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Islam, Democracy and the Future of the Death Penalty

Professor Dr Jimly Asshiddiqie, SH



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The late Professor Dr Iur Adnan Buyung Nasution was widely regarded as Indonesia's leading advocate and trial lawyer. He was a pioneer of legal aid and law reform, as well as being a key figure in the development of human rights law and constitutionalism in Indonesia.

In 2010, he was appointed as Honorary Professorial Fellow in the Melbourne Law School, in recognition of his huge contribution to constitutional studies and scholarship on Indonesian law, and his commitment to building the rule of law in his home country.

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ISLAM, DEMOCRACY AND THE FUTURE OF THE DEATH PENALTY

ABSTRACT

This paper explores Islamic attitudes to the death penalty and argues that all contemporary cultures – whatever their origin and whatever their religious context – face challenges in reconciling the death penalty with the right to life. The experiences of the United States (the world’s largest Christian society), India (the largest Hindu society), and Indonesia (the largest Muslim society) suggest, however, that religion is not always an obstacle to democracy or human rights reform, even if all these countries still execute. The paper raises the questions of whether Islam requires the death penalty for certain crimes; whether executions are a breach of human rights; and whether religion is an obstacle to human rights reform. The paper concludes that increasing acceptance of democracy and international human rights norms as a global civilisational aspiration is forcing reconsideration of the death penalty in many societies - including in Muslim majority states like Indonesia.

PROFESSOR DR JIMLY ASSHIDDIQIE, SH



Professor Jimly Asshiddiqie is a leading Indonesian legal figure, both as a scholar and a prominent public official. As founding Chief Justice of Indonesia’s first Constitutional Court (2003-2008) he established a new branch of the judiciary and developed a process of constitutional review of statutes that had long been missing in Indonesia. He helped set a new standard in Indonesian courts for reasoned judgments drawing on international jurisprudence, as well as pioneering publication of judgments. He also led the Constitutional Court when it decided a challenge to the death penalty in 2007. He is now chair of the Honorary Council of the Electoral Management Bodies and of the Advisory Council

to the National Commission of Human Rights. He has advised presidents and the national legislature on legal and political issues, and has twice been decorated for his contributions to Indonesian law reform and state administration. Professor Asshiddiqie studied at the University of Indonesia, Leiden University and Harvard, and is Professor of Constitutional Law at the University of Indonesia. He has published more than 40 books, some in English, creating an important resource for emerging constitutional thought on democracy in Indonesia.

ISLAM, DEMOCRACY AND THE FUTURE OF THE DEATH PENALTY

PROFESSOR DR JIMLY ASSHIDDIQIE SH

I am honoured to present the inaugural Distinguished Asian Lecture in Australia and, by doing so, contribute to the fostering of the intellectual dialogue between Asian and Australian scholars necessary if we are to build a region that is free, fair, prosperous, and peaceful.

Most scholars are able to take a long-term view of society and the development of civilisation. We do not have to report our company's financial results to the stock market this quarter or win enough votes in the election next year. In one way or another, we have all decided, as students of law, to study the ever-evolving definition of a civilised society and the development of human rights standards.

With this long-term perspective in mind, I will focus specifically on one of the key human rights that is highly problematic in democratic societies with capital punishment, namely, the right to life. I will begin with a brief overview of the role of democracy and then capital punishment in today's world before going back in time to look at traditional Islamic views on capital punishment. I will then jump forward to review the death penalty in Indonesia's Criminal Code – both the statute currently in force and the new draft version proposed by reformers.

Through this exercise in time travel, I hope to leave you with new perspectives on why Indonesia continues to use capital punishment, and how it does so. I will also advance ideas that might suggest a path towards abolition in Indonesia and other countries, especially the democracies.

THE STATE OF DEMOCRACY

Today, more than 95 per cent of the countries across the globe claim that their constitutions embrace democracy. This suggests that, in theory, 'democracy' has already become a common language of statehood – a universal standard of humanity. In practice, however, these states do not apply uniform systems or standards of democracy. For instance, the United States of America and the Republic of Cuba both claim that their constitutions embrace democracy but it is clear that the type of democracy we see in Cuba is very different from that in the United States.

This is because every country that calls itself democratic takes the liberty of interpreting the idea of 'democracy' according to its historical development and its unique economic, cultural, and even religious, experience. All of these influence what the nation sets as its normative aspiration – or regulates as acceptable behaviour by its citizens and within its borders. This dual focus on citizenship and geography is intentional, and I will come

back to it later.

Today, the three religions with the largest number of followers in the world are Christianity, Hinduism, and Islam. Each has shown that they can be compatible with, and even suited to, democratic ideals. The United States, with the third largest population in the world, is the largest Christian country. India, with the second largest population after China, is the largest Hindu country. Indonesia, with the fourth largest population, is the largest Muslim country in the world. We can all, I think, accept that the United States and India have been successful at applying democracy alongside – if not within – their specific religious contexts. This true of Indonesia too, even if democracy there is relatively new and still maturing.

As the countries with the second, third and fourth largest populations in the world, India, the United States, and Indonesia face highly complex criminal justice problems that are unique in scale. Moreover, the levels of economic and social development in India and Indonesia still lag behind those of the US – and, indeed, Australia too. So, logically, as a country with high levels of development and complex criminal problems, it is the United States of America that should show leadership in the matter of capital punishment. If the United States were to totally abolish capital punishment, then we could expect India and Indonesia to do likewise, on the basis that abolition would be in line with the development of a civilised democratic society.

Capital punishment – the right of the state to take a life as a punishment for a crime – receives singular attention at both theoretical and practical levels. An increasing number of scholars and experts from various backgrounds now support its abolition, and we are seeing more countries following suit. According to Amnesty International's 2014 study, 98 countries have abolished capital punishment. A further 35 countries are considered 'abolitionist de facto' by virtue of either not applying the death penalty or not carrying out the sentence. And seven more countries use capital punishment only in extreme cases. If those seven countries are considered 'abolitionist', then there are now, all together, 140 countries in total – two-thirds of all countries in the world – that do not apply capital punishment.

CAPITAL PUNISHMENT IN ISLAMIC TRADITION

Before talking about capital punishment and Islamic tradition, let me point out that Indonesia's current Criminal Code – introduced after we won Independence from the Dutch – is still based on the Dutch *Wetboek van Strafrecht*, applied originally by the Dutch government to its then-colony, the East Indies. This means that notwithstanding our national Independence, the provisions of the Criminal Code that allow capital punishment are not based on Islamic legal traditions but European ones. It is therefore highly ironic that people in Indonesia who argue for abolition of the death penalty – a punishment derived directly from non-Muslims and colonisers – are too often accused of being 'unbelievers' and *kafir*. Why are they not seen as heroes?

It is true, however, that the question of abolition of death penalty in Indonesia is always influenced by its religious context. This is because one of the most significant and sensitive aspects of Islam is that the *al-Qur'an* and *al-Hadiths*, the core textual sources of its teachings, justify capital punishment. Indeed, they explicitly provide for it. As scholars, we need to examine this in more detail.

In Islamic *fiqh* or jurisprudence, there are two categories of criminal sanctions related to capital punishment, and these rest on two very different philosophical foundations. The first category is called *hudud wa ta'zir*, or *hudud* and *ta'zir*, which is based on the notion of judgment with penalties or punishments. According to conventional understandings, most scholars recognise only *ta'zir* penalties as commutable, while *hudud* offences and their penalties are fixed, absolute and not commutable. They are understood as especially intended to protect the broader interests of society or the public.

The second category is called *qisas wa diyat*, or *qisas* and *diyat*, which is based on principles of retaliation and compensation. In this category, the sanctions are meant to protect the interests of society or the public but also to respect the victim by protecting the personal and private interests of the victim's family.

Let me now look at various *hudud wa ta'zir* crimes that traditionally call for the death sentence and then explain how – in almost every case – Islamic law calls for mediation and mitigation before calling for death.

HUDUD WA TA'ZIR CRIMES

First, adultery or *zina*. On careful reading, different types of adultery could result in sanctions other than stoning to death, a punishment that actually originated from pre-Islamic tradition. In fact, the *hadith* tell us that in many situations the Prophet Muhammad imposed other severe, but non-fatal, punishments, such as life imprisonment or exile. Al-Qur'an even allows for no punishment when the offenders repent: 'If two persons among you are guilty of lewdness, punish them both. If they repent and amend, leave them alone, for God is oft-returning, most merciful' (QS 4:16)

Second, *riddah* or apostasy or treason. During the time of the Prophet Muhammad, Islam was still a growing religion with few devotees. It was also a time of numerous battles where followers of the Prophet fought those who rejected Islam. Hence, apostasy was seen as a form of treason that endangered the general safety of the Muslim followers, and death was therefore a reasonable punishment in the historical context, as it was in most other societies and religious communities at the time. It is important also to note that, despite the clear nature of the sanction for apostasy or treason, those who repented and returned to Islam could be given a stay of execution.

In the modern context, such sanctions are difficult to understand and accept, since these days the decision to convert to or from a religion is a mere matter of religious choice, which can be framed as a matter of human rights. Moreover, Islam itself guarantees

the freedom to follow whatever religion someone may choose: al-Qur'an states 'For you, your religion, and for them, their religion' (QS 109: 6). So, in the modern world, the death penalty, again, should not be an absolute and exclusive punishment for apostasy or treason.

Third, *hirabah* or armed robbery. The most severe punishment possible in a case of *hirabah* is the death sentence. In general, experts on Islamic law believe that the accused should face execution only when the crime causes the death of the victim. Judges are, however, given the freedom to decide the form of the punishment, which could, for example, be amputation rather than death. Moreover, the accused could avoid the death sentence by admitting fault and repenting publically and voluntarily. Again, it is not an absolute certainty that the punishment for armed robbery can only be death.

Fourth, *baghy* or armed rebellion. *Baghy* or *bughot* is the intentional use of arms to overthrow a legitimate leader. *Riddah* is the religious form of treason and *baghy* is the political form. This case of capital punishment must also be seen – as in apostasy – as a sanction suited to specific conditions, such as a time of war. It should therefore be understood in the context of the law of war or state martial law. It is inappropriate to apply this extreme punishment to cases of common criminal offences.

QISAS WA DIYAT CRIMES

Having considered the four types of *hudud wa ta'zir* offences that can attract the death penalty in Islamic tradition, and which are based on the principle of judgment with penalties or punishments, let me now turn to the second category, *qisas wa diyat*. This is based on the principles of retribution and compensation, as, for example, in the case of murder.

The sanction for murder is death, which is seen as an equal and balanced retribution for the death of the victim. It is important, however, to appreciate that there is a mechanism by which the accused may be pardoned and released. This process involves:

1. the accused expressing remorse and apologising;
2. the family of the victim sincerely forgiving the accused; and
3. an alternative punishment in the form of compensation (*diyat*) given to the victim's family.

If *qisas* law is implemented correctly, the process is not likely to result in execution, since the accused will usually do his or her utmost to meet the required terms of *diyat* or compensation. Hence, just as with the various types of *hudud* crimes, the likelihood of the death sentence being carried out for *qisas* offence is not absolute.

I would like to emphasise that it is this aspect of *qisas* that makes it so appealing to me,

as someone who believes in human rights and civilised discourse. The idea that the victim's family – those most directly affected by the crime committed – determine the terms of justice is a powerful mechanism to promote forgiveness and reconciliation. Islamic law strongly encourages forgiveness, which I consider a hallmark of civilised society.

Modern criminal law focuses, however, on the state's relationship with the accused. It is the state that exacts punishment for crimes against its citizens; it is also the state – not the individual – that receives any fines (a kind of *diyat*) that are levied. The interests of the victim's family are too often missing in both the theory and practice of modern criminal law.

Let me now offer a brief summary of my remarks so far. My quick overview suggests that in Islamic tradition, the death penalty is conditional and subject to alternative sanctions. Of the five types of crimes that involve the death penalty, only two can be considered absolute, meaning, in the modern context, that an official, judicial process in a court of law might return a death sentence. These are:

1. apostasy, which would be understood today to be political (that is, treason towards the state); and
2. murder (although this is qualified after sentencing by the operation of the *qisas* principles).

I therefore propose that Muslim countries that have not yet removed, or cannot yet remove, the death penalty entirely might start by considering limiting the sanction of death to just one crime, that is, murder – and doing so according to the balancing principle of retribution and compensation (*qisas*). To that end, Muslim nations that practice some form of modern democracy should consider the reform of their system of criminal sanctions. By understanding the evolving application of traditional laws and the dynamic definition of just and civilised universal human values, Islamic legal scholars could begin to discuss – rationally and objectively – the difficult and sensitive matter of the death penalty.

It is also conceivable that Indonesia, spread across the seas between mainland Asia and Australia, the largest country in Southeast Asia, with the largest Muslim population in the world, could become a pioneer in both Asia and the Islamic world in advancing the ideals and practices of democracy and human rights. It could do this by extending their application to abolition of the death penalty. Indonesia could become an example to other countries and nations, especially from Islamic world. It could show how a huge and complex country can peacefully transform itself to become a democratic state, and then take action to promote and respect human rights – especially the right to life.

THE DEATH PENALTY IN INDONESIA

To show how this might actually come about, let me give you some background about the death penalty as currently codified in Indonesian law and the Constitution. I will

then discuss opportunities for abolition in the government's draft Criminal Code, which is scheduled for deliberation in the current legislative session by Indonesia's national legislature, the DPR (Dewan Perwakilan Rakyat, People's Representative Assembly).

In 2007, the Indonesian Constitutional Court, where I served as foundation Chief Justice, recognised that the death penalty is still valid and constitutional under Indonesian law. In the 'Considerations' section of our decision, however, we provided guidance as to when capital punishment should be applied. We recommended that:

- a. the death penalty should no longer been seen as a primary punishment but only as a specific, alternative punishment;
- b. the death penalty should be imposed with a ten-year probation period, after which the sentence should be commuted to imprisonment in cases of commendable behaviour;
- c. the death penalty may not be imposed on those who have not yet reached adulthood; and
- d. the death penalty is to be suspended in cases of convicted pregnant women (until they have given birth) or those with mental illness (until they have recovered).

I regret that as Chief Justice of the Court at that time, I could not persuade my fellow justices to go further. Nonetheless, in the context of the times, we made significant progress with just those four points, which I am pleased to say are now reflected in the new draft Criminal Code before the DPR.

SENSITIVE ASPECTS OF THE DEATH PENALTY

I also hope that a number of other sensitive aspects of death penalty will be examined closely by the DPR. There are four that are of particular importance.

Article 7

Article 6 of the current Criminal Code, which now becomes art 7 of the new draft Code, states 'the death penalty cannot be imposed upon an act for which the death penalty is not provided for by the law of the country *where* the act has been committed' [emphasis added]. This provision was tested unsuccessfully in the course of efforts to overturn the death sentences for drug traffickers from Australia (a country that, of course, abolished the death penalty long ago).

In my opinion, art 7 of the new draft does not go far enough. It should consider not only the country where the crime has been committed but also the citizenship of the perpetrator. To my thinking, the new draft should also include a provision that:

Although the act has been committed in the territory governed by Indonesian law, the death penalty cannot be imposed as punishment for an act for which

the death penalty is not sanctioned by the laws of the country of the convicted person.

This dual focus on location and nationality would, I hope, help guide discussion about aligning legal principles with human rights.

I suggest environments such as universities offer ideal opportunities to consider how we might use nationality as a fulcrum or forcing point to encourage greater acceptance of the universality of human rights. For if a country is indeed developed or civilised, then levels of tolerance should exist within it that allow acceptance of the rights of others as defined not just by citizenship but also by humanity.

Articles 89 and 90

There are no regulations in the current Indonesian Criminal Code on the suspension or revocation of the death penalty once imposed. Articles 89 and 90 of the new draft Criminal Code do, however, draft spell out situations that can postpone or otherwise modify the sentence. It is clear that the death penalty, according to this draft, is no longer a type of primary punishment, as mentioned earlier, but an alternative pathway in sentencing.

Other Articles

In the current Criminal Code, only four types of crimes can result in capital punishment.¹ One of them is, however, dropped in the new draft Code namely, theft preceded, accompanied or followed by force or threat of force against persons, resulting in death. That would seem to be an improvement but then the draft goes on to list another five additional types of crimes that can result in capital punishment:

- i. terrorism
- ii. abuse of narcotics and psychotropic substances;
- iii. human rights violations;
- iv. crimes against life; and
- v. abuse of authority.

This increase would certainly seem to be a setback, however, when we take into account that the new draft Code also allows for the suspension or revocation of the death penalty, we might conclude that – with some improvements – the Code could

1 1) Crime against the security of the country: arts 104, 110, and 124; 2) Crimes against close countries and representatives of countries in the region: art 140; 3) Theft with violence leading to death: art 345; and 4) Shipping Crimes: arts 444, 479k, and 479o.

actually be quite advanced.

Article 28 and Framers' Intent

This brings me to a series of articles of the 1945 Constitution, namely 28A, 28I and 28J (see the appendix for the full text of these articles). These provisions deal with the rights and duties of citizens and they are usually the starting points for any discussion about capital punishment in Indonesia.

When the Constitutional Court examined the death penalty in 2007, we interpreted these articles in accordance with the 'framers' intent', and concluded that the existence of the death penalty does not conflict with the 1945 Constitution.

Moreover in a six-to-three decision (or, actually, to be more exact, a five-to-four decision) the Constitutional Court found that the provisions of art 28I(1) regarding the right to life must still be subject to, and limited by, the provisions of art 28J(2), that is, the individual's duty to respect the rights of others. In other words, that the right to life is not absolute.

The four judges in the minority took the view that the death penalty is in conflict with art 28(i)(1), which they saw as guaranteeing that the right to life was absolute and could not be diminished in any circumstances. Only three of these four, however, wrote a dissenting opinion, with the fourth preferring to support the majority in the interests of legal certainty. The majority view relied on the Minutes of the Second Amendment of the 1945 Constitution in 2000, where the framers are recorded as saying that the right to life in art 28I(1) should not extend to prevent (i) the death penalty, and (ii) abortion to save the life of a mother (*abortus melitus*).

The question thus arises as to whether the original intent of the framers of the constitution should be the final word on the interpretation of its provisions. Using the framers' intent is, in fact, only one method of interpreting the provisions of any constitution and it has its limitations. In my view, for any constitution to be able to fulfil its function in a dynamic and developing society, it must be understood as a living and evolving document, not just the document the framers created.

Another method is what I call 'humanist intent', an approach linking back to my opening that I think scholars and scientists would endorse. If this is used, it could well lead to a different interpretation of the right to life. For that reason, the application of the death penalty does not have to be placed in an absolute context of right or wrong but can be better understood in the context of a dynamic spectrum that changes in response to shifts in moral, social, religious and philosophical conditions.

So, while I must acknowledge that Indonesian law still prefers capital punishment over human rights and, in particular, the right to life, it is entirely possible that a new era could emerge in the future, in which most people would want to abolish capital punishment. A

dynamic change like that would require wider recognition in Indonesia of the universality and intrinsic value of human rights. Likewise, however, if capital punishment is seen as an effective solution to a universal problem, then public opinion will swing behind it and support its use.

It seems clear to me, however, that in the modern world, capital punishment is not a solution. Instead, capital punishment is a sign of powerlessness, or even a failure by modern democratic states to uphold justice – and govern – in a fair and equitable manner. By believing in, and resorting to, capital punishment as the ultimate deterrent, such states have reneged on their implicit obligation to deliver government based on a respect for human rights.

This is all the more reason for societies to consider the use of *qisas* in its positive sense to re-align justice with the values of human rights. I encourage you all, as scholars and lawyers, to consider this idea in the context of helping to temporarily limit, and then totally abolish, the use of the death penalty in our modern, civilised societies.

This concludes my small contribution to the debate on Islam, democracy and the future of the death penalty. I sincerely hope that the points I have raised can be used as the basis for further discussion and debate between scholars in Australia, Indonesia, and elsewhere. Our two countries should participate in this together, because our geography means we really do not have a choice except to be close friends. If the politicians of our two countries do not want close relations and friendship, because, for example, of differences over the death penalty, then the responsibility falls to us as scholars and intellectuals to maintain and nurture close and friendly relations between our two countries. But more importantly – and beyond the interests of friendship and intellectual fraternity between our two countries – in doing so, we must always recognise the wider interests of humanity that are at stake when we discuss capital punishment.

APPENDIX

1945 Constitution of the Republic of Indonesia

Section XA: Fundamental Human Rights

Article 28A

Each person has the right to live and the right to defend his life and existence.

Article 28I

1. The rights to life, to remain free from torture, to freedom of thought and conscience, to adhere to a religion, the right not to be enslaved, to be treated as an individual before the law, and the right not to be prosecuted on the basis of retroactive legislation, are fundamental human rights that shall not be curtailed under any circumstance.
2. Each person has the right to be free from acts of discrimination based on what grounds ever and shall be entitled to protection against such discriminative treatment.
3. The cultural identities and rights of traditional communities are to be respected in conjunction with progressing times and civilisation.
4. Protecting, promoting, upholding, and the full realisation of human rights are the responsibilities of the state, foremost of the government.
5. To uphold and protect human rights in accordance with the principles of a democratic and law-based state, the implementation of fundamental human rights is to be guaranteed, regulated, and laid down in laws and regulations.

Article 28J

1. Each person has the obligation to respect the fundamental human rights of others while partaking in the life of the community, the nation, and the state.
2. In exercising his rights and liberties, each person has the duty to accept the limitations determined by law for the sole purposes of guaranteeing the recognition and respect of the rights and liberties of other people and of satisfying a democratic society's just demands based on considerations of morality, religious values, security, and public order.

LEGISLATION

Criminal Code: art 6 (death penalty); arts 104, 110 and 124 (crime against the security of the country); art 140 (crimes against close countries and representatives of countries in the region); art 345 (crime of theft with violence leading to death); arts 444, 479k and 479o (shipping crimes)

Draft revised Criminal Code: art 7 (death penalty); arts 89 and 90 (postponing or modifying death penalty)

1945 Constitution: 28A, 28I and 28J (see above)

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