

THE JUDGE CONSIDERATION IN IMPOSING LIFE IMPRISONMENT: BALANCED JUSTICE PERSPECTIVE

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Abstract

The Prison system still leaves complicated problems in criminal law. Considering the improper situation of the prison recently raises radical thoughts to change the prison into other penal sanction forms. Article 10 of the Indonesian Penal Code states that the primary punishment is imprisonment in the second position. Imprisonment consists of two types, that is life imprisonment and imprisonment for a particular time (temporary). The term of life imprisonment is arranged in Article 12 of the Indonesian Penal Code but without further explanation. Thus, it brings a debate on the understanding of life imprisonment itself and the certainty of the limitation of time in life imprisonment. As part of the punishment, life imprisonment has a different purpose than imprisonment for a specific time (temporary), which seems more paradoxical. In life imprisonment, reintegration into society cannot be achieved, even though the community gets protection from the crime. The convicted person will not have the opportunity to be returned to the community. It is different from the punishment goal of temporary imprisonment aimed at fostering and rehabilitating the convict. It must gradually be returned to the community. Other problems arose from the historical arguments that some experts may object to in implementing life imprisonment because the Indonesian Penal Code is a Dutch Colonial legacy. However, life imprisonment seems to be still maintained in the Bill of Indonesian Penal Code, but with different arrangements. The provision concerning life imprisonment is inseparable from determining the punishment purposes as arranged in the Bill of Indonesian Penal Code. The Indonesian courts have widely applied life imprisonment with various considerations. These decisions are related to transnational crimes, such as narcotics, psychotropics, corruption, and many more. The court did not impose life punishment on Indonesian citizens only, but also for several foreigners. Thus it needs to review the judge's considerations and will be weighed from the justice perspective. The result of this study is expected to bring input on the existence of life imprisonment in the criminal law system in Indonesia.

Keywords: Imprisonment; life imprisonment; Judge Consideration; Justice balance

Introduction

Criminal law has become one of the famous ancient branches of law known as harsh and cruel law. It is commonly understood that Criminal law has become one of the scariest

laws, punishing rather than healing.¹ It potentially creates hurt rather than healing. Criminal law has been manifested in the form of various criminal sanctions and put in every law. Criminal law punishes crimes (in the term of *mala per se* and *mala prohibita*). Criminal law arranges the prohibition of crimes which such harm society. Criminal law is a crucial branch of law since it deals with public interest protection rather than personal interest protection. Unfortunately, criminal law has been constructed as unbalanced punishment for a particular society, sometimes excessive. The never-ending discussion is about capital punishment, or law that sharp implemented to powerless society but blunt if implemented to the robust community. *Mala per se* (*rechtsdelicten*) is defined as a law (in a broad meaning) offense, meaning any illegal activities as a violation of the law that has been considered an injustice since the beginning act. Therefore, it is prohibited. Otherwise, *mala prohibita* (*wetsdelicten*) is defined as an act against the law (legislative meaning). The legislators refuse these actions by considering the development of society whether it needs to be banned. *Mala per se* occurs typically by the religious norms and moral norms, while *mala prohibita* did not relate to any religious and ethical standards. In *Mala per se*, the violation against religious norms and moral norms then constituted in the law followed by strict criminal sanctions. Thus, law enforcement can impose that sanction when the breach of the law is coming.

In the context of objectivity of the constituted criminal law, it will be related to criminal law enforcement. It means that the acts violated in material criminal law must be subject to action by the state. In this regard, Hiariiej mentions that two perspectives must be noticed in understanding the law enforcement of criminal law: the aspect of superstructure and infrastructure. The superstructure is related to the duties and authorities of the institutions that have to be enforced. At the same time, infrastructure is associated with the availability of the facilities for the operation of law enforcement officers.² To enforce criminal law, it needs strong institutions.

Criminal law must be based on the principle of legality. In Article 1 (1), the Indonesian Penal Code mentions that “no action shall be punished unless under the prior statutory penal provision.”³ Reid was stressing out that the definition of crimes must be precise,

¹ Go Lisanawati, ‘Menyoal Pemberatan Pidana Sepertiga Dan Duapertiga Pada UU ITE Dan Harmonisasinya Atas RUU KUHP’ in Komisi Hukum Nasional (ed), *Problematika Pembaharuan Hukum Nasional* (Desember, Komisi Hukum Nasional 2013) <<http://www.komisihukum.go.id>>.

² Eddy O. Hiariiej, *Prinsip-Prinsip Hukum Pidana* (01 edn, Cahaya Atma Pustaka 2014) 11.

³ The Republic of Indonesia, ‘Penal Code of Indonesia’ <<https://www.icj.org/se-asia-security-law/penal-code-of-indonesia/>>.

unambiguous, and useable. That is the definition that must permit us to determine who is and who is not criminal.⁴ In the literature of criminal law, there are 3 (three) principles contained in the doctrine of legality, as follow:

- *Lex certa*;
- *Let stricta*;
- *Lex Scripta*

Crime is an act defined by the law; unless the elements specified by criminal law are present and proved beyond a reasonable doubt, a person should not be convicted of a crime.⁵ Since to be punished by the criminal law, the person (perpetrator) must have an element of the crime of intention or omission. This element of *mens rea*, culpability, or mental elements must have existed that someone cannot be punished based on their thought but their action. For criminal law, the element of crime in the form of *mens rea* is the crucial element. However, the methodology of criminal law must be based on an actual occurrence. In some types of crime, it is required to determine whether an act was or was not a crime. The intention must be established in an extraordinary crime (corruption, terrorism, crimes against humanity, and many more). The explanation above shows that the crimes involve harm to society and no liability to a specific individual. In the context of damage to the community, it is not in the meaning that the evidence must be in the act itself. In the development, there is plenty of harm to society, and transforming into a cruel, extraordinary, and or dangerous crime based on international conventions and other international customs such as illicit drugs (based on Vienna Convention on drugs), crimes against humanity, genocides, war crimes, aggression (based on Rome Statute), corruption (Merida Convention - United Nations Convention Against Corruption), Terrorism, and any other crimes such as hijacking, piracy, slavery, trafficking, and many more that based on Palermo Convention. These types of crimes have been recognized as severe, dangerous, and some called extraordinary crimes. The highest of human capacity can cause negative impacts among others, especially in the form of increasingly committing a sophisticated crime. As a social phenomenon, crime has been prevented and reduced but is challenging to eradicate properly. It needs the proper mechanism of criminal sanction implementation to the offender.

The problem occurs regarding the criminal law and punishment, and it deals with the mechanism. Thus, it needs to know the judge's reasoning when punishing the offender with a

⁴ Sue Titus Reid, *Crime and Criminology* (4th edn, CBS Colleges 1985) 6.

⁵ *ibid.*

specific sanction. The law did not give a particular reason and any further information related to the purpose, but it must be imposed on to offender who, based on the judgment, they blamed for committing a crime.

Andi Hamzah mentioned about 8 (eight) characteristics of sophisticated crimes. Those are transnational, crime uses sophisticated tools, uses sophisticated methods, creates enormous losses, the legal norms' presence unavailability. The other requires particular expertise of law enforcers to handle the case, expensive eradication, and prosecution; and need legal intelligence assistance to the investigation and prosecution process.⁶ This sophisticated crime shows how the penetration of international and transnational to the appearance of crime will need to be handled well. Thus, Bambang Waluyo⁷ reminds us that one of the ways to anticipate sophisticated crime is by effectively functioning the instruments of criminal law through law enforcement. Transnational crimes are significantly different from old traditional crimes. It can be understood that the process of handling transnational crimes must be treated differently from conventional crimes. Further, the imposition of punishment must not merely be an act of revenge. The function of punishment (sentencing) must be aimed at deterrence and can be purposed for correctional.

The Nature and The Purpose of Punishment (Sentencing) System

The 1945 Constitution of the Republic of Indonesia affirms that Indonesia is a state based on the law (*Rechstaat*). As a consequence, Indonesia has always respected human rights. As a state of law, Indonesia always guarantees that every citizen has the same position in law and government and upholds the law with no exceptions. Ideally, Indonesia adheres to a system of the rule of law. Law has the highest power (supremacy of law) in the state.

For this reason, Indonesia also places the presumption of innocence as crucial to ensure the realization of the rule of law itself. Court decisions are an essential milestone for the reflection of justice, including court decisions in sanction and punishment systems. Thus, to impose a sanction to an offender of crime (Defendant) must be based on the court decision.

Understanding appropriately criminal law can be started by understanding what criminal law is. Criminal law consists of Criminal and Law. The literature of criminal law explained that there is no single definition that experts and scholars can define. Thus,

⁶ Andi Hamzah, *Perkembangan Hukum Pidana Khusus* (Rineka Cipta 1991) 47.

⁷ Bambang Waluyo, *Pidana Dan Pemidanaan* (2nd edn, Sinar Grafika 2004) 2.

understanding the law only tells about the character of regulation and the function. It can be understood criminal from such different ways, as follows:

- Criminal as a part of entire law that implemented in a system of law of a country, such as criminal law, private law, administrative law, constitutional law, and international law;
- Criminal in meaning as one of the recognized sanctions in the system of sanction of a country; and
- Criminal can be understood as a punishment system and how the authority imposes it.

There is significant differentiation between the purpose of criminal law and sanction (punishment). Anyhow the purpose of sanction (penalty) could not be separated from the school of thought. Criminal law underlies criminal objectives based on classical schools, modern schools, and neo-classical schools. Thus, the sanction system (punishment) objectives are divided into absolute, relative, and combination theories. However, in its development, there are also contemporary theories concerning the purposes of sentences.

In its nature, the imposing of punishment must be directed to specific goals or purposes. The absolute theory appears in the age of classical schools. The absolute idea puts revenge as the legitimacy of punishment. This theory says that the state has the right to impose penalties because criminals are against the protected legal rights and interests. The absolute theory or the theory of revenge (retaliation), which is the basis of the classical flow, consists of subjective and objective revenge. In short, subjective revenge focuses on the perpetrator's fault (*mens rea*), while objective vengeance focuses on dismissing an action that the perpetrator has carried out. In the end, to understand absolute theory among different opinions, Hiariej.⁸ They were strengthened that the justification and requirements to imposed penalty for a crime is included in the crime itself. The absolute theory is based on the Indeterminism doctrine as introduced in the classical schools. The free will of man emphasizes the criminal act of the perpetrator. Thus, criminal law is desired to be implemented. According to this, retributive and repressive actions are needed through a single-track system.

The relative theory lays the basis of punishment on efforts to prevent crime. The sentence must be taken to enforce public order, which must be carried out by criminal law. This relative theory is also known as goals theory. This theory views that crime and injustice are not an a priori relationship. This relative theory introduces the two models of prevention,

⁸ Hiariej (n 2) 32.

general and specific prevention. General prevention is purposive to crime prevention. The punishment is imposed on perpetrators, and at the same time, a sentence will give fear to society for not committing a crime. Specific prevention is purposed to the perpetrator that has received punishment for not committing a crime again. Depart from the doctrine of determinism that the modern/positivist schools promote and its views that humans do not have free will. It is influenced by the nature of the environment where the human is existing. Therefore, men cannot be asked for responsible and punished. It requires an individualization perspective.

The theory of combination in principles allows the imposition of punishment to the criminals, but it must be appropriately imposed and duly. There must be a limitation that must be bear by the perpetrator and bring utility to the society. Combination theory puts more concern on public protection rather than retaliation. Punishment cannot be used merely as retributive but security for the community.

In its development, several other theories of punishment occur, which come from the theory of absolute, relativity, and combination theory. Hiareij named it a contemporary theory⁹. Wayne R. Lafave, as a quote from Hiareij, mentions that one of the punishment objectives is as a deterrent effect so that the criminals do not repeat their actions. Punishment (sentencing) must be purposed as an education to the society related to good and evil. Lafave also mentions that the goal of a sentence is rehabilitation, meaning that the criminals must be corrected and directed in a better direction. Thus, they can return to society without rejection by the community. The criminals no longer repeat evil deeds¹⁰ This deterrent effect theory has the same meaning as specific prevention in the relative theory.

Indonesia is implementing the combination punishment (sentencing) theory. The Indonesian Criminal Code did not mention the idea of punishment Indonesia implemented, but it can be found in the Bills of the Indonesian Penal Code. Article 51 Bills of Indonesian Penal Code (draft of December 2019) stated that the sentencing (punishment) aims to:

- a. prevents the commission of criminal acts by enforcing legal norms for the community's protection;
- b. socializes the convicts by conducting coaching and mentoring so that they become excellent and valuable people;

⁹ *ibid* 35.

¹⁰ *ibid*.

- c. resolve conflicts caused by criminal acts, restore balance, and bring a sense of security and peace in society; and
- d. cultivates a sense of remorse and free the guilt of the convict

According to the Bills of the Indonesian Penal Code, the sentencing under Indonesian punishment systems accommodates the combination theory. Further, Article 52 Bill of the Indonesian Penal Code reminded that punishment does not degrade human dignity. From this article, punishment is something important but does not intend to devalue the offender's dignity. In this context, it can be said that the aims of sentencing (punishment) are paradoxes. In the modern theory of sentencing, sentencing aims to protect and release. Sentencing must be purposively to protect the convict, society, and victims, while on the other side, sentencing should release the sense of remorse of the convict. This paradox is impossibly realized in the best portion. Each case has its characteristics. The model of sentencing must purpose to the social protection, and at the same time, it has to give protection and correction to the perpetrator of a crime. It is called Mono Dualistic balance ideas. It needs the balanced justice view.

Life Imprisonment: Now and Then

Through Article 10 of the Indonesia Penal Code, life imprisonment has become one of two models of imprisonment. Article 10 recognized that sentencing (punishment) consists of:

- The primary sentence includes the death penalty, imprisonment (life and temporary, privileged treatment (*Custodia honesta*), fines, light imprisonment
- Additional punishment.

In the whole Penal Code regulation in Indonesia, there is only 1 article explaining life imprisonment. Article 12 (3) of the Indonesian Penal Code states that:

“Temporary imprisonment may be imposed for at most twenty consecutive years in cases where indiscretion of the judge the crime is punishable by capital punishment, life and brief imprisonment, or life long or temporary imprisonment and in those cases where because of a sentence increase because of a conjunction of crimes, recidivism of crime or the provisions under article 52, and 52a, the term of fifteen years is exceeded.¹¹ In comparing to Articles 64 and 65 of the Indonesian Penal Code Bill of Law, explains detail rather than Indonesian Penal Code itself. Concerning sanctions, the draft of Indonesian Criminal Law is arranged in

¹¹ Republic of Indonesia (n 3).

Article 64 until Article 102 and then followed by measurement in the context of Double Track System from Article 103 – 111.

According to Article 64 and Article 65, punishment consists of:

- a. Basic crime: imprisonment (life-long and temporary); privileged treatment (*Custodia honesta*); supervision sanction; fines; and community service order (CSO)
- b. additional penalties; and
- c. particular crimes for certain crimes specified in the law

Regarding the imprisonment system, Toha explained that the design of imprisonment mentions the retribution or retaliation elements using correctional institutions. The plans are contrary to the concept of social rehabilitation/healing and reintegration. In purpose, through this system, the offender will know what their act is and realize that it is a crime. Thus, through correctional, the offender of crime has no intention to commit a crime.¹²

Several articles in the Criminal Code and several specific laws (outside of the Criminal Code) still punish perpetrators of certain crimes by life imprisonment. Those kinds of crimes include premeditated murder, denouncement of a head of state's killing, and many more. About the specific laws, it has already explained aforementioned, and those several laws regulate crime related to sophisticated crime, an extraordinary crime, transnational, international crime. This opinion has also been said by Chandrawati, which demonstrates that imposing severe punishment such as capital punishment and or life imprisonment needs to consider the qualification of the crime. That qualification such as extraordinary crimes dominated in applying the imposing of the death penalty and life imprisonment. Other crimes cultivated from the particular crime arranged by a special law with its character as an enemy of humankind, crime against humanity, serious crime, crimes without victims, terrorism, narcotics, corruption, genocide¹³. It means that life imprisonment and the death penalty are imposed for certain crimes with specific qualifications and characteristics.

If there is an option between the death penalty and life imprisonment or a criminal offense sentenced to 15 years in prison, imprisonment for a particular time may be imposed for 20 consecutive years (Article 68 (3) Bill of Indonesian Penal Code). This article implies that Indonesia wishes not to impose defendants with severe punishment but still chooses lighter

¹² Budimartono Masrur, Toha and Budimartono, 'Lifetime Imprisonment in the Perspectives of Human Rights' (2021) 2 Journal of Law and Legal Reform 311, 312.

¹³ IGA.Fitria Chandrawati, 'Pidana Penjara Seumur Hidup Atau Pidana Mati (Konfigurasi Dilematis Antara Hukum Dan Kemanusiaan)' (2020) 8 Jurnal Kertha Semaya 1984, 1986
<<https://doi.org/10.24843/KS.2020.v08.i12.p15>>.

than capital punishment and life imprisonment. Following Article 69, in the condition that the convicted who has served life imprisonment for a minimum of 15 years in prison, the life imprisonment may be changed into 20 years in the president through a presidential decree after the supreme court give consideration. Through this article, it can be understood how life imprisonment shall be implemented. This regulation answers life imprisonment uncertainty regulation, and the existing laws regulate implementation. The existence of life imprisonment is unknown maximum and minimum. So, if the threatened punishment is one of them with imprisonment for life, then the sentence is not possible reduced in the judge's decision. Even if there is a reduction, it is only possible after the decision has permanent force, namely through clemency (pardon) or decline (remission). The authority to annul the judge's decision through a reduced sentence as described above against a decision judge is blasphemy against the judge's decision. Another condition related to the imposing of life imprisonment is Roeslan Saleh (1977:22), as quoted by Diah Gusniati Maulani, who explained that the convicted offender would have no lingering hope through the imposing of lifetime imprisonment. It remained a way to restore by using the clemency institutions to change the sentence into 20 years of imprisonment. If the convicted offender has good behavior gradually and continuously, then each year on the Independence Day of Indonesia, the convict can receive remission¹⁴

Since life imprisonment has been measured as one of severe punishment, then it needs to have the guidelines to implement all the sanctions. To answer this, then through article 53 Bills of Indonesian Penal Code give the sentencing guidelines, such as:

- in adjudicating a criminal case, the judge is obliged to uphold the law and justice
- if in upholding law and justice, as referred to in paragraph (1), there is a conflict between legal certainty and justice, the judge is obliged to prioritize justice

The government of the Republic of Indonesia remains consistent that the value of Pancasila (the *grundnorm*/the way of life of the people of Indonesia) shall be implemented by considering that it needs to uphold the value of justice, law, legal certainty, and many more. Then the Bill of Indonesian Penal Code also gives guidance as follows:

In sentencing, the judges are obligatory to consider:

- a. form of criminal offense
- b. motive and purpose of committing a crime

¹⁴ Diah Gustianti Maulani, 'Pidana Penjara Seumur Hidup Dalam Sistem Pemasyarakatan' (2011) 5 Praevia 41, 42.

- c. the inner attitude of the perpetrator of the crime
- d. the crime was achieved with a planned or unplanned
- e. how to execute crime
- f. attitudes and actions of the perpetrator after committing a crime
- g. curriculum vitae, social justice, and economic condition of the perpetrator of the crime
- h. criminal influence on the future of criminals
- i. the effect of the crime on the victim or the victim's family
- j. forgiveness from the victim and or his family; and or
- k. values of law and justice that live in a society (Article 54 (1))

Further, subparagraph (2), Indonesian Penal Code bills reminded that in terms of the lightness of the act, the personal condition of the perpetrator, or the circumstances at the time the crime was committed. Other is that what happened afterward could be used as a basis for consideration not to impose a crime or not to impose an action considering the value of justice and humanity.

In this regard, justice and humanity are the values to consider the sanction. The Bill of the Indonesian Penal Code is also a concern to the specific conditions of a defendant. This particular condition will cause it may not be imposed with imprisonment (vide Article 70). The perpetrator is a child, eldest (75 years and above), a defendant is the first-timer criminal; the loss and victim's suffering is not too excessive; crime occurs in the family and many more. Anyhow, there is a limitation for those criteria, as mention in Article 70 (2) that stated: the provision does not apply to criminal acts punishable by imprisonment of 5 years and above, crimes punishable by a particular minimum sentence, or certain crimes that are dangerous or detrimental to the society, or financially or detrimental to state's economy.

The imposition of life imprisonment can be an alternative to capital punishment. Through Article 100 Bills of Indonesian Penal Code mention that:

In principle death penalty can be changed into life imprisonment under several conditions, as follow:

A judge can impose a death penalty with 10 (ten) years' probation if:

- a. the defendant shows remorse, and there is hope for improvement
- b. the role of the accused in the crime is not very important; or
- c. there is a mitigating reason (vide subparagraph 1)

Suppose the convict during the probationary period shows a commendable attitude and action. In that case, the death penalty can be changed to life imprisonment by a presidential decision after receiving consideration from the Supreme Court (subparagraph 4).

Article 101:

Suppose the request for pardon of the death convict is rejected, and the death penalty is not carried out for 10 (ten) years since the clemency was denied, not because the convict has fled. In that case, the death penalty can be changed into life imprisonment by presidential decree.

Understanding both criminal sanctions, as mentioned as life imprisonment and the death penalty, is finding a different scheme of the meaning of life. Even though Indonesia recognizes severe punishment, efforts are still being made in various ways so that the sentencing must consider many aspects such as justice and humanity. The convicts remaining have the opportunity to improve themselves before the punishment shall be applied to them.

Life Imprisonment from the Lens of Judge's consideration: Balanced Justice Perspectives

Life imprisonment as a criminal sanction remains problematic. There is a minimum and maximum period in life imprisonment. So, if life imprisonment is threatened, then the sentence is impossible to be reduced in the judge's decision. Even if there is a reduction, it is only possible after the court has permanently decided, that is, through clemency (pardon) as the president's prerogative or through reduction (remission)—the authority to annul the judge's decision through a reduction sentence.

Through the cases described in the related attachment to the imposing of life imprisonment, it can be understood that judges, both *judex facti* and *judex Juris*, sometimes have different considerations to impose the defendant with life imprisonment between judges. The cases were just an example in this discussion. Aforementioned that Indonesian law (based on the Indonesian Penal Code and specific law outside the Indonesian Penal Code) recognized life imprisonment. The cases were randomly chosen amongst many instances that the court has decided. The cases that served here have exciting reasons to be analyzed. Table 1 below also puts the cases that are punished with the Death penalty. The author wants to study more profound the excuse to impose life imprisonment and capital punishment.

Through the case of Alwi Rongkeng als Awi, it can be learned how cruel the matter was. Awi, a defendant, has committed a premeditated murder through a brutal, sadistic, and relentless action. His barbaric act (burns) causes the death of the victim and the witness. The judge has sentenced him to life imprisonment without considering mitigating circumstances, for the defendant should have given a clear explanation.

After studying some cases regarding Drugs, it can be seen that similar issues such as violated Article 114 (2) in conjunction with Article 132 (1) of the Law on Narcotics resulted

from the different decisions, that is, capital punishment and others life imprisonment. ZULKIRAN Als ZUL Bin Ahmad Ibrahim brings a dissenting opinion from the Supreme court panel of Judges. The judge's consideration in imposing life imprisonment rather than the death penalty is based on the sense of justice and the opportunity for the defendant to have self-improvement. The court had given the death penalty at the district and appeal court (judex facti) levels. Nevertheless, the Supreme court corrected the decision made by the Judex Facti and renewed the punishment from the death penalty into life imprisonment. It is essential to study here what makes this happen. The Judex Facti has been correctly and adequately proofing all the elements of the crime. The panel of judges disagrees with the opinion of the public prosecution in considering whether the narcotics that the defendant had brought are perilous. It is based on the fact that the defendant owned 150 (one hundred and fifty) kilograms of Marijuana, and it is a large number. Then, life imprisonment would not be a deterrent effect for the defendant and other offenders of similar cases. The reason for punishing the defendant is based on the narcotic's characteristics and how severe and complicated the impact to the life of society, nation, and state. The illicit circulation and misuse of narcotics destroy human resources responsible for the development of a country. Drugs illegal traffic is already syndication by traffickers, then the eradication of Narcotics in Indonesia is a must. It must be handled extraordinarily. During the trial, the judges found the aggravating circumstances that must be taken into account. Based on those considerations, the Judges will impose Capital punishment/death penalty as the proper and maximum punishment for the defendant. According to the Supreme court Panel of Judge, The point that has become the aggravating circumstances for imposing the death penalty is a reason revealed in the trial. Still, it is the judges' opinion or conclusion. Besides that, the pros and cons of death penalty imposition, in reality, is a matter of debate even though the positive law is allowed concerning human rights. Some believe that it is a non-derogable right. In this regard, the death penalty is contrary to Article 28 (1) of the 1945 Constitutions of the Republic of Indonesia and Article 4 of Law Number 39 of 1999 concerning Human Rights, and article 3 of the UN Declaration of Human Rights. The death penalty must be applied selectively and imposed in some instances and appropriate circumstances. The purpose of punishment must contain educative, conductive, and preventive measures that are difficult to imagine in the imposition of capital punishment. Thus, the imposition of imprisonment on the defendant will be considered fairer and more civilized.

The case of Ramlan Siregar, as mentioned in table 1 below, shows the consideration of the judge and panel of judges in punishing the defendant with the death penalty. For this

consideration, the Supreme Court believes that to punish a defendant with the death penalty must be treated carefully and thoroughly because it is related to someone's life. The supreme court thought that *Judex Facti* said that one of the ways to prevent the defendant from repeating a *quo act* is by imposing a death penalty for the defendant so that he no longer engages in illicit narcotic traffic. *Judex facti* failed to consider Article 8 (2) of the Law on Judicial Power and article 197 (1) point 1 of Indonesian Procedural Law. There are aggravating and mitigating circumstances as revealed in the trial for the defendant that the judges consider. There is a dissenting opinion from one judge. According to article 30 (1) of the Supreme Court Law, if there is a dissenting opinion, it must deliberate for the majority vote.

From the court decisions that have been put as the object to analyze, it can be well understood that the aspects in imposing severe punishment (death penalty and/life imprisonment) shall be based on several considerations. The judge's lens needs first to prove the elements of crimes as formulated in the indictment for the defendants. It has a meaning to impose the defendants with punishment shall base on the laws. In this context, the judge and or panel of judges guarantee legal certainty. Consequently, the judge and or panel of judges must consider the characteristics of crimes committed by the defendant. It brings to the decision whether he conducted evil deeds, serious, cruel, dangerous, or not. Then the judge will be discovering whether there remain aggregative and or mitigating environments or conditions of the defendant or not. If there are no mitigating conditions of the defendants, it can be ensured that the defendant and their criminal acts are punished with severe sanctions. The complex consideration described in the cases is whether the defendant deserved to be punished with those kinds of sanctions or not, whether defendants deserved to get the second chance to be a new person or must be imposed too heavy sanctions. Even though difficult, it must always consider the common adages that let the punishment imposed on several people give lessons learned to other people for not committing crimes. The maxims above are the aspect of general prevention as introduced by the relative theory.

On the other hand, punishment cannot be imposed on the defendant if their criminal activities were not according to the imposition itself. This judges' lens tells that criminal sanction must be following the criminal act (*actus reus*). It is based on the retributive theory as retaliation to the defendant. Other than that, every decision must consider the balance of justice protection. The panel of judges must confirm whether society's security must be in the first place rather than the protection for the perpetrator. Still, it cannot avoid considering how the crime caused the victimization evidence in the case. As explained in the previous chapter

above, it is not like rocket science to decide a punishment. The decision will constantly challenge the judge and or panel of judges with the paradox position. The Supreme Judge needs to consider protecting all parties, including victims (and or family), defendant (and or family), society, and the country.

In this regard, the judge and or panel of judges must arrive at the consideration based on the balanced justice principle. The protection given to the defendant is a must. It cannot ignore the cost of crime price created by the defendant to the state, society, and or victims. Gray has a perspective that economic consideration is a complex subject. Crime is assumed as a complicated phenomenon.¹⁵ The victimization needs precisely calculated from the victims, as much as the cost of crime for society or state. The party may forget the cost of prison. The cost of life imprisonment and/and/another prisoner system is expensive. Who will bear this cost? In the end, Jennifer Rosenberg adds the information Calculating the expenses. Various types of expenses need to be included in a cost-benefit analysis, including capital costs (e.g., the one-time cost of constructing the physical drug court) and operational costs (e.g., staff salaries, maintenance, and other overhead expenses). In calculating expenses, marginal costs—which refer to the *additional* cost of sentencing an offender to a drug court rather than a traditional prison—should be favored over absolute prices.¹⁶ Thus, balanced justice must be implemented in every case.

Before the judge decides to punish a defendant in some instances with life imprisonment and or capital punishment, the judge must consider all the aspects needed to be valued. The judges must consider the purposes of the Indonesian sentencing system. In giving a penalty, it needs to see that sentencing (punishment) must be a revenge action to what the defendant has done and how it could bring self-improvement for the defendant and become a better person. Thus, it must guide an imposed defendant with lighter punishment rather than life imprisonment and the death penalty. In this sense, it is crucial to consider that narcotics smuggling is very dangerous. Still, it must have a similar way of thinking about the best sanction needed to be imposed to protect whole parties and after valuing the cost of crime that the defendant has made. The losses of country and victim in the cases are.

¹⁵ Charles M Gray, 'The Cost of Crime: Review and Overview' in Charles M Gray (ed) (Sage Publication 1979) 17.

¹⁶ Jennifer Rosenberg and Sara Mark, 'Balanced Justice: Cost-Benefit Analysis and Criminal Justice Policy (2011) <<https://policyintegrity.org/publications/detail/balanced-justice/>>.

In the end, from the cases shown in table 1, it has remained unclear why one defendant got lighter than other defendants for the same provision charged to them, the number of shreds of evidence revealed in the trial and the similar consideration of circumstances. It is correct that Judges have the authority to give punishment, but it needs more to measure why it must be imposed with life imprisonment and why it is not capital punishment.

Conclusion

The problem of the life imprisonment model of sentencing must be carefully understood. The existing law (Indonesian Penal Code and other specific criminal law outside Indonesian Penal Court) never gives the reason of imposing offender of crime with life imprisonment. It can be learned that life imprisonment is formulated as the maximum penalty and the Death penalty, and it is alternatively provided as an option. As far as the provision is developing with the death penalty and or life imprisonment, judges can choose whether to impose capital punishment or life imprisonment.

The balanced-Justice must be carefully taken care of by the judges in considering the sanction imposed on the defendant of certain characteristic crimes. Judges are not easy to decide. The paradox characteristic in criminal cases will be the problem. The judges must be fairly scaling for all parties, the effect, and many more aspects. The cost of crime remains challenging to count. The judge is having a heavy burden because to impose defendant with life imprisonment and or capital punishment is always related to someone's life and the opportunity for someone to be a better person. Thus, it needs guidance more clearly.

Reference

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No	Court Decision Number	Name of Defendant	Case(s)	Sanction	Judge Consideration
1	36/Pid.B/2016/PN.MLL.	ALWI RONGKENG alias AWI	Premeditated Murder (Art 340 Indonesian Criminal Code) and Child abuse “that resulting in serious injuries (Art 80 (2) Law of the Child)	Life imprisonment	<ul style="list-style-type: none"> - Defendant has been proven committed “Premeditated Murder” and “Child Abuse that result in serious injuries. - By considering the consequences of actions that cause the victim's death, the witness is severely disabled. - The Supreme Court considers itself on the length of the sentence demanded by the public prosecutor, which is 20 years to life imprisonment. This criminal imposition has been deemed fair and proper and by the sense of justice in society. - Supreme Court judges consider the point that to achieve the legal objectives, namely the fulfillment of a sense of justice, the principle of utility, and legal certainty. In this regard, Supreme Court judges put attention to the purpose of sentencing where the defendant's actions have taken the victim's life and suffered the witness. This action is contrary to the State Law System of Indonesia. - The Supreme Court Judges have considered that in Rule of Law Theory to be accepted as exceptional circumstances mentions that there are circumstances that exclude human rights law. To live is an absolute right that is only owned by the state. The Law enforcement of complementary Right to Life exists if accompanied by the Basic Prohibition Law and the Law of Basic Sanctions as Essential substances. - The judge was considering the Law of Human Rights Prohibition, the Right to Life prohibition against killing or eliminating another person's life accompanied by primary sanctions, namely the death penalty or life sentence for the defendant. The object of human rights is to maintain the rights of life of other citizens. The case is against human rights. - In this condition, the Supreme Court has the attributive authority by law that can be imposed any implied and contained the Right of Life, namely the Right to Die or

					<p>an act of retaliation, implemented through State Instruments.</p> <ul style="list-style-type: none"> - Based on the attributive authority of the supreme court, the Judges decided that it is proper and has a legal base of imposing the Defendant with Life Imprisonment. - Hopefully, the judge's decision will also serve as an effort to socialize the community's law. It is expected that other people should not imitate or duplicate the same action (as educative, corrective, and preventive), which creates a good sense of Justice: Legal Justice, Social Justice, and moral Justice. - There is another legal fact found in court where, at the time of the defendant's burning of the witness's domestic affairs, the defendant was still in a marriage with the witness. So, it can be seen as Domestic Violence, and it is against the law of Domestic Violence elimination. Thus, the protection for entire people in the scope of domestic needed to be implemented.
2	204 K/PID.SUS/2018	Faisal Kudri	<p>"Become an intermediary in buying and selling, selling or receive Narcotics category I, non-plants" (Article 114 (2) Law on Narcotic.</p>	Life Imprisonment	<ul style="list-style-type: none"> - The Supreme Court strengthens the decision of the High Court at the appeal level by rejecting the defendant's request. - Judex Facti/ High Court of Medan has changed the decision of the District Court of Medan. The court has considered the legal facts that are juridically relevant appropriately and correct according to the legal facts revealed before the court so that the defendant's actions have fulfilled all the elements of a criminal act as prohibited in Article 114 (2) of the Narcotic Law as formulated in the first indictment. - According to Judex Facti, to impose defendants to a sentence on the Defendant is Life Imprisonment, and it does not exceed the limits of its authority. It has sufficiently considered all the circumstances surrounding the defendant's criminal act, especially the situation which is burdensome with such a large amount of methamphetamine stored in the defendant's house bedroom and motorcycle seat, and by considering the nature of the crime committed the defendant. - The severity of the punishment is in the Judex Facti's

					<p>jurisdiction that is not subject to cassation unless Judex Facti imposes a sanction that is not regulated by law or exceeds the maximum sanction held by statute or imposing sanction without sufficient consideration.</p> <ul style="list-style-type: none"> - The Supreme court has considered the decision of Judex Facti as a decision that does not contradict laws.
3	311 K/PID.SUS/2017	Bambang Zulkarnain Sauti	Without rights or against the Law in Conducting Evil Conspiracy becomes an intermediary in illegal trade, in giving or in receiving Narcotic Class I in the form of non-plants with weight exceed than 5 (five) Kilogram (Article 114 (2) of Narcotic Law) in conjunction Article 132 (2)	Life Imprisonment	<ul style="list-style-type: none"> - The Judex Factie of High Court has strengthened the Judex Facti of District Court Decision. The judge states that the defendant was proven legally and convincingly guilty of committing attempted or evil conspiracy and unlawfully has become an intermediary in narcotic's trade-in delivering or receiving Narcotics. The supreme court has analyzed that Judex Facti has imposed life imprisonment has been correct and impartial in applying the law. - Judex Facti's decision has precisely and correctly considered the legal facts following the legal points revealed before the court. The defendant received 1 (one) kilograms of methamphetamine from the witness and repacked into 10 (ten) small packs, each weighing 100 (one hundred) grams, then handed over the 10 (ten) packets of methamphetamine into 3 (three) another witness's subordinates. - The Supreme Court gives a reaction to the defendant's cassation regarding the assessment of the results appreciative evidence of the fact that it was not accepted to be considered because the Supreme court as the Judex Juris did not examine the application whether a legal regulation is applied as it should be, or whether the juridical method is not implemented according to the provisions of the act, and whether the court has exceeds the limits of their authority as referred to in Article 253 (1) of the Criminal Procedure Code
4	268/Pid.Sus/2018/PN Bnj	ZULKIRAN Als ZUL Bin Ahmad Ibrahim	Without rights or against the Law in Conducting Evil Attempt or Conspiracy become an intermediary in	Death Penalty	<ul style="list-style-type: none"> - The Judex Facti has appropriately and correctly proofed all the crime elements as convicted for the defendants. As mentioned in Article 114 (2), in conjunction with Article 132 (1) of Narcotics Law, the components of the crime were fulfilled. - Related to the Memorandum of Defense (<i>Pledoi</i>) of

			<p>illegal trade, in giving or in receiving Narcotic Class I in the form of plants with weight exceed than 1 (one) Kilogram (Article 114 (2) of Narcotic Law)</p>		<p>Legal counsel for Defendant and Defendant that request leniency because defendant regrets his actions, the <i>pledoi</i> submitted by the defendant and the legal counsel is unreasonable. The application must be rejected.</p> <ul style="list-style-type: none"> - Regarding the sentence imposed to the defendants, the panel of judges disagreed with the Public Prosecutors because the amount of evidence in a quo case is considerable; as much as 150 (one hundred and fifty) kilograms of Marijuana is perilous. Thus, life imprisonment does not deter the defendant or other offenders of similar cases. The decision that made based on several considerations such as follow: <ul style="list-style-type: none"> - Narcotics are dangerous for the life of society, nation, and state. The misuse and illicit circulation of drugs have spread to all levels in the organization. Narcotics destroy the human resources responsible for the nation development, then the eradication of drugs must be seriously dealt with by law enforcers and all levels of society to save Indonesia from the dangers of Narcotics; - Narcotics illicit traffic is already syndication by traffickers, then the eradication of Narcotics in Indonesia must be included by the government as an Extraordinary Crime program. It needed to be handled in an extraordinary method. - The Judges consider the aggravating circumstances as revealed in the trial for the defendant. - Based on those considerations, the Judges will impose Capital punishment/death penalty as the proper and maximum punishment for the defendant.
	1754 K/Pid.Sus/2019			Life Imprisonment	<p>The supreme court decision has to correct Judex Facti's decision.</p> <p>The Supreme court panel of judges decided based on the consideration of judex facti decision that strengthens the decision Binjai District Court regarding the imposition of the death penalty on the defendant in casu must be corrected with the following considerations:</p> <ul style="list-style-type: none"> - There is a situation that is considered to lighten

					<p>the sentence that is not viewed by Judex Facti when making its decision. In casu a defendant has not received another perpetrator's promised money (IDR 20,000,000 (twenty million rupiahs). Likewise, original marijuana narcotics will be sent to Jakarta in the case it has been successfully thwarted. Then, it will not be circulating in the community.</p> <ul style="list-style-type: none"> - The point that has become the aggravating circumstances for imposing the death penalty is a reason revealed in the trial, but it is the judges' opinion or conclusion. - The pros and cons of death penalty imposition, in reality, is a matter of debate even though the positive law is allowed for human rights. Some believe that it is a non-derogable right. In this regard, the death penalty is contrary to the provisions of Article 28 (1) the 1945 Constitutions of the Republic of Indonesia, and to article 4 of Law Number 39 of 1999 concerning Human Rights and article 3 of UN Declaration of Human Rights; - The death penalty must be applied selectively and imposed in some instances and appropriate circumstances - The purpose of punishment must contain educative, conductive, and preventive measures that are difficult to imagine in the imposition of capital punishment. Thus, the imposition of imprisonment on the defendant will be considered fairer and more civilized
5	83 K/Pid.Sus/2016	RAMLAN SIREGAR	Without rights or against the Law in Conducting Evil Conspiracy	Capital Punishment/Death Penalty	<ul style="list-style-type: none"> - Judex Facti's verdict that sentenced the defendant to life imprisonment creates a very conspicuous criminal disparity between the perpetrator of illicit drug trafficking.

			<p>becomes an intermediary in illegal trade, in giving or in receiving Narcotic Class I in the form of non-plants Shabu-shabu type with weight exceed than 5 (five) Kilogram (Article 114 (2) of Narcotic Law)</p>		<ul style="list-style-type: none"> - Considering that defendant is worthy and fair to be sentenced with the Death penalty based on careful and thorough consideration because it relates to someone's life. The primary concern for imposing capital punishment against the defendant is actually by considering the amount of evidence that has been found. The number of narcotics found in connection with a quo case is approximately 25 kilograms of methamphetamine and 30,000 ecstasy pills or equivalent to 10 kilograms. The amount has exceeded more than any other evidence of narcotics criminals who have carried out the death penalty. - The Unjust, wise, and hurt feelings of the community's law will occur if the defendant does not impose with Death Penalty. It is because, in many cases of narcotics crime, couriers who proven to have brought or received or handed over narcotics in an amount far fewer narcotics than in a quo case have been executed with the death penalty. - The consideration is based on the effort to combat and eradicate narcotics trafficking. In Indonesia, one approach that must be taken is severely punishing couriers or dealers/narcotics owners for breaking the syndicate circulation chain network built so far in an organized crime. - Consider that methamphetamine and ecstasy drugs found by the police come from Malaysia, enter Indonesia through a network between States. At the same time, the defendant plays his role in Indonesia as the party who receives from someone and hand over narcotics to one of the witnesses. Thus, the supreme court panel of Judges has reminded us about the number of people who will become the victims if the police fail to reveal that cases. The illicit trafficking of Indonesian people who have already been narcotic abusers has reached millions of people. Other than that, more than thousands of people are died and suffered from addiction. - The supreme court judges believe that the defendant
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					<p>and his syndicates are not doing this for the first time, especially with excessive evidence.</p> <ul style="list-style-type: none"> - The defendant's imposing life imprisonment will not reduce the defendant's malicious intent, nature, or behavior in jail. There is no life sentence for the defendant to guarantee that defendant will not repeat his actions. - Further, the defendant's presence in jail is hazardous because it can affect people within and outside the prison. The defendant could control narcotics outside the prison using his network. - The defendant is part of illicit trafficking of narcotics syndication and has a significant role in breaking the defendant's movement and network and must be sentenced to capital punishment. - It is believed that to prevent the defendant from repeating a quo act is by imposing the death penalty. So that the defendant no longer engages in narcotics illicit traffic; Hence, Judex Facti failed to consider the provisions of Article 8 (2) of the Law on Judicial Power and article 197 (1) point 1 of Indonesian Procedural Law more depth. - There are aggravating and mitigating circumstances as revealed in the trial for the defendant that the Judges consider. - There is a dissenting opinion from one judge. According to article 30 (1) of the Supreme Court Law, if there is a dissenting opinion, it needs to deliberate for the majority vote.
6	2345/Pid.Sus/2016/PN Mdn	Hendy(1 st Defendant) Mirawaty a.k.a Achin (2 nd defendant)	Without the Right to Conspiracy, Accept, and Submitting Narcotics 1 st Group exceeds 5 Grams (article 114 (2) in conjunction with article 132 (1) of Narcotics Law.	Life Imprisonment	<ul style="list-style-type: none"> - The court proves all the elements of crimes as mention in the indictments - Thus, the Defendants must be given a punishment commensurate with their actions. - There are several aggravating circumstances found in the case. - After the panel of judges carefully study the provisions in article 114 paragraph (2) of the Narcotics Law, it can be concluded that there are 3 (three) types of punishment (<i>straf soort</i>) that can be imposed, namely

					<p>the death penalty, 2. Life Imprisonment, 3. Temporary Imprisonment for a minimum of 6 (six) years and a maximum of 20 years and a fine. Thus the Panel of Judges is granted freedom by the law, whether to impose a death penalty, life imprisonment, or temporary imprisonment and a fine</p> <ul style="list-style-type: none">- In considering the type of crime to be imposed on the Defendants, the Panel of Judges must carefully consider the severe aspects of legal certainty, aspects of benefit, and aspects of justice, both justice that lives and develops in society and justice for the Defendants.- In considering aspects of legal certainty, The Panel of Judges is based on the Supreme Court of the Republic of Indonesia Number 45 PK/Pid.Sus./ 2009 and the Supreme Court of the Republic of Indonesia Number 39 PK/ Pid. Sus./ 2011, which in essence, the two Supreme Court Decisions stated that the death penalty is contrary to the provisions in Article 28 I of the 1945 Constitution the Republic of Indonesia and the death penalty also violates Article 4 Law of the Republic of Indonesia Number 39 of 2009 concerning Human Rights. Based on the higher Court Decision, so that It is hoped that legal certainty can be realized, then the Panel of Judges will not be Imposing the death penalty for the Defendants.- Considering the aspect of utilities, then The Panel of Judges is based on the purpose of the punishment: corrective, preventive, and educational. The Panel of Judges believes that the death penalty does not allow the Defendants to improve their behavior patterns and have not. It can also be proven that the death penalty can cause a deterrent effect for the perpetrator of other crimes. Thus, the death penalty is not having an aspect of benefit both for the Defendants and for the community;- In considering justice, the Panel of Judges must pay attention to justice for the Defendants and their families and Justice for the Indonesian people who must receive protection from illicit trafficking of narcotics. It is fair
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					<p>for the Defendants not to be sentenced to the death penalty. In contrast, saving the community from the defendant's actions who circulates Narcotics as justice can be fulfilled without imposing the death penalty.</p> <ul style="list-style-type: none"> - Based on legal certainty, legal utility, and legal justice for the defendants and the community, the aggravating circumstance matters, the Defendants do not have to be sentenced to death. Still, it is appropriate if the self and the defendants' actions are sufficiently deprived of liberty for life.
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Table 1: Court Decision with Capital Punishment – Life Imprisonment – Prison for 20 years

(Sources: www.mahkamahagung.go.id, processed)

