



Women's Access to Justice: The Death Penalty and Online Gender- Based Violence Policies in Indonesia

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The Institute for Criminal Justice Reform (ICJR) is an independent research institute established in 2007. ICJR focuses on criminal law and justice reform, and general law reform in Indonesia. ICJR takes the initiative by providing support in the context of establishing respect for the Rule of Law and, at the same time, establishing a fervent human rights culture in criminal justice system.

A. Role of Indonesia's human rights assessment

1. The International Human Rights Instrument and the 1945 Constitution of the Republic of Indonesia have provided assurances that every human being is entitled to the right to life. There is no international human rights instrument that legitimizes the use of the death penalty; thus, the death penalty is limited.¹
2. The right to life and freedom of opinion and expression are also constitutional rights as guaranteed by the 1945 Constitution. Article 28E paragraph (3) guarantees that everyone has the right to freedom of association, assembly, and opinion. Article 28F ensures that everyone has the right to communicate and obtain information to develop their personal and social environment, and has the right to seek, obtain, possess, store, process, and convey information using all available channels. This is also guaranteed in Article 23 paragraph (2), Article 25 and 44 of Law No. 39 of 1999 concerning Human Rights.
3. Indonesia has also ratified the Convention on the Elimination of All Forms of Discrimination against Women through Law No. 8 of 1974. As a result, Indonesia is committed to eliminating all forms of gender-based discrimination, both in the form of direct discrimination and from legal provisions that are neutral but have a disproportionately gender-based impact.
4. Based on reports from the UN High Commissioner for Human Rights, the death row inmate is those with a background of poor, economically vulnerable groups, ethnic minorities, people with intellectual and psychosocial disabilities, foreign nationals, indigenous persons, or marginalized communities.²
5. When the death penalty occurs against women, discrimination is related to poverty, socioeconomic background, and gender-based discrimination. Gender stereotypes, stigma, discrimination, and patriarchal cultural norms have a devastating impact on women's ability to access equal justice in death penalty cases.³⁴

¹ Article 6 paragraph (2) of the International Covenant on Civil and Political (ICCPR) states that the death penalty can only be imposed against the "most serious crimes." Paragraph (6) stipulated that this procedure must not be a reason for states parties to delay or prevent the abolition of the death penalty.

² OHCHR, 'Human Rights Council holds high-level panel on the death penalty, in particular with respect to the rights to non-discrimination and equality' (HRC, 26 February 2019)

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24215&LangID=E>> accessed 8 March 2022

³ Cornell Center on the Death Penalty Worldwide, *Women Sentenced to Death (Detailed Factsheet)* (2021)

⁴ The Cornell Center on The Death Penalty Worldwide, *Judged for More Than Her Crime A Global Overview of Women Facing the Death Penalty* (2018) 15

6. In the third cycle of the UPR, Indonesia took steps to support recommendation 141.52 from Austria, Namibia, and Italy to impose a *de jure* moratorium on the death penalty and take steps for the total abolition of the death penalty, as well as recommendation 141.60 from the Republic of Moldova to ensure the enjoyment of the right to fair trial. As Indonesia entered the UPR fourth cycle, Indonesia has not taken steps to *de jure* abolish the death penalty and still prosecuted and sentenced people with the death penalty in its criminal justice system. This practice impacts the growing number of death row, no guarantee of commutations for death row inmates who have been in delay.
7. Indonesia supported 23 UPR recommendations in the UPR 3rd cycle on women empowerment, including the Criminal Procedure Code for women (139.35), the protection of women and children (139.99 and 139.106), gender equality (139.104), measures against gender discrimination and women's access to justice (139.107), women's rights (139.113, 139.14, 139.15).

B. Data on women facing the death penalty

8. Data on death penalty cases with female defendants based on the ICJR's internal database as of October 2021 had recorded 42 death penalty cases out of 884 cases ranging from 1969 to the latest in 2021.
9. The list of cases of women facing the death penalty has never been published by the Government of Indonesia (GoI), making it difficult for the CSOs to be able to conduct an examination and supervision of the situation of women dealing with the death penalty. ICJR has difficulty collecting death row data in 2021 from the Ministry of Law and Human Rights because the data provided in 2021 is not as complete as in previous years.
10. ICJR defines cases as the number of cases being prosecuted and/or sentenced to the death penalty.
 - As of 2021, out of 884 death penalty cases in the ICJR's internal database, there were about 42 death penalty cases with female defendants who could be identified and profiled.
 - Of the death row inmates, there is 12 female. This figure is only 3% of the total number of 404 people on death row in Indonesia. This small number resulted in attention to women's death sentences minimal.⁵
 - Of the 42 death penalty cases with identifiable female defendants, the ICJR conducted a study of 32 cases in the first-degree court ruling of the case. The study found women's vulnerability in the vortex of the death penalty.
11. We recommend that the GoI, especially the Indonesian Ministry of Law and Human Rights and Attorney General's Office of Indonesia, publish the record of death penalty cases and disaggregated data on gender, type of violence, and the duration

⁵ Budiman, Iftitahsari, Rahmawati, *Situation Report on Death Penalty Policies in Indonesia of 2021 "Double Uncertainty: Calling for the Assurance of Commutations in the Death Penalty Cases"* (ICJR, 2022) <<https://icjr.or.id/wp-content/uploads/2022/03/Laporan-Situasi-Kebijakan-Pidana-Mati-di-Indonesia-2021-Ketidakpastian-Berlapis-Menanti-Jaminan-Komutasi-Pidana-Mati-Sekarang.pdf>> accessed 5th March 2022, 18

of the delay on the death row.

C. Violation of the right to fair trial of women faced with the death penalty

12. The majority of Female Defendants (56%), 18 of the 32 death penalty cases, appointed their own legal counsel at the trial level.
13. Of the total cases, only five people (15%) submitted mitigation witnesses, coming from the female defendants who could afford to appoint their own legal counsel.⁶ Meanwhile, the legal counsel appointed by the court did not make any defense by submitting mitigation witnesses. This indicates the problem of the Gol's commitment to providing effective legal assistance.
14. The number of court-appointed legal counsel at the trial level tends to be high, with as many as 13 people (40%) of defendants, where the majority of socioeconomic backgrounds are low: 7 people are not financially independent, three people work as workers/farmers, three people are self-employed are not defined income.
15. Of all the legal counsel appointed by the court, only one person⁷ filed a formal objection (exception) during the trial, 2 of them did not submit a written defense, and no one presented a mitigation witness. This suggested female defendants from low economic backgrounds are less likely to be able to appoint their own legal counsel and impeding their access to effective legal aid. The defendants who did not file a written defense were later sentenced to death by the judges.
16. The fundamental commentary on the procedural law for persons facing criminal charges in Indonesia is that the Law No. 8 of 1981 concerning the Criminal Procedure Law (KUHAP) provides a stricter arrangement relating to the procedure for persons facing the death penalty and the right to counsel, however, the law does not provide that the legal counsel ought to provide an effective defense. Anyone suspected of or charged with a crime for which the death penalty may be imposed to adequate legal assistance at all stages of the proceedings, death penalty cases must, in all circumstances, respect the highest of evidentiary standards, opportunity to resort to all judicial appeal procedures or non-judicial avenues and to have their requests for official or private pardon considered.⁸
17. Specific rulings on higher criminal procedure law for death penalty cases are not found in the legal system in Indonesia, so we recommend changes to the Indonesian criminal procedure law, which will have to contain a stricter provision on the procedure of death penalty cases and to provide all possible safeguards to ensure a fair trial and respect for due process as contained in Article 14 of the ICCPR.

⁶ The Case of ZH (907/Pid.B/2020/Pn Mdn) in Medan District Court, The Case of SM (410/Pid . B/2010/PN.Slmn) in Sleman District Court , The Case of THW (120/Pid.Sus/2015/PN Smn) in Sleman District Court, The Case of SZ (75/Pid.B/2016/PN Str) in Simpang Tiga Redelong District Court, and the Case of MM (09/Pid.B/2015/PN. Pinrang) in Pinrang District Court

⁷ The Case of DAH (1166/Pid.Sus/2015/PN Jkt.Sel) in South Jakarta District Court

⁸ UNGA, 'Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General' UN HRC 42nd Session A/HRC/42/28 (2019), for. 18

D. The vulnerability of women in death penalty cases

18. Regarding the submission of defense in the death penalty trials with female defendants, there are findings related to the condition of vulnerability in 11 cases (34%), in the form of being a single parent with 2 cases, defendants' parenting duty with 5 cases, economic difficulties with 2 cases, not as the main perpetrator with 1 case, and victims of an exploitative network of drug traffickers with 1 case.
19. However, the court's response to conditions with the vulnerability of female defendants was found only in 4 cases (12%) of all 32 cases: in 2 cases, it was recognized as a judge's consideration, and in 2 other cases used explicitly as a mitigating factor (dependents, economic status, family).
20. Based on the analysis, it was found that 13 cases (40%) of all 32 cases contained gender vulnerabilities, weighed from the following aspects:
 - Record as victims of violence (5 cases), but only 1 case is considered during the trial but used as an aggravating factor.
 - Engaging in an intimate relationship (8 cases), four of these defendants were sentenced to death, but only one was taken into account by the court because the defendant was pregnant with the child of her exploiter.
 - Threats to the family (1 case), the vulnerability was only seen as an excuse and is considered an aggravating factor.
 - Two other vulnerabilities: victims of child marriage (1 case) and victims of domestic violence (4 cases.)
21. The majority of women on death row - 19 (59%) out of 32 were not the main perpetrators. This showed that although most of the women facing the death penalty are not the main perpetrators, law enforcement still prosecutes and/or sentences them with the death penalty.
22. In 20 (63%) of all 32 cases, the panel of judges said they found no mitigation factors. There were 3 cases (9%) that did not elaborate on the mitigation factors, 2 cases in which the death penalty was then delivered, and 1 case the panel of judges rejected the death penalty.
23. The death penalty should only apply to the most serious crimes, and the judges must weigh any evidence in aggravating or mitigating the sentence. Substantially, the obligation to consider individual conditions, including vulnerability, as a basis for mitigating the sentence, especially in death penalty cases, is not contained in the criminal procedural law. In fact, in the human rights instrument, sentencing judges must take into account the particular circumstances of the offense.⁹
24. In one of the cases against a female defendant, ZH, the judges stated that ZH did not need to explain the history of violence she experienced because, according to them, ZH should be remorseful. The judge noted that "... *The defendant as a wife should*

⁹ *Ibid.*, for. 21

love and respect the husband and as a wife should be able to start an orderly family."¹⁰
This argument is considered as aggravating factor.¹¹

25. We recommend that the Indonesian government ensure the construction of legal unity in judges' decisions to ensure high standards in examining cases with the death penalty, including the obligation to consider the mitigation factor that also needs to be viewed from a gender perspective.

E. The Application of the War on Drugs in the case of the death penalty

26. Only 1 in 21 drug-related cases do not use the narrative of "*in violation of the government's war on drugs program.*" 19 of the 21 drug-related cases listed the narrative of "*violating the government's war on drugs program*" as an aggravating factor even though there was no basis of legitimacy for applying the death penalty to drugs policy.
27. In the case of a defendant named MJ, War on Drugs was used as an aggravating factor; used a xenophobic narrative was mentioned: "*... to provide a deterrent effect for other Foreign Nationals so as not to bring narcotics to the State of Indonesia, especially in large quantities.*"¹²
28. The panel of judges also once rejected the 15 years imprisonment petition for the case of LJS, and instead sentenced her to death. The judges argued that the death penalty should be applied to break the drug supply chain, and the accused should be removed from society. Whereas in the framework of international human rights, drug-related crimes do not meet the qualifications as the most serious crime that the death penalty can impose.¹³
29. We recommend that the Indonesian government stop the imposition of the death penalty for drug-related crimes and end the "War on Drugs" narrative with the use of the death penalty.

F. The need for a legal framework on online gender-based violence with a human rights perspective

30. The number of online gender-based violence cases has been increasing since it was first reported in The National Commission on Violence Against Women's report in 2018. In 2018, the Commission reported 97 cases of online gender-based violence experienced by female victims¹⁴. While in 2021, it had reached

¹⁰ The Case of ZH (907/Pid.B/2020/Pn Mdn) in Medan District Court

¹¹ *Ibid.*

¹² The Case of MJ (385/PID. B/2010/PN. SLMN) in Sleman District Court

¹³ The Case of LJS (901/PID. SUS/2012/PN. DPS) in Denpasar District Court

¹⁴ Aryani et.AL., *Korban Bersuara, Data Bicara Sahkan Ruu Penghapusan Kekerasan Seksual Sebagai Wujud Komitmen Negara. Catatan Kekerasan Terhadap Perempuan Tahun 2018 (Victims Speak Out, Data Speaks Out On Sexual Violence Elimination Bill As A Form of State Commitment. The Report of Violence Against Women in 2018)* (The National Commission on Violence Against Women, 2019) 53

1.751 cases.¹⁵

31. The same trend can also be seen in the Indonesian Legal Aid Association for Women (LBH Apik) 's mentoring report. The report stated that of the 489 online gender-based violence cases found, only 25 cases could be reported to the police, and lesser, only 2 cases could enter the judicial process. The main challenge in handling online gender-based violence in Indonesia is that there are no adequate laws and/or regulations that can protect online gender-based violence victims.¹⁶
32. The situation of online gender-based violence in Indonesia shows that the legal framework for protecting and providing access to justice for victims in Indonesia is still limited. One of the reasons for the low rate of reports is the victim's concern about the risk of getting criminalized. These concerns are caused by the fear of the Indonesian information and electronic transaction (ITE) law and pornography law, which regulates the criminalization of the dissemination of content in violation of decency related to "morality." victims are afraid to report the violence they experience if the victim has been involved in the creation of an intimate digital content, for example with her partner/ex-partner.
33. Victims are vulnerable to revictimization. One of the well-known cases of revictimization in Indonesia is the case of Baiq Nuril in 2018, and she was convicted in a cassation trial using Article 27 (1) of the ITE Law on the dissemination of decency content. She has previously recorded the verbal abuse she experienced and gave the recording to other parties to report her case. Instead, she was criminalized for spreading indecent content of his abuse.¹⁷
34. Another case was experienced by W in 2015, in Bandung, West Java, who had gone through the judicial process for violating Article 27 (1) of the ITE Law on decency. She was tried for spreading an indecent content of violations, even though she was the victim of domestic violence where W's husband used her data to file a crime report against her.¹⁸

¹⁵ Mustafainah et.AL., *Perempuan Dalam Himpitan Pandemi: Lonjakan Kekerasan Seksual, Kekerasan Siber, Perkawinan Anak, Dan Keterbatasan Penanganan Di Tengah Covid-19 Catatan Kekerasan Terhadap Perempuan Tahun 2020 (Women in The Pandemic: Spike in Sexual Violence, Cyber Violence, Child Marriage, And Limitations of Supervision In the Midst of Covid-19. The Report of Violence Against Women in 2020* (The National Commission on Violence Against Women, 2020) 95

¹⁶ 'LBH APIK: 'LBH APIK: Kasus Kekerasan Seksual Meningkat, Dominan KBGO-KDRT (LBH Apik: Sexual Violence Cases Increase, Dominant on online gender-based violence-Domestic Violence)' *CNN Australia* (Jakarta, 10 December 2021) <<https://www.cnnindonesia.com/nasional/20211210211057-20-732722/lbh-apik-kasus-kekerasan-seksual-meningkat-dominan-kbgo-kdrt>> accessed on 25 March 2022

¹⁷ The Case of Baiq Nuril (574K/Pid.Sus/2018) in the Supreme Court

¹⁸ The Case of W (324PK/Pid.Sus/2018) in the Supreme Court

35. The case of PA in 2020, in Garut, West Java, was a child marriage victim involved in an exploitative environment by her husband used her as a sex worker based on her husband's influence. Her husband, without her permission, recorded and disseminated the intimate content. She was later convicted of violating Article 8 of the pornography law.¹⁹
36. Indonesia currently does not have a legal framework for protecting women from online gender-based violence from a human rights perspective. Indonesia has only the ITE Law with a view to protecting public morals, prohibits the dissemination of content in violation of decency without regulating the guarantee of protection of personal data and personal, intimate correspondence. The pornography law prohibits any form of dissemination of content in violation of decency. The law does not accommodate the concept of consent in the involvement and the dissemination of content, so it is not able to distinguish between victims and perpetrators; all parties can be assessed as perpetrators.
37. We recommend the Gol eliminate Article 27 (1) of the ITE Law on content against decency, and all provisions in the pornography law must be improved by ensuring that the prohibition is not in the context of protecting the norms of public decency but on respect for the right to the integrity of one's body and personal data.
38. We recommend the Gol to regulate online gender-based violence, namely: prohibition of the act of recording one's body/ private matters without permission, prohibition on disseminating one's intimate content for threatening/blackmailing/abusing, the act of modifying/falsifying electronic information to present sexual images about others.
39. The existing legal framework must also regulate the protection of victims of online gender-based violence, namely: granting the right of individuals to request the removal of content, removal of personal data from the internet, providing public information about the compliance of service providers/Electronic System Operators (ESO) to prevent and manage online gender-based violence.
40. The existing legal framework should also regulate the obligations of the private sector to have security and equality guidelines on the internet, have terms of service or community rules which are in accordance with the

¹⁹ The Case of PA (150/Pid/2020/Pt.Bdg jo. No. 289/Pid.B/2019/Pn.Grt) in Garut District Court and Bandung High Court

perspective of human rights and anti-online gender-based violence, and provide an effective complaint system.