

A Gap Between Right to Live Protection and Death Penalty in Indonesia (Judges Decision on Cases Threatened Death Penalty)

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Abstract. In Indonesia, right to life and death penalty has been perceived separately both by legislative and judiciary institutions. It can be seen from the government stand to ratify covenant regarding to right to life, but impose death penalty. This article is trying to elaborate judges' decisions to cases threatened to death at district courts in South Sumatra and Yogyakarta Province. The research will contribute to provide an understanding of judges to the Article 6(2) ICCPR in both provinces. The main methods for this research comprise literature review and review of selected verdicts from district courts in both provinces. The data will be supported by several interviews to several judges serving in the district courts. As a result, none of the verdicts provide a consideration on human rights law set forth in the Article 6(2) for the cases threatened to death. In contrast, some judges believe that capital punishment has a deterrent effect for others. Fortunately, in some district courts, the judges are for sure that death penalty is the very last choice for very sadistic culprit when there is no mitigating circumstance in sentencing.

1 Introduction and literature review

What is right to life? The European Convention of Human Rights as the oldest binding covenant interprets that right to life is “not just about the state not killing its citizens but rather about a broader requirement that human life be respected by the avoidance of death where possible and the investigation of its cause where not possible” [1].

Polemic of death penalty in Indonesia is a never-ending issue. The gap between in the International Covenant on Civil and Political Rights (ICCPR) and the reality is far from ideal especially on the right to life. The right must be understood integrally as the supreme right which no derogation is permitted [2] and the most serious crimes in the Article 6(2) as the only possible crimes for capital punishment must be understood by judges because the punishment is never give any deterrent effect for real [3].

Indonesia as the member of ICCPR has an obligation to be bound to the covenant based on the principle of *pacta sunt servanda*. It means that by ratification Indonesia must deem an international agreement as a national law. According to the covenant, the capital punishment is possible only for the most serious crimes. The definition of the most serious crimes is not

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obvious. The limitation is only provided that it does not contradict with the Convention on the Prevention and Punishment of the Crime of Genocide 1948. However, in 1998, the concept of the most serious crimes has developed with the Rome Statute. The scope of the most serious crimes in the statute are crimes of genocide, crimes against humanity, crimes of aggression and war crimes [4].

Data from international amnesty uncovered that crimes decided with death penalty and executed in 2015 were more than sixty people [5]. The following year, the Supreme Court decided twenty five culprit with death penalty [6]. How about judges' consideration on human rights in cases threaten to death and the most serious crimes as the only crimes which is permissible to be sentenced to death and what about judge's view on the right to life stipulated in the Article 6(1).

Several article discussed about death penalty such as Muhammad Hatta's. He compares capital punishment in the context of Islamic Law and Indonesian Criminal Law and argues that capital punishment is not against the Indonesian law. Even though death penalty is still recognized in Indonesia, judges in making decision are very carefully with the limitations determined by the law [7] and put the death penalty as an alternative punishment [8]. Another article by Damon Barrett states that ILO Committee of Experts challenged the state practice of capital punishment for drugs offences. He provides an example that Indonesia has an increasing willingness to use capital punishment to address crime especially in drug trafficking cases [9]. Compare to those two articles, the novelty of this article is an analysis of verdicts from district courts with the view point of Article 6(2) the ICCPR and interview to judges in those courts whether they are binding to the ICCPR or not primarily concerning to the article 6(1) when they are taking decision in their judgment.

2 Objective of the Study

The aims of this study is to analyze judges' decisions on the cases threatened to death at district courts. In addition, the view of the judges will be uncover regarding to the most serious crimes as the only crimes which is permissible to be sentenced to death and the judge's view on the right to life stipulated in the Article 6(1).

3 Methodology

This article comprise normative [10] and empirical [11] research which analyze not only on the statute *per se*, but also how the statute is applicable in the field (district court). The Article 6 of ICCPR is applied as viewpoints to analyze the verdicts. Interview to the appointed judges from each district court are also become a concern to enrich this article with judges' viewpoints right to life and capital offence.

4 Discussion

Rights in the ICCPR are divided into "derogate" and "non-derogate" rights. There are requirements for state to derogate their obligation to protect and fulfil human rights [12]. It can be determined that other than non-derogate rights are "derogate" rights and non-derogate rights are definite such as right to life, prohibition to torture, inhuman, or degrading treatment or punishment. These rights are absolute though several rights are debatable such as prohibition against torture, inhuman and degrading treatment which is no longer "absolute"[13] and this idea has been rebutted by Natasa Mavronicola in a cases *Gafgen v Germany* where the ECtHR's Grand Chamber demanded adequate redress for Germany because of ill-treatment by police officers [14].

One of the absolute rights which is not permitted to be derogated is right to life in Article 6(1). Nonetheless, there is a gap that several countries still recognize the death penalty. In the Article 6(2) there is a possibility to for a state to impose death penalty which is only for the most serious crime. According to the General Comment of Article 6 state parties are not obliged to abolish capital punishment totally but to limit its use only for the most serious crimes. It means that capital punishment only possible for such serious crimes. One of the reasons why it can only be applied to the most serious crimes, it is because this type of ignorance has caused suffering and destruction in history [15].

It is true that the General Comment stated that the state did not have an obligation to abolish the death penalty, but it is only for crimes categorized as the most serious crimes [16]. Until 1989 after the second optional protocol of ICCPR adopted, the members of the protocol are forbid to impose capital punishment [17]. The optional protocol is separated from its main protocol and Indonesia is not the parties.

In addition, related to the competent court as stated in the Article 6(2), the court must have a jurisdiction to the crimes, the defendant must have a right to fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence and the right to review by a higher tribunal [18].

Until now there are around 169 parties to the ICCPR, including Indonesia. It means that the country is bound to the principle of *pacta sunt servanda* [19]. Moreover, in the Article 1(2) the Law 12 of 2005 stipulates that the ICCPR is an integral part of the law. As a result, when there are differences in interpretation between Bahasa as the translation of the ICCPR and the original English language manuscripts, the original language manuscript is prioritized.

All cases which become a focus of this research are threatened with capital punishment. However, in fact there are some distinctions in decisions imposed by judges even though the prosecution of the public prosecutor differs. In detail, cases, human rights considerations and decisions made by judges as follow:

Table 1. Judges Consideration and Decisions

No	No. Verdicts	Judges Consideration			Threaten /prosecution	Decision
		Incriminating elements	Absolve elements	Human Rights		
1	54/Pid.B/2015/PN. Btl	Meet all elements contained in Article 340 of the Criminal Code / Sadistic	Regret, polite, never punished	None	Dead/20 Years in Prison	14 Years in Prison
2	385/PID. B/2010/P N.SLMN	Meet all elements contained in Article 114 (2) The 2009 Law No. 35	None	None	Dead/ Lifetime	Dead
3	01/Pid.B/2015/PN. Yyk	Meet all elements contained in Article 340 of the Criminal Code / Sadistic	Polite, has never been punished and has family responsibilities	None	Dead/20 Years in Prison	15 Years in Prison

4	41/Pid.B/ PN.Pbm/ 2013	Meet all elements contained in Article 340 and 354(1) of the Criminal Code	None	None	Dead/ Lifetime	Dead
5	502/Pid. B/2015/P N. Plg	Meet all elements contained in Article 55(1) and Article 340 of the Criminal Code	None	None	Dead / Dead	Dead

Source: collected from various sources

The data above shows various considerations and decisions at district courts in Yogyakarta and South Sumatra Provinces. It was found that there were significant similarities regarding the judges' consideration, especially by excluding elements of human rights. Judgment in deciding cases did not consider the human rights element as mitigating matters at all. Interestingly, there are cases which are only prosecuted for lifetime sentence by prosecutors, but the judge decides with a death penalty.

Interviews is also conducted by researcher on several judges at the Yogyakarta, Bantul, Sleman and Palembang District Courts provide some descriptions of the following questions: 1). Judge's view of the death penalty and rights to life? 2). If the death penalty must be applied, what can be considered? 3). Is human rights consideration important in deciding a case? 4). What is the judges' opinion regarding to Article 6(2) of ICCPR? 5). What is the judges' argument regarding to the binding of the Law Number 12 of 2005 concerning the Ratification of the ICCPR?²⁰

These questions earn various answers from the judges. Here some of the judge's views on death penalty and right to life.

Table 2. Judge's Opinion on Death Penalty and Right to Life

No	Judges	Views					Suggestion
		Right to Life	Judges' Consideration	Human Rights	Art 6(2)	Means of ratification	
1	Distric Court of Yogyakarta	Not Absolute	As long as it is accordance with the elements of Article contained in the Penal Code the judge is permitted to impose death penalty	It is often not to be considered	This Article only allows the death penalty for genocide, but in the Criminal Code death penalty is possible	Binding	The Supreme Court should issue a Circular concerning its' attitude towards the death penalty in the ICCPR
2	Distric Court of Sleman	Not Absolute	As long as it is accordance with the elements of Article	The human rights of the perpetrator'	In Indonesia the district	Can be ignored because the	As much as possible, as a

			contained in the Penal Code the judge is permitted to impose death penalty	s family are considered to be an mitigating element	court still has the authority to impose the death penalty	Criminal Code still recognizes the death penalty	judge, I will avoid the death penalty
3	District Court of Bantul	Not Absolute	Judges as God's representatives in providing justice and the Death Penalty are still needed for a deterrent effect	It is often not to be considered	District court still has the authority to impose the death penalty	Can be ignored	Death Penalty Still Needs to be a deterrent effect for other
4	District Court of Palembang	Not Absolute	As long as it is accordance with the elements of Article contained in the Penal Code the judge is permitted to impose death penalty	Human rights of the victim and culprit must be balanced, just consider the perpetrator's rights is impossible	ICCPR is the same level as national law, but death penalty in Penal Code and Narcotic Law is <i>lex specialist</i>	Can be ignored	Death Penalty Still Needs to be Enacted In Indonesia, but the characteristic must be more detailed

Source: collected from various sources

The answers of the judges varied in responding to the issue of the right to life, human rights, ICCPR and Indonesia's ratification of the ICCPR. But in some cases there are similarities in the issue of the right to life in which all judges agree that the right to life is not absolute. In this case there are judges who consider themselves as God's representatives for justice and the judge has an authority by the law to sentence death penalty to the defendant. Interestingly, most judges state that the impact of ratification are not totally binding because the Article 6(2) in the ICCPR can be ignored and death penalty is permissible to be applied event though the crimes are not categorized as the most serious crimes.

5 Conclusion

The enquiry of this research first about judges consideration on cases threaten to death and judge's view on the right to life. It can be found that in deciding a case most judges do not consider right to life as stipulated in the Article 6(1) ICCPR. Several judges in the District Courts argue that right to life not absolute. Even though ratification is binding and has the same level as law, ICCPR can ignored because there are more specific laws, namely the Criminal Code and Narcotics Law which are *lex specialis*. In addition, regarding to the Article 6(2) about the possibility for death penalty only for the most serious crimes, all of the judges argue that the provision can be ignored because there is another law which permit the judges to decide capital punishment even though the crimes are not categorized as the most

serious crimes. The judges only consider the human rights of the victim, which then becomes an incriminating element for the defendant.

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