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Life Imprisonment in Indonesia: Is Its Use Appropriate in the National Criminal Justice System?

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7.1 Theoretical Background and Introductory Overview

Whether life imprisonment is appropriate in Indonesia, must be understood against the background of the general principles of criminal law and constitutional law that are emerging in this country. In theory, criminal law in Indonesia is based on the principle of legality. Article 1(1) of the *Indonesian Penal Code* provides that no action shall be punished unless under the prior statutory penal provision. The definition of crimes must be precise, unambiguous, and usable. That definition must permit us to determine who is and who is not a criminal (Reid, 1985, p. 6). The definition of punishment, the reasons for its imposition and the manner of its enforcement must also meet the standards of precision,

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unambiguity and usability. A problem often occurs when criminal law is imposed in practice by a court of law, for, in order to know whether the decision to impose it meets the standards of legality, it is also necessary to know the judge's reasoning for convicting the accused person and then punishing him or her with a specific sanction.

In addition, according to the requirements of the rule of law, criminal law must abide by certain substantive principles to ensure that it does not punish conduct that should not be criminalized, lest it becomes simply a tool of repression, rather than healing (Lisanawati, 2013). This requires in the first instance that only serious offences should be punished with severe penalties. As will be explained in more detail below, life imprisonment in Indonesia, as elsewhere, is a severe penalty.

Theorists of punishment often dispute what purpose sentences should emphasize. Classical theorists focused on retribution, arguing that the state has the right to impose severe penalties, particularly for serious offences, because criminals undermine the most fundamental protected legal rights and interests of other members of society. The absolute theory or the theory of revenge (retaliation), which is the basis of the classical theory, consists of subjective and objective revenge. In short, personal revenge focuses on the perpetrator's fault (*mens rea*), while objective vengeance focuses on sanctioning the action that the perpetrator carried out (Hiariej, 2014, p. 32). The relative theory places the emphasis of punishment on efforts to prevent crime aimed both at the individual who commits an offence (specific prevention) and wider society (general prevention).

Indonesia is developing what it calls a combination theory, which includes both absolute and relative elements. In its development, several other theories of punishment have been combined. It is what Hiarej (2014, p. 35) calls a contemporary theory. The modern, Indonesian combination theory includes a further (relative) purpose, namely rehabilitation, which should enable prisoners to change and internalize new norms so that they can return to society and no longer repeat evil deeds (Hiarej, 2014, p. 35). Rehabilitation should have the same crime reduction effect as specific prevention. However, it recognizes the human dignity of persons in prison and seeks to give them opportunities to improve while serving their sentences.

The current *Penal Code* of Indonesia does not deal directly with the purposes of punishment or how it should be implemented. However, Article 51 of the proposed new *Bill on the Indonesian Penal Code* (September 2019 draft) begins to develop these ideas by putting forward a model of sentencing that must have the purpose of social protection, but at the same time, also has to protect and correct (rehabilitate) the perpetrator of a crime.

The analysis of life imprisonment in this chapter refers to the emerging Indonesian combination sentencing theory. The analytical method used in this study is normative juridical research, using secondary data obtained from library research results and supported by processed information from various articles.

The chapter proceeds to set out the offences that can be punished by life imprisonment, both in the *Penal Code* and other specialist legislation, and considers whether it is justifiable to make life imprisonment a potential punishment for all these offences. It then turns to the question of how the courts can and should use their powers of imposing life imprisonment, both within the framework of the existing law and following amendments to the *Penal Code* that are expected to be introduced shortly. Particular attention is paid to how life-sentenced prisoners, who have no right to be considered for parole in the same way as prisoners serving fixed terms, can still be released through a legally complex clemency system. Finally, the paper looks at the evidence that suggests that in practice the Indonesian penal system does not provide adequately for life-sentenced prisoners to prepare for their release. More generally, it concludes that, for life imprisonment to meet emerging Indonesian standards, there should be automatic consideration of all life-sentenced prisoners for release on parole by an independent body, and that all such prisoners should be given opportunities to rehabilitate themselves while in prison.

7.2 Offences Punished by Life Imprisonment

The *Indonesian Penal Code* clearly makes provision for life imprisonment as a recognized form of punishment. It does so through the combination of articles 10 and 12. Article 10 lists ‘imprisonment’ as the second of five basic punishments. (The other basic punishments are capital punishment, light imprisonment, privileged treatment (*custodia honesta*), and a fine).

Article 12 refers to life imprisonment by distinguishing imprisonment into two subcategories: fixed-term imprisonment and life imprisonment. The former may not exceed 20 years, while life imprisonment may only be imposed if the offence is serious enough to justify a sentence of death or a fixed term of more than 15 years. This may change, if the current *Bill on the Indonesian Penal Code* is implemented. In the future, if there is an option between the death penalty and life imprisonment or a sentence to 15 years in prison, imprisonment for a fixed term of 20 years may be imposed (Article 68 (3) of the *Bill on the Indonesian Penal Code* September 2019 draft). This article implies that Indonesia wishes not to impose severe punishments but will choose lighter sentences than capital punishment and life imprisonment where possible.

In addition, for life imprisonment to be legal, the rule of law requires clear provisions that allow a life sentence to be imposed following the conviction for specified offences. Several articles in the *Indonesian Penal Code* and several specific laws (outside of the Penal Code) duly provide for the perpetrators of certain crimes to be punished with life imprisonment. Table 7.1 lists the offences that are punished with life imprisonment in terms of the Code. This table also indicates where life imprisonment is the only option that a court has following a conviction for these offences, or whether the death penalty or alternatives to it are also possibilities. The offences for which life imprisonment may or must be imposed in terms of the penal code are typical of those serious offences for which life sentences are imposed around the world (van Zyl Smit & Appleton, 2019).

Table 7.2 lists the offences for which life imprisonment can be imposed outside the *Penal Code*. They encompass a wide range of offences, including some that the Indonesian authorities regard as

Table 7.1 Offences in the Penal Code for which life imprisonment can be imposed

Groups of criminal acts/criminal act	Formulation sanction of life imprisonment	Life imprisonment/20 years imprisonment
Crimes against state security	<p>Death penalty/life imprisonment/20 years imprisonment</p> <ul style="list-style-type: none"> - Article 104: The attempt undertaken with intent to deprive the President or Vice President of his life or his liberty or to render him unfit to govern - Article 111 (2): act of colludes with either a foreign power or a king or a community, with the intent to induce them to conduct hostilities or to wage a war against the state, to strengthen them in the intention made up thereto, thereby promising them assistance or assisting them in their preparations If the hostilities are committed or the war breaks out - Article 124 (3): the principal: 1st, betrays to the enemy, smuggles into the enemy's hands, destructs or damages a stronghold or post, which is reinforced or occupied, a means of communication, a storehouse, a military provision, or a military, naval or army chest or any part thereof, obstructs, prevents or frustrates a plan for inundation or another military plan devised or executed for defence or attack. 2nd-ly, causes or facilitates a revolt, mutiny or desertion among the armed forces, in time of war intentionally renders assistance to the enemy or prejudices the state against the enemy 	<ul style="list-style-type: none"> - Article 106: The attempt undertaken with intent to bring the territory of the state wholly or partially under foreign domination or to separate part - Article 107 (2): Leaders and originators of an attempt undertaken with the intent to cause a revolution - Article 108 (2): Leaders and originators of a rebellion - Article 124 (2): the principal: 1st, informs or surrenders a map, plan, drawing or description of military works, of any information concerning military movements or plans; 2nd-ly, serve the enemy as a spy or harbours a spy, in time of war intentionally renders assistance to the enemy or prejudices the state against the enemy

(continued)

Table 7.1 (continued)

Groups of criminal acts/criminal act	Formulation sanction of life imprisonment Death penalty/life imprisonment/20 years imprisonment
Crimes against state	<p>Article 140 (3): attempt on the life or the liberty of a ruling king or another head of a friendly state undertaken with premeditation, results in death</p>
Crimes whereby the general security of persons or property is endangered	<p>Life imprisonment/20 years imprisonment</p> <ul style="list-style-type: none"> - Article 187 number 3: deliberate intent sets fire, causes an explosion or causes a flood if thereby danger of life for another is feared and the act results in the death of someone - Article 198 number 2: deliberate intent and unlawfully causes a vessel to sink or strand, or destroys, renders useless or damages a vessel if there from danger of life for another is feared and the fact results in the death of any person - Article 200 number 3: deliberate intent destroys or damages a building or a structure if there from danger of life for another is feared and the fact results in the death of any person - Article 202 (2): put any substance in a well, pump, spring or in a drinking water establishment to be used for general or common use or to be used together with others, knowing that because of it the water becomes harmful if the fact results in the death of a person

Groups of criminal acts/criminal act	Formulation sanction of life imprisonment
Death penalty/life imprisonment/20 years imprisonment	Life imprisonment/20 years imprisonment
Crimes against life	<p>– Article 204 (2): act of sells, offers for sale, delivers or distributes goods, knowing that they are harmful to life or to health and conceals said harmful nature results in the death of any person</p> <p>Article 339: Manslaughter followed, accompanied or preceded by a punishable fact and committed with intent to prepare or facilitate the execution of said fact, or being taken in the act, to secure oneself or other accomplices to said fact or either impunity or the possession of the unlawfully acquired object</p>
Theft	<p>Article 340: deliberate intent and with premeditation takes the life of another person, shall, being guilty of murder</p> <p>Article 365 (4): theft preceded, accompanied or followed by force or threat of force against persons, committed with intent to prepare or facilitate the theft, or when taken in the act, either to enable for himself or for other accomplices to the crime to escape, or to ensure possession of the thing stolen results in a serious physical injury or death, committed by two or more united persons and thereby accompanied by one of the circumstances mentioned under first and thirdly (committed either by night in a dwelling or at an enclosed yard where a dwelling is; or on the public road; or in a railway carriage or tram that is in motion and the offender has forced an entrance into the place of the crime by way of breaking into the house or climbing in, of false keys, of a false order or a false costume)</p>

(continued)

Table 7.1 (continued)

Groups of criminal acts/criminal act	Formulation sanction of life imprisonment Death penalty/life imprisonment/20 years imprisonment	Life imprisonment/20 years imprisonment
Extortion and blackmail	<p>Article 368 (2): with intention to unlawfully benefit himself or another, by force or threat of force forces someone either to deliver a good that wholly or partially belongs to that person or to a third party or to negotiate a loan or to annul a debt, shall, being guilty of extortion possession of the thing stolen results in a serious physical injury or death, committed by two or more united persons and thereby accompanied by one of the circumstances (committed either by night in a dwelling or at an enclosed yard where a dwelling is; or on the public road; or in a railway carriage or tram that is in motion and the offender has forced an entrance into the place of the crime by way of breaking into the house or climbing in, of false keys, of a false order or a false costume)</p>	

Groups of criminal acts/criminal act	Formulation sanction of life imprisonment
	Death penalty/life imprisonment/20 years imprisonment
Crime relates to navigation	Life imprisonment/20 years imprisonment
	<p>Article 444: acts of violence described in Articles 438–441 result in the death of one of the persons on board the attacked vessel or of one of the assaulted persons, the skipper, commander or captain, and those who have participated in the acts of violence</p> <p>– Article 479 k (2): If said act causes the death of a person or the destruction of said aircraft</p> <p>– Article 479 o (2): If said act causes the death of a person or the destruction of said aircraft</p>
Crime relates to aviation and aviation facilities	<p>– Article 479f sub b: deliberate intent and unlawfully causes disaster to an aircraft, destroys, renders an aircraft incapable of use or damages an aircraft that caused death of a person</p> <p>– Article 479 k (1): if the act mentioned in Article 479j and Article 479j: a. is committed by two or more persons jointly; b. is a continuation of a conspiracy; c. is committed with premeditation; d. causes serious physical injury to a person; e. causes damage to said aircraft, such that its navigation may be endangered; f. is committed with intent to deprive a person of his liberty or to maintain the deprivation of liberty of a person</p> <p>– Article 479 o (1): the act mentioned in Article 479j (letter "l"), Article 479 m, and Article 479 n: a. is committed by two or more persons jointly; b. is a continuation of a conspiracy; c. is committed with premeditation; d. causes serious physical injury to a person</p>

Source Indonesian Penal Code, processed by the author

transnational and sophisticated crimes that require the possibility of a sentence as severe as life imprisonment.

Indonesian scholars have identified the characteristics of sophisticated crimes, which justify their being punished by a penalty as severe as life imprisonment (if not capital punishment). Those are that the crimes may have a transnational element, and that persons committing them use sophisticated tools and methods, and these crimes potentially create enormous losses and undermine recognized legal norms. Other characteristics are that particular expertise is required of law enforcers to handle them, and that they are expensive to eradicate and prosecute, requiring legal intelligence assistance to the investigation and prosecution process (Hamzah, 1991, p. 47; Waluyo, 2004, p. 2). Most debated among the 'sophisticated crimes' are those involving drugs which Indonesia, as well some other Asian states, punishes very harshly including with sentences of life imprisonment, and in some instances, death. In 2014, the Indonesian President, H.E. Mr. Joko Widodo stated that for drugs offenders, there will be no clemency. H.E Mr. Joko Widodo underlined that the threat posed to society by drugs (narcotics) is extraordinary. He mentioned that drugs have the power to destroy the next generation (Sajarwo, 2014). Drug trafficking has become a transnational and dangerous crime which targets the young. The continued application of the death penalty to drug crimes shows the commitment and seriousness of the State in its handling of narcotics cases in Indonesia (Anwar, 2016, p. 242).

7.3 Imposing Life Imprisonment

Once it has been established that courts in Indonesia may impose life imprisonment, the question remains whether, if they have the choice of imposing another sentence, they should do so. It is clear from Tables 7.1 and 7.2, that the choice may be the 'heavier' sentence of death or the 'lighter' sentence of a fixed term of imprisonment of 20 years.

While this chapter is primarily about life imprisonment, life sentences in Indonesia cannot be discussed in complete isolation from the death penalty. Capital punishment is controversial, not least because if the state

Table 7.2 Offences outside the Penal Code for which life imprisonment can be imposed

Groups of criminal acts/criminal act	Formulation sanction of life imprisonment	Life imprisonment/20 years imprisonment	Life imprisonment
Law number 12/drt/1951 concerning firearms	Article 1 (1): makes, receives, tries to obtain, surrender or try to hand over, control, carry, have supplies on it or have in his possession, store, transport, hide, use, or remove from Indonesia something firearm, ammunition or something explosive	Life imprisonment/20 years imprisonment	Life imprisonment
Law number 5 of 1997 on psychotropics	Article 59 (2): use, producing and/or using, circulating, import, without the right to own, store and/or carry psychotropic group I that conducted in an organized manner		
Law number 35 of 2009 on narcotics	Article 113 (2): produce, import, export, or distribute Narcotics Category I in the form of plants weighting more than 1 (one) kilograms or more than 5 (five) trees, or in the form of no plant weight exceeds 5 (five) grams		– Article 111 (2): planting, maintain, possess, store, control, or provide Narcotics Category I in the form of plants that has a weight more than 1 (one) kilogram or more than 5 (five) trees

(continued)

Table 7.2 (continued)

Groups of criminal acts/criminal act	Formulation sanction of life imprisonment		
	Death Penalty/Life imprisonment/20 Years imprisonment	Life imprisonment/20 years imprisonment	Life imprisonment
	<p>Article 114 (2): sold, selling, purchased, brokered in the sale and purchase, exchange, deliver, or accept the Narcotics Category I in the form of plant weighing more than 1 (one) kilogram or more than 5 (five) trees, or in the form of no plant weighed 5 (five) grams</p> <p>Article 116 (2): case of narcotics use against others or giving the Narcotics Category I to be used by another person resulted in the death of another person or permanent disability</p> <p>Article 118 (2): produce, import export, or distribute the Narcotics Category II referred to in paragraph (1) weighing more than 5 (five) grams</p> <p>Article 119 (2): offered to be sold, sell, purchase, receive, be an intermediary in sale and purchase, exchange, or deliver the Narcotics Category II referred to in paragraph (1) weighing more than 5 (five) grams</p>	<p>– Article 112 (2): possess, store, control, or provide Narcotics Category I which is not a plant that has a weight more than 5 (five) grams</p> <p>– Article 114 (1): offering to be sold, selling, buying, receiving, brokered in the sale and purchase, exchange, or give the Narcotics Category I</p> <p>– Article 115 (2): bought, transfer, transport, or transit the Narcotics Category I as referred to in paragraph (1) in the form of plant weighing more than 1 (one)</p>	

Groups of criminal acts/criminal act	Formulation sanction of life imprisonment	
Death Penalty/Life imprisonment/20 Years imprisonment	Life imprisonment/20 years imprisonment	Life imprisonment
<p>Article 121 (2): usage the Narcotics against others or giving the Narcotics of Category II to be used another person referred to in paragraph (1) resulted in the death of another person or permanent disability</p> <p>Article 133 (1): orders, give or promise anything, provide opportunities, encourage, provide facilities, force by threats, force with violence, deceit, or the persuade children not old enough to commit criminal acts of narcotics</p>		
Law number 31 of 1999 as amended by law number 20 of 2001 concerning Corruption	<p>Article 2 (1): enriching oneself or another person or a corporation, thereby creating losses to the state finance or state economy</p>	

(continued)

Table 7.2 (continued)

Groups of criminal acts/criminal act	Formulation sanction of life imprisonment Death Penalty/Life imprisonment/20 Years imprisonment	Life imprisonment/20 years imprisonment	Life imprisonment
		<p data-bbox="545 869 732 1142">Article 3: enriching oneself or another person or a corporation, abuses the authority, opportunity or facilities given to him related to his post or position, which creates losses to the state finance or state economy</p> <p data-bbox="737 869 854 1142">Article 12: bribery to civil servant or state apparatus, a Judge, a lawyer related to bribery as listed in number a until i of the Corruption law</p> <p data-bbox="859 869 1040 1142">Article 12 B (2): A civil servant or state apparatus who is found guilty of the criminal offense of gratification shall be considered as a bribe when it has something to do with his/her position and is against his/ her obligation or task</p>	

Groups of criminal acts/criminal act	Formulation sanction of life imprisonment	
Death imprisonment/20 Years imprisonment	Life imprisonment/20 years imprisonment	Life imprisonment
<p>Law number 26 of 2000 concerning Human Rights Court**</p> <p>**Formulated as Death Penalty/Life Imprisonment/25 years imprisonment</p> <p>Article 36: commits actions as referred to in Article 8-point a, point b, point c, point d, or point e → Crime of Genocide</p> <p>Article 37: commits action as referred to in Article 9-point a, point b, point d, point e, or point j → Crime against humanity</p>		
<p>Law number 5 of 2018 concerning 2nd amendment of law number 15 of 2003 concerning terrorism</p>	<p>Article 6: deliberately uses Violence or Threats of Violence that creates an atmosphere of terror or fear of people is widespread, causing mass casualties by means of a mass nature, depriving the freedom or loss of life and property of others, or resulting in damage or destruction to Strategic Vital Objects, the environment or Public Facilities or international facilities</p> <p>Article 7: intentionally uses violence or the threat of violence intends to create an atmosphere of terror or Fear of people is widespread or causes victims who mass nature by depriving of independence or loss life or property of others, or to cause damage or destruction of strategically vital objects, or environment, or public facilities, or international facilities</p>	

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Table 7.2 (continued)	Formulation sanction of life imprisonment		
Groups of criminal acts/criminal act	Death Penalty/Life imprisonment/20 Years imprisonment	Life imprisonment/20 years imprisonment	Life imprisonment
	<p>Article 9: unlawfully enters Indonesia, makes, receives, tries to obtain, hand over or tries to hand over, control, carry, have supplies on him. or have in his child, nudge pan, transport, hide, use, or discharge to and/or from Indonesia something firearm, ammunition, or an explosive device and other dangerous materials with the intent to commit a criminal act of terrorism</p> <p>Article 10A (1): unlawfully enters into the territory of the Republic of Indonesia, makes, receives, acquires, surrenders, controls, carries, has supplies for it or possess in his possession, store, transport, conceal, or remove from the territory of the Unitary State of the Republic of Indonesia chemical weapons, biological weapons, radiology, microorganisms, nuclear, radioactive or its components, with a view to committing a Criminal Act of Terrorism</p>		

Groups of criminal acts/criminal act	Formulation sanction of life imprisonment	
Death Penalty/Life imprisonment/20 Years imprisonment	Life imprisonment/20 years imprisonment	Life imprisonment
Law number 9 of 2013 concerning terrorist financing	<p>Article 6: deliberately plans, organizes, or mobilizes others to commit criminal acts that provides, collects, provides, or lends Funds, whether directly or indirectly, with the intention of being used in whole or in part to perform the Act Terrorism, terrorist organization, or terrorist</p>	
The law number 17 of 2016 regarding stipulation of government regulation in lieu of law number 1 of 2016 concerning The 2nd amendment of law number 23 of 2002 concerning child protection	<p>Article 81 (5): In the case of criminal acts as intended in Article 76D cause victims of more than 1 (one) person, resulting in severe injuries, mental disorders, infectious diseases, disturbed or loss of reproductive function, and/or death</p> <p>Article 89 (1): violation of Article 76 J paragraph 1 about intentionally placing, allowing, involving, ordering to involve the Child in the abuse, as well as the production and distribution of narcotics and/or psychotropic</p>	

(continued)

Table 7.2 (continued)

Groups of criminal acts/criminal act	Formulation sanction of life imprisonment		
	Death Penalty/Life imprisonment/20 Years imprisonment	Life imprisonment/20 years imprisonment	Life imprisonment
law number 21 of 2007 concerning eradication of trafficking in person			**Formulated as Minimum 5 years imprisonment and maximum life imprisonment Article 7: If the criminal act as intended in Article 2 paragraph (2), Article 3, Article 4, Article 5, and Article 6 result in the death of the victim

Source Various Indonesian laws outside the *Penal Code*, processed by the author

executes a convicted person, it fails in at least one of the sentencing objectives, namely giving that person the possibility of rehabilitation so that they can lead a crime free life in the future. As we explained in Part 1 of this chapter, that objective is a key part of the emerging Indonesian penal philosophy. At very least, therefore, Indonesian courts could choose not to impose a sentence of death when they have the possibility not to do so. In practice, however, the courts struggle to implement this element of Indonesian penal philosophy.

The National Legal Development Agency has commented that the current *Penal Code* does not mention the purpose of the execution of sanctions (punishments) or offer guidelines on how it should be done (BPHN, 2008, p. 11). Criminal charges are interpreted according to the views of law enforcement officers and judges, who may have different interpretations from one another. On the other hand, the procedures for imposing punishment in the *Indonesian Penal Code* is rigid. There is no difference between handling cases in which the death penalty or life imprisonment may be imposed (Article 340 *Indonesian Penal Code*) and those where the death penalty or life imprisonment is not an option (Article 338 *Indonesian Penal Code*). This often leads to difficulties in practice that can offend the sense of justice in society (BPHN, 2008, p. 11).

There are some cases where judges have chosen to impose life imprisonment rather than the death penalty. A prominent example is the recent case of Herry Wirawan, who, following conviction, was facing the death penalty, but the District Court decided on life imprisonment instead (court decision number 989/Pid.Sus/2021/PN.Bdg). Wirawan had sexually assaulted some of his female students, some of whom had subsequently become pregnant and given birth. He was found guilty of rape but argued, in order to gain sympathy, that the birth of the children meant that he should not be executed. The prosecutors, however, argued that he had committed a severe crime and that he should be sentenced to death. The Court decided on a lighter penalty than death and sentenced him to life imprisonment. It reasoned that in his case the provisions for sentencing for the offence with which he had been charged made the death penalty inappropriate. Since the crime committed by Wirawan was categorized as a serious crime, the court considered it should be punished

by a sentence that would serve as a deterrent. In this regard life imprisonment was a sufficiently severe penalty to have an appropriate deterrent effect.

As this chapter was being completed, there was a further development when, on 5 April 2022, the Appeal Court decided to cancel the life sentence and change it to the death penalty. (Ramadhan, 2022). However, it is still possible that further proceedings will follow, which could change the outcome again.

Thus far, the focus has been on the imposition of life imprisonment. It has been assumed that life imprisonment, although a severe sentence, is less harsh than the death penalty. For this assumption to be true, much depends on how life sentences are implemented. Firstly, is there an appropriate framework for prisoners sentenced to life imprisonment in Indonesia to be considered for release? Secondly, do prisoners sentenced to life imprisonment have prison conditions that protect their basic human dignity, while providing them with opportunities to rehabilitate themselves, thus improving their prospects of release?

7.4 Release from Life Imprisonment

The *Indonesian Penal Code* gives no clear indication about what the current law is governing release, conditionally or unconditionally, from life imprisonment. Article 15 of the Code does deal with conditional release, but it applies only to release from fixed-term sentences after two thirds of the term have been served. It is clearly impossible however, to calculate prospectively what two thirds of a human life means! The result is that the *Penal Code* as it currently stands does not provide for life with parole sentences. Such sentences require that possible release on parole must be governed by clear law that operates independently of the discretionary powers of the head of state (van Zyl Smit & Appleton, 2019).

There is however clear provision in Indonesian law for individuals sentenced to life imprisonment to be subject to conditional release through the exercise of the presidential power of clemency. As the head of state, the President has the prerogative right to grant clemency in

any case where the sentence is the death penalty, life imprisonment, and fixed-term imprisonment for two years as a minimum. This power cannot be challenged. Provisions governing clemency are to be found in the first instance in Article 14, paragraph 1 of the *1945 Constitution of the Republic of Indonesia*. These provisions are supplemented by *Law Number 5 of 2010 amending Law Number 22 of 2002 concerning Clemency*. Clemency is a pardon in the form of changes, reductions, or abolition of the execution of a sentence for criminal offences granted by the President. Before clemency can be considered, a person must have been convicted of a crime and sentenced by a court decision that has permanent legal force (Clemency Law, Article 1, numbers 1 and 2). Clemency granted to prisoners must reflect justice, human rights protection, and legal certainty based on the Indonesian national philosophy of *Pancasila*¹ and the *1945 Constitution of the Republic of Indonesia*.² The granting of clemency is not a judicial issue, and it is not related to the assessment of the sentencing judge's decision. Clemency does not mean that the President intervenes in the judicial sector but simply that the President is exercising the prerogative right to grant pardons. Through clemency, the punishment of convicted persons can be changed, alleviated, or reduced, or the obligation to serve a sentence imposed by a court can be abolished. Clemency does not eliminate the guilt of the convicted person and does not constitute a legal rehabilitation of the status of a convicted person into that of a person who has been found not guilty of the crime with which they were charged.

According to Article 2, a convicted person can apply for clemency after being sentenced to death, life imprisonment, and temporary imprisonment for two years. As the law now stands, the convicted person can request clemency only once. Table 7.3 reveals that there is a significant

¹ *Pancasila* is the Indonesia state ideology (philosophy) which is believed to epitomize the way of life of Indonesian people. *Pancasila* have five principles, that is. belief in one God, just and civilized humanity, Indonesian Unity, democracy under the wise guidance of representative consultation, and social justice for all the people of Indonesia.

² The *Clemency Law* does not set any clear indicators that the President must consider in granting or refusing the requested clemency. The reasons cannot be accessed publicly, and are not transparent. However, the *Clemency Law* does not require the president to be transparent and accountable regarding his decision. Lamintang (1984, pp. 287–288) has mentioned that there at least two reasons of granting clemency, that is, reason of justice and humanity.

difference between the regulation in *Law Number 22 of 2002 and Law Number 5 of 2010* regarding the time of requesting clemency.

Since 2010, there has been no possibility to request clemency for the second time. Furthermore, the *Clemency Law* describes the process of requesting clemency. According to Article 6 of the *Clemency Law*, convicted persons or their legal representatives or their families (with the convicted persons' consent) may apply to the President. However, in a case where the convicted persons are to be punished by the death penalty, the family may submit a clemency application without the convicted person's consent. Besides those parties who can initiate an application for clemency, Article 6A mentions that the Minister of Law and Human Rights can request the parties to apply for clemency on behalf of the interest of humanity and justice. The Minister is also authorized to research and carry out the application process for clemency and submit it to the President.

As it is understood, clemency is the prerogative right of the President. However, the President will decide whether to grant the clemency or

Table 7.3 Differences in clemency provisions before and after amendment

Aspects	Law number 22 of 2002 (before amendment)	Law number 5 of 2010 (after amendment)
Number of times clemency can be requested	Once, but with the exception	once without exception
Exception	<p>a. To the prisoners whose clemency applications have been rejected and have two years after the date of rejection of the pardon application, they can re-apply</p> <p>b. To the prisoners who have been granted clemency from the death penalty to life imprisonment, two years have passed from the date the Clemency decision is received</p>	There is no exception apply anymore

Source Clemency Law, processed by author

reject it after listening to the Supreme Court's views. Clemency may result in remission from the death penalty to life imprisonment and from life imprisonment to a fixed term of years. Once a sentence has been changed by the exercise of clemency from life imprisonment to fixed term, the prisoner concerned has a further possibility of conditional release, in the same way as a prisoner who was sentenced directly to a fixed term. Such conditional release implies that a conditionally released person may be returned to prison for failing to meet the conditions on which the release was granted.

Figure 7.1 illustrates the operation of a pardoning mechanism under the *Clemency Law*, which must be initiated by an application from the convicted person.

If the convicted person does not request a pardon, the President will not consider the matter. Under the *Government Regulation Number 99 of 2012 and Presidential Decree Number 174 of 1999*, life imprisonment can be changed through remission from life imprisonment to temporary imprisonment. The general requirement for getting remission is clearly stated in the regulations.

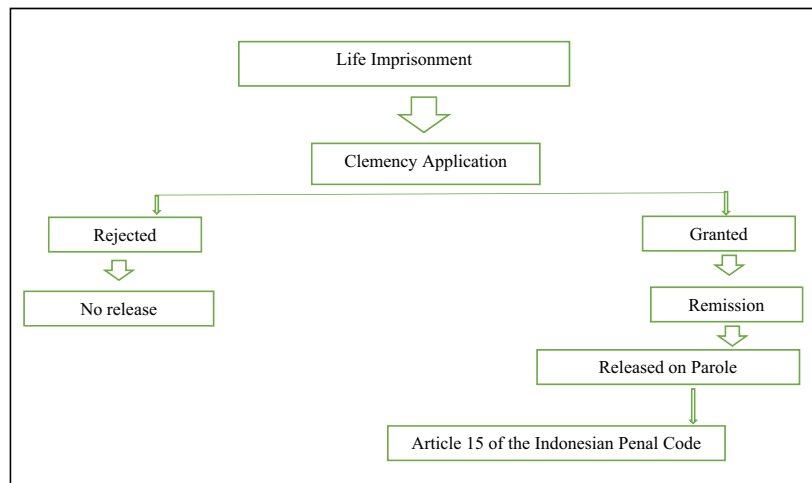


Fig. 7.1 Life imprisonment and the clemency process (Source *Clemency law*, processed by the author)

In the future, following Article 69 of the proposed *Bill on the Indonesian Penal Code*, where a life-sentenced prisoner has served a minimum of 15 years in prison, the life sentence may be changed into a fixed term of 20 years by the President directly, through a presidential decree, after the Supreme Court has given consideration to the matter. The *Bill on the Indonesian Penal Code* can be counted as a reformatory tool in Indonesian criminal law since this is a Bill drafted by the Indonesian Government itself, not a remnant of Dutch Colonialization.

How life imprisonment is served in Indonesia needs to be rethought. Although there has been no direct research on the conditions under which life-sentenced prisoners in Indonesia serve their sentences, there is reason to doubt whether they have access to opportunities for rehabilitation.

7.5 Conclusion

Penal theories that are emerging in Indonesia provide the basis for a more humane approach to life imprisonment. However, to achieve this objective, changes to law and practice are required. Fewer forms of conduct should be subject to life imprisonment, and courts should be encouraged only to impose life sentences in the most severe cases. A clearer system of release for life-sentenced prisoners should be developed, which gives them a right to be considered for release on parole. Finally, more needs to be done to ensure that life-sentenced prisoners are granted opportunities to rehabilitate themselves in prison. To achieve this last goal there should be more empirical research undertaken on how life-sentenced prisoners are treated in prison, their regime, their experiences, and what opportunities for self-improvement they have available to them in practice.

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PALGRAVE ADVANCES IN CRIMINOLOGY
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Life Imprisonment in Asia

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Dirk van Zyl Smit
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Nottingham, UK
Trondheim, Norway
Hanoi, Vietnam
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Dirk van Zyl Smit
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