

# The Right to Health Assessment on Indonesian Policy on Releasing Incarcerated People

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## ABSTRACT

The Indonesian government issues the regulation with releasing people in incarceration to respond to the Covid-19 pandemic. Indonesian government released 40.000 peoples in incarcerated in 2020. However, the overcrowded prisons in Indonesia that reach more than 80% need a more progressive response and new perspective. The human rights approach obliges Indonesia to protect, promote and fulfill human rights as an international norm for everyone in its jurisdiction. The international human rights laws provide the guideline to solve the issues on public health in the prisons and detention centers and lining the basic standard to evaluate and assess the policy and program. This research analyzes on the Indonesian government fulfills and protects human rights, especially the right to health towards people in incarceration, and to reduce the risk of the failure of human rights obligation in the prisons. This research finds flawed policy regarding the incarcerated peoples' release due to the lacking of alternative policy in order to reduce the overcrowding population. The research also finds the lack of prioritizing the most at risk and vulnerable groups in the prisons that leads to the failures to fulfill the policy's aim on releasing people in incarceration. This research uses normative methods with library research on national and international human rights instruments.

**Keywords:** *People in Incarceration, The Right to Health, Human Rights, Prison, Indonesia.*

## 1. INTRODUCTION

One of the areas impacted enormously due to the Covid-19 pandemic is prison or other closed setting places [1]. A prison is an unsafe place due to the virus outbreak. Especially when the prisons population is overcrowded. The number of people in incarceration is getting higher in the recent 10 years even before the pandemic Covid-19 appeared. Imandeka & Zulfikri in their paper shows that to prevent the Covid-19 in the prison needs many efforts from the Indonesian government since the overcapacity of the prisons to reach over 176.7% and the trend each year is moving higher from 176.754 inmates in 2015 to 269.846 inmates in 2019 [2]. The situation of Indonesian prisons on the adequate health care and overcrowding is also being criticized by International communities, such as the United Nations and other international human rights organizations even before the pandemic [3]. This situation needs extra effort to ensure the most

at risk in the prison are safe and also being protected.

One of the policies to reduce the Covid-19 outbreak within the prisons is by releasing the incarcerated peoples with certain criteria. Indonesia and other countries agree to release the peoples in incarceration but seemingly, Indonesia's policy regarding this situation is not enough, moreover fails to succeed in order to ensure the reduction of the Covid-19 outbreak in the prison. The data shows that the Covid-19 pandemic outbreak within the prison is enormously occurred from the law enforcement such as judges and prosecutors to the inmates in the prisons [4].

Since the first case of the Covid-19 pandemic globally appeared in 2020, WHO and national health institutions established strict health protocols to prevent the spreading of the virus. The health protocol is mandatory to be implemented by governments and their institution and should be followed by society in private and public spheres, including in Indonesia [5]. There is no doubt that the Covid-19 has impacted the

limitation of freedom and liberties, such as restriction of people's movement, limited access to work and education, including some particular health care under the nations' response's policy on quarantines, isolation, and lockdown policy [6]. The United Nations set up some guidelines to reduce the human rights violations implication due to the Covid-19 response [7].

The balance of response to the Covid-19 and the human rights protection is one of the tasks that should be guaranteed under international human rights law by the nations. One of the basic human rights that should be protected is the right to health. Under Article 12 of the International Covenant on the Economic, Social and Cultural Rights (ICESCR), the right to health that should be fulfilled without delay and progressively considered the precaution, prevention, treatment and care [8]. The precaution and prevention of the Covid-19 outbreak will be hard to be completely implemented when the locations are overcrowded, therefore the release of peoples in incarceration is one of the policies that is used by the government as an immediate response to the Covid-19 outbreak prevention in the prisons [9].

This paper aims to find the rationale on the implication of prison overcrowding due to the risk of health threats among the inmates without an effective policy on the release of incarcerated peoples in Indonesia. The Indonesian government needs to reform its policy with human rights perspective especially the right to health. The issue of the failure to prevent the Covid-19 outbreak within the prisons is not only the limited budget that the government should deal with, or the well-known overcrowding issues, but also relates to the failure to respond to the issue of human rights obligation under international human rights law [10].

## 2. RESEARCH METHOD

This research is conducted by a juridical-normative method that analyzes the regulation at national and international levels, especially international human rights law instruments as a primary resource. As the secondary sources, this paper uses the data gained from national and international publications and research reports as well as legal and law literature.

The response to prevent the Covid-19 Outbreak and the phenomenon on the overcrowding prisons, also the health program within the prisons are analyzed with the human rights principles, especially with the

right to health perspective based on International Covenant on Economic, Social and Cultural Rights (ICESCR).

## 3. FINDINGS AND DISCUSSION

### 3.1 Indonesian human rights obligation during pandemics on the right to health

Since March 11, 2020, WHO declared that Covid-19 is a global pandemic that has been infecting millions of people worldwide [11]. Based on WHO reports the current situation on Covid-19, it seems that the struggle of the society and global states to end this challenge against the virus is still a long way to go. WHO reported that more than 4.1 million new cases and 84.000 new deaths were recorded and the merging of SARS-CoV-2 Variants such as Variants of Interest (VOIs) and Variants of Concern (VOCs) B.1.1.7, B.1.351, P.1, and B.1.617. Furthermore, WHO stated that there is emerging evidence surrounding the phenotypic characteristics of VOCs (transmissibility, disease severity, risk of reinfection, and impacts on diagnostics and vaccine performance), as well as the geographic distribution of VOCs [12]. This situation is appearing with non-discriminatory implications towards any country, including Indonesia [13]. The data on incarcerated people or closed settings with Covid-19 infection is also devastating. Among 251.546 individuals in the prisons, there are 19.1% of them in detained pre-trial [14]. In 2020, there are 611 individuals in prisons infected with Covid-19. The Indonesian government responded to the pandemic by releasing 40.388 individuals from prisons [15]. The releasing policy towards people incarcerated is required to avoid major risk on Covid-19 outbreak in the prisons, especially when the prisons are overcrowded population. This policy is not only relating to the public order issues, but also as the implementation of international human rights obligations relates to the protection and fulfilment of the right to health with nondiscrimination principles, because prison health is public health [16].

Under international human rights law, a nation needs to find the balance between public order and human rights. International Commission of Jurists (ICJ) has been issued the Siracusa Principles on civil and political rights that aimed to find the equilibrium between public order and public safety [17]. The Siracusa Principles are applied during the emergency situation, threatening national security, public safety, public order and public health, such as this recent

Covid-19 pandemic. In the paragraph 35-37 of the the Siracusa Principle describes the justification on the limitation of certain rights civil liberties' restrictions should be balanced with rule of law and human rights fulfilments. The Siracusa Principles describe that the restriction should be lawful and carried out in accordance with the law, have a legitimate objective of general interest and is strictly necessary in a democratic society to achieve the objective. Siracusa Principles in the paragraph 25 on Public Health define that public health may be invoked to allow nations to take measures dealing with a serious threat to the public of population or individual members of the population and prevent disease or injury or provide care. The question is aside from restrictions in the general population, how the policy also impacted those who live under restriction liberty and limited access to public services, such as the individual in incarceration. The Siracusa states that the response to the emergency situation needs to be done proportionally, necessity and avoiding the misuse of emergency power. The policy and law response to the emergency also should protect the non-derogable rights (paragraph 58-60 of the Siracusa Principles) and the rule of law prevails (paragraph 64 of the Siracusa Principles). The fundamental rights as a customary international law apply to all individuals including the people in the incarceration.

ICESCR and UDHR explain that "the right to health defines as the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" that should be achieved with the progressive realization towards the full realization based on of article 12 of the ICESCR [18]. As a customary international law and fundamental rights, the right to health obliges the Nation Member to apply in all circumstances to all individuals. Therefore, Indonesia should refrain from denying or limiting equal access including the incarcerated peoples or detainees and ensure the protection and fulfilment of the right to health, especially in this recent situation of the Covid-19 Pandemic as stated in article 34 of the ICESCR. Moreover, international agencies, such as WHO, the UNODC, OHCHR encourages nations to step forward to prevent the pandemic outbreak in prisons. Particularly, UNODC focuses on the issues of overcrowding, lack of hygiene products and unacceptable sanitation procedures that need to be tackled by nations to prevent the spread of the virus in the prisons.

The standard of the prisons and other closed settings is governed by various international human rights documents. Although the standards are soft law, every nation has obligations to apply the standard since defined, regulate and provide the guidelines to fulfil the basic rights towards certain groups who are vulnerable due to the restriction of liberty and access. Therefore, the Indonesian government needs to comply with the human rights obligation on treatment to people in incarceration that governed in the United Nations Standard Minimum Rules for the Treatment of the Prisoners [19] and the United Nations for the treatment of Women Prisoners and Non-Custodial Measures for Women Offenders [20] and also the United Nations Standard Minimum Rules for Administration of Juvenile Justice [21]. These minimum standards should be inherent in the evaluation system regarding prisons administration and the criminal justice process, including as the basic tools for considering how the government protects the right to health of the incarcerated people. The Nelson Mandela Rules described several health standards that should be fulfilled by the nations since the right to health is the customary international law that governed under International Covenant on Economic, Social and Cultural Rights [22]. Based on Preliminary Observation 1-3 of the Nelson Mandela Rules, it stated clearly that the right to health is for all peoples in incarceration and should be fulfilled in order to preserve human rights protection. The guidelines provide the proper facilities, health care, minimum standard of adequate sanitation, food and nutrition, importantly the minimum standard of spatial to avoid the overpopulation within a cell. Those minimum standards are the minimum requirement to prevent the Covid-19 pandemic within prisons. It seems that hard to be fulfilled by the Indonesian government.

### ***3.2. Indonesia's implementation on the right to health towards people in incarceration***

Based on General Comment No. 14 paragraphs 12 and 50-52, the right to health has 4 (four) standards such as availability, accessibility, acceptability and quality; as well as 3 (three) human rights obligations that the nations should provide and fulfil. Indonesia as a member state of the ICESCR has to assess its policy on releasing of incarcerated people based on the right to health standards and obligation. As stated in the reports regarding the Indonesian prisons' situation [23]. and police detention facilities that lack sanitation and hygiene, health care and services, food and

nutrition, and overcrowded, therefore the release of the people in incarceration is unavoidable and an urgent policy to respond to the pandemic within prisons. Indonesian policy on release of the incarcerated peoples must be provided by law and proportional in the implementation.

Based on Article 5 of the Law Number 12 Year 1995 on Prison, peoples in incarceration have the right to health [24]. In Law No. 9 Year 2012 on the procedure of incarcerated people's rights it is clear that regardless of the status and crimes that have been indicted, all peoples in incarceration have the right to the highest attainable standard of health. However, due to several issues, such as overcrowding of prisons, budgetary, spatial and staffing limitation, the obligation to fulfil the right of incarcerated peoples mandated by ICESCR is hardly adhered. Indonesia has been faced an overcrowding population of up to 170% [25]. The death of people in incarceration is also very high, which is around 116 death cases in 2018 inside prisons [26] and the crisis on overcapacity in Indonesia prisons is never be reduced [27].

The Ministry of Law and Human Rights has released 38.822 incarcerated peoples to avoid the Covid-19 pandemic outbreak based on Law No. 10 Year 2020 [28]. The policy on releasing of the incarcerated people becomes mandatory since even before the Covid-19 pandemic, the rapid spreading of diseases among people in incarceration in Indonesia prisons is very high [29]. One of the reasons is because the limited access to medicine and health care inside the prison. Based on the ICESCR, although the right to health does not mean the absence of diseases but the progressive realization of the right to health to all is the aim of the Covenant. The right of the incarcerated peoples in the Indonesian legislature, such as in the article 3 of Ministry of Law and Human Rights Regulation No. 6 Year 2013 also guarantees the treatment and care in physical and mental health. [30]. Notably, the Covenant obliges the Nation Member to implement the right to health through progressive realization as stated in the General Comment No. 14 on the Right to Health paragraph 33 and improve policy and regulation towards a better approach for the right to health to all, including in prisons that governs in paragraph 43 and 12 of the General Comment No. 14.

The Government Regulation No. 99 Year 2012 regulates the release of incarcerated peoples by

reducing the length of punishment. The regulation also provides the realization criteria through the remission based on the type of crimes or a particular situation, such as the age of the incarcerated peoples, the imprisonment length less than 1 (one) year, sickness, etc. [31]. Through Government Regulation No. 10 Year 2020, the government release the incarcerated peoples that complied with the list of criteria. Among those criteria, drug offences are excluded since the Indonesian government defines drug offences as a "extraordinary crimes". However, the data shows that drug offences are approximately 52% of the total number of prisons and detention centers in Indonesia. Most of the drug offences in Indonesia are caused by small amount of possession of drugs, people who use drugs for personal use, and children or female drugs mules. [32]. The intention to reduce the population of the prisons by excluding the drug offences is not a strategic policy and is also unable to reduce the overcrowding population that is needed to prevent the Covid-19 outbreak. In the end, the reduce in population in the prisons leaves most people at risk behind, since people who use drugs relate to the prevalence of the HIV epidemic, Hepatitis-C or Tuberculosis in and out of the prisons. The United Nations gives a comprehensive analysis on why Indonesian policy for people who use drugs needs to be diverted from prisons and send to medical treatment [33]. In sum, Indonesian strategy and policy on releasing the incarcerated peoples lead to violation of the right to health since the access to avoid the diseases are rarely to happen for marginalized and vulnerable groups, such as women, children and people with drug dependence.

The health rights based on the General Comment No. 14 mandates the Indonesian government to ensure the (1) availability of treatment and care due to the Covid-19; (2) accessibility of the program and vaccination regardless of the social ground; (3) acceptability with proper scientific and ethic as well as cultural acceptance and standards and (4) guarantee the quality of treatment and care. The prevention of the Covid-19 pandemic in prisons though vaccination programs should become a priority [34]. It is not only a legal obligation but also an ethical and moral obligation [35]. Moreover, the people in incarceration in Indonesia are under the radar of the health care providers and services, in some cases their rights to get vaccines are also at risk due to corruption [36]. When the treatment and care are not properly available, the current policy on releasing incarcerated peoples should

be re-evaluated. While the intention of the Indonesian government is to give access to treatment and care, such as vaccines and basic medicine for people incarcerated, Indonesian government lacks human rights approach. The progressive realization of health and human rights are lacking because the Indonesian government still focus on imprisonment and retributive approach and avoid the better alternative. The alternative to detention is a part of the human rights approach on the issue of incarceration. The alternative to detention must be a part of Indonesian strategy during and post Covid-19 pandemic since the cause of the difficulties to ensure Indonesian obligation on the right to health is the overcrowding population and lacking the human rights-based approach.

#### 4. CONCLUSION

The limitation and restriction of certain rights are avoidable during the Covid-19 Pandemic situation. The international human rights laws assess how nations allow doing the limitation of certain rights of individuals. However, fundamental and non-derogable rights should be protected under all circumstances without discrimination, including incarceration. The rule of law prevails over the public order, mainly when the public order is unnecessary and disproportionate. International human rights law, such as the Nelson Mandela Rules, Beijing Rules, and Bangkok Rules, provides the guidelines and standards for the member states to protect, promote and fulfill human rights for all, including people in the incarceration.

As part of most international human rights laws, Indonesia is guided to ensure that human rights principles such as nondiscrimination and equality principles are implemented, especially the right to health. However, the Indonesian situation on the right to health towards people in incarceration is far from fulfillment and protection. The overcrowding population in the prisons and detention centers leads to the unavailability of equally distributed health care and programs. The 52% population of the prisons as the most at-risk and vulnerable groups due to the Covid-19 pandemic are drug offenses. Nevertheless, they cannot access the releasing of incarcerated peoples' program since drug offenses are defined as an extraordinary crime, although the international human rights organization stated otherwise and call the Indonesian government to provide the alternative to detention and prisons. The punitive and retributive

approach has been the challenge for Indonesia to focus on human rights protection. Ensuring the human rights law by prioritizing the treatment and care within the prison is a proper strategy and a legal and ethical obligation.

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