

# Acces To Justice for Foreigners Before Constitutional Court of Indonesia

*By* Sefriani Sefriani



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*Access to Justice for Foreigners Before Constitutional Court of Indonesia*

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**Abstract**

In 2007, Indonesian constitutional court refused judicial review submitted by 3 Australian citizens. Those people have been verdicted in death penalty before Indonesian district court on abused of drugs. The Australian citizens considered that death penalty stipulated in Indonesian Law regarding narcotic law violated their constitutional right, namely the right to life. Therefore they asked the court to abolish the death penalty clause. Unfortunately the court refused their request for judicial review with the reason because as foreigners, they have no legal standing before the constitutional court, whereas the right access to justice is non derogable right. This research analyse whether the refusal of constitutional court violated international human right law on access to justice.

The research is doctrinal research that used normative and comparative approach. The result of the research showed that the refusal of judicial review by the constitutional court did not violated international human right. All of constitutional rights are human rights. However not all human rights can be recognized as constitutional rights. As a sovereign state, Indonesia have right to determine the human rights that can be categorized as constitutional rights that owned for its citizen. However Indonesia has obligation to provide access to justice for foreigners for any kind of purposes.

Keywords: constitutional rights; human rights; access to justice

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## Introduction

In 2007 three Australian citizens, accused of **1** drug cases, and has been sentenced to death penalty by an Indonesian court, submitted **judicial review** on **Law No. 22 Year 1997 regarding Narcotics**. Those men feel that their constitutional rights violated by the existence of death penalty stipulated at Law Number 22 of 1997. The existence of death penalty is contrary to fundamental rights in human rights law, namely the right to life.

Unfortunately the court refused their request for judicial review with the reason because as **for 1**ners, they have no legal standing before the constitutional court. The Court stated **that Article 51 paragraph ( 1 ) of the Law** no 24/2003 regarding the Constitutional Court explicitly and clearly stated that individuals or groups only of Indonesian Citizen who have constitutional rights granted by the 1945 Constitution

The wishes of the foreigners who have been convicted of death penalty to conduct a judicial review against the Indonesian narcotics law is very understandable considering the existence of the death penalty violates the right to life of a person guaranteed under **international human rights law instruments**. Article 6 ( 1 ) International Convention on the **Civil and Political Rights ( ICCPR )**, which has been ratified by the Government of **Indonesia** through **Law No. 12 of 2005** stipulated as follows : Every human being has the inherent right to life. The prohibition of the death penalty in the human rights conventions is motivated by the beliefness that the abolition of the death penalty will contributes to increase human dignity and the progressive development of human rights.<sup>1</sup> The right to life is categorized as non- derogable rights which is can not be derogated under any circumstances . Whatever crime was committed , some one still entitled to the right to life

Judicial review submitted by applicant including foreigners is part of the efforts of that persons to access justice for his rights that have been impaired by the existence of the requested legislation to those tested .

Not only the right to life, Access to justice is also non derogable rights which can not be derogated and discriminated base on sex , ideology , language, religion , race, nationality etc.

Access to justice is the fundamental right of every person regardless the citizenship. This right stipulated at article 16 ICCPR as follow:

**1**  
 “Everyone shall have the right to recognition everywhere as a person before the law. This right provide the right of access to justice before the court wherever the court exist

---

<sup>1</sup> Paragraf 1 , Second Optional Protocol to ICCPR



There is no clarity whether the court in question as well as the constitutional court or not. Is there a hierarchy between supreme court with the constitutional court? Does the state has right to restrict a person's right to access justice only because that person is foreigner?

### **Problem Statements**

Base on the background which is mentioned previously, the questioned are: first, why Indonesian constitutional Court decide that the foreigners did not have legal standing before this court. Second, wheter Indonesian constitutional Court decision in accordance with international human rights law or not

### **Objective of the Research**

The objective of the research are to analyse comprehensively why does Indonesian constitutional Court decide that the foreigners did not have legal standing before this court and whether the Indonesian constitutional Court decision provide no legal standing in accordance with international human rights law or not

### **Research Method**

This is qualitative research, The methodology employed in this research is library-based research. It employed statutory, conseptual, and comparison approachs. While the main research materials use in this research are primary and secondary sources. The primary sources consist of Indonesian law No 24/2003 regarding Indonesian constitutional court, and constitutional court decision no Nomor 21-22/PUU-V/2007, and ICCPR

### **Results/Findings**

Base on the research that has been carried ot concerning the access to justice of foreigners before Indonesian constitutional court, there are some results that can be presented.

#### **1. Legal standing of Foreigners under Indonesian Constitutional Court Decision**

The primary arguments was delivered by the applicant in this present case is that the access to justice is the right of every person regardless the citizenship. The law of Constitutional Court which provide no access to foreigners before this court is contradict with Article 28D paragraph ( 1 ) of the 1945 Indonesia Constitution.

Responds this claim, the indonesian constitutional court reminded that since 2005, under the Decision No. 006 / PUU - III / 2005 which was followed by subsequent decisions agreed that become applicant before indonesian constitutional court should meet five requirements, namely :

- a. there is rights granted by the 1945 Constitution ;

- b. those rights was impaired by the enactment of the law concerned for reviewed
- c. The constitutional impairment must be specific (special) and actual or at least potential which according to logical reasoning, will surely occurred
- d. there is causal link between the losses in question and the enactment of the law for reviewed
- e. there is a possibility that with the granting of the claim, the constitutional impairment will not or no longer occurred.

Moreover, Indonesian constitutional court stated that the three Australian citizens has no legal standing because :<sup>2</sup>

- a. Article 51(1) Indonesian constitutional Law and its explanation stipulated that an individual who entitle delivered judicial review before the Indonesian constitutional court only indonesian citizens.
- b. Even though foreigners has no access before Indonesian constitutional court does not mean that foreigners do not obtain legal protection because they are still have access before other public courts.

## 2. Indonesian constitutional court decision is not violated international human right law.

### 2.1. Constitutional right and obligation of citizen

Human rights is different with constitutional rights. Human rights is the right inherent on each human person because they are human, not because they are citizen. While constitutional rights is the rights provided by state to its citizen only. However, due to human rights it has been stipulated in 1945 indonesian constitution, so that human rights officially become a constitutional right of every citizen or "constitutional rights". Not all constitutional rights identical with human rights. There are some citizen's constitutional rights can not be categorized as human rights. the right of every citizen to occupy positions in government is "the citizen's constitutional rights", but could not be applied to any person who is not a citizen. Therefore, not all "the citizen's rights is" the human rights", but it can be said that all "the human rights" also is at once a "the citizen's rights".<sup>3</sup>

There are certain rights that can be categorized as the constitutional rights of citizens in indonesia as follow :

1. certain human rights which are provided by state to Indonesian citizens only. For example the rights to get equal opportunity in terms of governance ; the right to work

<sup>2</sup> See indonesian constitutional court decision no 21-22/PUU-V/2007

<sup>3</sup> Jimly Asshiddiqie, "Hak konstitusional perempuan dan penegakannya", Presented on an events of Public Dialogue and Consultation of the National Commission of Women ". Jakarta, 27 November 2007 p. 1, Last accessed april 05 2016 at [http://www.jimly.com/makalah/namafile/8/HAK\\_KONSTITUSIONAL\\_PEREMPUAN.doc](http://www.jimly.com/makalah/namafile/8/HAK_KONSTITUSIONAL_PEREMPUAN.doc)



and a decent living; the rights and obligations in the defending of state efforts , the rights and obligations for the defense and security of the state ; the right of education.

2. certain human rights that applied to everyone, but in certain cases, Indonesia citizen entitle certain priveleges regarding that rights. For example, 1945 constitution guarantees rights to work for everyone. In practice, states may restrict the right of foreigners to work in Indonesia with many administrative requirements. The right to freedom of association, assembly and expression for everyone. The foreigners and a citizen can not be treated equally in the implementation of this rights. Foreigners prohibited to interfere in the domestic affairs of Indonesia. For example, they are not allowed to freely express opinions that may raise a particular social tensions. In a larger scope, for example, foreigners have no legal basis to establish a political party for any purpose at indonesia, even it will be strongly contested if that political party potentially try affect political policy of Indonesia

3. The right of citizens to occupy positions that are filled through general election procedures , such as the president and vice president ; governor and vice governor

4. The right of citizens to be appointed in certain positions , such as the military , the state police , prosecutors , other civil servants within the structural and functional personnel

The policy of State to distinguish between human right and constitutional rights are very common. United States distinguish between "the people 's rights" versus "the citizen 's rights" . Human rights arise simply by a human being while Civil rights arise only by virtue of a legal grant of that right, such as the rights imparted on American citizens by the U.S. Constitution.<sup>4</sup> In America, civil rights protected by the U.S. Constitution and many state constitutions. Civil rights protect citizens from discrimination and grant certain freedoms, like free speech, due process, equal protection, the right against self-incrimination, and so forth. Civil rights can be thought as the agreement between the state and the citizens

2 In an international framework, civil rights derive from the constitutions or laws of each country, while human rights are considered universal to all human beings. As a result, international players are less likely to take action to enforce a nation's violation of its own civil rights, but more likely to respond to human rights violations. While human rights are universal in all countries, civil rights vary greatly from one nation to the next. No nation may rightfully deprive a person of a human right, but different nations can grant or deny different civil rights and liberties.<sup>5</sup>

How does the civil rights at US can be described by some questions as follows: "Are you one of the People of the United States as contemplated by the U.S. Constitution Preamble ? Or , are you one of the citizens of the United States as defined in the U.S. Constitution

2  
<sup>4</sup> What is the Difference Between a Human Right and a Civil Right?, Last accessed april 05 2016 at [www.hg.org/article.asp?id=31546](http://www.hg.org/article.asp?id=31546)  
<sup>5</sup> ibid

14th Amendment ? " . " If you are one the People of the United States , then all Ten Amendments are available to you . You have natural rights . If you are a citizen of the United States , then you have civil rights ( properly called civil privileges ) " . " Civil privileges " that are not owned by US residents who are not the United States citizens <sup>6</sup>

Not only the differences between constitutional rihgts and human rights . it is important also to distinguished between constitutional rights and legal rights . Constitutional rights are rights guaranteed within and by 1945 indonesian constitution, while the legal rights guaranted by the laws or regulations beyond 1945 indonesian constitution. <sup>7</sup>

After provisions on human rights adopted completedly in 1945 indonesian constitution , <sup>8</sup> the notion of human rights and the rights of citizens can be attributed to the notion of " constitutional rights" guaranteed in the 1945 Constitution. furthermore Indonesian citizen has also legal rights more detailed and operational regulated by legislation or other subordinate .

As a counterweight to the guarantee of citizens' constitutional rights mentioned above , 1945 Indonesian constitution was also regulated the constitutional obligation of every citizen . Almost similar to the constitutional rights ,the constitutional obligations consist of :

1. the obligation as a human being or a human obligation
2. the obligation as citizen

these are the explanation of human obligation and citizen obligation :<sup>9</sup>

1) The obligation<sup>1</sup> of every person to respect the human rights of others in the society as stipulated in Article 28J paragraph ( 1 ) of the 1945 Indonesian Constitution

2) The obligation of every person in the perform of their right<sup>1</sup> and freedom to be subjected to the restrictions established by law with the purpose is solely to ensure recognition and respect for the rights and freedoms of others and to ac and to meet the demands of a fair in accordance with morality consideration<sup>1</sup>, religious values , security and public order in a democratic society , as stipulated in Article 28J paragraph ( 2 ) of the 1945 Indonesian Constitution ;

3) The obligation of every person and every citizen to pay taxes and other Additional compulsory charges , as stipulated in Section 23A of the 1945 Indonesian Constitution ;

4) The obligation of every citizen to participate in the efforts of state defense as stipulated in Article 27 ( 3 ) and to participate in the defense and security of the country referred to in Article 30 paragraph ( 1 ) of the 1945 Indonesian Constitution<sup>10</sup>

<sup>6</sup> Jimly Asshiddiqie *op.cit*, p.2

<sup>7</sup> Ibid

<sup>8</sup> See second amendment of 1945 constitution at year 2000.

<sup>9</sup> Jimly Asshiddiqie, *op.cit*, p.12

<sup>10</sup> Ibid, p.13



## 2.2 The right of access to justice is non- derogable

Indonesia already ratified the ICCPR 1966 . This fact raised consequences that all categories of civil and political rights were guaranteed by the ICCPR must stand on non - discrimination requirements <sup>11</sup>.

Although it requires the absence of state interference, the state must create a protection mechanism in a formal legal instrument . In the modern political civilization generally civil and political freedoms guaranteed by the Constitution as the highest of legal instrument or guaranteed by penal law system..<sup>12</sup>

Political and civil rights can be divided into non- derogable and derogable rights These groupings raised different opinion regarding hierarchi among human rights base. on the argument that the nature of interdependence and indivisability of that human rights <sup>13</sup>

According to Article 4 paragraph 2 of the ICCPR there are seven kinds of non- derogable rights , namely the rights mentioned in articles 6, 7 , 8 ( paragraphs I and 2 ) , 11 , 15 , 16 and 18 consists of :<sup>14</sup>

1. the right to life ;
2. freedom from torture ;
3. freedom from slavery ;
4. freedom from arrest for failing to pay the debt
5. freedom from retroactive punishment
6. the rights as legal subjects ;
7. the right to freedom of thought, conscience and religion

Thus it is not justified for any country to reduce the fulfillment of non derogable rights. Everyone whose rights are violated shall obtain effective remedy in the e form of compensation , restitution and rehabilitation or reparation. All States parties are required to provide regular accountability toward the international community , such as make regular reports to the Human Rights Committee.<sup>15</sup>

Even though article 4 stipulated that those seventh rights could not be derogated by who ever and in whatever conditions however actually this convention still give possibility to derogated the right to freedom of thought, conscience and religion.

<sup>11</sup> Todung Mulya Lubis, "Menjaga Kebebasan Sipil", at Kompas , 3 february 2006

<sup>12</sup> Francisco Forrest Martin, Stephen J. Schnably, Richard J. Wilson, Jonathan S. Simon Mark V. and Tushnet, *International Human Rights and Humanitarian Law Treaties, Cases and Analysis*, Cambridge University Press, New York, 2005, p.. 46

<sup>13</sup> Teraya Koji, "Emerging Hierarchy in International Human Rights and Beyond From the persepectife of non derogable right", *European Journal of International Law (EJIL)* 2001, Vol 12 No 5 p. 917

<sup>14</sup> see article 4 paragraf 2 ICCPR

<sup>15</sup> Francisco Forrest Martin Stephen J. Schnably, Richard J. Wilson, Jonathan S. Simon Mark V. and Tushnet, *op.cit*, hlm. 64

For an example, article 18 ICCPR stipulated that the right to express of religion is limitable by the law to protect public security, public order, health or moral and fundamental rights and other freedoms.<sup>16</sup>

The limitation toward non derogable rights could not be found at other six non derogable rights such as right to life, the rights as legal subjects , freedom from torture, freedom from slavery , freedom from arrest for failing to pay the debt, freedom from retro active punishment

Convention also stipulated that non derogable right could be derogated or limited only in the emergency situation and fulfill all requirements mentioned at covenant. The requirements are cumulative in nature. Those cumulative requirements as follows:<sup>17</sup>

1. there is emergency situation which formally noticed as threat of continuing living of State
2. suspension or restriction is not allowed base on discrimination of race, colour, sex, language , religion or social status . The limitation and suspension concerned should be reported to United Nations
3. those rights could be restricted or derogated with the reason to protect *national security or of public order (ordre public), or of public health or morals, healthy and fullfilment other rights*

The scope of non derogble rights mentioned in ICCPR different with African Charter also American Convention. There are eleven rights belonging to non- derogable rights under the American Convention. This Convention allows the violation at the time of war, public danger , or other emergency that threatens the security of the state.<sup>18</sup>

As stated above, one of the rights that can not be restricted under any circumstances are right as a legal subject . This is stated expressly in Article 16 of the ICCPR that Everyone shall have the right to recognition everywhere as a person before the law .. Everyone has the right to be recognized as a person before the law . As a person before the law means that it can sue or be prosecuted before the law.<sup>19</sup>

Nowdays quite a lot of countries which stipulate that foreigners have legal standing to claim the fulfillment of their constitutional rights before their constitutional court. German Bundesverfassungsgericht verdict , May 22, 2006 , granted a constitutional complaint ( ' *Verfassungsbeschwerde* ' ) of a foreign student from Morocco which considers the prevention of data screening ( ' *Rasterfahndung* ' ) , which is held by The Federal Policy Agency in order to anticipate the danger of terrorists after the Sept. 11 ,

<sup>16</sup> see pasal 18 ICCPR

<sup>17</sup> Francisco Forrest Martin Stephen, Richard J.Wilson,Jonathan S. Simon Mark V. and Tushnet *op.cit*, p.65

<sup>18</sup> see <http://www.interights.org>. Compare with an article at <http://www.amnestyusa.org>. The last visited 23 march 2016

<sup>19</sup> Dixon, Martin, *op.cit*, hlm. 105



2001, contrary to the right for informational self-determination guaranteed by the Grundgesetz Republic German Federation. Another example is the Constitutional Court of Mongolia, commonly called Constitutional Tsets (or Tsets) recognizes the rights of foreign citizens and those without citizenship, who are not staying lawfully in the territory of Mongolia apply for judicial atauTsets referred to the Constitutional Tsets<sup>20</sup>

In the United States, in the case of *Asakura v. City of Seattle*, 265 US 332 (1924), the court allowed Japan citizen filed a judicial review of a city ordinance that prohibits foreigners to do business in the pawnshop, and only gave such permits to citizens. Furthermore, in the case of *Cabell v. Chavez - Salido*, 454 U.S. 432 (1982) foreigners were allowed review on Article 1031 (a) Of Cal.Govt Ann, which requires that public officers or employees declared by law to peace officers, must be an American citizen.

Furthermore, the Constitution of Dominica in 1978, stipulated Foreigners were allowed to conduct a judicial review. Moreover, Dominica Constitution states that foreigners are "a person", within the purview of s.100 (a), and is entitled to judicial review under s.103 (1), even though has been debarred from entering the territory of the country.<sup>21</sup>

The right to be recognized as legal subjects in this particular case manifested by its legal standing before the Constitutional Court. Basically This rights should be extended to foreigners. However, statement above should not be interpreted that the rights of a foreigners in every thing should be same with the rights of citizens.

The Indian Constitution clearly divides fundamental rights into two parts, namely:

1. the rights which only exists for citizens, and
2. the rights which are exist for people", including for foreigners, which include:
  - A. equality before the law,
  - B. the right not to be prosecuted with recroactive criminal law or double jeopardy (be tried again after a decision of the magnitude),
  - C. the right to life and the right to personal freedom, etc.<sup>22</sup>

Related to 1945 indonesian constitution, although it uses the formula "everyone", not by itself all the rights contained in Chapter XA of these also apply to foreigners. Political rights that are closely related to the duty of citizens of the country, can only be acquired because of his position as a citizen. It is different with the human rights of foreigners, who also received protection before the Indonesian law.

Indonesia's participation in the Convention on International Human Rights, on a reciprocal basis also provide rights to Indonesia whether juridically and morally the implementation of international obligations of other countries, to protect and guarantee human rights of Indonesian citizens abroad are equal to the minimum standard of national

<sup>20</sup> Constitution Magazine, No. 17, November-December 2006, p. 13).

<sup>21</sup> Francisco Forrest Martin Stephen J. Schnably, Richard J.Wilson,Jonathan S. Simon Mark V. and Tushnet, *op.cit*, p.69

<sup>22</sup> Note (*risalah putusan*) of indonesian constitutional court decision

1 treatment. The practice of other countries shows that they accept the locus standi for foreigners to obtain access to justice through a judicial mechanism, in an effort to obtain the protection of human rights of foreigners who breached by legislation of host state to foreigners, whether they are living temporarily or not.

There are still many other cases referring to international practice that do not close access of foreigners before constitutional court to claim any rights which is universally recognized and protected, although limited to rights which by their nature involve a relationship between citizens and its state and the rights which demands loyalty arising from obligation of a citizens of the country.

1 The right to life is the right owned by every human not only Indonesia citizen. This rights by their nature do not involve a relationship between citizens and its state and also do not related with a demands of loyalty arising from obligation of a citizens of the country. There fore foreigner should have the right to ask judicial review before Indonesian constitutional court for this right.

### 2.3 Indonesia had not implemented yet ICCPR to Its National Law

As legal subjects Indonesia hold rights and obligations under international law. Some obligations were derived from international treaties that already ratified by Indonesia. Base on pacta sunt servanda principle, those treaty is legally binding to its parties and should be performed with good faith.<sup>23</sup>

The majority of international human rights instruments currently established through international treaty. Those treaties bound to State through ratification. Until now Indonesia has ratified<sup>24</sup> many international human rights instruments. Ratification is not an obligation in international law. Ratification has been known in international law by the ratio :

1. state's right to reexamine and reconsider the international treaty that already signed by its representatives
2. implementation of democracy principle and the sovereignty of the people

Related to the first Ratio, state has right to examine more whether the treaty contradict to the national interest or not. While related to the second ratio, base on the principles of democracy, what has been agreed upon representatives of the state in an international conference need to be awared and seek approval of the people, especially when the contents of the treaty have a direct impact on the interests of the people. Indonesian law number 24 of 2000 on international treaties, stipulated that ratifications require the approval of Parliament when the material regarding the following matters :

- a. political, peace, defense, and security of the state
- b. changes or delimitation of the territory of the Republic of Indonesia

<sup>23</sup> Martin Dixon, *Textbook on International Law*, Blackstone Press Limited, fourt edition, 2000, pp24-25



- c. sovereignty or sovereign rights
- d. human rights and the environment
- e. establishment of new legal rules
- f. loans and / or grants

In 2005, Indonesia has ratified the ICCPR through Law No. 12 of 2005. ICCPR legally binding to Indonesia including Right to access justice, recognized as a person before the law means that everyone has the right to access a justice before the law. The right to recognized as a person before the law, equality before the law is categorized as non-derogable rights.<sup>25</sup>

Thus unwarranted presumably what is stipulated in Article 51 (1) of the Law on Constitutional Court which does not grant access to foreigners to ask judicial review before Constitutional Court on the reason only that they are foreigners is not compatible with Article 4 regarding non derogable rights. Providing access to foreigners before Constitutional Court will not threat the life of the state. The right of access to justice is the right of every person because they are human beings who entitle right to life, not because of their citizenship status.

It is legal for the government do not accede some or all what prompted by the foreigners in their judicial review. However it will be violated the international human right law if the government do not provide access to foreigners to claim their constitutional right before Indonesian constitutional court regarding the right to life. The right to life is owned by every human not only Indonesia citizen. This rights by their nature do not involve a relationship between citizens and its state and also do not related with a demands of loyalty arising from obligation of a citizens of the country. There fore foreigner should have access to justice asking judicial review before Indonesian constitutional court for this particular right.

## Conclusion

Indonesian Constitutional Court decision refused legal standing of foreigners before this court solely due to normative considerations that Article 51 ( 1 ) of the Law of constitutional Court restricted its jurisdiction.. This provision provide legal standing only for:

1. Indonesian citizens or groups of people who have the same interest
2. community of indigeneous people
3. The public or private legal entity
4. State institution

There is no satisfactory explanation why the Indonesian cconstitutional court limited its jurisdiction only for citizen or national legal entity and do not provide access to foreigners

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<sup>25</sup> Art 4 ICCPR

The decision of Indonesian Constitutional Court's which provide no access to foreigners deliver judicial is not violate international human rights law.because Human rights is different with constitutional rights. constitutional rights is the rights provided by state to its citizen only. Not all " the citizen 's rights is " the human rights“:

The policy of State to distinguish between human right and constitutional rights are very common. United States distinguish between "the people 's rights" versus " the citizen 's rights/civil rights

Access to justice is non derogable right. Even though foreigners has no access before Indonesian constitutional court does not mean that foreigners do not obtain legal protection because they are still have access before other public court

If Indonesia want to provide access to justice for foreigners before indonesian constitutional court, it can be provided for the right by their nature do not involve a relationship between citizens and its state and also do not related with a demands of loyalty arising from obligation of a citizens of the country

iafor

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