

Inflicting Death Penalty to Sexual Offenders: A Comparison between Indonesia and Saudi Arabia

Try Hardyanthi¹, M. Fabian Akbar^{2*}, Ichwan Rizki Akbar Napitupulu², Nia Prilia Nirwana², Shaffa Aulia Yasmin²

¹ Department of Financial and Economic Law, Asia University, Taiwan, 41354

² Department of Law, Faculty of Law, Universitas Muhammadiyah Yogyakarta, Indonesia

*Corresponding Author: m.fabian.law20@mail.umy.ac.id

DOI: <http://dx.doi.org/10.18196/iclr.v4i1.15072>

Abstract

The case of sexual violence is increasing every year in Indonesia. The current prevailed penalties for perpetrators of sexual violence as stated in the Penal Code and the Child Protection Act are considered ineffective. The public then proposed that the perpetrators of sexual violence should be sentenced to death. The study aims to conduct a comparative study between Indonesia and Saudi Arabia in punishing sexual violence perpetrators. This study will look at how the death penalty is deemed appropriate to be applied for sexual offenders. It also explores the prevailed punishments by Saudi Arabian government for sexual violence cases. The study is normative research with employing comparative and statutory approaches. The study shows that sexual violence could be regarded as extraordinary crime as it meets particular conditions. Indonesia opens up the possibilities to punish the sexual offenders with the death penalty. However, Saudi Arabia on the other hand did not impose death penalty for sexual violence perpetrators but rather have a public humiliation as an alternative.

Keywords: death penalty; extraordinary crime; human rights; sexual violence

1. Introduction

Death penalty is one of the most debated punishments in the world. The death penalty in Indonesia is considered the most severe punishment (Santoso, 2020). Indonesia officially regulates the death penalty in Article 10 of the Criminal Code. The existence of capital punishment in the world cannot be separated from the socio-cultural and historical values of each nation. In today's world the death penalty is still legalized by a number of countries, one of which is Saudi Arabia and Indonesia. Indonesia and Saudi Arabia are the two countries currently retaining the death penalty. The death penalty in Saudi Arabia is a punishment for perpetrators of extraordinary crimes such as corruption, terrorism, and sexual crimes.

Sexual violence is a form of crime that is considered an extraordinary crime. This is because it is a form of crime against humans which violates the human rights of others. Sexual violence is any act that demeans, insults, harasses, and attacks a person's body, or reproductive function, due to unequal power and gender relations, which results in psychological or physical suffering, including disturbing a person's reproductive health (Subroto & Susila, 2020).

The case of the rape of 13 female students by a teacher at one of the Islamic boarding schools in West Java that occurred recently is one of the cases of sexual violence that has caught the attention of many people. Herry Wirawan is a teacher who sexually assaulted 13 of his female students. For his actions, Herry Wirawan was demanded the death penalty by the public prosecutor.

The case of rape committed by Herry Wirawan can be said to be an extraordinary crime because there are human rights violations where the perpetrator has raped a minor so that it has the potential to damage the child's health both physically and mentally. This is in line with what is stated in Section 81 point (5) of Law Number 17 of 2016 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection. In addition, the crime was also systematic in nature, which happened to 13 victims and had an impact on sexual crimes (Miller et al., 2014).

Indonesia highly upholds human rights, including the rights of children, which is marked by the guarantee of protection and fulfillment of children's rights in the 1945 Constitution of the Republic of Indonesia and several statutory provisions, both national and international (Narain, 2014). This guarantee is strengthened through the ratification of international conventions on children's rights, namely the ratification of the conventions on children's rights through Presidential Decree No. 36/1990 on Ratification of the Convention on the Rights of the Child (Yanto, 2016).

Based on this background, the author will answer several issues as follows, namely whether the application of the death penalty against perpetrators of sexual crimes violates human rights? Is sexual violence considered as an extraordinary crime? And as a comparison, this paper will also discuss the comparison of the implementation of the death penalty in Indonesia and Saudi Arabia.

2. Method

The research was conducted through a normative approach in accordance with legal issues related to the death penalty for perpetrators of sexual crimes according to Indonesian and Saudi Arabian laws. The normative approach is carried out by examining theories, legal principles, and regulations. In addition, this study also uses a statutory and case approach. Data were obtained through books, legal journals, newspapers, and others. Furthermore, the legal materials are analyzed and grouped into categories according to the discussion, interpreted and linked to concepts that are relevant to the focus of the problem. Then it is explained qualitatively by using deductive-inductive reasoning to find the answer to the problem.

3. Result and Discussion

3.1. The Death Penalty under Human Rights Perspective

Human rights are legal and normative concepts which state that humans have inherent rights. Human rights apply anytime, anywhere, and to anyone (Muvumba Sellström, 2019). The definition of human rights is considered very broad, as is the application of the death penalty. Normatively, the death penalty violates the right to life which should be protected and cannot even be reduced in any form and by anyone. Referring to the provisions of the

Universal Declaration of Human Rights (UDHR) Article 3 states that everyone has the right to life, liberty and personal security (Burgason & Pazzani, 2014). The most extreme form of violation of the right to life is killing or injuring the body or soul of a person or group (Gunawan & Irrynta, n.d.). The death penalty clearly violates this article where the convict has been deprived of his life, his freedom, and his personal security. Furthermore, if the death penalty is reviewed according to the International Covenant on Civil and Political Rights, namely Article 6 point (1), that every human being has the right to live (Steiker & Steiker, 2015). These rights must be protected by law. No human being can be taken from his life at will. As explained in Article 3 of the UDHR that the implementation of the death penalty has violated Article 6 point (1), where execution basically causes physical pain and the loss of a person's right to life (John, 2021).

However, the death penalty is still permissible as regulated in Article 6 point (2) of the ICCPR:

"In countries which have not abolished the death penalty, the death penalty may only be imposed for the most serious crimes in accordance with the law in force at the time of the commission of the crime, and not in contravention of these provisions and the Convention on the Prevention and Punishment of The Crime of Genocide. The sentence can only be carried out on the basis of a final decision handed down by a competent court."

This shows that the imposition of the death penalty can be justified as long as it meets the specified conditions or limits (Gammon, 2015). This means that the abolition of the death penalty has not yet become a generally accepted legal norm that must be universally accepted by the international community (Novak, 2014). In Indonesia, the death penalty is carried out if it is classified as a crime that is considered a serious violation of human rights which is then considered an extraordinary crime (Santoso, 2020). Extraordinary crimes originally referred to crimes against humanity, war crimes, and genocide (Wright, 2014). In Indonesia, what is included in extraordinary crimes in the Law on Human Rights Courts are gross human rights violations which are limited to two forms, namely genocide and crimes against humanity. Thus, sexual violence can be considered as a form of extraordinary crime because it is a form of crime against humanity which violates the human rights of others (Armatta, 2018).

However, the Indonesian National Human Rights Commission (Komnas HAM) has a different view. According to them, the right to life and the right not to be tortured are human rights that cannot be reduced under any circumstances (non-derogable rights) and are constitutional rights according to Article 28 I of the 1945 Constitution. This was conveyed by Sandra Moniaga, Commissioner for Studies and Research of the Indonesian National Human Rights Commission when she was a speaker at the Parahyangan University Human Rights Guest Lecture entitled The Phenomenon of the Death Penalty in Indonesia from the Perspective of Law and Human Rights.

Sandra observed the public perception that still considers the death penalty as the most effective punishment to provide a deterrent effect and the strong punishment function which emphasizes the retributive aspect. In fact, according to her, the punishment should be corrective or remedial. Indonesia still applies the death penalty in its judicial system, there are at least 30 types of crimes that can be punishable by the death penalty. In Article 10 of the Criminal Code, the death penalty is classified as one of the main crimes. Crimes punishable by death in the Criminal Code are contained in Article 104 of the Criminal Code for treason to kill the head of state; Article 111 point 2 of the Criminal Code is about inviting foreign countries to attack Indonesia; Article 124 point 3 of the Criminal Code, namely providing

assistance to the enemy when Indonesia is in a state of war; Article 140 point 4 of the Criminal Code, which is about killing heads of friendly countries; Article 340 of the Criminal Code, namely premeditated murder; Article 365 point 4 of the Criminal Code, namely theft and violence by two or more people and results in someone being seriously injured or dead.

Meanwhile, the death penalty legislation is contained in Law Number 31 of 1999 concerning the Crime of Corruption, jo. UU no. 20 of 2001 concerning Amendments to Law no. 31 of 1999 concerning the Crime of Corruption; UU no. 26/2000 on Human Rights Courts; UU no. 23/2002 on Child Protection, jo. UU no. 35 of 2014 Amendments to Law No. 23/2002 on Child Protection; and several sections in Law Number 35 of 2009 concerning Narcotics also regulate the death penalty. Section 118 and Section 121 point (2) state that the maximum penalty for violators is the death penalty.

The death penalty also has implications for other issues. A death convict waiting for the execution process for a long time (as a death row) with uncertain conditions is already a form of torture. Sandra underlined the social reality of the death penalty which contained flashbacks of three death penalty cases that occurred in Indonesia, the Marry Jane Case, Rodrigo Gulate Case, and the Poso Case and revealed a portrait of the situation of death row inmates in Indonesia. In addition, it also explained the legal reality of the roots of the death penalty in Indonesian legislation and the principles of human rights and the impact of the death penalty on human rights.

Juan E. Mendez, Special Rapporteur on the UN Human Rights Council on torture and other atrocities (2010-2016 period), has discussed that the death row phenomenon results in inhuman or degrading treatment as a result of physical conditions and consequences of mental grief due to long waiting periods. on the execution of the death penalty. Based on data in Sandra's presentation, citing data from the Ministry of Law and Human Rights in 2021, where until October 2021, there were 401 prisoners sentenced to death, which on average were grouped based on the waiting time for execution since the beginning of sentencing with details: under 5 years as many as 230 people; 107 people between 5-10 years old ; 62 people between 10-19 years old; and 2 people over 20 years old.

ICJR data as of January 2022 stated that 260 convicts awaiting execution were narcotics convicts; 118 people convicted of murder; robbery of 9 people; abuse of psychotropic substances 8 people; terrorist 5 people; case of theft of 2 people; child protection for 2 people. Sandra emphasized that everyone has dignity, a human right to be protected and everyone is also very likely to make mistakes but there is an opportunity to correct these mistakes. Here is the space for the State to punish someone to improve himself.

3.2. Is Sexual Violence Considered as an Extraordinary Crimes?

Extraordinary crimes are planned, systematic and organized behaviors and actions which mostly target specific individuals and groups for reasons of discrimination. Extraordinary crimes are acts committed with the intention of eliminating human rights and becoming the jurisdiction of international criminal courts where the perpetrators of these crimes can be sentenced to death (Hood & Hoyle, 2015). Extraordinary crimes originally referred to crimes against humanity, war crimes, and genocide. In Indonesia, acts that are included in extraordinary crimes in the Law on the Human Rights Court are gross human rights violations which are limited to two forms, namely genocide and crimes against humanity where the perpetrators of these crimes can be sentenced to death (Hearn et al., 2022).

Regarding the criteria for extraordinary crimes, sexual violence crimes have similarities and can be criminalized as extraordinary crimes because sexual violence is carried out in a planned, systematic way and hurts a deep sense of humanity (Cucolo & Perlin, 2017). Sexual violence is any act that humiliates, harasses, or attacks a person's body, or reproductive function, because of inequalities in power relations or gender, which can result in psychological and physical suffering including those that interfere with a person's reproduction. Furthermore, sexual violence also threatens and endangers lives, damages personal lives, as well as victims' futures, disturbs comfort, security, and order in society (McGlynn et al., 2017). Sexual violence is a form of sexual violence that is carried out by coercion, threats, or about deceiving others. Acts that include sexual violence are intercourse, rape, and obscene acts that have psychological, physical, and social impacts. Thus, perpetrators of sexual violence can be categorized as a form of extraordinary crime because it is part of a serious violation of human rights, namely crimes against humans that cause suffering to the victims.

President Joko Widodo has stated that sexual violence is an extraordinary crime that requires strict laws to ensure harsh punishments for perpetrators to prevent people from committing crimes (Cucolo & Perlin, 2015). President Joko Widodo classifies sexual violence as an extraordinary crime so that its handling requires extraordinary actions with appropriate punishments. The act of sexual violence has several impacts on the psychological aspects of the victim, namely the victim becomes embarrassed, afraid, traumatized, depressed, anxious, which ultimately has a desire to commit suicide (Sverdlov, 2017). While on the social aspect, the victim received cynical treatment from the people around him so he was afraid to get along. So with this character, sexual violence becomes an extraordinary crime because there is coercion in an act. Thus, sexual violence if we refer to extraordinary crimes, acts of sexual violence are a form of crime that is considered an extraordinary crime because it is a form of crime against humans that violates the human rights of others.

3.3. Sexual Violence Case in Indonesia

Sexual harassment can basically happen to children and adults. However, acts of violence against women are more common. Therefore, women have the right to obtain the protection of human rights and basic freedoms as regulated in Book III of the Criminal Code starting from Article 281 to Article 299 (Hood & Hoyle, 2015). Unfortunately, Indonesia does not yet have a law that regulates the elimination of all forms of violence against women. Currently, when acts of violence against women occur, law enforcers only use the Criminal Code and Law no. 23 of 2004 concerning the Elimination of Domestic Violence (PKDRT).

Right at the beginning of 2021 in the city of Bandung, the case of sexual violence by Herry Wirawan was revealed when one of the parents of a student realized that there was something different with her daughter's body. The mother found out that her daughter was pregnant. The mother then immediately reported to the village head in the area where the school was located. Then the mother also reported the incident to the West Java Regional Police and the Integrated Service Center for the Empowerment of Women and Children.

Based on police investigations, there were at least 13 victims who were sexually assaulted by Herry Wirawan, and what was even more surprising, of the 11 victims, 9 babies were born from 8 victims, 1 of whom had given birth twice as a result of immoral acts committed by Herry Wirawan. The age range of the victims of sexual abuse committed by Herry Wirawan is around 14-20 years (Ramadhan, 2022). Herry Wirawan even made his

victims work as construction workers at the school he built with the lure of freeing the victims as long as they were in the Islamic boarding school.

In this case, Herry Wirawan was initially charged to 20 years in prison for his crimes. However, this has resulted in pros and cons in the community because the punishment given to Herry Wirawan according to some people is not commensurate with the crime. Whereas on the other hand, the victims have to experience lifelong trauma and also be ashamed of the surrounding environment from the depraved acts committed by Herry Wirawan.

At this urging, the public prosecutor decided to indict the death penalty. Prosecutors said Herry Wirawan's crime of raping 13 schoolgirls was a very serious crime. There are several arguments and considerations behind the indictment of the death penalty for Herry Wirawan (Amindoni, 2021). First, the Prosecutor referred to the United Nations Convention relating to sexual violence. Second, sexual violence perpetrated by Herry Wirawan to his students who were in helpless and depressed conditions was considered very inhumane. Third, sexual violence committed can damage children's health and risk causing HIV disease. Fourth, crime affects the child's overall psychological and emotional state. Fifth, sexual violence was carried out continuously and systematically. Sixth, the prosecutor considered that the crime was also not following religious values. Seventh, the crime is considered to have caused extraordinary social unrest. Therefore, the Public Prosecutor charged Herry Wirawan with Section 81 point (1), point (3) and point (5) jo. Section 76D of Law Number 17 of 2016 concerning Stipulation of Government Regulation in Lieu of Law Number 1 of 2016 concerning Second Amendment to Law Number 23 of 2002 concerning Child Protection which is punishable by death as well as Article 65 point (1) of the Criminal Code (Astungoro, 2022).

Nevertheless, Komnas HAM refused the death sentence for Herry Wirawan who was accused of raping 13 students. The refusal was because the death penalty and chemical castration were against human rights principles. However, finally on April 4, 2022, the Bandung High Court (PT) judges sentenced Herry Wirawan to death. Considering whereas taking into account the legal facts revealed in the trial of the panel of judges at the first instance, the panel of appeals believes that Herry Wirawan should be given an appropriate punishment for his crimes. The judge said that Herry's sentence was a revenge for his crimes. More than that, the punishment imposed is to give a sense of justice to the victim.

3.4. Sexual Violence Case in Saudi Arabia

The Saudi Arabian government has decided that men found guilty of sexual assault can have their identities revealed and made public. The sentence was set by the Saudi Arabian Council of Ministers in January 2021. This is intended to provide social sanctions. In addition to imprisonment and a fine, the defendant was also sentenced to public humiliation (Tommy, 2021).

In January 2022, the court in Medina implemented the new provisions. As reported by the Saudi Gazette, the Medina court announced that it had sentenced Yasser Muslim Al-Arawi, the first defendant to be named publicly. Yasser was found guilty of verbally abusing a woman. He was also sentenced to eight months in prison and a fine of 5,000 riyals or around Rp. 1.9 million. The decision of the Saudi Arabian Council of Ministers to determine that the identity of the accused of sexual violence must be disclosed to the public was welcomed by various parties. The amendments to the law also contain articles that punish parties who falsify claims of sexual violence (Tommy, 2021).

Lawyers in Saudi Arabia say revealing the identity of the accused can provide a deterrent effect. The reason is that perpetrators of sexual violence have an open track record and it can be considered by employers in the future as a bad track record. Disclosure of identity is a strict punishment that deters anyone who may be tempted to sexually harass.

The law, which came into effect in 2018, provides for sentences of up to two years in prison and fines of up to \$27,000 for those found guilty of acts of sexual harassment. Repeat offenders face up to five years in prison and a fine of up to \$80,000 (BBC, 2022).

4. Conclusion

In terms of the criteria for extraordinary crimes, sexual violence crimes share similarities and can be prosecuted as extraordinary crimes because sexual violence is committed in a planned, systematic manner and causes profound human suffering. Furthermore, sexual violence endangers and threatens lives, harms personal lives as well as the futures of victims, and disrupts social comfort, security, and order. The imposition of the death penalty can be justified if it meets the conditions or limits specified in Article 6(2) of the ICCPR. In Indonesia, President Joko Widodo has stated that sexual violence is a distinctive crime that necessitates strict laws enforcing harsh punishments for perpetrators in order to deter people from committing crimes. Sexual violence is classified as an extraordinary crime by President Joko Widodo, necessitating extraordinary measures and appropriate punishments, with the death penalty considered an appropriate punishment for sexual perpetrators. Saudi Arabia, on the other hand, did not execute the perpetrators of sexual violence. The Saudi government has decided to reveal and publicize the identities of men found guilty of sexual assault. The Saudi Arabian Council of Ministers imposed the sentence in January 2021. This is meant to be a social sanction. The defendant was sentenced to public humiliation in addition to imprisonment and a fine.

References

- Amindoni, A. (2021, December 9). Herry Wirawan, pemerkosa 13 santriwati, diganjar hukuman mati oleh Pengadilan Tinggi Bandung, "harta dan aset dirampas." *BBC*. <https://www.bbc.com/indonesia/indonesia-59581586>
- Armatta, J. (2018). Ending sexual violence through transformative justice. *Interdisciplinary Journal of Partnership Studies*, 5(1), 4.
- Astunggoro, R. (2022, April 4). Vonis Mati Herry Wirawan Tonggak Sejarah Kasus Kekerasan Seksual. *Republika*. <https://www.republika.co.id/berita/r9tdm7328/vonis-mati-herry-wirawan-tonggak-sejarah-kasus-kekerasan-seksual>
- BBC. (2022, January 12). Arab Saudi hukum pelaku pelecehan seksual, mulai dari penjara delapan bulan hingga dipermalukan depan umum. *BBC*. <https://www.bbc.com/indonesia/dunia-59962173>
- Burgason, K. A., & Pazzani, L. (2014). The death penalty: A multi-level analysis of public opinion. *American Journal of Criminal Justice*, 39(4), 818–838.
- Cucolo, H. E., & Perlin, M. L. (2015). Far from the turbulent space: Considering the adequacy of counsel in the representation of individuals accused of being sexually violent predators. *U. Pa. JL & Soc. Change*, 18, 125.

- Cucolo, H. E., & Perlin, M. L. (2017). Promoting Dignity and Preventing Shame and Humiliation by Improving the Quality and Education and Attorneys in Sexually Violent Predator (SVP) Civil Commitment Cases. *U. Fla. JL & Pub. Pol'y*, 28, 291.
- Gammon, J. (2015). Researching Sexual Violence, 1660–1800: A Critical Analysis. In *Interpreting Sexual Violence, 1660–1800* (pp. 13–22). Routledge.
- Gunawan, Y., & Irrynta, D. (n.d.). International Human Rights Protection: The Impact of COVID-19 Pandemic on Domestic Violence. *Yustisia Jurnal Hukum*, 11(1).
- Hearn, J., Strid, S., Humbert, A. L., Balkmar, D., & Delaunay, M. (2022). From gender regimes to violence regimes: re-thinking the position of violence. *Social Politics: International Studies in Gender, State & Society*, 29(2), 682–705.
- Hood, R., & Hoyle, C. (2015). *The death penalty: A worldwide perspective*. OUP Oxford.
- John, M. E. (2021). Feminism, sexual violence, and the times of# MeToo in India. In *Routledge Handbook of Gender in South Asia* (pp. 335–350). Routledge.
- McGlynn, C., Downes, J., & Westmarland, N. (2017). Seeking justice for survivors of sexual violence: Recognition, voice and consequences. In *Restorative responses to sexual violence* (pp. 179–191). Routledge.
- Miller, M., Wood, S. M., & Chomos, J. C. (2014). Relationships between support for the death penalty and cognitive processing: A comparison of students and community members. *Criminal Justice and Behavior*, 41(6), 732–750.
- Narrain, A. (2014). Sexual Violence and the Death Penalty: A Tale of Two Judgments. *Economic and Political Weekly*, 38–42.
- Novak, A. (2014). *The death penalty in Africa: Foundations and future prospects*. Springer.
- Ramadhan, D. I. (2022, April 5). Jejak Perkara Herry Wirawan: Perkosa 13 Santriwati hingga Divonis Mati. *Detik*. <https://www.detik.com/jabar/hukum-dan-kriminal/d-6016627/jejak-perkara-herry-wirawan-perkosa-13-santriwati-hingga-divonis-mati>
- Santoso, T. (2020). Parties to Crime: Development and Comparison. *Indonesian Comparative Law Review*, 2(2), 67–79.
- Sellström, A. M. (2019). Burundi's rebel groups and the stigmatisation of wartime sexual violence. *Journal of Sexual Aggression*, 25(3), 275–291.
- Steiker, C. S., & Steiker, J. M. (2015). The American death penalty and the (in) visibility of race. *The University of Chicago Law Review*, 243–294.
- Subroto, D. W., & Susila, M. E. (2020). Sentencing for Minors in Sexual Abuse Cases. *Indonesian Journal of Criminal Law and Criminology (IJCLC)*, 1(3), 136–148.
- Sverdlov, D. (2017). Rape in war: prosecuting the Islamic state of Iraq and the levant and Boko Haram for sexual violence against women. *Cornell Int'l LJ*, 50, 333.
- Tommy, K. (2021, January 14). Arab Saudi Rilis Hukum Baru Bagi Pelaku Pelecehan Seksual, Identitas Dipublikasikan. *Liputan 6*. <https://www.liputan6.com/global/read/4457282/arab-saudi-rilis-hukum-baru-bagi-pelaku-pelecehan-seksual-identitas-dipublikasikan>
- Wright, R. (2014). *Sex offender laws: Failed policies, new directions*. Springer Publishing Company.

Try Hardyanthi, M. Fabian Akbar, Ichwan Rizki Akbar Napitupulu, Nia Prilia Nirwana, Shaffa Aulia Yasmin
Inflicting Death Penalty to Sexual Offenders: A Comparison between Indonesia and Saudi Arabia

Yanto, O. (2016). Death Penalty Execution and the Right to Life in Perspective of Human Rights, 1945 Constitution of the Republic of Indonesia, and Indonesian Law. *Yustisia Jurnal Hukum*, 5(3), 643–662.