sus/2021/PN Bna (Defendant 3)	Banda Aceh District Court	Narcotics
T15	125/Pid.Sus/2021/PN Bna (Defendant 1)	Banda Aceh District Court	Narcotics
T16	125/Pid.Sus/2021/PN Bna (Defendant 2)	Banda Aceh District Court	Narcotics
T17	125/Pid.Sus/2021/PN Bna (Defendant 3)	Banda Aceh District Court	Narcotics
T18	125/Pid.Sus/2021/PN Bna (Defendant 4)	Banda Aceh District Court	Narcotics
T19	995/Pid.Sus/2021/PN Tjk	Tanjung Karang District Court	Narcotics
T20	17/Pid.B/2021/PN Skh	Sukoharjo District Court	Premeditated murder

T21	167/Pid.Sus/2021/PN Bls	Bengkalis District Court	Narcotics
T22	142/Pid.Sus/2021/PN Bls	Bengkalis District Court	Narcotics
T23	143/Pid.Sus/2021/PN Bls	Bengkalis District Court	Narcotics
T24	254/Pid.Sus/2021/PN Btm	Batam District Court	Narcotics
T25	651/Pid.Sus/2021/PN Plg	Palembang District Court	Narcotics
T26	893/Pid.Sus/2021/Pn Plg	Palembang District Court	Narcotics
T27	24/Pid.Sus/2021/PN Mdn	Medan District Court	Narcotics
T28	105/Pid.Sus/2021/PN Pal	Palu District Court	Narcotics
T29	176/Pid.Sus/2021/PN Pkb	Pangkalan Balai District Court	Narcotics
T30	177/Pid.Sus/2021/PN Pkb	Pangkalan Balai District Court	Narcotics
T31	484/Pid.Sus/2021/PN Plg	Palembang District Court	Narcotics
T32	672/Pid.Sus/2021/PN Mdn	Medan District Court	Narcotics
T33	894/Pid.Sus/2021/PN Plg	Palembang District Court	Narcotics
T34	1300/Pid.Sus/2021/PN Mdn	Medan District Court	Narcotics
T35	236/Pid.Sus/2021/PN Sky	Sekayu District Court	Narcotics
T36	1554/Pid.B/2021/PN Mdn	Medan District Court	Premeditated murder
T37	262/Pid.Sus/2021/PN Mks	Makassar District Court	Narcotics

T38	272/Pid.Sus/2021/PN Tjb	Tanjung Balai District Court	Narcotics
T39	252/Pid.Sus/2021/PN Stb	Stabat District Court	Narcotics
T40	271/Pid.Sus/2021/PN Tjb	Tanjung Balai District Court	Narcotics
T41	1924/Pid.Sus/202/PN Mdn	Medan District Court	Narcotics
T42	136/Pid.B/2021/PN Olm	Oelamasi District Court	Premeditated murder and violence against children
T43	569/Pid.Sus/2021/PN Jkt.Brt	Jakarta Barat District Court	Narcotics
T44	150/Pid.Sus/2021/PN JKT.SEL	Jakarta Selatan District Court	Narcotics
T45	126/Pid.Sus/2021/PN Bna	Banda Aceh District Court	Narcotics
T46	27/Pid.Sus/2021/PN Idi	Idi District Court	Narcotics
T47	28/Pid.Sus/2021/PN Idi	Idi District Court	Narcotics
T48	29/Pid.Sus/2021/PN Idi	Idi District Court	Narcotics
T49	30/Pid.Sus/2021/PN Idi	Idi District Court	Narcotics
T50	33/Pid.Sus/2021/PN Idi	Idi District Court	Narcotics
T51	164/Pid.Sus/2021/PN Idi	Idi District Court	Narcotics
T52	71/Pid.Sus/2021/PN Idi	Idi District Court	Premeditated murder
T53	75/Pid.Sus/2021/PN Idi	Idi District Court	Narcotics
T54	138/Pid.Sus/2021/PN Idi	Idi District Court	Narcotics
T55	136/Pid.Sus/2021/PN Idi	Idi District Court	Narcotics
T56	139/Pid.Sus/2021/PN Idi	Idi District Court	Narcotics
T57	175/Pid.Sus/2021/PN Idi	Idi District Court	Narcotics
T58	176/Pid.Sus/2021/PN Idi	Idi District Court	Narcotics
T59	177/Pid.Sus/2021/PN Idi	Idi District Court	Narcotics

T60	178/Pid.Sus/2021/PN Idi	Idi District Court	Narcotics
T61	179/Pid.Sus/2021/PN Idi	Idi District Court	Narcotics
T62	163/Pid.Sus/2021/PN Jth	Jantho District Court	Narcotics
T63	162/Pid.Sus/2021/PN Jth	Jantho District Court	Narcotics
T64	65/Pid.Sus/2021/PN Lsk	Lhoksukon District Court	Narcotics
T65	67/Pid.Sus/2021/PN Lsk	Lhoksukon District Court	Narcotics
T66	84/Pid.Sus/2021/PN Skl	Singkil District Court	Child rape resulting in death
T67	85/Pid.Sus/2021/PN Skl	Singkil District Court	Child rape resulting in death
T68	33/Pid.B/2021/PN Sml	Saumlaki District Court	Premeditated murder
T69	325/Pid.Sus/2021/PN Tjb	Tanjung Balai District Court	Narcotics

In analyzing the decision data above, this research focused on two aspects, namely the aspect of torture and the aspect of fulfilling other rights to a fair trial. Although the right to be free from torture is part of the right to a fair trial, this research report spares a dedicated portion to discuss the aspect of torture, which includes anything occurring during the trial process and those arising from the death row phenomenon when a death row convict has undergone a trial and is currently awaiting his/her execution.

First, the aspect of finding indications of torture (including verbal, physical, or psychological pressure/intimidation) against the accused and witnesses was explored through the information contained in court decisions. This information can be found in the defendants' testimonies, witness statements, defense arguments, or the presence of Police Investigator which are submitted to the trial to explain the course of the examination in the investigation process where there is an alleged act of torture. Meanwhile, other aspects of torture discussed in this study are related to the analysis of the death row phenomenon faced by death row inmates.

The second aspect which constitutes the focus of this research is the fulfillment of the right to a fair trial. Considering that the analysis in this study merely relies on the information contained in the decision documents, the fair trial issues discussed only cover several issues related to legal aid and defense

opportunities, the process of arrest and detention, compliance with the principle of beyond reasonable doubt in proving cases, and considerations of judges regarding mitigating circumstances and attitude towards death penalty.

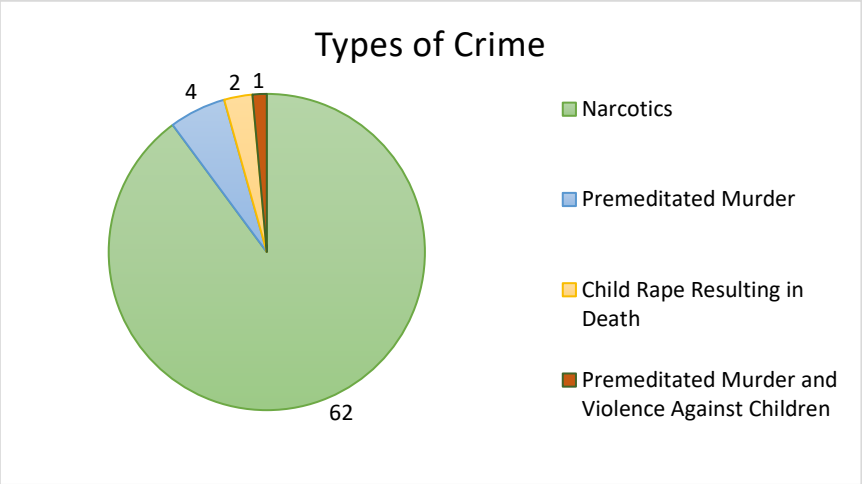
The analysis related to the right to legal aid and defense pertains to the availability of legal advisors from the level of investigation to trial. Some parts of the analysis in this research also include an assessment of the quality of the defense, which can be seen from the presence or absence of exceptions (objection notes), written or oral defense by legal advisers, the use of defense opportunities through the submission of mitigating witnesses/experts, and trends in the use of testimonies from a crown witness (i.e., a defendant in the same case who is prosecuted in a separate/*splitsing* case file). In this section, we also identify whether there are arguments in the defense that specifically concern the fulfillment of the right to legal aid, including how the court responds to the defense through the judge's considerations.

Analysis related to the process of arrest and detention takes into account the duration of arrest and detention as well as findings during the arrest process, especially in narcotics cases which are longer than the provisions in the Criminal Procedure Code. Meanwhile, the problem of complying with the principle of beyond reasonable doubt is apparent in the analysis of data findings on key witnesses with the status of Wanted Persons List (*Daftar Pencarian Orang/DPO*) in the construction of cases and trends in the composition of the types of aggravating witnesses examined during trials.

The final analysis in this study alludes to the problems posed by the administrative framework of the decision documents, which are also very closely related to the process of discovering violations of fair trial rights. For example, the duration of detention that is stated does not match the real needs, there is no information about the period of arrest or the status of legal assistance before the trial period, the information conveyed in the decision documents does not match the information in the defense documents (e.g., exceptions, plea) and prosecution documents (e.g., indictments, charges), and there are errors or other inaccuracies in the technical writing. This area has almost been overlooked in previous research, which was based on decisions, so in this study, it is important to raise, specifically to describe its relation to the fulfillment of rights to a fair trial.

3. Demographic Data on Death Penalty Case Research Samples for 2021

Graph 1. Types of Cases Prosecuted and/or Sentenced to Death



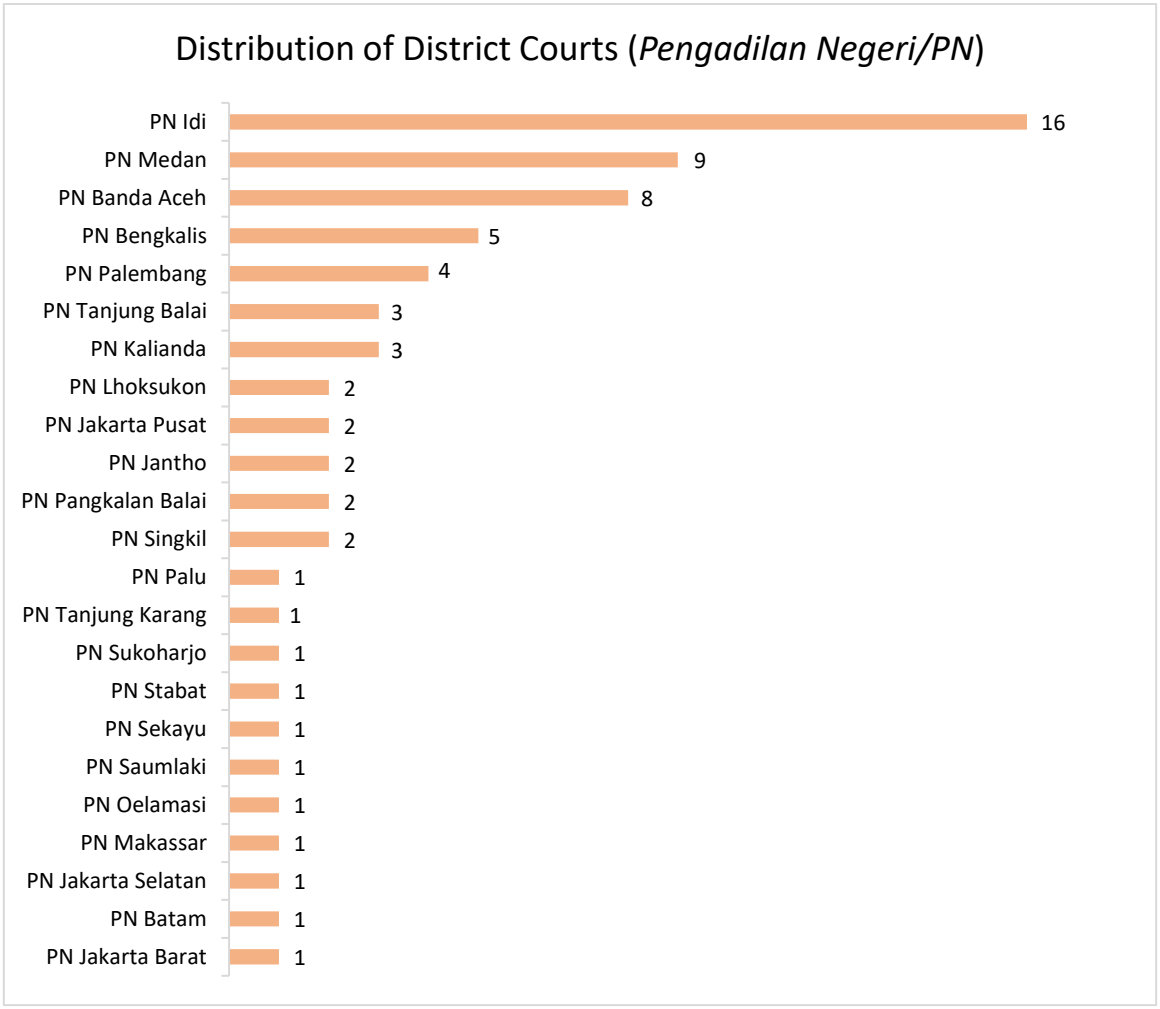
Source: ICJR's Internal Database which was updated in January 2022

Throughout 2021, narcotics defendants will make up the majority of defendants prosecuted or sentenced to death. As many as 62 of the 69 defendants in death penalty cases (90%) who were the samples of this study committed narcotics crimes. All of these 62 defendants were charged with violating the law of selling and buying or being intermediaries in buying and selling, exchanging, or handing over Category I narcotics.[8] A total of 61 defendants were found guilty, and 1 defendant (T51) was acquitted.

Meanwhile, 7 defendants (10%) were found in death penalty cases other than narcotics crimes, consisting of 5 defendants from homicide cases and 2 defendants from child rape cases which resulted in death.

[8] Law Number 35 of 2009 concerning Narcotics, Article 114 Paragraph (1)

Graph 2. Distribution of Death Penalty Cases by District Court



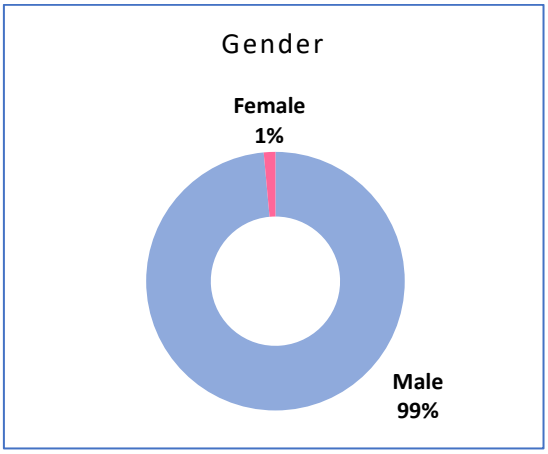
Source: ICJR's Internal Database which was updated in January 2022

The graph above shows the high number of death penalty cases based on the distribution of court districts in 2021. The three courts with the highest number of defendants in narcotics cases, which also illustrate the general trend of cases, are the Idi District Court, the Medan District Court, and the Banda Aceh District Court. 16 of the 69 defendants (23%) were tried at the Idi District Court, 9 defendants (13%) at the Medan District Court, and 8 defendants (11%) at the Banda Aceh District Court.

As many as 15 of the 16 defendants at the Idi District Court were defendants in narcotics cases and the remaining 1 was a defendant in a premeditated murder. As many as 8 of the 9 defendants at the Medan District Court were in narcotics cases and the remaining 1 was a defendant in a premeditated murder case. Meanwhile, all of the defendants at the Banda Aceh District Court were defendants in narcotics cases.

For non-narcotics crimes, they were found at Idi District Court (1 defendant), Medan District Court (1 defendant), Sukoharjo District Court (1 defendant), Oelamasi District Court (1 defendant), Singkil District Court (2 defendants), and Saumlaki District Court (1 defendant).

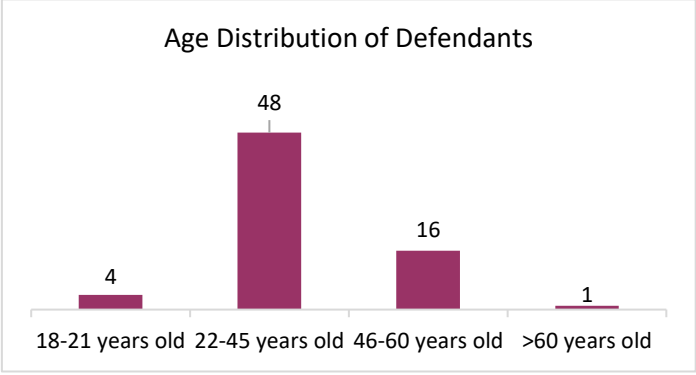
Graph 3. Distribution of Death Penalty Convicts by Gender



Source: ICJR's Internal Database which was updated in January 2022

In terms of gender, 68 defendants (99%) in death penalty cases were male. Only 1 female defendant was tried for a narcotics crime at the West Jakarta District Court (defendant T43). In the T43 case, the Panel of Judges considered the gender vulnerability of the defendant as a woman who was used in the sale and purchase of narcotics although this was not explicitly stated as a mitigating factor. Even though the prosecutor in the T43 case demanded a death penalty, the panel of judges decided on a 20-year prison sentence and a 1 billion fine.

Graph 4. Distribution of Death Penalty Defendants by Age



Source: ICJR's Internal Database which was updated in January 2022

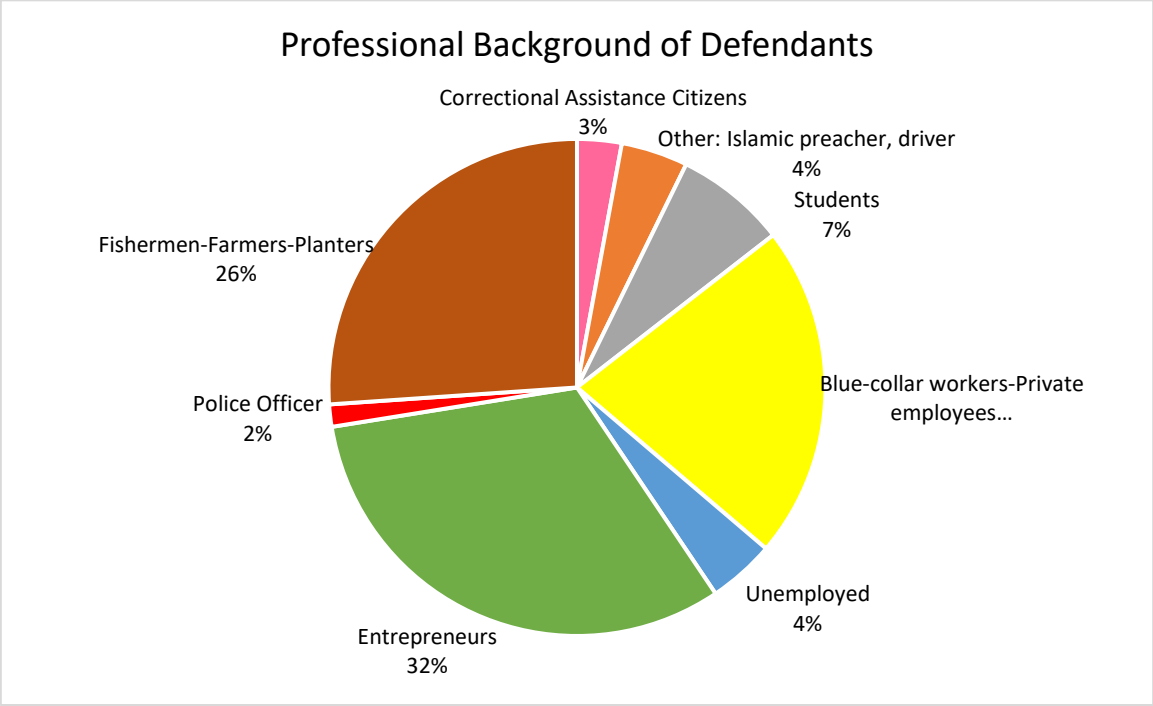
Judging from the age distribution of the defendants, the productive age group or the workforce and the elderly group were found to be substantial. A total of 48 defendants (69%) were aged between 22-45 years old, then 16 defendants (23%) were aged between 46-60 years old, and there were even 4 defendants (6%) who were very young at 18-21 years old. On the other hand, the number of death

convicts aged over 60 years is 1 person (1%). Of these, detailed comparisons for narcotic and non-narcotics cases can be described as follows.

For narcotics cases, there were 3 defendants aged 18-21 years old, 44 defendants aged 22-45 years old, 14 defendants aged 46-60 years old, and 1 defendant over the age of 60. Based on this research sample, the youngest and oldest defendants are from narcotics cases. The two are defendant T65 who was 18 years old and had a student status when he committed his crime and was sentenced to death; and defendant T17 who was 62 years old when he committed the crime.

In the non-narcotics cases, 1 defendant aged 19 years old (defendant T68) was tried for the crime of premeditated murder, while the other 6 defendants ranged in age from 30-56 years old.

Graph 5. Distribution of Death Penalty Defendants by Professional Background

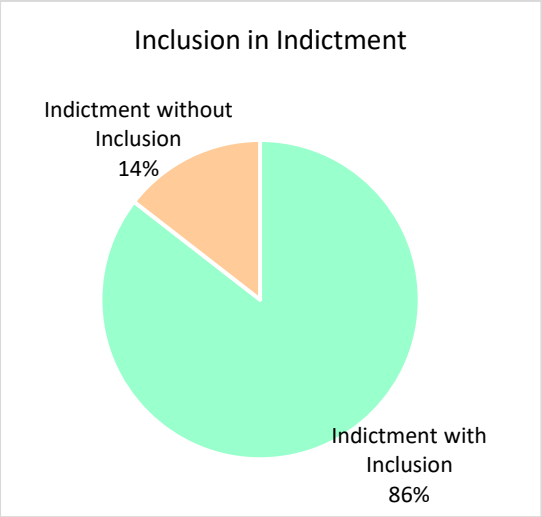


Source: ICJR's Internal Database which was updated in January 2022

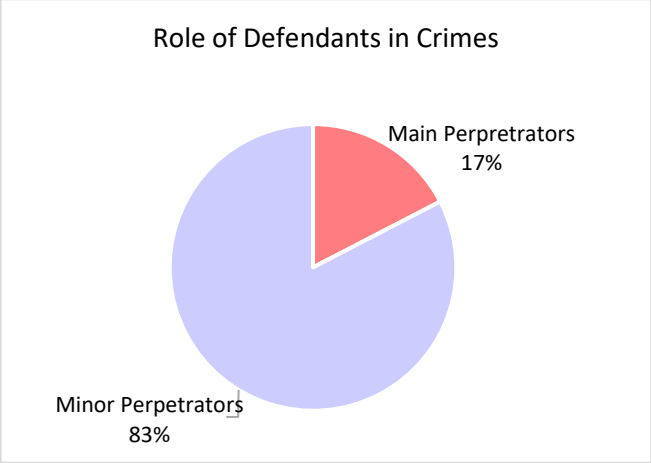
Entrepreneurs constitute the highest number of drug case defendants facing the death penalty. There are as many as 20 death penalty defendants in narcotics cases with employment status as entrepreneurs, followed by 13 defendants with employment status as fishermen, 10 private employees, 5 students, 2 farmers, 3 drivers, 1 laborer, 1 security officer, 1 religious leader, 1 state-owned enterprise employee, and 3 unemployed people. There are also 2 defendants from the narcotics case who were inmates of Tangerang Prison and Tanjung Gusta Class I Prison.

In non-narcotics cases, there are 7 defendants, consisting of 2 defendants with employment status as farmers, 2 entrepreneurs, 1 private employee, 1 fisherman, and 1 member of the National Police.

Graph 6. Inclusion in Death Penalty Indictments



Graph 7. Role of Defendants in the Death Penalty

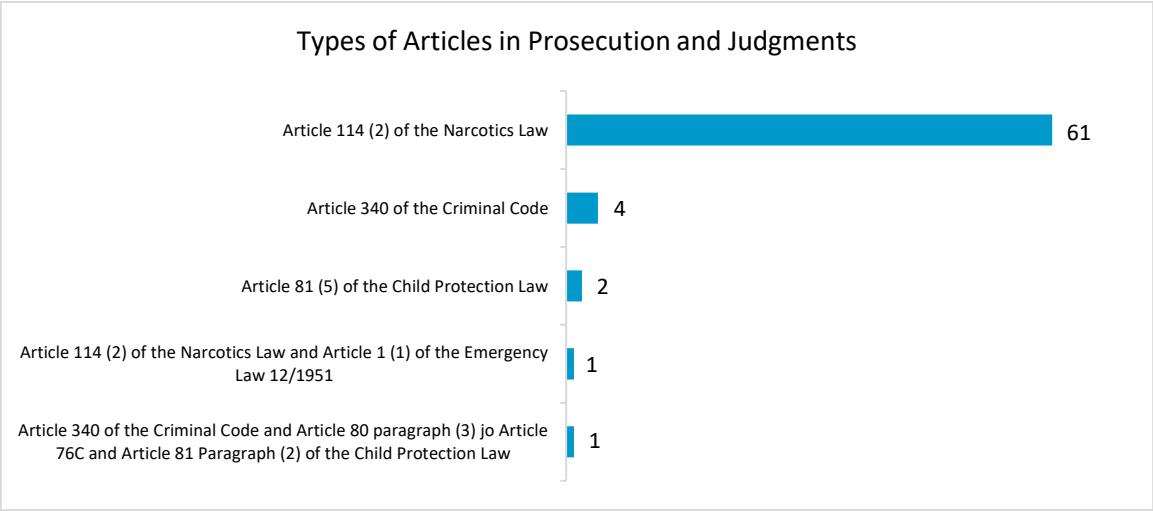


Source: ICJR's Internal Database which was updated in January 2022

In the judicial process of death penalty cases in this study's sample data, there are criminal cases committed by several perpetrators (inclusion) who were prosecuted separately in several case files (*splitsing*). Based on their criminal acts, out of a total of 62 defendants in narcotics crime cases, 56 of them had articles of inclusion in their indictments, and 4 of them were the main perpetrators. The remaining 6 defendants in narcotics cases were not accompanied by any articles of inclusion in their indictments, and 1 of them was the main perpetrator of a narcotics crime.

As for non-narcotics crimes, out of 7 defendants, there are 3 defendants with inclusion in indictments, and 4 other defendants were not charged with inclusion. All defendants in non-narcotics cases (i.e., premeditated murder and rape of a child which results in death) were the main perpetrators.

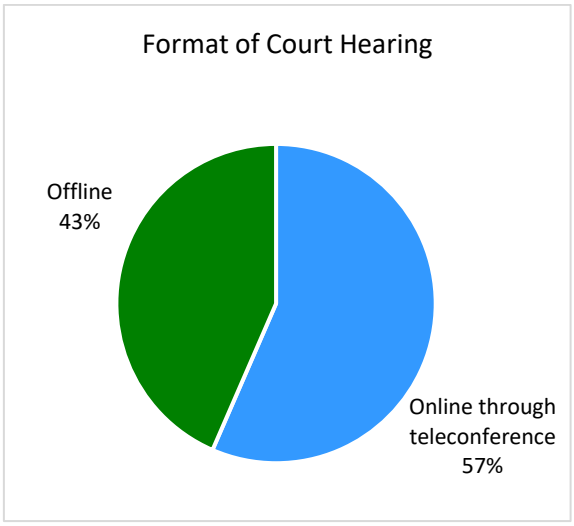
Graph 8. Distribution of Types of Articles Used in Prosecution and Judgments



Source: ICJR's Internal Database which was updated in January 2022

It can be seen from the chart above that all of the defendants in narcotics cases (62 defendants) were prosecuted and judged using Article 114 Paragraph (2) of the Narcotics Law, and one of them, namely defendant T52, was also *juncto-ed* by Article 1 Paragraph (1) of Emergency Law No. 12 of 1951. The T52 case uses Emergency Law No. 12 of 1951 because in carrying out his criminal act, the defendant used short-barreled firearms and ammunition for use in a state of urgency. In the next top position, there were 4 defendants of premeditated murder who were prosecuted and judged using Article 340 of the Criminal Code, and then 2 defendants were prosecuted and judged using Article 81 paragraph (5) of the Child Protection Law as they violently forced a child to have copulation, which led to serious injury/mental disorders/infectious diseases/reproductive disorders/deaths. Meanwhile, 1 defendant was prosecuted and judged using Article 340 of the Criminal Code and Article 80 jo Article 76C and Article 81 of the Child Protection Law for committing violence against children and causing their death.

Graph 9. Types of Trial Format (Teleconference or Offline)



Source: ICJR's Internal Database which was updated in January 2022

Since the COVID-19 pandemic, trials have generally been conducted through teleconference, including when a defendant is prosecuted or sentenced to death. This study reveals which cases whose court reading was carried out offline or online as stated in the verdict document. However, this information is only limited to the hearing session for the reading of the verdict, while the format of other trial agendas is unknown.

Out of 62 defendants in narcotics cases, the court hearing for 36 defendants was done online via teleconference, and 10 of them were sentenced to death. Then the verdicts for the remaining 26 narcotics cases were read out through an offline hearing, in which 14 defendants were sentenced to death.[9]

For non-narcotics crimes, the court hearing for 3 defendants was done online via teleconference, with 2 of whom were sentenced to death and 1 being sentenced to life imprisonment. Meanwhile, the court hearing for the remaining 4 defendants in non-narcotics cases was done in an offline format, and all of them were sentenced to death.

[9] *Disclaimer: The search for the verdict was carried out by assuming that if the recording was "via zoom meeting or by teleconference" then the hearing was carried out through teleconference/online media, and those that are not listed as "via zoom meeting or by teleconference" are regarded to be carried out offline. However, this does not rule out the possibility that the trial via teleconference/online media has an offline trial agenda in the previous stage.*

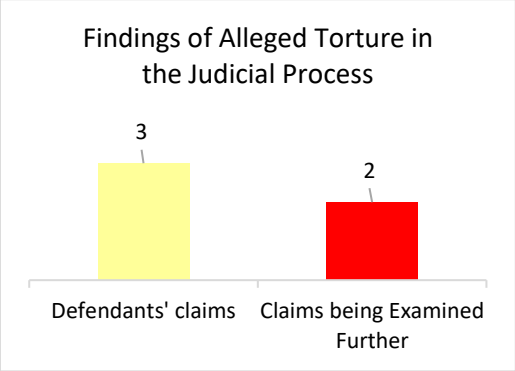
4. Findings of Torture in Death Penalty Cases

This section will explain torture in death penalty cases which occurs in two contexts, namely during the judicial period and after the judicial period, which is when the death row inmate is in the waiting period for execution. Aspects of torture during the judicial process can be seen from the findings of torture claims contained in the verdict data of this study's sample. Meanwhile, in other parts of this report, it is pointed out that torture also has the potential to be experienced by death row inmates in the death row phenomenon, which is marked by a decrease in the quality of their physical and psychic health due to the long and uncertain waiting period for execution and the inappropriate place of detention.

a. Findings of claims of torture in the judicial process

This study found that 3 defendants, namely T37, T39, and T53, claimed to have been tortured in the form of verbal intimidation and physical violence in the investigation process. All of them occurred in narcotics cases. Of the three defendants, only the claims of T37 and T53 were examined further by a panel of judges with the help of Police Investigators who conducted examinations of suspects during the investigation process). As for the claim from T37 about being forced to give information as the investigator wanted in the minutes of examination (*Berita Acara Pemeriksaan/BAP*), there was no response at all from the panel of judges.

Graph 10. Findings of Alleged Torture



Source: Verdict Indexation by ICJR

1) Claim of torture in the case of defendant T37

Defendant T37 was involved in a narcotics case and was arrested based on the results of the development of an investigation into another defendant who was caught first (crown witness). Although at the time of the arrest, no evidence of narcotics was found on the defendant, the defendant was later forced to confess to being the owner of the narcotics found on the crown witness and was beaten in the face during the examination process by the police.[10] This claim is also supported by two mitigating witness statements presented at the trial who testified that they had heard the defendant screaming for help during the police examination, heard the story of the accused being tortured at the police station,

[10] Makassar District Court Decision Number 262/Pid.Sus/2021/PN Mks, p. 21.

and saw the injuries on the defendant's body after the police examination process.[11] The defendant also denied all witness statements presented by the public prosecution consisting only of the arresting police, crown witnesses, and Police Investigator.

However, the panel of judges at the Makassar District Court who tried the defendant's case in its consideration rejected the defendant's claim of torture and the legal counsel's defense to revoke the suspect's statement in the BAP and continued to use the information in the BAP as a basis for deciding the case.[12] In its deliberations, the panel of judges held that the claim of torture was unfounded as it was based only on the testimony of a mitigating witness who was deemed to have close relatives with the accused (i.e., his fiancée and his sister's friend) and was not supported by other evidence, such as the doctor's statement.[13] The panel of judges also seemed to "blame" the defendant who did not take advantage of the opportunity to see a doctor to check himself when he was discharged by the investigator after the examination.[14] The panel of judges who had doubts about the defendant's claim of torture then based its consideration on the testimony of Police Investigator who certainly stated that the examination process had been carried out according to procedure and even presented video evidence of the examination showing the defendant giving a confession, although according to the defendant, the video was taken after the beating.[15]

From the T37 case above, it can be seen how the evidentiary practice for torture claims strongly shows the apparent imbalance of power between the state and civilians in a limited space of contestation. So far, the evidential burden against claims of torture rests solely on the accused. In fact, on the other hand, there are physical and health examination procedures that must be carried out when the suspect begins to enter the place of detention,[16] which should also be used as a reference for evidence for any claims of torture. Nevertheless, the panel of judges in examining claims of torture can be biased by digging into and questioning the fulfillment of those obligations to investigators and public prosecutors.

Currently, the development of the judicial process of the T37 defendant's case is in the review stage, and the application was filed on September 5, 2022, according to information on the SIPP PN Makassar website. Previously, defendant T37 was charged by the public prosecutor with a death penalty but sentenced to life imprisonment by a first-level judge on July 15, 2021, through the decision of the Makassar District Court Number 262/Pid.Sus/2021/PN Mks. Then at the appeal level, on August 26, 2021, a panel of judges changed the defendant's sentence to 20 years in prison based on the decision of the Makassar High Court Number 484/PID.SUS/2021/PT MKS. However, at the cassation level, the

[11] *Ibid.* pp. 22-23.
[12] *Ibid.* pp. 27-28.
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.* pp. 21 and 27.
[16] Regulation of the Chief of Police of the Republic of Indonesia Number 4 of 2015 concerning The Treatment of Detainees within the National Police of the Republic of Indonesia, Article 6 paragraph (1) letter d; Government Regulation No. 58 of 1999 concerning the Conditions and Procedures for the Implementation of the Authority of the Duties and Responsibilities of Detainee Nurses; Regulation of the Minister of Justice Number: M.04.UM.01.06 of 1983 concerning Procedures for Placement, Treatment of Prisoners and Rules for State Detention Centers; and Decree of the Minister of Justice of the Republic of Indonesia Number: M. 02-Pk.04.10 of 1990 concerning the Pattern of Development of Prisoners of the Minister of Justice of the Republic of Indonesia.

defendant's application was rejected by the Supreme Court through the judgment numbered 565 K/PID.SUS/2022 dated February 24, 2022.

2) Claim of torture in the case of defendant T39

Defendant T39 received intimidation from the officers who made the arrest. Defendant T39 testified at trial that when an arrest was made against him on charges of involvement in a narcotics case, the defendant was blindfolded with duct tape and carried around in a car for three hours.[17] Not only that, but defendant T39 was also not taken directly to the police but to an empty house, as he said in the trial when he raised objections to the testimony of the police witness who made the arrest.[18]

Defendant T39 had also presented a mitigating witness who at that time saw firsthand the violent treatment of the police officers as the accused had submitted to be heard in the trial.[19] However, there was no follow-up examination or special consideration from the Stabat District Court panel of judges to respond to the claim of torture suffered by defendant T39.

Despite the lack of evidence in this case, which was based solely on the testimony of two police witnesses who made the arrest and the narcotics evidence found on the defendant, the public prosecutor continued to pursue the death penalty. The key witness who told the accused to deliver the goods and the person who provided the narcotics for the accused to deliver were still included in the Wanted Persons List (*Daftar Pencarian Orang/DPO*), so he could not be presented at the trial for cross-examination. This is important because, in the chronology of the case, it is known that the defendant in the trial admitted that he was only told to deliver a bag of clothes that turned out to contain narcotics.

Against the death penalty charges filed by the public prosecutor, a panel of judges of the Stabat District Court then sentenced the defendant T39 to life imprisonment on September 13, 2021. At the time of writing, the case of defendant T39 has permanent legal force after the appeal decision from the Medan High Court Number 1648/Pid.Sus/2021/PT MDN dated November 9, 2021, corroborated the previous decision, and the defendant's appeal application was also rejected by the Supreme Court through decision number 1441 K/PID. SUS/2022 dated May 24, 2022.

3) Claim of torture in the case of defendant T53

Defendant T53 was arrested for a narcotics case without an arrest warrant against him.[20] Defendant T53 was also shot in the leg during the arrest for allegedly trying to escape, although in the trial, the defendant stated that he never resisted when he was arrested.[21] While undergoing a police examination,

[17] Stabat District Court Decision Number 252/Pid.Sus/2021/PN Stb, p. 13.
[18] *Ibid.*, pp. 8-10.
[19] *Ibid.*, p. 10.
[20] Idi District Court Decision Number 75/Pid.Sus/2021/PN Idi, pp. 29-30.
[21] *Ibid.*

defendant T53 was also physically assaulted. The form of physical violence he experienced was the beating to be forced to confess to being the perpetrator of a narcotics crime alleged by the police.[22]

Against the claim of torture made by defendant T53, the public prosecutor then presented a Police Investigator who essentially stated that the investigation process had been carried out according to procedure and that there was no physical, psychic, mental, or verbal violence against the accused. Defendant T53 then responded to the testimony at trial by stating that the physical violence against the accused was not committed by the Police Investigator presented at this trial but by another Police Investigator.[23]

The practice of examining torture claims in the case of defendant T53 illustrates that the criminal justice system in Indonesia currently does not have sufficient mechanisms to respond to torture claims. The Police Investigator presented at the trial may not have been violent or are perhaps not the people who conducted the inquest, and there is no mechanism to anticipate this from happening. The absence of a standard regarding the summoning of Police Investigator in trials that can ensure that the person presented is the alleged perpetrator of the torture referred to by the accused certainly makes it easier for the perpetrator to evade responsibility and perpetuate impunity. Ultimately, presenting Police Investigator in a trial without any clear procedural law standards as it is today is not an effective way to examine allegations of torture that occurs during the judicial process.

Moreover, at the level of investigation, defendant T53's right to be assisted by legal counsel was not fulfilled even though the Criminal Procedure Code had made it mandatory.[24] This is as stated in the defense memorandum from the defendant's legal counsel who had just begun to assist the defendant during the trial process, namely based on the determination letter of the Idi District Court Panel of Judges on May 19, 2021. The absence of legal counsel during the investigation process has also led to torture experienced by the defendant. This is due to the absence of a party who shall ensure that the rights of the accused have been fulfilled and who can immediately respond to or dispute the actions of arbitrary officials, especially in the process of investigation by a police officer who is negligibly supervised by other law enforcement authorities.

However, in the case of defendant T53, the panel of judges of the first instance did not respond to the claim at all and gave special consideration to the claim of torture or neglect of the right to legal assistance for the defendant. The panel of judges fully based the facts of the law as well as the consideration of the elements of the article solely on what the public prosecutor said in the indictment and the testimony of aggravating witnesses. Until finally on August 25, 2021, the decision of the court of first instance registered with the Idi District Court Number 75/Pid.Sus/2021/PN Idi granted the demands of the public prosecutor, namely by imposing death penalty on the defendant. At the appeal level, the panel of judges through the Banda Aceh High Court Decision Number 362/PID/2021/PT BNA dated October 25, 2021, also agreed with the previous ruling regarding the defendant's sentence. As

[22] *Ibid.*, pp. 33-34.
[23] *Ibid.,* p. 33.
[24] *Ibid.,* p. 4.

noted from the SIPP PN Idi website, at the writing of this study, there was no further information regarding further legal proceedings (cassation) pursued by defendant T53.

4) Indications of torture claims in other cases

In addition to the three aforementioned defendants' cases, it is possible that allegations of torture could be found in the defendants in this study's sample data. Due to the limited data studied, which are the first-degree judgment documents, claims of torture that may only be found in appellate, cassation, or judicial review documents become unidentifiable. Thus, it cannot be guaranteed that there were no allegations of torture in the cases of the other 66 defendants.

In a previous ICJR study entitled "Investigating Vulnerable Justice: The Death Penalty and the Application of Fair Trial in Indonesia" released in 2019, in some cases there were newly discovered claims of torture, for example in the legal remedy decision document.[25] One of them is the case of Yusman Telaumbanua who was sentenced to death by the Gunung Sitoli District Court through Decision Number 8/Pid.B/2013/PN-GS in 2013 for premeditated murder. A few years later, the defendant's legal counsel filed for judicial review after evidence was found that Yusman was tortured to admit to being an adult, even though he was under 17 at the time of the crime, and was forced to confess to all the acts alleged by the investigators.[26]

On the other hand, in this study, it was found that Police Investigator were also presented in some cases, for example, in the case of defendants T31 and T52, although there were no claims of torture explicitly mentioned in the verdict documents. Police Investigator are usually presented to explain whether the investigation process has proceeded according to the procedure, including responding to claims of torture. Further monitoring of the development of death penalty cases, both the ones included in the sample of this study and beyond, remains necessary going forward.

b. Aspects of Torture in the Death Row and Opportunities for Commutation of the Death Penalty in the Latest Criminal Code

1) The number of death row inmates waiting for execution continues to grow

Based on data from the Directorate General of PAS of the Ministry of Law and Human Rights on November 29, 2021, 404 people were sitting in a row waiting for execution. Based on ICJR's regular monitoring, in January 2022, 79 prisoners on death row had been waiting to be executed for more than 10 years. As of October 2022, the number of inmates who spend more than 10 years on the death row has increased by 18 people. Thus, a total of about 97 death row inmates have been waiting for their execution for more than 10 years.

Although there have been no executions of death row inmates since 2016, the number of death row inmates continues to increase as death sentences are still carried out by the courts. Even the number of

[25] Zainal Abidin, *et.al.*, *Menyelisik Keadilan yang Rentan: Hukuman Mati dan Penerapan Fair Trial di Indonesia*, ICJR, Jakarta, 2019, pp. 165-169.
[26] Supreme Court of the Republic of Indonesia Decision Number 96 PK/Pid/2016, p. 24.

new death penalty cases tends to be high in the last three years, especially during the pandemic as follows: in 2021 there was an addition of 146 new cases with 171 defendants;[27] in 2020 there was an addition of 173 new cases with 210 defendants;[28] and in 2019 there was an addition of 126 new cases with 135 defendants[29].

2) Conditions of detention centers and the risk of inmates experiencing death row phenomenon as a form of torture

Indonesia does not have a special place of detention for death row inmates before their execution, so death row inmates are placed in various prisons in Indonesia and also participate in coaching activities in prisons. Based on data from the Directorate General of PAS dated November 29, 2021, Besi Nusakambangan Class II A Prison has the highest number of death row inmates in Indonesia, with 49 death row inmates (12% of all death row inmates) detained in this prison. Other prisons with a high number of death row inmates are, in descending order, Medan Class I Prison with 46 death row inmates (11%), and Nusakambangan Class II A Narcotics Prison with 42 death row inmates (10%).

Death row inmates are placed in prisons that are known to be overcrowded. Inadequate conditions of the place of detention can worsen the psychic condition of death row inmates living in uncertainty because they are in a long waiting period as it is uncertain when the execution will be carried out. This situation then makes death row inmates vulnerable to experiencing the death row phenomenon, which is characterized by a decrease in the quality of physical and mental health of death row inmates who have been awaiting their execution for a long time.[30] In its development, because of this condition, the death row phenomenon is considered a form of torture, as outlined in a report from the UN Special Rapporteur on Torture, and Other Cruel, Inhuman, and Degrading Treatment or Punishment, namely Juan Mendez at the UN General Assembly in 2012.[31]

3) Ratification of the Criminal Code and the opportunity for commutation of death penalty to prevent the occurrence of the death row phenomenon

The government of Indonesia must prevent torture as part of its commitment after ratifying the Convention against Torture through Law Number 5 of 1998. For this reason, in the context of formulating the national death penalty policy, the government must take efforts to help prevent the death row phenomenon from occurring among the growing number of death row inmates.

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[27] Adhigama Andre Budiman, *et. al.,* 2022, *Death Penalty Policy Situation Report in Indonesia 2021 "Layered Uncertainty: Waiting for Death Penalty Commutation Guarantee Now!",* ICJR, Jakarta, p. 9.
[28] Adhigama Andre Budiman, *et. al.,* 2020, *Death Penalty Policy Situation Report in Indonesia 2020: Uprooting Lives in the Pandemic Era,* ICJR, Jakarta, p. 13.
[29] Adhigama Andre Budiman, *et. al.,* 2019, *Death Penalty Policy Situation Report in Indonesia 2019: "Playing with Destiny",* ICJR, Jakarta, p. 15.
[30] Adhigama Andre Budiman and Maidina Rahmawati, 2020, *Death Row Phenomenon among Death Row Inmates in Indonesia,* ICJR, Jakarta.
[31] The UN General Assembly, 'Interim report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' 67th session (2012) (A/67/279).

However, the government's commitment in this regard is lacking in the future practice of death penalty after the ratification of the new Criminal Code on December 6, 2022, which will be effective within 3 years. On one hand, the government intends to provide a middle ground for groups that are supportive of and against the death penalty by introducing a mechanism for a commutation (i.e., change of criminal sanctions) of the death penalty. Under the scheme, the death penalty can be changed into a life sentence after a death row inmate gets 10 years of probation. However, in the development of the discussion of the Criminal Code that has just been passed, as of December 6, 2022, this commitment remains uncertain because several provisions are open to various interpretations, as illustrated by incongruent rules between articles and also the narrative presented in the discussions by both the government and the House of Representatives.

This will have an impact on the technical implementation regulations. Therefore, it is necessary to have very strict arrangements in the technical implementation regulations that address the procedures for assessment in the 10-year probationary period that can be given commutation, including indicators of assessment and the guarantee that any inmates in a 10-year waiting period who are eligible for the assessment must be given a sentence change.

However, in the process of discussing the bill moments before it was passed, there were significant changes made by policymakers. In the previous draft bill as of November 9, 2022, a probationary period of 10 years to obtain a commutation of sentences is not guaranteed to be automatically granted to all defendants who will be sentenced to death in the future as it must rely on the judge's consideration. In the formulation, it states "The judge **may sentence** an inmate to death with a probationary period of 10 (ten) years." This provision was later amended in the latest Criminal Code passed on December 6, 2022, which reads "The judge **sentences** death with 10 (ten) years of probation." The death penalty provision in the Criminal Code that was passed means that the sentence of probation is given automatically and does not depend on the judge's decision. This change in the process of discussing the bill was made as a guarantee that any person convicted of the death penalty **must be given a 10-year probation to delay his execution.**

With the commitment reflected in the discussion of the Criminal Code draft bill that the death penalty is given automatically to all death row inmates after the bill was passed, there are lighter provisions that must be applied regarding death penalty according to the principles of criminal law in Article 1 paragraph (2) of the Criminal Code and Article 3 paragraph (7) of the New Criminal Code, namely:

> "*Whenever there is a change in the statute after the act has been committed, the provisions against the defendant are applied in his favor*." (Article 1 paragraph (2) of the Criminal Code)
>
> "*In the event that after a conviction with permanent legal force and the acts that occur are threatened with a lesser sentence according to the new laws and regulations, the implementation of the conviction is adjusted to the criminal limit according to the new laws and regulations*." (Article 3 paragraph (7) of the New Criminal Code)

Currently, the number of people who have been on death row for more than 10 years has reached about 97 death row inmates, so they are eligible to undergo an assessment for commutation of sentences. The advocacy for the future, which remains very urgent, is to ensure that there are technical arrangements for the implementation of the commutation of the death penalty immediately on those 97 people who have been death row inmates for more than 10 years.

The following is a comparison table between the formulation of the Criminal Code as of December 6, 2022, and the recommendations from ICJR regarding the formulation of articles that have been previously submitted to the government:

Recommendations for the Formulation of the Criminal Code Draft Bill **Article 100**	**New Criminal Code Provisions as of December 6, 2022** **Article 100**
(1) The judge sentences an inmate to death by including probation of 10 (ten) years. (2) The grace period of 10 (ten) years' probation begins 1 (one) Day after the court's decision acquires permanent legal force. (3) If the convicted person during probation as referred to in paragraph (1) shows commendable attitudes and deeds, the death penalty is commuted to life imprisonment by Presidential Decree. (4) If the convicted person during probation as referred to in subsection (1) does not show commendable attitudes or deeds and there is no hope of improvement, the death penalty may be carried out by order of the Attorney General.	(1) The judge sentences an inmate to death with a probationary period of 10 (ten) years by considering: a. the defendant's sense of remorse and hope for self-improvement; or b. the role of the accused in the Criminal Act. (2) The death penalty with probation as referred to in paragraph (1) shall be included in the judgment of the court. (3) The grace period of 10 (ten) years' probation begins 1 (one) Day after the court's decision acquires permanent legal force. (4) If the convicted person during probation as referred to in paragraph (1) shows a commendable attitude and deeds, the death penalty may be commuted to life imprisonment by Presidential Decree after obtaining the consideration of the Supreme Court. (5) Life imprisonment as referred to in paragraph (4) is calculated from the moment the Presidential Decree is established.

	(6) If the convicted person during probation as referred to in subsection (1) does not show commendable attitudes or deeds and there is no hope of improvement, the death penalty may be carried out by order of the Attorney General.

5. Application of Fair Trial in Death Penalty Cases

a. Right to Legal Aid and Defense

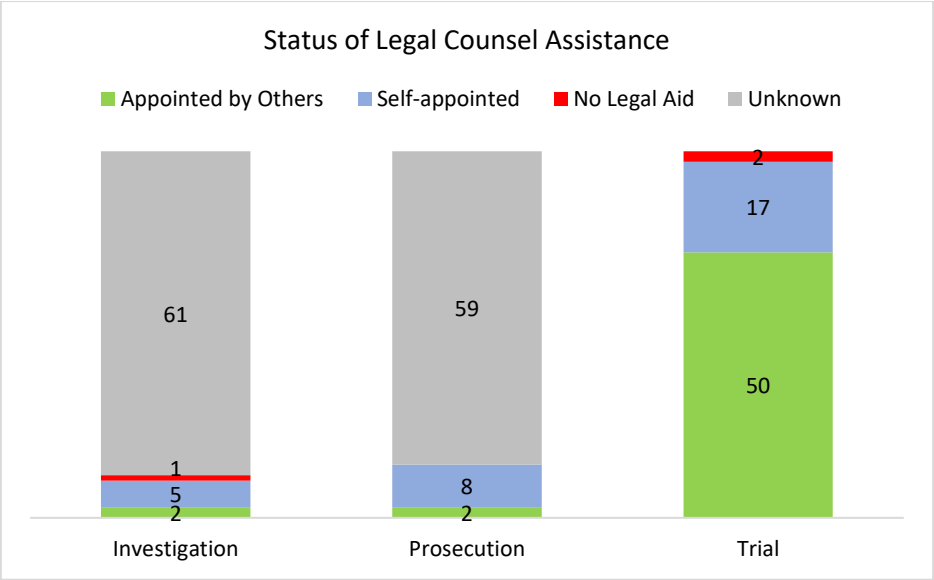
1) Status of assistance by legal counsel

Graph 11 shows data on the number of suspects/defendants who have access to legal aid. From the graph, it can be seen that in most of the investigation process, it is not known whether the suspect/defendant was accompanied by legal counsel or not (61 people). Similarly, during the prosecution process (i.e., the file has arrived in the hands of the prosecutor's office), in general from the sample of verdicts analyzed, the majority did not mention whether the suspect/defendant was accompanied by legal counsel (59 people). This is because the limited information contained in the judgment may further impact the fulfillment of fair trial rights (see our analysis in Section 6).

The legal assistance status of some defendants during the investigation and prosecution process can be identified, yet such information can only be obtained usually when the defendant in question appoints his/her legal counsel. That way, the date of granting a special power of attorney can be known and be later compared with the timeline of the detention period, which is also stated in the verdict document. Hence, this way can reveal the stages that the defendant is going through at the time of granting the power of attorney.

How information was obtained regarding the status of legal counsel assistance during the investigation and prosecution process is different from that of the trial process, during which the information in the verdict document has been clearly stated for each defendant. The various statuses of legal counsel's assistance in the proceedings include: (a) the court-appointed legal counsel for the suspect/defendant to face the trial (50 persons); (b) the defendant appointed his/her legal counsel (17 persons); and, (c) there was no assistance from legal counsel at all (2 persons).

Graph 11. Number of Legal Counsel Assistance



Source: Verdict Indexation by ICJR

Furthermore, the data in the graph above can be distinguished by the type of cases, either narcotics or non-narcotics cases. Specifically for suspects/defendants in narcotics cases, the same trend was observed, which is that during the investigation process, out of a total of 62 people, the majority (54 people) were unknown whether they had legal counsel or not, while 5 people appointed their legal counsel, 2 people got their legal counsel through appointment by the competent authority, and 1 person who was not assisted by legal counsel at all.

In addition, there is an important note about legal assistance at the investigation level. Of the total 54 narcotics case defendants who in the verdict did not mention whether or not they had legal counsel during the investigation, there was one defendant who, based on the testimony of Police Investigator, had been assisted by legal counsel during the examination at the investigation level (T31), but it is not known whether the legal counsel was appointed by himself or the investigator.

Going further, at the prosecution level, as many as 52 defendants in narcotics cases are not known whether they were assisted by legal counsel. Then 8 people appointed their legal counsel and 2 people whose legal counsel was appointed by the competent authority.

Then in the trial process, the number of suspects/defendants in narcotics cases who appointed their legal counsel increased (14 people). However, most of the legal counsel for suspects/defendants in narcotics cases at the trial level was appointed by the court (48 people).

Meanwhile, there is also data on the status of legal counsel assistance for other suspects/defendants who were charged with non-narcotics cases, including cases of murder, premeditated murder, and rape of children resulting in death. The data shows that it is unknown whether, in the investigation and prosecution process, the 7 suspects/defendants were assisted by legal counsel, whereas in the trial process, the majority of suspects/defendants (5 people) appointed their legal counsel, and the other 2 people (both in child rape resulting in death cases) explicitly stated in the verdict that they were not assisted by legal counsel. The two defendants, namely T66 and T67, stated that they wanted to appear in court on their own even though they had been given the right to be accompanied by legal counsel free of charge.

When a person is examined by law enforcement authorities, assistance from legal counsel is a manifestation of the principle of fair trial and embodies the equality of standing before the law. Thus, at every stage of the examination, the suspect/defendant has the right to be assisted by legal counsel as stated in Article 54 of the Criminal Procedure Code. If the suspect is suspected of committing a criminal offense with the threat of imprisonment of at least 5 years or more, or even the death penalty, then in his/her examination, it is mandatory for him/her to be accompanied by legal counsel. This is further regulated in Article 56 of the Criminal Procedure Code.

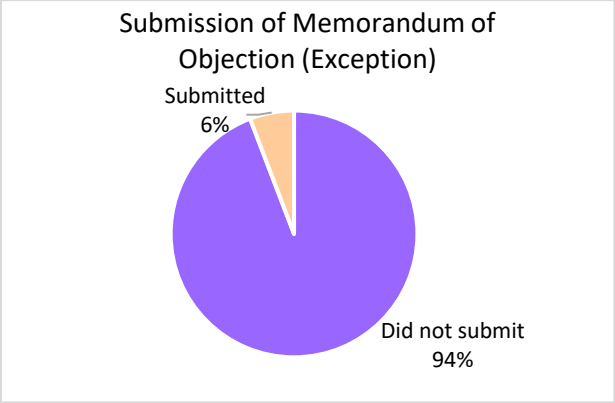
However, in two convictions for defendants T66 and T67, both were not willing to be accompanied by legal counsel; in other words, they waived their right to legal aid and defense from legal counsel. In prosecuting death penalty, which is the highest sentence that can be given, this is certainly not an ideal practice. This practice is inseparable from the view that legal assistance is considered a right, which in certain contexts is legal to be deprived or not utilized by the right. However, especially in handling

death penalty cases that mandate a higher standard of prudence and fulfillment of fair trial rights, there needs to be a strict mechanism regarding the waiver of rights, for example, only with the permission of the judge.[32] In addition, even though the defendant eventually submits himself/herself to the examination, it is important to ensure that there is legal counsel physically present following the course of the examination. This is to anticipate if at any time the defendant changes his/her mind and is willing to be assisted by legal counsel so that the legal counsel who will accompany him/her can immediately master the case well after following the previous process.

2) Submission of defense efforts by legal counsel

In this study, the analysis to determine the defense efforts was based on the submission of two key documents, namely the exception (memorandum of objection) and the plea (memorandum of defense). Based on the graph below, it is clearly illustrated that as many as 94% of suspects/defendants did not file a memorandum of objection (exception) through their legal counsel. Meanwhile, the remaining 6% of suspects/defendants filed an exception out of a total of 69 people.

Graph 12. Number of Exceptions Submitted

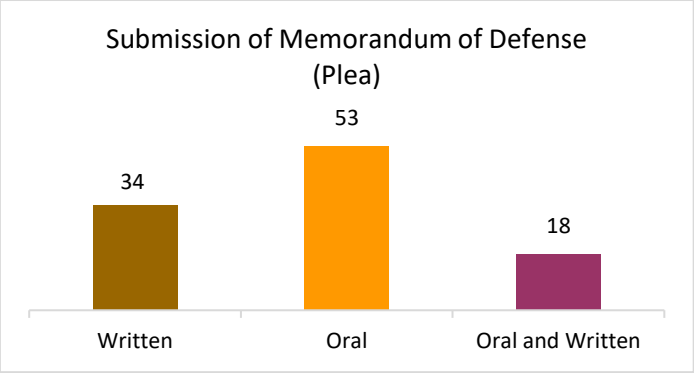


Source: Verdict Indexation by ICJR

Meanwhile, in the stage of submitting a memorandum of defense (plea), which is also part of the defendant's self-defense, all the suspects/defendants in this study (69 people) and their legal counsel filed a plea, either in writing or orally. In submitting the plea, 53 defendants or their legal counsel gave the defense orally, 34 defendants had their legal counsel submit a written plea, and 18 defendants, together with their legal counsel, filed the plea orally and in writing (see Graph 13). The findings regarding the majority of the pleas, which were only submitted orally, indicate that the legal counsel had not made optimal use of the opportunity to give the defense by adequately preparing plea documents.

[32] Read more: Iftitahsari, *Encouraging Regulation of Special Fair Trial Rights for People Facing the Death Penalty in RKUHAP*, ICJR, Jakarta, 2022, p. 21.

Graph 13. Number of Pleas Submitted



Source: Verdict Indexation by ICJR

For narcotics cases, out of a total of 62 defendants, only 4 people filed a plea. Then as many as 29 people filed an oral plea only, 16 people filed a written plea only, and 17 people filed both an oral and written plea.

As for non-narcotics cases (e.g., murder, premeditated murder, and rape resulting in the death of people) with as many as 7 defendants, all of them did not file an exception (memorandum of objection) during the trial process. Meanwhile, 1 person filed a plea (memorandum of defense) in writing, 5 people filed an oral plea, and 1 person submitted both an oral and written plea. This proves that, even for non-narcotics cases, the efforts, especially from legal counsel, to make defenses through the submission of a memorandum of objection and efforts to prepare plea documents adequately (in writing) remain feeble.

Out of the 69 verdicts studied, there was 1 case (T53) that drew our attention regarding the filing of a plea. Defendant T53's legal counsel in his plea document made an argument regarding the fact that the defendant was not assisted by legal counsel during the investigation as follows:

> *"During the investigation, the accused was not accompanied by legal counsel at all, and this is contrary to Article 56 of the Criminal Procedure Code, which requires the defendant to be accompanied by legal counsel if the threat of his sentence is above 5 years; therefore, the investigator is obliged to provide legal counsel for the defendant."*[33]

However, in the verdict document of defendant T53, there was absolutely no specific response from the judge to the objections raised by the defendant's legal counsel. The judge merely re-cited statements made by the counsel without giving substantial consideration even though they fall under the category of serious fair trial rights violations.

3) Submission of mitigating evidence

The submission of witnesses/experts/mitigating evidence is part of the defense opportunity provided for the defendant in the course of examination in court. However, in this study, it can be seen from Graph

[33] Idi District Court Decision Number 75/Pid.Sus/2021/PN Idi, p. 55.

14 that the majority (90%) of defendants did not submit witnesses/experts/mitigating evidence when their cases were at trial.

The defendants who filed witnesses/experts can be detailed as follows. For narcotics cases, of the 62 defendants, only 6 filed mitigating witnesses. As for non-narcotics cases (e.g., murder, premeditated murder, and rape resulting in the death of people), out of a total of 7 defendants, only 1 person filed a mitigating expert.

The above facts show that although almost all defendants received assistance from legal counsel during the trial process as outlined in the previous discussion, the quality of the defense made by the legal counsel can be said to have not reached the standard of effective defense. It turns out that only 10% (7 of the total 69 defendants) filed a defense document by presenting mitigating evidence.

Graph 14. Submission of Mitigating Witnesses/Experts

Source: Verdict Indexation by ICJR

4) Use of crown witness testimony

The term crown witness is not found in the Criminal Procedure Code. Even so, in practice, it is common to have crown witnesses in trials; they are witnesses who are suspects or other defendants who jointly committed the criminal act but were prosecuted in separate case files (*splitsing*). The crown given to the witness who is the accused is in the form of a waiver of prosecution of his/her case or a very light charge if the case is transferred to the court or forgiven for the mistakes that the witness has made.[34]

Referring to the above definitions and characteristics, crown witnesses will only be found in cases with inclusion. The arrangement regarding crown witnesses was originally provided for in Article 168 of the Criminal Procedure Code, which, in principle, explains that the parties who are together as defendants cannot be heard and can resign as witnesses. Later in its development, the understanding of crown

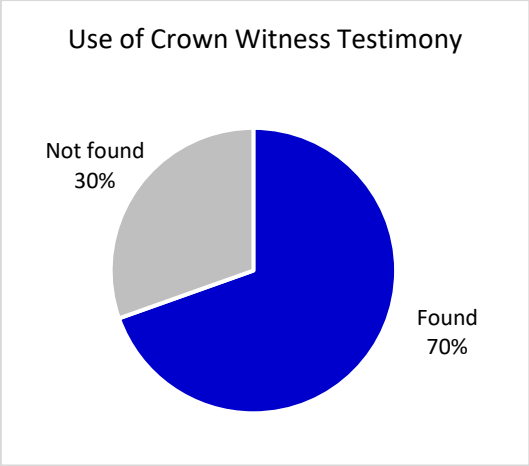
[34] Decision of the Supreme Court of the Republic of Indonesia Number 2437 K/Pid.Sus/2011, p. 14.

witnesses as evidence in criminal cases was regulated in the Jurisprudence of the Supreme Court No. 1986 K/Pid/1989 dated March 21, 1990.

In the said jurisprudence it is explained that the Supreme Court does not prohibit a public prosecutor from submitting a crown witness on the condition that this witness in his/her position as a defendant is not included in the same case file as that of the defendant being given testimony. In the jurisprudence, it is also emphasized that the definition of a crown witness is "a friend of the accused who committed a criminal offense together as a witness to prove the prosecution's charges, whose cases were separated due to lack of evidence."

In the trial of the 69 defendants sampled in the study, most (70% or 48 of the total 69 defendants) were still found using the testimony of the crown witness as one of the witnesses of the public prosecution to prove the guilt of the accused. The use of crown witnesses for non-narcotics cases was found in the trial of 3 defendants, namely in cases of premeditated murder and rape of children resulting in death. Meanwhile, for narcotics cases, the use of crown witnesses was found in the trial of 45 defendants.

Graph 15. Use of Crown Witness Testimony in Trials



Source: Verdict Indexation by ICJR

The use of crown witnesses is fundamentally contrary to the Criminal Procedure Code, which upholds human rights and the principles of fair and impartial justice (fair trial). Some of the provisions in the Criminal Procedure Code that are violated (other than Article 168 of the Criminal Procedure Code) are the right of the defendant not to be charged with an evidential burden (Article 66 of the Criminal Procedure Code). The involvement of the accused as a witness in the same case (even though the case is separated) clearly shows that the defendant is subject to proving through his/her testimony whether the defendant (in a separate case) committed the criminal act (i.e., the same case/deed as committed by the defendant who was a crown witness), and this means violating the provisions of the Criminal Procedure Code.

The rejection of the crown witness's testimony was also found in one of the verdicts studied, namely the narcotics case in the Makassar area with defendant T37. In his defense, the defendant's legal counsel

expressed objection against the use of crown witnesses. However, the panel of judges in its deliberations continued to accept the testimony of the crown witness because the Supreme Court did not prohibit the use of crown witnesses, and the use of crown witnesses in the case was based on certain conditions, namely that the criminal act was carried out jointly and had been examined by the method of *splitsing* and that there was still a lack of evidence, especially witness statements.[35]

From the case of defendant T37, it can be seen that the practice of trial so far tends to compromise the fulfillment of the defendant's rights by violating the principle of non-self-incrimination (i.e., the right of the defendant not to give aggravating testimony) when the defendant, in one case construction, was sort of 'forced' to testify against the other defendants to prove their guilt. This has been regarded as a common practice, especially in proving cases with minimal evidence, especially narcotics cases. The use of crown witness testimony should not be expressly prohibited, especially for death penalty cases which require the highest standards of prudence and stricter standards of the fulfillment of fair trial rights than ordinary criminal cases.[36]

b. Findings of violations of fair trial rights in the process of arrest and detention

1) Long period of arrest in narcotics cases: The practice of incommunicado detention

In concept, arrest in the Criminal Procedure Code is defined as an act of temporary restraint on the freedom of a suspect or defendant if there is sufficient evidence for investigation or prosecution, and/or trial.[37] In the Criminal Procedure Code, the arrest is carried out for a maximum of one day.[38]

Indeed, regarding the concept of arrest in the Criminal Procedure Code, there is no obligation to immediately physically present the arrested suspect to a judge to determine whether to continue the detention process or release him/her. However, the standards set out in the ICCPR, especially Article 9 paragraph (3), provide that any person arrested or detained based on criminal charges must be immediately brought before a judge or other officer permitted by law to test the judicial authority.[39] However, in the Criminal Procedure Code, there is no obligation to immediately present a suspect who has been physically arrested to a judge.

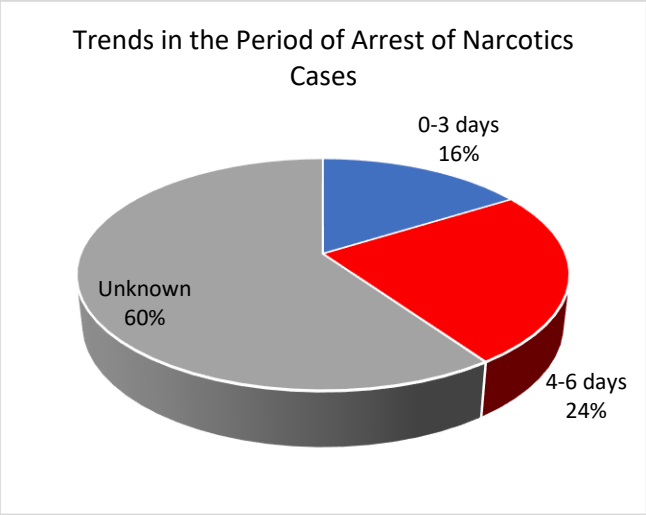
On the other hand, another law regulates a longer duration of arrest for certain criminal acts, which is a form of exception or deviation from the provisions of the Criminal Procedure Code related to the one day of arrest. One of these exceptions/deviations is found in narcotics crime cases whose suspects can be arrested for up to a maximum of 6x24 hours.[40]

This practice can then be seen from the findings of the study as described in Graph 16 that for most narcotics cases, as obtained from the verdict documents studied, 24% or 15 people served an arrest period of between 4-6 days, while 16% or 10 people served an arrest period of up to a maximum of

[35] Makassar District Court Decision Number 262/Pid.Sus/2021/PN Mks, pp. 25-26.
[36] Read more: Iftitahsari, *Encouraging Regulation of Special Fair Trial Rights for People Facing the Death Penalty in RKUHAP*, ICJR, Jakarta, 2022, p. 28.
[37] Criminal Procedure Code, Law No. 8 of 1981 concerning the Criminal Procedure Law, Article 1 number 26
[38] *Ibid.,* Article 19 paragraph (1)
[39] Law Number 12 of 2005 concerning Ratification of the International Covenant on Civil and Political Rights, Article 9 Paragraphs (3) and (4)
[40] Narcotics Act, *op. cit.*, Article 76

3 days. Meanwhile, the remaining 60% or 37 suspects (including 3 suspects who were serving sentences for previous cases or were in the process of trial for other cases) did not have their arrest periods included in the verdict documents.

Graph 16. Period of Arrest of Narcotics Cases



Source: Verdict Indexation by ICJR

As for non-narcotics cases with 7 defendants, there were no indications of violations regarding the arrest period listed in the verdict document. Of the total 7 people, 5 of them were said to have been arrested for one day, while the period of arrest for 2 others (including 1 person who was serving a sentence for a previous case or was in the process of being tried for another case) was unknown in the verdict document.

The study also found interesting facts during the arrest process. For example, in the case of defendant T37, there was even a confession from a Police Investigator who said that an arrest warrant was only made after an arrest was made.[41] Meanwhile, in the Criminal Procedure Code, the provision of arrest letters and detention letters, including copies for suspects and their families, is a procedural right that is very mandatory to be fulfilled. It is because, with the fulfillment of the procedural rights of the suspect, the guarantee and access to the rights of other suspects/defendants in the judicial process will be carried out.

There was another finding that defendant T53 was arrested without any arrest warrant.[42] At the time of the arrest, the defendant was also shot in the leg by police, but according to the defendant's confession, he did not escape. Even at trial, the Police Investigator admitted that the witness's friend had committed the physical abuse. Unfortunately, at trial, the defendant's confession, which was also supported by verbal testimony related to the violence he experienced during the investigation, was not investigated further by the judge.

[41] Makassar District Court Decision Number 262/Pid.Sus/2021/PN Mks, p. 19.
[42] Idi District Court Decision Number 75/Pid.Sus/2021/PN Idi, pp. 29-30.

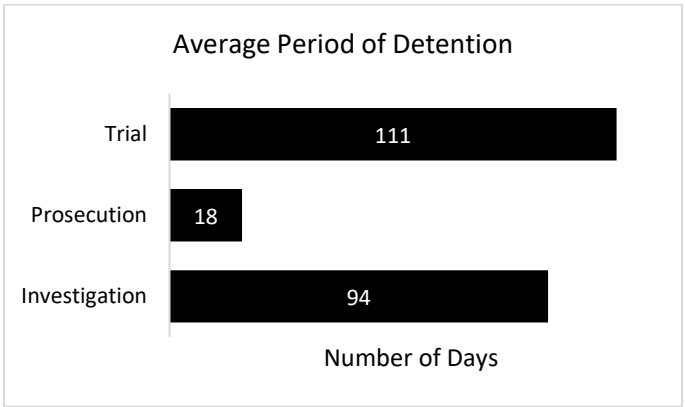
On the other hand, neither the Narcotics Law nor the Criminal Procedure Code regulates the temporary shelter for suspects who have been arrested for a long time. The criminal procedure law does not provide that suspect who is serving an arrest period be placed in certain lawful places as when serving detention. This then led to the practice of arbitrariness, as seen in the case of defendant T39 who was a defendant in a narcotics case who claimed that after being arrested he was not immediately taken to the police but was, instead, taken to an empty house.[43]

In the absence of arrangements in the Criminal Procedure Code regarding the place of arrest, the investigator has great power, which then has an impact on the lack of supervision and the emergence of the practice of incommunicado detention, which is when the suspect is undergoing the arrest period is practically detained without having communication access to the outside world. With the lack of supervision, the practice of torture of suspects on the grounds of pursuing confessions in the investigation process becomes latent and is often carried out, especially when during the crucial process of making a Minutes of Examination of suspects. Some examples of cases of alleged acts of violence by officials during the arrest of suspects in narcotics cases are defendants T37, T39, and T53, who claimed to have been subjected to torture in the form of verbal intimidation and physical violence in the investigation process, as described in the previous analysis section.

2) Excessively long detention period with bureaucratic procedures

One of the principles of the criminal justice system is that justice must be carried out simply, quickly, and at a low cost.[44] However, based on Graph 17, at the investigation stage, the opposite situation was found as defendants averagely served a 94-day detention period during the investigation, 18 days at the prosecution stage, and 111 days at the trial stage.

Graph 17. Average Period of Detention



Source: Verdict Indexation by ICJR

The findings are inseparable from the ongoing practice of extended detention granted, with the same length of duration provided for in the procedural law at most, which finally serves only as a technical

[43] Stabat District Court Decision No. 252/Pid.Sus/2021/PN Stb, pp. 8, 10, and 13.
[44] Law Number 48 of 2009 concerning Judicial Power, Article 2 Paragraph (4)

administrative or formal correspondence practice. Thus, the mechanism of detention and its extension is not based on a needs analysis, but, rather, on the consideration of fulfilling the right of the suspect/defendant to get a speedy trial.

In addition, the Criminal Procedure Code stipulates that detention, including its extension at the stage of the first-degree trial, can be carried out for up to 150 days in total. However, in the verdict of defendant T34, which is a narcotics case, there are indications of violations of the detention period, which exceeded the maximum limit of the provisions of the procedural law, which is up to 295 days. In defendant T34's verdict document, there is information that the defendant began serving a period of detention at the trial level from December 1, 2020, to the reading of the verdict of the court of first instance on September 21, 2021.[45]

The period of detention that exceeds the provisions of the procedural law shows an arbitrary deprivation of independence, despite the information in the verdict that mentions the status of defendant T34 as a correctional assistance citizen stationed in Tanjung Gusta Prison, meaning that since the beginning, he had indeed been placed in a detention situation. Nevertheless, indications of violations of the principle of a speedy trial are still very relevant in such cases.

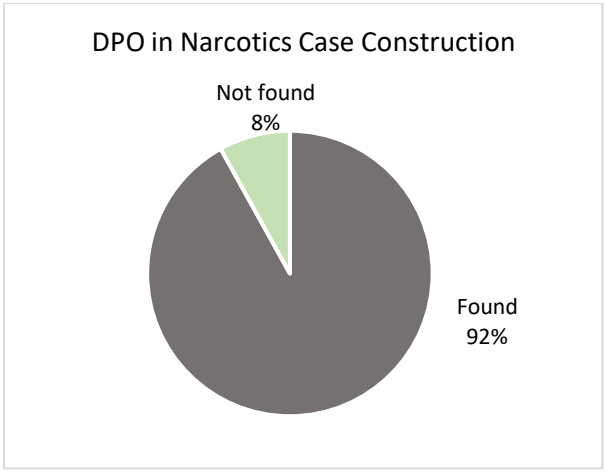
Based on the data analyzed in this study, it was also found that 4 defendants were not detained because they were said to be serving a criminal period from the previous case or were in detention for other cases. The four defendants are defendants T22, T44, and T57 in narcotics cases and defendant T52 in a premeditated murder case. From the findings of this data, 4 people become recidivists or repeat criminal acts in death penalty cases sampled in this study.

c. Proving a Case and Constructing a Case by Disregarding the Principle of Beyond Reasonable Doubt

In the majority of death penalty cases examined in this study, it was found that in the construction of the cases, as mentioned in the indictment, some defendants had the status of Wanted Persons List (*Daftar Pencarian Orang/DPO*). All of these were narcotics cases although these DPO persons may be key witnesses who could change the facts or create opportunities for change in determining the extent of the guilt of the accused. Hence, in this case, the proof of the death penalty case still does not meet the standard of beyond reasonable doubt.

[45] Medan District Court Decision Number 1300/Pid.Sus/2021/PN Mdn, pp. 2 and 46.

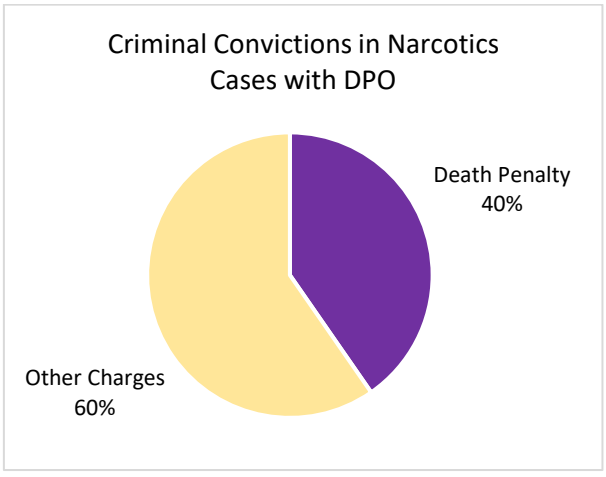
Graph 18. DPO Witnesses in Narcotics Cases



Source: Verdict Indexation by ICJR

As seen in the graph above, in 92% of narcotics cases (57 defendants), there were DPO among defendants threatened with the death penalty. These persons with DPO status practically cannot be presented to the court for cross-examination. In addition to not meeting the standards of beyond reasonable doubt, the defendant's right to make an effective defense in that context, therefore, cannot be fulfilled.

Graph 19. Types of Criminal Convictions in Narcotics Cases with DPO Witnesses

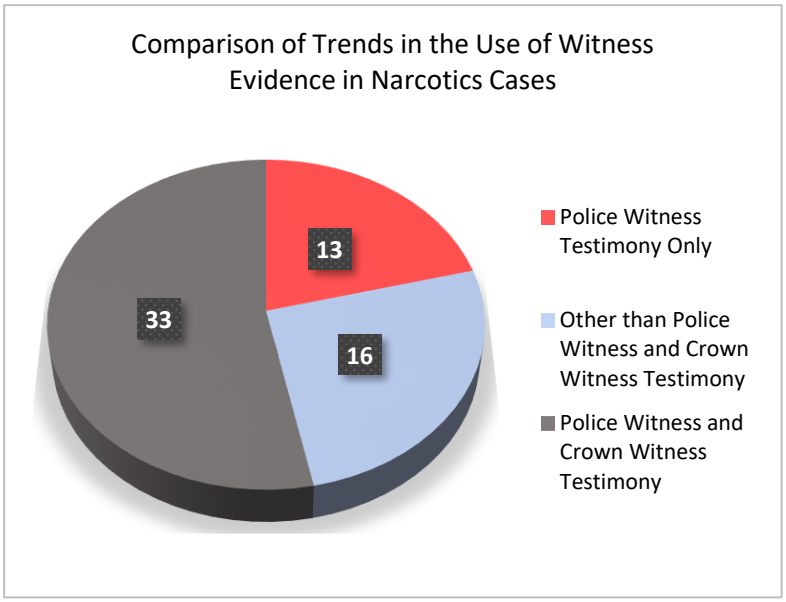


Source: Verdict Indexation by ICJR

Even though the evidentiary process did not meet the standards of beyond reasonable doubt, coupled with the violation of the defendant's fair trial right to plea, the panel of judges still sentenced the defendant to death. The figures found are considerable, with 23 defendants in narcotics cases (40%).

On the other hand, in all narcotics cases sampled in this study, no other evidence was submitted by the public prosecutors other than witness statements and letters of examination of seized narcotics evidence. An identification of the types of witness testimony is shown in the following diagram.

Graph 20. Comparative Diagram of Trends in the Use of Witness Evidence in Narcotics Cases



Source: Verdict Indexation by ICJR

The study found that for more than half of the narcotics cases, in which defendants were threatened with the death penalty (53% or 33 defendants), the evidentiary process relied solely on police witnesses and crown witnesses. Of the total 33 defendants, 14 were sentenced to death. The police witness in this context is the officer who made the arrest. Meanwhile, the crown witness is the person who has committed the criminal act with the accused (accomplice) and is sort of coerced into giving testimony/confessions against each other. It is because, at trial, the crown witness would be sworn in before giving testimony, which does not apply to the accused.

The matter was raised by the legal counsel in the case of defendant T37, who denied the use of crown witness testimony. However, in its deliberations, the panel of judges held on to jurisprudence allowing the use of crown witness testimony, while, at the same time, admitting that this practice was indeed common for proving cases with minimal evidence so that the defendant would not avoid criminal liability.[46]

Another important finding shows that in the process of examining as many as 13 defendants of narcotics cases who were threatened with death penalty in this study, amounting to 21%, there was very little evidence at a very extreme level, and the evidence was based only on the testimony of the police witness who made the arrest. Of the 13 defendants, 4 of them were later sentenced to death without the support of any evidence other than the information of the police who made the arrest and the examination of narcotics evidence.

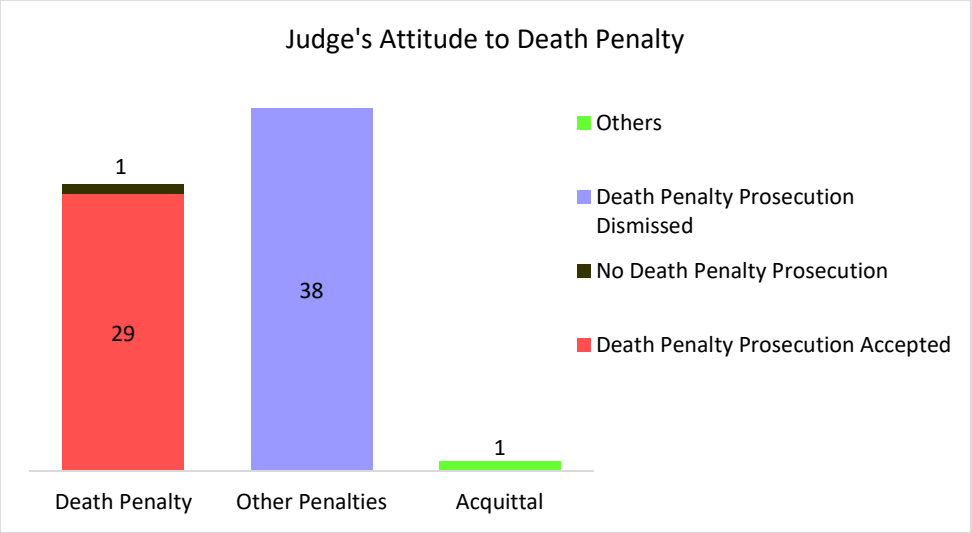
[46] *Ibid, pp.* 25-26.

Meanwhile, in narcotics cases, the rest (26% or 16 defendants) were found to use evidence from witnesses other than police and crown witnesses. However, the testimony of the witness was also not very significant in the evidentiary process; for example, the witnesses only gave testimony related to the arrest process of the accused, which had the same content as the police witness statement, in the case of defendants T10 to T18, T29, T32, T59, and T60; or as the owner of a vehicle that was converted to transport narcotics in the case of defendants T25, T53, and T63. The aggravating witness testimony filed by the public prosecutor was not to expose the illicit trade network of narcotics.

d. Judge's Attitude to Death Penalty and Consideration for Mitigating Reasons

Of all the cases sampled in this report, there is a trend of prosecutions from the public prosecutor that were granted by judges (among 29 defendants in 5 non-narcotics cases and 24 narcotics cases), and some cases were decided by the judge with the death penalty even though they were not charged by the public prosecutor with the death penalty (for 1 defendant in a premeditated murder case). However, not all death penalty charges were agreed upon by the judge. Of all the cases, there were 38 defendants (1 defendant in a non-narcotics case and 37 defendants in narcotics cases) who were sentenced to other penalties and 1 defendant in a narcotics case who was sentenced to acquittal. More detailed information can be seen in the following diagram.

Graph 21. Judge's Attitude to Death Penalty



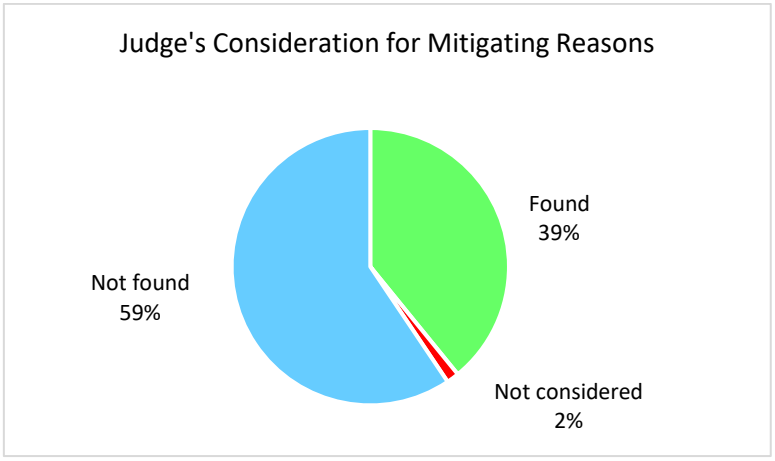
Source: Verdict Indexation by ICJR

The judge's dismissal of the death penalty charges and the judge's decision to impose the death penalty on the defendant cannot be separated from other factors, one of which is the presence or absence of pleas from the defendant in court. Of the 39 defendants who were not sentenced to death, 23 defendants filed a plea in writing through their legal counsel. However, in this report, it was also found that the 30 defendants sentenced to death essentially filed a plea, both written and oral, at trial. Of the 30 defendants sentenced to death, 19 of them filed only an oral plea and 11 of them filed a written plea.

Examined further, among the oral pleas filed by the defendants, there was one that only focused on the request for leniency. For example, in defendant T63's verdict document, the defendant's plea was filed in writing to essentially invoke a sentence as lightly as possible and plead guilty. The same plea can also be seen in defendant T64's verdict document. However, there was also a plea, submitted by one defendant through his legal counsel, that directly addressed the main subject matter of the case, particularly regarding the testimony of witnesses. This, for example, can be seen in the case of defendant T29, whose one defense, among others, was to reject the testimony of a witness, who, according to him, had limited knowledge, and the accused was not caught red-handed but was arrested based on an arrest warrant without sufficient preliminary evidence.[47] Despite filing a defense in the context of the subject matter of the case, defendant T29 was still sentenced to death by the panel of judges with the consideration that the defendant, who brokered the sales and purchases of narcotics in the illicit trade network, deserved the death penalty and had fulfilled the sense of justice for both the defendant and the community.[48]

Furthermore, in addition to the presence or absence of pleas from the accused, the judge's consideration for mitigating reasons affects whether or not a death penalty is imposed. Of all the rulings, related considerations for these mitigating reasons can be seen in the following diagram.

Graph 22. Judge's Consideration for Mitigating Reasons



Source: Verdict Indexation by ICJR

Based on the diagram above, it can be seen that for 59% of the verdicts (41 defendants: 7 non-narcotics cases and 34 narcotics cases), the judge considered the mitigating circumstances but concluded that no mitigating circumstances were found in the defendants. Furthermore, in 39% of the verdicts (27 defendants in narcotics cases), the judge considered the mitigating circumstances and found them in the defendants. Meanwhile, the remaining 2%, namely one defendant in a narcotics case, had no information regarding the consideration for mitigating circumstances.

In terms of consideration for mitigating circumstances, in the verdict document of defendant T62, the panel of judges held that the defendant's misconduct was very passive, namely only seeking the berth

[47] Putusan Pengadilan Negeri Pangkalan Balai Nomor 176/Pid.Sus/2021/PN Pkb, p. 3-4.
[48] *Ibid.*, p. 100.

of a ship carrying narcotics; the defendant did not belong to the narcotics illicit trafficking syndicate; and, the defendant was only used by the witness (perpetrator) to find the berth of the ship. Therefore, the panel of judges later held that it did not agree with the public prosecutor who demanded a death penalty.

Although there were considerations for mitigating circumstances in some of those rulings, there was one case in which the mitigating circumstances were considered but the defendant was still sentenced to death. For example, in the case of defendant T55, the panel of judges in its consideration held that there were mitigating circumstances for the accused (i.e., the defendant admitted his conduct).[49] However, the panel of judges continued to impose the death penalty on the accused, whereas ideally, when a judge finds one mitigating reason, then it should be a sign that the death penalty, which is the maximum sentence, does not need to be imposed.

Furthermore, in the verdicts with no information regarding considerations for mitigating circumstances, namely in the case of defendant T19, the panel of judges did not include either aggravating or mitigating circumstances in its judgment. When referring to article 197 paragraph (1) letter f of the Criminal Procedure Code, the sentencing decree contains both aggravating and mitigating circumstances. Thus, the verdict violates the provisions in the Criminal Procedure Code itself and should be declared null and void as stated in Article 197 paragraph (2) of the Criminal Procedure Code.

In addition to the above case, there was a ruling that considered a woman being used as a courier in the illicit trade of narcotics, namely defendant T43. In her case, her counsel submitted a plea stating that "the defendant was merely a woman and merely a courier who was exploited by a network of illicit narcotics trafficking.".[50] The plea was agreed upon by the panel of judges but was not viewed as a mitigating circumstance for the defendant.

[49] Idi District Court Decision No. 136/Pid.Sus/2021/PN Idi, p. 44.
[50] West Jakarta District Court Decision No. 569/Pid.Sus/2021/PN Jkt.Brt, p. 34.

6. Technical Issues of Court Documents Impacting the Fulfillment of the Fair Trial

a. Inaccuracy and thoroughness of the preparation of the verdict document

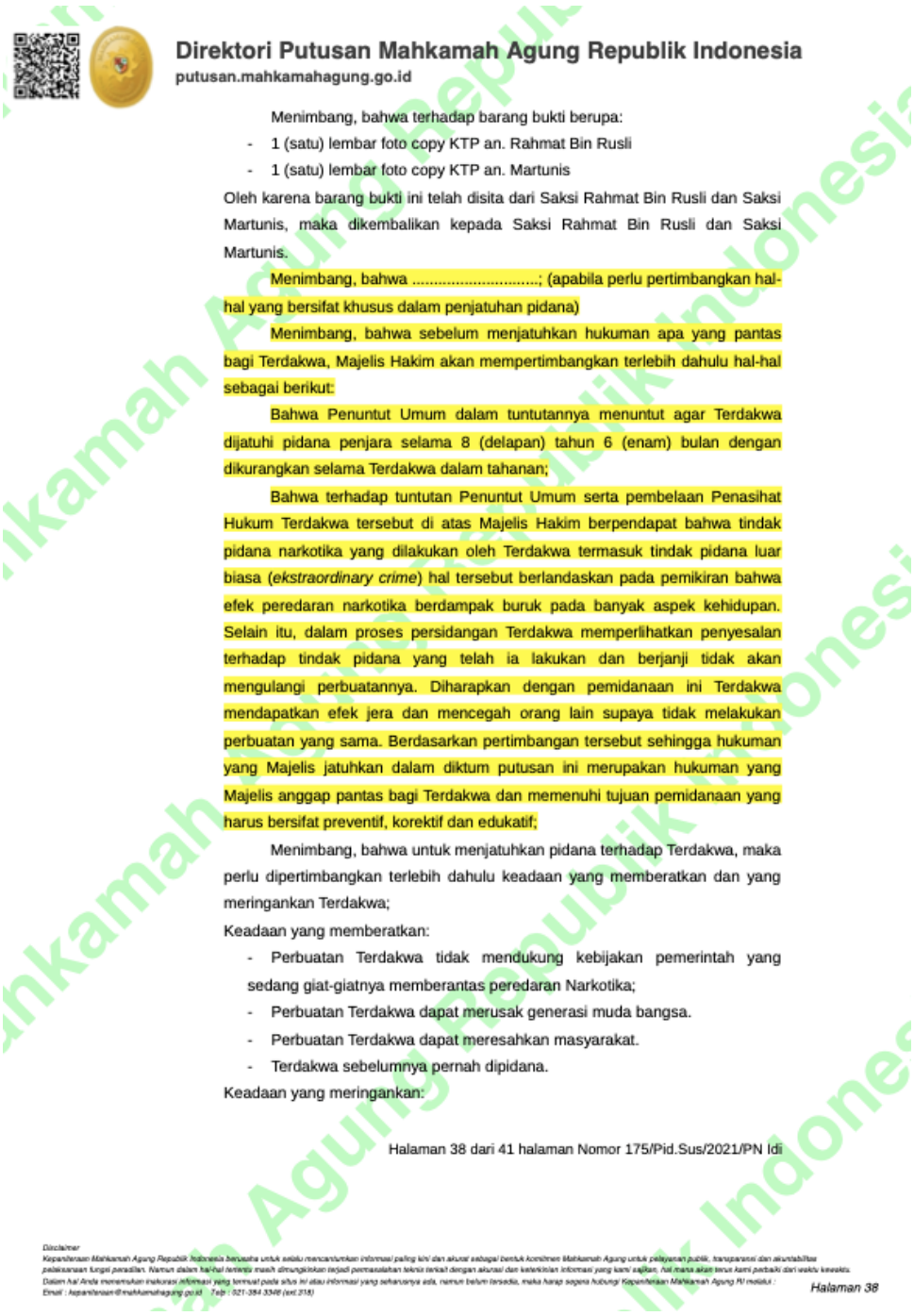
Given the irreversible nature of the death penalty, the highest level of rigor and scrutiny shall be applied from the examination to the writing of the verdict of the death penalty case. Unfortunately, this study found inaccuracies in some of the rulings that were used as the subject of the study. These errors include typographical errors in the prosecution clause,[51] lack of information regarding the date of case handling,[52] miswriting of charges in the judge's legal considerations [53], and copy-paste of witness testimony into legal fact entirely[54].

Carefulness and rigor in the drafting of verdicts are often not seen as essential to determining the quality of the verdict, whereas minor errors concerning these two matters just show how the court did not give sufficient attention to the death penalty verdict. In fact, in death penalty cases, the highest level of attention must be given to the examination of the case to ensure that no mistakes are made in the irreversible criminal conviction process. Furthermore, minor errors can result in misconceptions of the case, particularly for research purposes.

For example, in the verdict document of defendant T58 obtained from the Supreme Court's Directory of Verdicts, there are several parts of the judgment that are highlighted in yellow, including the consideration for the defense from the defendant's legal counsel, consideration for the period of detention, consideration for the placement of the defendant, as well as the tribunal's consideration for the charges of the public prosecutor and the defense from the defendant's legal counsel (see Graph 1). Based on an analysis of the entirety of this judgment, it was found that the highlighted parts did not correspond to the construction of the case under examination. Thus, all the information in the yellow highlight was not available in the verdict document. The inaccuracy of the process of drafting a verdict, in this case, has an impact on the incompleteness of information regarding the consideration of the panel of judges in imposing the death penalty in the verdict, while in the imposition of the death penalty, it is mandatory to carefully take into account all aspects by not giving room for doubt to the facts in the case.[55]

[51] Putusan Pengadilan Negeri Medan Nomor 1286/Pid.Sus/2021/PN Mdn
[52] Putusan Pengadilan Negeri Tanjung Karang Nomor 995/Pid.Sus/2021/PN Tjk
[53] Putusan Pengadilan Negeri Idi Nomor 176/Pid.Sus/2021/PN Idi
[54] Putusan Pengadilan Negeri Bengkalis Nomor 168/Pid.Sus/2021/PN Bls
[55] United Nations Economic and Social Council Resolution 1984/50, Safeguards guaranteeing protection of the rights of those facing the death penalty. Para. 4

Figure 1. Display of Defendant T58's Verdict Document



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Menimbang, bahwa terhadap barang bukti berupa:

- 1 (satu) lembar foto copy KTP an. Rahmat Bin Rusli
- 1 (satu) lembar foto copy KTP an. Martunis

Oleh karena barang bukti ini telah disita dari Saksi Rahmat Bin Rusli dan Saksi Martunis, maka dikembalikan kepada Saksi Rahmat Bin Rusli dan Saksi Martunis.

Menimbang, bahwa .....; (apabila perlu pertimbangkan hal-hal yang bersifat khusus dalam penjatuhan pidana)

Menimbang, bahwa sebelum menjatuhkan hukuman apa yang pantas bagi Terdakwa, Majelis Hakim akan mempertimbangkan terlebih dahulu hal-hal sebagai berikut:

Bahwa Penuntut Umum dalam tuntutannya menuntut agar Terdakwa dijatuhi pidana penjara selama 8 (delapan) tahun 6 (enam) bulan dengan dikurangkan selama Terdakwa dalam tahanan;

Bahwa terhadap tuntutan Penuntut Umum serta pembelaan Penasihat Hukum Terdakwa tersebut di atas Majelis Hakim berpendapat bahwa tindak pidana narkotika yang dilakukan oleh Terdakwa termasuk tindak pidana luar biasa (*ekstraordinary crime*) hal tersebut berlandaskan pada pemikiran bahwa efek peredaran narkotika berdampak buruk pada banyak aspek kehidupan. Selain itu, dalam proses persidangan Terdakwa memperlihatkan penyesalan terhadap tindak pidana yang telah ia lakukan dan berjanji tidak akan mengulangi perbuatannya. Diharapkan dengan pemidanaan ini Terdakwa mendapatkan efek jera dan mencegah orang lain supaya tidak melakukan perbuatan yang sama. Berdasarkan pertimbangan tersebut sehingga hukuman yang Majelis jatuhkan dalam diktum putusan ini merupakan hukuman yang Majelis anggap pantas bagi Terdakwa dan memenuhi tujuan pemidanaan yang harus bersifat preventif, korektif dan edukatif;

Menimbang, bahwa untuk menjatuhkan pidana terhadap Terdakwa, maka perlu dipertimbangkan terlebih dahulu keadaan yang memberatkan dan yang meringankan Terdakwa;

Keadaan yang memberatkan:

- Perbuatan Terdakwa tidak mendukung kebijakan pemerintah yang sedang giat-giatnya memberantas peredaran Narkotika;
- Perbuatan Terdakwa dapat merusak generasi muda bangsa.
- Perbuatan Terdakwa dapat meresahkan masyarakat.
- Terdakwa sebelumnya pernah dipidana.

Keadaan yang meringankan:

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Not only in the above case but the practice of copy-paste in the making of a verdict document was also found in the verdict samples of defendants T8 and T9. In both of these verdicts, the compiler of the verdict directly took all the testimonies of witnesses presented at trial as legal facts, without first sorting them out. Based on the Guidelines for Drafting Verdicts of the First Level of General – Criminal Courts, the section on legal facts in the verdict should sketch out a correlation between the facts.[56] It means that

[56] Guidelines for the Compilation of Verdicts of the First Instance of the General Judiciary – Criminal, p. 12.

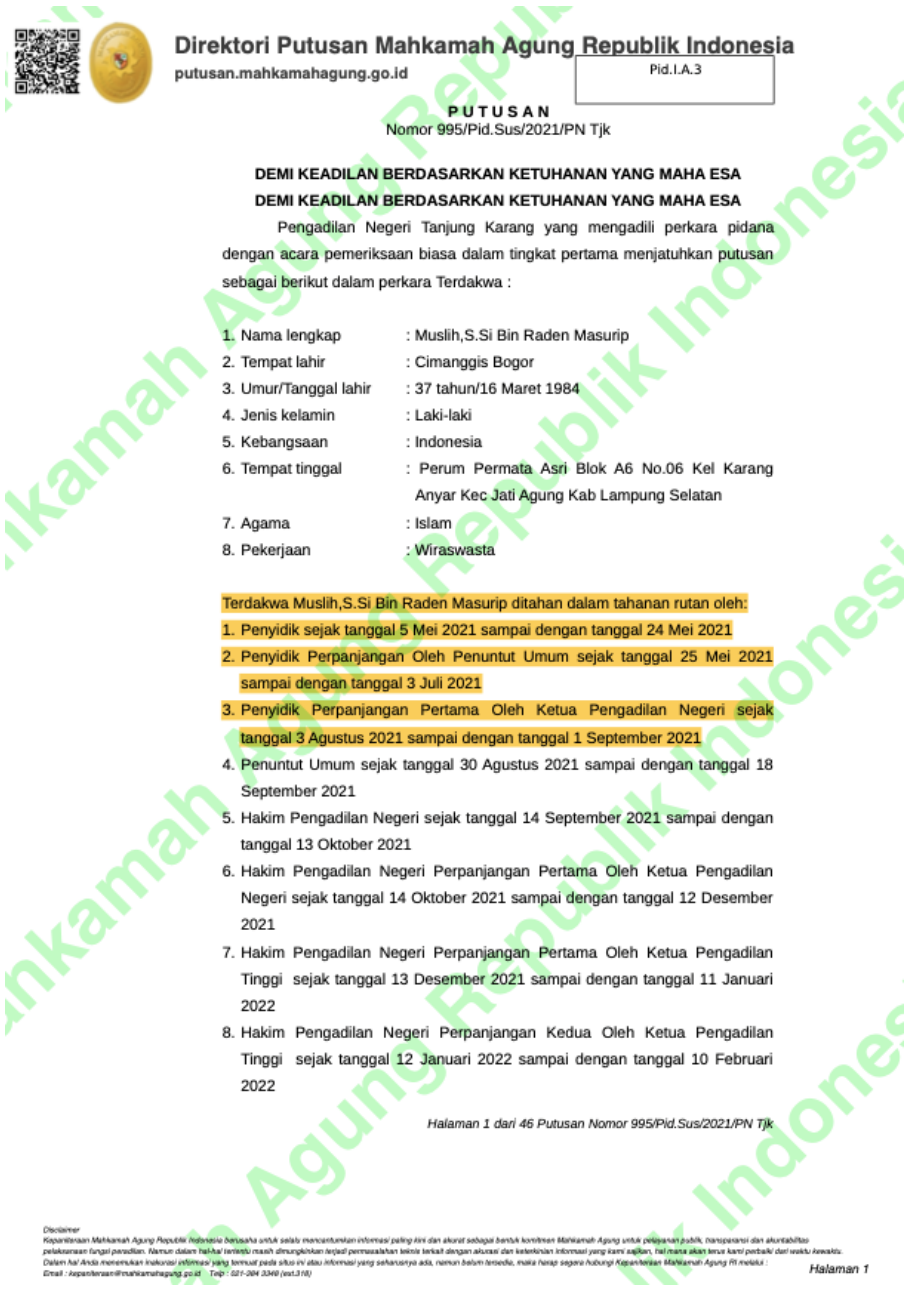
not all the testimony of witnesses and experts presented in person at trial can be copied and pasted as was done in the findings of this study. Not only that, in the cases of defendants T8 and T9, the witnesses presented were only 3 (three) persons, namely 2 (two) police witnesses (who made the arrest) and 1 (one) crown witness (i.e., a witness in the same case but processed in a separate case file).[57] The direct copy-paste procedure of the witnesses' testimony into legal facts in the verdict raises the question of whether in the course of hearing the case, the panel of judges has properly conducted an in-depth and careful examination because it does not rule out the possibility that the inaccuracy found in the writing of the verdict illustrates the actual process in the examination of the case as well.

Furthermore, although it seems simple, in the cases of defendants T1, T2, T3, and T4, there is an error that is not yet known whether it came from the public prosecutor's document which was then copied and pasted by the compiler of the verdict or whether it came from the compiler of the verdict who misrepresented the article of the public prosecutor's claim in the case. In the indictment, the four defendants were charged with a prima facie charge of Section 114 subsection (2) jo. Article 132 (1) of the Narcotics Law subsidiary Article 112 paragraph (2) jo. Article 132 paragraph (1) of the Narcotics Law. In the examination, the panel of judges proved the primary charge, i.e., Article 114 subsection (2) jo. Article 132 paragraph (1) of the Narcotics Law, in which this charge was declared to be validly and conclusively proven by the judge. However, an oddity was evident in the prosecution document, as the criminal article listed is Article 114 paragraph (2) jo. Article 112 paragraph (1) of the Narcotics Law.

Finally, in the case of defendant T19, it was found that there was a void in the period of detention without information. Based on the verdict document (see Figure 2), defendant T19's detention status was unknown for 30 days from July 4 to August 2, 2021 (detention at the investigation level). The extension of detention previously requested by the investigator to the public prosecutor was recorded from May 25 to July 3, 2021, and the subsequent extension of detention from the Chief Justice of the District Court (first) began on August 3 to September 1, 2021. The void in the date of detention can be interpreted in many ways. First, the defendant on that date was unlawfully detained without permission of detention from competent authorities. Secondly, there was missed information in the writing of the period of detention, wherein fact at that time there was detention with the permission of the first extension of the Chief Justice of the District Court under Article 29 paragraph (2) of the Criminal Procedure Code because the duration of that time which was not recorded by the period was 30 days.

[57] See Bengkalis District Court Decision No. 168/Pid.Sus/2021/PN Bls, pp. 11-15.

Figure 2. Display of Defendant T19's Verdict Document



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PUTUSAN
Nomor 995/Pid.Sus/2021/PN Tjk

DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA
DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA

Pengadilan Negeri Tanjung Karang yang mengadili perkara pidana dengan acara pemeriksaan biasa dalam tingkat pertama menjatuhkan putusan sebagai berikut dalam perkara Terdakwa :

1. Nama lengkap : Muslih,S.Si Bin Raden Masurip
2. Tempat lahir : Cimanggis Bogor
3. Umur/Tanggal lahir : 37 tahun/16 Maret 1984
4. Jenis kelamin : Laki-laki
5. Kebangsaan : Indonesia
6. Tempat tinggal : Perum Permata Asri Blok A6 No.06 Kel Karang Anyar Kec Jati Agung Kab Lampung Selatan
7. Agama : Islam
8. Pekerjaan : Wiraswasta

Terdakwa Muslih,S.Si Bin Raden Masurip ditahan dalam tahanan rutan oleh:
1. Penyidik sejak tanggal 5 Mei 2021 sampai dengan tanggal 24 Mei 2021
2. Penyidik Perpanjangan Oleh Penuntut Umum sejak tanggal 25 Mei 2021 sampai dengan tanggal 3 Juli 2021
3. Penyidik Perpanjangan Pertama Oleh Ketua Pengadilan Negeri sejak tanggal 3 Agustus 2021 sampai dengan tanggal 1 September 2021
4. Penuntut Umum sejak tanggal 30 Agustus 2021 sampai dengan tanggal 18 September 2021
5. Hakim Pengadilan Negeri sejak tanggal 14 September 2021 sampai dengan tanggal 13 Oktober 2021
6. Hakim Pengadilan Negeri Perpanjangan Pertama Oleh Ketua Pengadilan Negeri sejak tanggal 14 Oktober 2021 sampai dengan tanggal 12 Desember 2021
7. Hakim Pengadilan Negeri Perpanjangan Pertama Oleh Ketua Pengadilan Tinggi sejak tanggal 13 Desember 2021 sampai dengan tanggal 11 Januari 2022
8. Hakim Pengadilan Negeri Perpanjangan Kedua Oleh Ketua Pengadilan Tinggi sejak tanggal 12 Januari 2022 sampai dengan tanggal 10 Februari 2022

b. Lack of basic information on the fulfillment of the right to legal assistance and allegations of torture within the framework of court decisions

In the process of indexing the verdicts in this study, several things were found that need to be considered in the future, especially related to cases that were prosecuted or sentenced to death. The unavailability of some basic information that is important to know, particularly whether or not fair trial rights were fulfilled effectively and with quality, causes the analysis in this study of judgments to be limited. All elements mentioned in this section are not components that are required in the format of a verdict as stipulated in the Decree of the Chief Justice of the Supreme Court Number 44/KMA/SK/III/2014 of 2014 concerning the Implementation of Verdict Templates and General Judicial Case Numbering Standards. However, in the future, if the Supreme Court wants to improve the quality of its judgment to

ensure that all parties are thoroughly informed about a case, especially death penalty cases that must be monitored and ensured concerning the quality of the examination of the case, then it is important to include the following components:

1) Legal Assistance Status

Unlike the status of detention (and in some situations, the status of arrest), the status of legal assistance is not always fully stated in the verdict document. In all the verdicts indexed in this study, only information about the status of legal assistance at the court examination level was found. This has an impact on the difficulty of identifying whether a defendant has received legal assistance since he/she is designated as a suspect, with the particular right contained in Article 56 paragraph (1) of the Criminal Procedure Code.

Although in practice that information has been contained in the case files examined by the panel of judges at trial, the non-inclusion of this information in court decisions that are widely accessible to the public will make it difficult for parties who are not directly related to the case to assist at the time of the trial. Not only that, such a format of the verdict may complicate research work in the future, especially those that require information related to the fulfillment of fair trial rights in death penalty cases, such as this study. In this study, the most recorded data relating to legal assistance at the investigation and prosecution level was unknown (*Tidak Diketahui/TD*).

2) Defendant's Identity

The inclusion of the identity of the defendant in the verdicts sampled in this study is not entirely uniform. Although by default the Court has listed at least the name, place, and date of birth (or age), address, and occupation, the last educational attainment of the defendant is not always listed. In the cases of defendants T1-T4, T34, and T69, the educational background of the defendants are listed, but in other verdict documents in this study, no particular information relating to the last educational attainment can be found.

It is important that demographic details, such as the identity of the defendants, be included in the verdict document, especially in death penalty cases. This is because death penalty in some documents has been presented as a form of punishment that is disproportionately imposed on those who are in a pre-prosperous economic situation and unable to access effective and quality legal assistance.[58]

3) Period of arrest

The study also found several verdicts that did not include the defendants' arrest period. The majority of the verdicts sampled in this study are narcotics verdicts whose detention period can last up to 6 (six) days, in accordance with the provisions of the Narcotics Law.

[58] Death penalty disproportionately affects the poor, UN rights experts warn' UN Office of High Commissioner for Human Rights, 6 Oktober 2017 <https://www.ohchr.org/en/press-releases/2017/10/death-penalty-disproportionately-affects-poor-un-rights-experts-warn#:~:text="If%20you%20are%20poor%2C%20the,from%20lower%20socio%2Deconomic%20groups> accessed 3 October 2022

It is important then to pay attention to the period of arrest because, during the period of arrest, the defendants are subject to torture practices.[59] This is because, under the Criminal Procedure Code, access to fair trial rights, one of which is the right to legal counsel, can only be obtained when a suspect or defendant is detained.[60] Not only that, by not including the period of arrest, no further information was obtained about the location of the arrest. In this study, it was also found that a defendant was not taken to the police after the arrest but was taken to an empty house.[61] Such a situation, often called incommunicado detention, becomes unsupervised without sufficient information about the time of arrest in the verdict.

c. Imbalanced court responses to related parties

In the current format of the judgment of the court of first instance, there appears to be an imbalance in the attitude of the court towards the defense made by the defendants and their legal counsel. This can be seen from the inconsistency in the contents included in defense documents, such as exceptions, pleas, and other documents that may be filed at trial.

So far, the information in verdict documents has always been completed using the method of copy-pasting prosecution documents, such as indictments and charges. Meanwhile, the format of inclusion in defense documents, such as exceptions and pleas, was found to vary. Concerning pleas, the majority of verdicts only list the points of the defense presented by the defendants and/or their legal counsel. Moreover, since there is no obligation for pleas to be filed in writing by legal counsel (i.e., the defendants are allowed to give the plea orally), the standard of inclusion is uncertain. From these findings, it can be seen that there is an imbalance in the court's responses to the defendants and their legal counsel, which certainly does not reflect the proper implementation of the principle of equality of arms.

[59] According to research by LBH Masyarakat in 2012, at least 79% of people arrested in narcotics cases were tortured during arrest. See Gunawan et. al., *Reality Behind Bars: A Brief Report on Documentation of Human Rights Violations of Drug Suspects at the Investigation Stage in Jakarta*, LBH Masyarakat, 2012

[60] KUHAP, *op. cit.,* Article 57

[61] Stabat District Court Decision Number 252/Pid.Sus/2021/PN Stb

7. Conclusions and Recommendations

From the prior lengthy description described, it can be seen that the findings of torture continue to be evident in judicial practice in Indonesia to this day, including in death penalty cases. Based on the results of an analysis of 59 documents of first-instance court decisions throughout Indonesia in 2021 with a total of 69 defendants, various forms of torture were experienced by defendants who were threatened with the death penalty in the form of physical, psychological, or verbal violence from the authorities during the judicial process. The study found three defendants who filed claims of torture as stated in the verdict documents studied.

In addition, people who have been sentenced to death are still vulnerable to experiencing the death row phenomenon, which is included as a form of torture. Unfortunately, there has been no commitment from policymakers to prevent this in the Criminal Code policy passed on December 6, 2022, through the guarantee of commutation of the death penalty which includes people who have been awaiting their execution for more than 10 years.

In other aspects of fair trial rights, as reflected from the results of the analysis of the verdict documents, the fulfillment of fair trial rights has not been implemented at a higher standard compared to other criminal cases, as mandated in various international human rights instruments. Findings of substandard fulfillment of fair trial rights and findings of violations can still be found in the:

- aspects of the fulfillment of the right to legal aid and ineffective defense (e.g., lack of submission of defense documents, lack of submission of mitigating evidence, violation of the principle of non-self-incrimination through the use of crown witnesses);
- violations in the process of arrest and detention (e.g., a long period of an arrest leading to incommunicado detention, which is particularly prone to torture, as well as excessively long and bureaucratic detention periods);
- case proving that falls short of the standard of beyond reasonable doubt (ranging from key witnesses with DPO status to very limited evidence as the basis of proof, especially in narcotics cases, by relying solely on the testimony of the police witness who made the arrest and the crown witness);
- insufficient consideration for mitigating reasons, with even one defendant whose mitigating circumstances were not considered at all.

This research also specifically found that so far there had been problems in the practice of drafting verdict documents that had an impact on the fulfillment of fair trials, for example, the absence of basic information related to the period of arrest and the status of legal assistance since the investigation process. In addition, the inclusion of defense documents (e.g., exceptions, pleas) has not been treated the same as prosecution documents (such as indictments), which are always fully outlined. Then this study found technical errors related to inaccuracy in the writing of crucial parts of the verdict, such as the indictment article and the prosecution.

Based on the above, the study recommends the following:

To policymakers (government and House of Representatives):

1. Take necessary steps to amend the law aimed at abolishing death penalty using the perspective of protecting human rights and humanity in a just and civilized manner under the values of Pancasila and the 1945 Constitution;
2. Ratify OPCAT as a form of the government's commitment to preventing torture, especially in places of detention which still pose great risks of violent acts, including to people who are threatened with the death penalty;
3. Ensure that there are technical implementation arrangements regarding the provision of death penalty commutation in the new Criminal Code that can warrant a rigorous, transparent, and accountable assessment process after a death row inmate has served 10 years of probation, as well as ensuring that the guarantee of direct commutation assessment applies to death row inmates who are currently in a waiting period for execution of more than 10 years (approximately 97 people);
4. Initiate changes to the criminal procedure law to regulate adequate mechanisms for torture claim examination, guarantee the regulation of fair trial rights with higher standards for people threatened with the death penalty, adopt supervisory mechanisms in the context of prosecution and court supervision functions to prevent torture in the process of trial, as well as ensuring the inclusion of basic information related to the fulfillment of fair trial rights in the structure of court decisions (in particular the period of arrest, the status of legal assistance since the investigation process, and the complete description of defense documents);
5. Initiated changes to sectoral laws governing deviations in the criminal procedure law to repeal provisions related to long arrest periods, such as in the Narcotics Law and the Terrorism Law, as people arrested during the long arrest period are vulnerable to torture.

To the Law Enforcement Agencies and the Supreme Court:

1. Impose a moratorium on both prosecutions and death penalty convictions until commutation mechanisms are in place to prevent an increase in the number of death row inmates waiting for execution who are prone to the death row phenomenon;
2. Initiate policy changes within the Supreme Court related to the preparation of the structure of court decisions to accommodate basic information related to the fulfillment of fair trial rights (in particular the period of arrest, the status of legal assistance since the investigation process, and the complete description of defense documents);
3. Ensure that there is a technical examination process for verdict documents before publication within the Supreme Court to avoid typographical error and technical errors in the writing of verdict documents.

To the Independent Human Rights Monitoring Agencies (Komnas HAM, Komnas Perempuan, and KPAI):

1. Encourage the government to immediately ratify OPCAT;
2. Monitor places of detention to prevent torture experienced by both prisoners who are still in the judicial process and death row inmates who are going through the death row phenomenon.

To Academics:

1. Promote research and discussion in the academic space on the issue of torture and the fulfillment of fair trial rights in death penalty cases;
2. Provide evidence through research that in death penalty cases, violations of the prohibition against torture and the right to a fair trial still occur.

To Local Civil Society and the International Community:

1. Continue advocacy activities for the abolition of death penalty at both the local and global levels;
2. Urge the government to immediately ratify OPCAT;
3. Encourage the implementation of the New Criminal Code to provide commutation guarantees for people who have been on death row and ill-treated.

Authors' Profile

Adhigama Andre Budiman, currently working as researcher at the Institute for Criminal Justice Reform (ICJR) since 2016. He completed his Masters program from Justus-Liebig Universität in Germany and is active in advocating death penalty issues and international human rights law.

Genoveva Alicia K. S. Maya, completed a master's degree in Human Rights Law in 2021 from the London School of Economics and Political Science (LSE) and obtained a law degree from the Faculty of Law, Gadjah Mada University (UGM) Yogyakarta. Since 2018, she has been active as a researcher at ICJR who conducts studies and is involved in advocating on issues of women's and children's rights in the criminal justice system, freedom of expression and opinion, as well as issues of imprisonment.

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Lovina, is a researcher at the Institute for Criminal Justice Reform (ICJR) and a graduate of the Indonesia Jentera School of Law majoring in Criminal Law. Previously, Lovina was active as a contributor at Mongabay Indonesia covering and writing about legal issues, indigenous peoples' conflicts, and the environment, had also worked at the Lokataru Foundation, and was active as a teacher at STH Indonesia Jentera. Over the last 10 years, Lovina has produced several research results and written articles on various issues, especially corruption and human rights. Some of her works include research on academic freedom, the practice of suppressing trade unions in Indonesia, and studies on the recovery of victims of corruption. Lovina has also published a book about Munir Said Thalib's advocacy stories, as well as written about the position and validity of the results of a polygraph (lie detector) examination in the criminal evidence system in Indonesia.

Maidina Rahmawati, is a 2016 graduate of the Faculty of Law, University of Indonesia, a certified advocate and mediator. She received a number of fellowships related to gender issues and drug policy reform: in 2017 from Criminology University of Hong Kong, on Human Rights and Narcotics Policy in Asean and East Asia, and in 2019 from The CEU School of Public Policy Budapest, Hungary on Aspects Gender in Narcotics Policy Reform. In 2017-2020, she was a researcher in a study on Trafficking in Persons Data Management in ASEAN, together with the WSD Handa Center for Human Rights and International Justice, Stanford Global Studies Division, Stanford University.

Nur Ansar, completed his education at the Indonesia Jentera School of Law (STHI Jentera) in the field of criminal law in August 2021. He has an interest in criminal justice issues as well as issues on agrarian and environmental conflicts. Since 2016, he has been involved in advocating for the resolution of agrarian and environmental conflicts, especially in South Sulawesi. Currently he works at ICJR as a researcher.

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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