

ISLAM, DEMOCRACY, AND THE FUTURE OF THE DEATH PENALTY

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Distinguished Guests, Ladies and Gentlemen

First of all, I would like to express my gratitude and appreciation to the Dean of the Faculty of Law and the Director of the Asian Law Centre of Melbourne University for your kind invitation to present this Public Lecture. I am really honored. I am also even more honored to present the inaugural lecture and to support the idea of fostering intellectual dialogue among Asian and Australian scholars in order to build a region that is free, fair, prosperous, and peaceful.

Unfortunately, as can be seen in even very recent tensions between our two countries, such an idea has been tarnished by political pandering to domestic audiences that has affected relations at both a national level and an individual level. I am referring, of course, to the controversies caused by Indonesia's decision to execute convicted Australian drug offenders and by Australia's treatment of the Rohingya boat people and other refugees. If you allow me to be cynical, I would suggest that these policies are examples of a larger, disturbing lack of commitment by modern, democratic states to uphold justice – to govern – with respect for human rights.

I therefore sincerely hope that through exchanges such as this, we -- as intellectuals, scholars and scientists, sitting in ivory towers or standing at the barricades – can better understand each other and the governments that guide our societies. With this hope, I turn to the topic of my lecture.

Distinguished Guests, Ladies, and Gentlemen,

Most of us here today are able to take a long-term view of society and the development of civilization. We do not have to report our company's financial results to the stock market this quarter or to win enough votes in the election next year. We have decided, as students of law, to study the ever-evolving definition of a civilized society and the development of human rights standards.

I will focus then specifically on one of the key human rights in democratic societies with capital punishment, i.e. the right to live. I will provide a quick overview of the role of democracy and then capital punishment in today's world before going back in time to look at Islam's traditional views on capital punishment before jumping forward to review Indonesia's Criminal Code – both the current and new draft versions. Drawing on that time traveling, I hope to leave you with some perspective on how and why Indonesia continues to use capital punishment. I will also advance ideas that might suggest a way towards abolition in Indonesia and other countries, especially the democracies in the world.

The State of Democracy

Today, more than 95 percent of the countries across the globe claim their constitutions embrace democracy. This suggests that, in theory, "democracy" has already become the common language of statehood – a universal standard of humanity. However, in practice, these states do not apply the same standards of democracy. For instance, the United States of America and the Republic of Cuba both claim that their constitutions embrace democracy. But in reality, it is clear that the type of democracy we see in Cuba is very different from that in the US.

Each country takes the liberty to interpret what it considers being democratic according to its historical development as well as economic, cultural, and even religious factors, which have all influenced what the nation believes or defines as idealistic behavior -- 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 -- Christianity, Hinduism, and Islam -- have 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 accept that the United States along with India and Indonesia – although Indonesia is relatively new and still maturing -- have been successful at applying democracy along side -- if not within -- their specific religious contexts.

As countries with the second, third and fourth largest populations in the world, India, the United States, and Indonesia face highly complex criminal problems that are unique in scale. Moreover, the levels of economic and social development in India and Indonesia are still below those of the US and Australia. So, logically, as the 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 could take the first steps to totally abolishing capital punishment, then we could understandably expect India and Indonesia to do likewise on the basis that abolishment is in line with the development of a civilized society.

Ladies and gentlemen,

Capital punishment – the right of the state to take a life -- receives singular attention at both theoretical and practical levels. An increasing number of scholars and experts from various backgrounds now support abolition of the death penalty. And we are seeing more countries doing so. 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. Considering those seven countries as "abolitionist," then all together there are

140 countries in total – two-thirds of the countries in the world -- that do not use capital punishment at this time.

Capital Punishment in Islamic Tradition

Before talking about capital punishment and Islamic tradition, let me point out that Indonesia's Criminal Code -- post-independence -- is still based on the Dutch "Wetboek van Strafrecht" as applied originally by the Dutch government to its then-colony. Even after Independence, the provisions in the Criminal Code regarding capital punishment are not based on Islamic legal traditions. However, the issue of death penalty abolition in Indonesia has always be influenced by its religious context. One of the most serious and sensitive aspects of Islam is that al-Quran and al-Hadiths, as the textual sources of its teaching, justify capital punishment. Indeed, they explicitly do cover capital punishment. However, as scholars, let's study 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," which is based on the principle of judgment with penalties or punishments. In its conventional understanding, most scholars recognize only the ta'zir penalty is commutable, while the hudud both the crimes and the penalty are absolute and not comutable. The related sanctions are meant especially to protect the broader interests of society or the public.

The second category is called "qisas wa diyat," which is based on the 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 look at various 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 murder.

First, adultery or "zina."

On careful reading, different types of adultery could result in sanctions other than stoning to death, which actually originated from pre-Islamic tradition. In fact, in many other situations, the Prophet's hadith provided other severe, but non-fatal, punishment such as life imprisonment or exile.

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 non-followers. Hence, apostasy was seen as a form of treason that endangered the general safety of the Muslim followers, and the reasonable punishment therefore was death. It should be noted that, despite this clear sanction, those who repented and returned to Islam could be given a stay of execution.

In the modern-day context, such sanctions are difficult to understand and accept since these days the decision to convert (to or from) 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-Quran states "for you, your religion, and for them, their religion." So, in the modern world, the death penalty is again not an absolute.

Third, "Hirabah" or armed robbery

The most severe punishment possible in a case of "hirabah" is the death sentence, delivered by judges for punishment in accordance with the crime. In general, experts believe that the accused is threatened with execution only when the crime causes the death of the victim. However, the judges are given the freedom to decide the form of the punishment, which instead of death could be amputation. 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 had to be the death penalty.

Fourth, “Baghy” or armed rebellion

“Baghy” or “bughot” is the intentional effort using arms to overthrow a legitimate leader. Compared to “Riddah,” the religious form of treason, this is the political form of treason. This case of capital punishment must also be seen – as in apostasy – as a sanction suited to specific conditions such as in times of war or martial law. It is inappropriate to apply this extreme situation to cases of common criminal law.

“Qisas wa diyat”

After considering the four types of “hudud wa ta’zir,” which are based on the principle of judgment with penalties or punishments, let’s turn to the second category, “qisas wa diyat,” which is based on the principles of retribution and compensation, as applied in the case of murder.

The sanction for murder is the death sentence, which is seen as equal and balanced retribution for the death of the victim. However, 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”) being 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 the utmost to meet the required terms of “diyat” or compensation. Hence, just as with the various types of “hudud” crimes, the likelihood of carrying out the death sentence is not absolute.

I would like to emphasize this idea in “qisas” that makes it so appealing to me, as someone who believes in human rights and civilized discourse. The idea that the victim’s family – those directly impacted by the crime committed – determines the terms of justice is a powerful mechanism to promote forgiveness

and reconciliation. Islamic law strongly encourages forgiveness, which I consider a hallmark of civilized society.

However, modern criminal law focuses on the state's relationship with the accused, and it is the state that exacts punishment for crimes against its citizens. And indeed it is the state – not the individual -- that receives any fines (a kind of “diyat”) that are levied. The interests of the victim's family are missing in both the theory and practice of modern criminal law.

Distinguished Guests, Ladies, and Gentlemen,

Now, let's do a broad recap. My quick overview suggests that the death penalty is quite conditional and subject to alternative sanctions. Of the five types of crimes that involve the death penalty, two can be considered absolute in terms of execution (meaning, in the modern context, that an official, judicial process in a court of law might return a death sentence):

1. In the case of apostasy, which would be understood today to be political (ie treason towards the state), and
2. In the case of murder (as addressed in the “qisas” principles).

In essence, I propose that countries that have not yet removed or could not yet remove the death penalty totally from their criminal system might start by considering limiting the sanction of death to one crime only, i.e. murder, according to the balance principle of retribution and compensation (qisas). To that end, Muslim nations that practice modern democracy should begin to consider efforts to reform the system of criminal sanctions in their respective legal systems. By understanding the evolving application of traditional law and the dynamic definition just and civilized universal human values, then Islamic legal scholars could begin to discuss rationally and objectively the matter of the death penalty.

It is also conceivable that Indonesia, as the largest country in Southeast Asia as well as the country with the largest Muslim population in the world, could become the pioneer in advancing the ideals and practices of democracy

and human rights, extended to aspects such as the abolition of the death penalty -- in both Asia and in the Islamic world.

To show how this might actually come about, let me delve into some background on the death penalty as codified in Indonesian law and the Constitution and then discuss the opportunities presented in the government's draft Criminal Code, which is scheduled for deliberation in the current legislative session by Indonesia's parliament.

In 2007, the Indonesian Constitutional Court', where I served as the Chief Justice, recognized that the death penalty is still valid and constitutional under Indonesian law. However, in considering our decision, the Constitutional Court provided guidance when applying capital punishment:

- a. The death penalty is no longer the primary punishment, however it is a specific and alternative punishment;
- b. The death penalty can be imposed with a 10-year probation, after which the punishment could be changed to imprisonment in cases of commendable behavior;
- c. The death penalty cannot be imposed on those who have not yet reached adulthood;
- 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. However, in the context of the times, we made significant progress just with those four points as reflected in the new criminal code draft. Besides that, there is now possibility that other sensitive aspects will also be examined closely in the parliament.

Sensitive Aspect Number One – Article 7

Article 6 of the current Criminal Code which now becomes article 7 of the new draft, states “the Death Penalty cannot be imposed upon an act which the

death penalty is not provided for by the law of the country where the act has been committed.” This provision, of course, was one tested unsuccessfully in the efforts to overturn the death sentences for the Australian drug traffickers.

In my opinion, Article 7 of the new draft should consider not only the country where the crime has been committed, but also the citizenship of the perpetrator. So, 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 upon an act which the death penalty is not sanctioned by the laws of the country of the convicted”.

This dual focus on location and nationality would, I wish, help guide discussion about aligning legal principles with human rights. I suggest that it is in environments such as the one here today where we can first consider the use of 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 there should exist the levels of tolerance within it to accept the rights of others as defined not by a country but by humanity.

Sensitive Aspect Number Two – Articles 89 and 90

There are no regulations on the suspension or revocation of death penalties in the current Indonesian Criminal Code. However, Articles 89 and 90 of the new Criminal Code draft spell out situations that could postpone or otherwise modify the sentence. Thus it becomes 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.

Sensitive Aspect Number Three – Various Articles

In the current Criminal Code, only four types of crimes can result in capital punishment. But, one of them is dropped in the new draft that is related to theft preceded, accompanied or followed by force or threat of force against persons, resulting in death. That would seem to be an improvement. But, the

draft goes on to add another five more 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 consider that the new code as drafted allows the suspension and revocation of the death penalty, we can consider the draft code – with some improvements -- to be quite advanced.

Sensitive Aspect Number Four -- Article 28 and Framers' Intent

This brings me to the series of Articles 28A, 28I and 28J of the 1945 Constitution, which are the starting points for any discussion about capital punishment in Indonesia. When the Constitutional Court examined it 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 6-3 decision (or actually, to be more quietly exact 5-4), the Constitutional Court found that the provisions of Article 28I Paragraph (1) – regarding the right to life -- must still be subject to and limited by the provisions of Article 28J Paragraph (2) – the individual’s duty to respect the rights of others. That is to say, that the right to life is not absolute. Using framers’ intent is only one method of interpreting the provisions of any constitution. However, for it to be able to fulfill its function in a dynamic and developing society, any constitution must be understood as a living and evolving document.

Using another method, what I call “humanist intent,” one linking back to my opening that I think scholars and scientists would endorse, could well lead to a different interpretation. For that reason, the application of the death penalty does not need to be placed in the absolute context of right or wrong, but in the context of a dynamic spectrum that changes in response to shifts in moral, social, religious and philosophical conditions.

So, while at this point in time, we must admit that Indonesian law still recognizes capital punishment over human rights. However, it is entirely possible that a new era could appear in the future where most people would want to abolish capital punishment. The key to understanding this dynamic phenomenon lies in the universality of human rights and value of human rights. If capital punishment were seen as an effective solution to a universal problem, then public opinion would swing behind it and support its use.

However, I see that capital punishment, today, is not a solution. Instead, capital punishment is a sign of the powerlessness or even failure of modern states to uphold justice – to govern -- in a fair and equitable manner. By believing in -- and resorting to -- capital punishment as the ultimate deterrent, these states have reneged on their obligation – at least in a democratic society – of 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 welcome you, as scholars and experts, 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, civilized societies.

Distinguished Guests, Ladies and Gentlemen,

This concludes the small contribution of my thinking on Islam, Democracy and the Future of the Death Penalty. I sincerely hope that the points I raised today can be used as the basis for further discussion and debate between scholars in Australia, Indonesia, and elsewhere. Beyond the sake of friendship and intellectual fraternity between our two countries, we must recognize the wider interests of humanity that are at stake when discussing the matter of capital punishment.

Thank you for your attention.