

Research Article

The Tension Between Combating Terrorism and Protecting the Right to a Fair Trial in Indonesia

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ABSTRACT: A consistent criticism of the Indonesian criminal justice system indicates its dysfunctional judicial system plagued by systemic corruption and government interference. Given the high profiles of terrorism offences and their strict punishment, it is essential to maintain consistency in sentencing decisions for these crimes. However, there is a significant lack of evidence-based studies of sentencing in Indonesian courts, and none specifically related to terrorism offences. The aim of this study is to analyse the application of the right to a fair trial in sentencing terrorism offences in Indonesia through the interpretive lens of Southern criminology. This study takes a multi-dimensional approach of historical, legal, and empirical analyses to provide an in-depth understanding of factors that affect sentencing decisions in terrorism cases. First, the historical analysis explains that prosecutions for terrorism today include radical Islamists, minority extremists and separatist groups willing to resort to violence against the state and society to achieve their goals. Second, the legal analysis highlights how the existing sentencing regimes provide limited guidance for judges when determining the appropriate punishment for terrorist offenders, frequently leading to prison sentences exceeding 10 years. Third, qualitative analysis further explains that judges use their discretion to avoid the minimum mandatory sentence in specific circumstances, such as in the case of juvenile offenders. A Southern criminology approach helps explain terrorism sentencing in the broader historical, legal, and socio-political contexts. Ultimately, the way laws are written and how judges determine the sentences of terrorism offences result from the persistent impact of colonialism, authoritarianism, and the 'war on terror' discourse. The case study reveals violations of international human rights rules and standards. Terrorism sentencing practices also exemplify a troubling trend where national security trumps the fundamental procedural rights of terrorist offenders.

KEYWORDS: Sentencing Decisions; Southern Criminology; Terrorism.

I. INTRODUCTION

Since the Indonesia bombing on 12 October 2002, the country has drawn international attention to its fight against terrorism. Two bombs detonated in the Sari Club and Paddy's Bar, and another exploded in front of the

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American consulate, causing 202 fatalities, 88 of whom were Australian, and hundreds more injured.¹ In response to the attacks and to counter future terrorism threats, President Megawati Soekarnoputri promulgated Government Regulation in lieu of Law 1/2002, enacting it into Law 15/2003, referred to as the 'Anti-Terrorism Law' (ATL). Notably, since the commencement of the ATL, Indonesian law enforcement agencies have arrested more than 1200² terrorist suspects and prosecuted more than 600 terrorist offenders,³ with a near 100% conviction rate.⁴ The National Agency for Combating Terrorism (BNPT or *Badan Nasional Penanggulangan Terorisme*) released a statement in 2017 revealing that there were 271 terrorist prisoners serving imprisonment in 68 prisons and one detention centre in Indonesia.⁵ A few high-profile cases aside, no information has been published on the actual number of terrorism prosecutions and their sentencing outcomes. National security is essential for the nation's stability, but our knowledge about the sentencing outcomes for terrorism offences remains limited. Judicial institutions have been widely criticised for corruption and incompetence,⁶ and terrorism prosecutions are far from free from such accusations.

¹ International Institute for Strategic Studies, "Indonesian Security and Countering Terrorism in Southeast Asia" (2003) 103:1 Strategic Survey 219–236; BBC News, "The 12 October 2002 Bali bombing plot", *BBC News* (11 October 2012), online: <<https://www.bbc.com/news/world-asia-19881138>>.

² Bilveer Singh, "Revising Indonesia's Anti-Terrorism Laws" *RSIS Commentary* (S Rajaratnam School of International Studies, 2016).

³ Marty M Natalegawa, *Strengthening the Implementation of the United Nations Global Counter-Terrorism Strategy*, International Counter-Terrorism Focal Points Conference on Addressing Conditions Conducive to the Spread of Terrorism and Promoting Regional Cooperation (Geneva).

⁴ *Prison Problems: Planned and Unplanned Releases of Convicted Extremists in Indonesia*, by IPAC, 2 (Institute for Policy Analysis of Conflict (IPAC), 2013). See also Natalegawa, International Counter-Terrorism Focal Points Conference on Addressing Conditions Conducive to the Spread of Terrorism and Promoting Regional Cooperation (Geneva).

⁵ Harry Siswoyo & Eka Permadi, "Berapa Jumlah Napi Teroris di Indonesia (How Many Terrorist Prisoners in Indonesia)", *Viva* (20 July 2017), online: <<https://www.viva.co.id/berita/nasional/937613-berapa-jumlah-napi-teroris-di-indonesia>>.

⁶ Timothy Lindsey, *Indonesia: Law and Society*, 2nd ed (New South Wales: The Federation Press, 2008).

Research suggests that terrorism prosecutions can be influenced by political interests, which may challenge the independence of and raise substantial challenges for prosecutorial impartiality.⁷ The public fear and perception of a terrorist attack may have profound implications, and the outcome of terrorism trials may be affected by incompetence and political interference in prosecutions. Particularly in the aftermath of 9/11, the 'war on terror' discourse has led to several significant changes and consequences in investigating and prosecuting extremist groups. In many jurisdictions, post-9/11 galvanised a wave of new anti-terrorism laws: more than 140 countries have enacted draconian anti-terrorism laws in the aftermath of the event, often with little regard for basic human rights and due process.⁸

More generally, state responses to terrorism reveal some improprieties and questionable decisions that potentially subvert the credibility of the criminal process. According to Wadie Said, some of the terrorism trials in the US resulted in sentencing enhancement despite a lack of supporting evidence.⁹ Improper decisions have threatened the efficacy of the court's sentencing function. Post-9/11 laws have also brought harsh consequences for terrorism-related offences. Therefore, even if the involvement of the offender in the crime has been limited or is at the stage of preparatory crime, laws now allow courts to impose a life sentence or a lengthy custodial term.¹⁰

To consider how the courts punish terrorist offenders, it is necessary to consider the relevant sentencing law, policy guidelines, and how the state

⁷ Ben Saul, ed, "Terrorism prosecutions and the right to a fair trial" in *Research Handbook on International Law and Terrorism* (Edward Elgar Publishing, 2020) at 384-398.

⁸ Jayson S Lamchek, *Human Rights-Compliant Counter-terrorism: Myth-making and Reality in the Philippines and Indonesia* (Cambridge: Cambridge University Press, 2018).

⁹ Wadie E Said, "The message and means of the modern terrorism prosecution. (Ten Years After 9/11: Rethinking Counterterrorism)" (2012) 21:1 *Transnational Law & Contemporary Problems* at 175.

¹⁰ Robert Diab, "Sentencing for Terrorism Offences: A Comparative Review of Emerging Jurisprudence" (2011) 15:3 *Canadian Criminal Law Review* at 267; Robert Diab, *The Sentencing of Terrorism Offences After 9/11: A Comparative Review of Early Case Law* (Canada: Canadian Institute for the Administration of Justice, 2011) at 347; Robert Diab, "R v Khawaja and the Fraught Question of Rehabilitation in Terrorism Sentencing" (2014) 39:2 *Queen's Law Journal* at 587.

implements these laws. Although the Global North has a long history of introducing sentencing principles and reforms that aim to reduce unjustified disparity and encourage consistency of approach in similar cases. The empirical studies in these jurisdictions suggest that sentencing decisions are influenced beyond the severity of the offence and prior criminal history,¹¹ including offenders' characteristics (such as race, age and gender).¹² Factors that may influence sentencing decisions in terrorism prosecutions centre upon several key themes: the severity of the crime,¹³ the effect of a terrorist label and political motivation,¹⁴ the role of context, cohort and timing of adjudication.¹⁵

While there is a substantial academic discussion on terrorism prosecutions in the Northern jurisdictions, there is limited evaluation of Indonesian terrorism

¹¹ Cassia C Spohn, "Thirty years of sentencing reform: The quest for a racially neutral sentencing process" (2000) 3 *Criminal Justice* at 427; Marjorie S Zatz, "The Convergence of Race, Ethnicity, Gender, and Class on Court Decisionmaking: Looking Toward the 21st Century" (2000) 3:1 *Criminal Justice* at 503.

¹² Darrell Steffensmeier & Stephen Demuth, "Ethnicity and judges' sentencing decisions: Hispanic-Black-White comparisons" (2001) 39:1 *Criminology* at 145; Cassia C Spohn & J Cederblom, "Race and disparities in sentencing: A test of the liberation hypothesis" (1991) 8:3 *Justice Quarterly* at 305; Cassia C Spohn & David Holleran, "The Imprisonment Penalty Paid by Young, Unemployed Black and Hispanic Male Offenders" (2000) 38:1 *Criminology* at 281; Cassia C Spohn, "The Effects of The Offender's Race, Ethnicity, and Sex on Federal Sentencing Outcomes In The Guidelines Era" (2013) 76:1 *Law and Contemporary Problems* at 75.

¹³ Brent Smith & Kelly Damphousse, "Punishing Political Offenders: The Effect of Political Motive on Federal Sentencing Decisions" (1996) 34:3 *Criminology* at 289.

¹⁴ B L Smith & K R Damphouse, "Terrorism, Politics, and Punishment: A Test of Structural-Contextual Theory And The 'Liberation Hypothesis'" (1998) 36:1 *Criminology* at 67.

¹⁵ Joanna Elizabeth Amirault, *Criminalizing Terrorism: The Impact of Context and Cohort Effects on the Sentencing Outcomes of Terrorist Offenders* (PhD Thesis, Simon Fraser University, 2014); Joanna Elizabeth Amirault & Martin Bouchard, "A Group-Based Recidivist Sentencing Premium? The Role of Context and Cohort Effects in The Sentencing Of Terrorist Offenders" (2015) 43:4 *International Journal of Law, Crime and Justice* at 512; Joanna Elizabeth Amirault et al, "Criminalizing Terrorism In Canada: Investigating The Sentencing Outcomes of Terrorist Offenders From 1963 To 2010" (2016) 106 *The Journal of Criminal Law and Criminology* at 769; Joanna Elizabeth Amirault & Martin Bouchard, "Timing Is Everything: The Role of Contextual and Terrorism-Specific Factors in The Sentencing Outcomes of Terrorist Offenders" (2017) 14:3 *European Journal of Criminology* at 269.

sentencing practices. This study aims to analyse the application of the right to a fair trial in terrorism prosecutions and what factors that may contribute to sentencing decisions. It combines historical, legal and empirical analyses to provide an in-depth understanding of sentencing decisions in terrorism cases.

This article explores a series of historical developments that explain judicial decision-making in terrorism cases. To begin, we analyse the origins of terrorism from the colonial and post-colonial eras, demonstrating that separatist movements, religious violence and social unrest have been in Indonesia for the last two centuries and have evolved. As a result of suppressions from the colonial and post-colonial regimes, these groups resorted to violence against the state and society. Critiquing the Eurocentric nature of sentencing scholarship, particularly on the war on terror, Chris Cunneen points out that such crimes are primarily viewed as a ‘problem’ for Western nations.¹⁶ However, a better understanding of the history of violent resistance and political struggle against colonial rule and subsequent repressive governments in Indonesia, highlighted through Southern criminology, helps explain the terrorist violence in the country.

Secondly, we analyse the structural factors rooted in the colonial and post-colonial past that shape how the courts determine sentencing outcomes for terrorist offenders. This article reveals how local religious and cultural dynamics that have occurred since the colonial era, along with judicial incompetence and weakness from the Soeharto authoritarian regime, are all structural factors that contribute to the determination of punishment for terrorist offenders by judges. Influenced by the principles of Southern criminology, this article provides an alternative criminological perspective on Indonesian sentencing practices, aiming to impart a new and diverse insight into terrorism sentencing.

¹⁶ C Cunneen, “Postcolonial Perspectives for Criminology” in Mary Bosworth & Carolyn Hoyle, eds, *What is Criminology?* (Oxford Scholarship Online, 2011) at 15, 251.

II. METHODOLOGY

A mixed methods approach utilised in this article combines three research areas that would be productive in understanding Indonesian terrorism sentencing decisions, i.e., historical, legal, and qualitative analyses. The structure of the article further confirms the complementarity of the two procedures. It first examines the historical background and then scrutinises the sentencing factors by analysing specific types of cases through qualitative methods. What follows is a brief explanation of each research approach, showing the combination of historical, legal, and qualitative methods. This mixed-methods approach provides ‘unique points of view’ that are well suited for studying the complex phenomenon of terrorist violence and its sentencing practices.¹⁷

This study analyses the application of the right to a fair trial in sentencing terrorism offences in Indonesia through the interpretive lens of Southern criminology. This perspective helps explain terrorism sentencing in broader historical and socio-political contexts. The Southern criminology movement is a scholarly approach that aims to decolonise criminological concepts. It offers new theoretical insights to understand the relationship between the ongoing and enduring effects of colonisation, state repression and the over-representation of marginalised peoples in the criminal justice system.¹⁸ In this article, the Global North refers to Europe and North America. In contrast, the Global South refers to the third world, former colonies, or ‘periphery’ that includes regions such as Asia, Africa, Oceania and Latin America.¹⁹ By the Global North, this article primarily refers to jurisdictions such as the United States, the United Kingdom, and Australia.

¹⁷ Rebecca Campbell, Debra Patterson, & Deborah Bybee, “Using Mixed Methods to Evaluate a Community Intervention for Sexual Assault Survivors: A Methodological Tale” (2011) 17:3 *Violence Against Women* 376–388; Leonard A Jason & David S Glenwick, eds, “Integrating Qualitative and Quantitative Approaches: An Example of Mixed Methods Research” in *Methodological Approaches to Community-Based Research* (Washington DC: American Psychological Association, 2015) at 376-377.

¹⁸ Kerry Carrington, Russell Hogg, & Máximo Sozzo, “Southern Criminology” (2016) 56:1 *British Journal of Criminology* at 1.

¹⁹ Nour Dados & Raewyn Connell, “The Global South” (2012) 11:1 *Contexts* at 12.

III. SOUTHERN CONTEXT OF TERRORISM AND SENTENCING STUDY

This section outlines how this study defines the Southern context to the broad idea of terrorism and its sentencing procedures. The Global North's epistemologies in criminology have been called for to be decolonised by the perspective of Southern criminology. Additionally, this research provides an alternative conception of terrorism and its sentencing procedures in discourses of belonging unique to the Indonesian setting that is conscious of cultural, socio-political, and historical disparities. This research also refers to the Southern context.

An approach known as "Southern criminology" is based on a mature and long-standing critique of critical criminology and post-colonial criminology.²⁰ The renowned Italian Marxist Antonio Gramsci is credited with first introducing the idea of the South. In his essay "The Southern Question," he explored the notion that Northern Italian capitalists had colonised Southern Italy and outlined the challenges faced by Southern peasants and Northern workers to establish an alliance.²¹ The left idealistic tradition in Marxist criminology has attempted to enlarge the concept of crime by incorporating acts of damaging and subordinating behaviours committed by states and corporations. According to critical criminologists, it is essential to comprehend and resist the state-driven altering of official language and the authoritarianism of state institutions that seeks to amplify

²⁰ Kerry Carrington, Russell Hogg, & Máximo Sozzo, *supra* note 18.

²¹ Gramsci examined the "Southern issue" in his article, highlighting the socioeconomic disparity between Southern peasants and Northern workers. What is undeniable, he said, is that only the working class, by capturing political and economic power from the hands of the bankers and capitalists, is in a position to address the primary issue plaguing Italian national life—the Southern Problem. The working class is tasked with completing the bourgeoisie's work and economically and spiritually uniting the Italian people. Only through dismantling the bourgeois state apparatus, which is based on the hierarchical hegemony of industrial and financial capitalism over the rest of the country's productive forces, can this be accomplished. See Antonio Gramsci, "Selections from Politics Writings (1921-1926)" in *Some Aspects of the Southern Question* - (International Publishers, 1978) at 119; Antonio Gramsci, *The Southern Question* (Canada: Guernica Editions, 2005).

authority and increase incarceration.²² Therefore, the definition of the Global South and North division must be clarified. Geographically speaking, the "Global South" refers to the "third world" or "periphery," which encompasses areas like Asia, Africa, Oceania, and Latin America. The "Global North" refers to Europe and North America.

Several academics pioneered the term "Southern criminology" to refer to the study of postcolonial criminology in the 1980s and 1990s. A proponent of postcolonial criminology, Stanley Cohen made some of the first arguments for the need for a more nuanced and balanced understanding of criminology. He criticised Western criminologists for ignoring the crimes perpetrated by colonial powers, arguing that colonial powers imported these methods and used them to suppress political protest in the colonised countries.²³ These methods were used by institutions in the criminal justice system. The Southern criminology perspective, which draws on postcolonial criminology, laments the information imbalance resulting from criminology's tendency to rely on presumptions borrowed from the metropole and Northern experiences.²⁴ As a result, it has stopped the advancement of Southern kinds of knowledge.

According to Pablo Ciocchini, terms with negative connotations like "underdeveloped," "developing," and "third world" are also replaced in the Global South. Such terms measure a society's social success and economic development, with Western countries being the benchmark. Consequently, European cultural values are presented as the ideal, common goal for all societies.²⁵

²² Ian R Taylor, P Walton, & J Young, *The New Criminology: For a Social Theory of Deviance* (London: Routledge and Kegan Paul, 1973); Ian R Taylor, P Walton, & J Young, *Critical Criminology* (London: Routledge, 2012).

²³ Stanley Cohen, *Against Criminology* (New Brunswick, USA: Transaction Books, 1988); Piers Beirne & David Nelken, *Issues in Comparative Criminology* (Aldershot, England; Brookfield, Vt., USA: Ashgate/Dartmouth: Dartmouth Publishing, 1997).

²⁴ Kerry Carrington, "Criminology, Southern Theory and Cognitive Justice" in Russell Hogg, John Scott, & Maximo Emiliano Sozzo, eds, *The Palgrave Handbook of Criminology and the Global South* (USA: Palgrave Macmillan, 2018) 3.

²⁵ Pablo Leandro Ciocchini, "Reinterpreting Chaos as Diversity: An Alternative Legal Approach from the Global South" in Pablo Leandro Ciocchini & George Baylon Radics, eds, *Criminal Legalities in The Global South: Cultural Dynamics, Political*

Although certain criminological studies from the Global South have been created, Western researchers generally disregard or overlook some of the works from this region. Similar claims are supported by Leon Moosavi, who maintains that the South has developed a sizable amount of criminological knowledge which has gone unrecognised. He presents Malaysian scholar Syed Hussein Alatas, who studied the sociology of corruption in his most recent work. According to Moosavi, non-Western academics must be involved in efforts to Southernise or decolonise criminology if Alatas is to receive more recognition from the criminology community.²⁶

In the meantime, the underlying principle of Southern criminology explains terrorism sentencing decisions in Indonesia within the broader historical, legal and socio-political context.²⁷ The lasting consequences of colonialism, authoritarianism, and the "war on terror" narrative influence how courts punish terrorist offences and how laws are drafted.²⁸ These characteristics highlight the value of a Southern criminology approach, which must be acknowledged as a critical contextual variable in Indonesian terrorism sentencing. Briefly, it could emphasise the significance of history and how colonialism and imperialism may have influenced historical patterns of justice, crime, and punishment. Colonialism's influence on historical study may lead to a better understanding of the causes of the violence, which have not been thoroughly studied in Indonesia.

Colonialism and post-colonialism are the key components of why empirically based explanations are missing. The effects of the colonial and post-colonial rule on sentencing practices are rarely mentioned in empirical research in the Global North, despite scholars having taken these contextual

Tensions, and Institutional Practices (Abingdon, Oxon; New York, NY: Routledge, 2020).

²⁶ Leon Moosavi, "Decolonising Criminology: Syed Hussein Alatas on Crimes of the Powerful" (2019) 27:1 *Critical Criminology* at 229; Leon Moosavi, "A Friendly Critique of 'Asian Criminology' and 'Southern Criminology'" (2019) 59:2 *The British Journal of Criminology* at 257.

²⁷ Raewyn Connell, *Southern Theory: The Global Dynamics of Knowledge in Social Science* (Sydney: Allen & Unwin, 2007).

²⁸ Raymond Geuss, *The Idea Of A Critical Theory: Habermas And The Frankfurt School* (Cambridge: Cambridge University Press, 1981).

factors, amongst others, into account. The internal peace and democratic system are frequently taken for granted in the Global North, where sentencing reasons are formed under distinct conditions. This resulted in society's fights for justice in the Global South being obscured. As such, analysing the sentencing systems, particularly in the Indonesian context, could provide a more comprehensive explanation of why such problems as corruption, government interference, punitive attitude, and poor decisions making are still prominent in criminal sentencing today.

The fact that the Southern criminology viewpoint is a theoretical, empirical, and political endeavour to modify, re-orienting, democratise, or enhance criminological knowledge on the periphery is one of its main components. To better fit the Indonesian context, this research aims to adopt criminological information on terrorism and sentencing. It attempts to comprehend the significance of historical occurrences in colonial and post-colonial regimes and to investigate the function of colonial-era legislation concerning terrorism offences that still have current applications. The Southern criminology movement contributes to our understanding of the context-dependent aspects crucial in determining how terrorist offences will be punished. Therefore, the Southern context of this article is built around a set of inquiries and will be discussed in the following sections. It undertakes the question of how much the centuries-long colonial and post-colonial regimes may have influenced the rise of the radical Islamist movement and separatist organisations in the nation. It is crucial to critically assess how colonial and post-colonial governments affected our knowledge of current sentencing legislation, crime trends, and criminal justice systems, particularly offences related to terrorism.

IV. INDONESIA'S ANTI-TERRORISM LAW AND THE GLOBAL WAR ON TERROR

This section offers a legal analysis that examines how Indonesia's anti-terrorism legislation and practices impact sentence decisions.²⁹ What is the

²⁹ John Hogarth, *Sentencing as a human process* (Toronto University of Toronto Press in association with the Centre of Criminology, University of Toronto, 1971). See also

legal and policy underpinning of criminal sentencing policies in Indonesia?; How and why is the punishment structure under the Indonesian Penal Code 1/1946 (Kitab Undang-Undang Hukum Pidana - KUHP) different from that established by the Anti-Terrorism Law ('ATL')? Does the current sentencing scheme give judges enough guidance when deciding how long to sentence terrorist perpetrators to ensure their legal certainty?³⁰

Following a study of the KUHP's start and growth, Indonesia's investigations, prosecutions, and trial processes are briefly explained. The KUHP's sentencing guidelines contrast those in the ATL in the following section, which also explains the KUHP's sentencing system. This section describes how ATL's sentencing guidelines differ from those outlined in KUHP. The ATL adopts new sentencing guidelines, which include a new aggravating element and a minimum required sentence. The ATL treats attempted terrorist acts as though they had been successfully committed.³¹ Even though the KUHP contains some of the same offences as terrorism, the ATL has more rigid sentencing guidelines in reaction to terrorism. This is so because the ATL is perceived as an immediate response to the rhetoric surrounding the "war on terror."

Although the KUHP does not explicitly state any aims of punishment in its sentencing guidelines, many academics believe that the KUHP embodies the "retaliation" concept (*werking der vergelding*). This is because severe and violent punishment characterised most punishments during the Dutch colonial administration. In contrast, the academic paper of the ATL creates

Martha A. Myers, 'The social contexts of criminal sentencing' (Springer, 1987). See also K. H. Ng and X. He, *Embedded courts: Judicial decision-making in China* (Cambridge University Press, 2017). See also Jeffery T. Ulmer and Brian Johnson, 'Sentencing in Context: A Multilevel Analysis' (2004) 42(1) *Criminology* 137. See Ronald Helms and David Jacobs, 'The political context of sentencing: An analysis of community and individual determinants' (2002) 81(2) *Social forces* 577.

³⁰ Darrell Steffensmeier & Stephen Demuth, *supra* note 12 at 145; Cassia C Spohn & J. Cederblom, *supra* note 12 at 305 at 305; Cassia C Spohn & David Holleran, *supra* note 12 at 281; Cassia C Spohn, *supra* note 12 at 75.

³¹ Robert W Hefner, "Introduction: Indonesia at the Crossroads: Imbroglios of Religion, State, and Society in an Asian Muslim Nation" in Robert W Hefner & Barbara Watson Andaya, eds, *Routledge Handbook of Contemporary Indonesia* (Routledge, 2018).

additional sentencing objectives, such as the concept of deterrence and rehabilitation. Due to these circumstances, judges may have varying or competing views on the goals of sentencing.

The sentencing principles and criteria are the following advancements in sentencing.³² While the ATL prepares particular sentencing guidelines and suggests a heavier penalty as retaliation for terrorism crimes,³³ the KUHP offers basic sentencing principles and guidelines. When crimes are linked to terrorism, it is viewed that extreme actions are necessitated to prevent them for the majority of offences, and the ATL recognises a minimum required punishment. The law also prohibits the execution of minor offenders and establishes the age of criminal responsibility as 18 years old.

The new sentencing framework of the ATL offers judges only minimal direction in calculating the length of sentences for terrorist offenders. Therefore, one may see the minimum required penalties included in the ATL as an effort to limit judicial discretion. However, the legal justification for this sentence modification is not entirely clear. It is also essential to assess the effectiveness³⁴ of this measure and the effect of the minimum sentences in the ATL. The ATL makes it clear that the Indonesian government has a firm position and continues to inflict severe and punitive sentences for certain offences, especially those related to terrorism.³⁵ The ATL is the Indonesian government's way of emphasising its strict laws and commitment to countering terrorism. This message, which fits the rhetoric surrounding the worldwide "war on terror," is intended for domestic and foreign audiences.

Since the 9/11, there has been a rapid transition in the security priorities of many countries. In a short time, terrorism emerged as the most important political discourse of the modern era. Richard Jackson argues that 'discourse'

³² Cassia C Spohn, *supra* note 11 at 427; Marjorie S. Zatz, *supra* note 11 at 503.

³³ Joanna Elizabeth Amirault, *supra* note 15; Joanna Elizabeth Amirault & Martin Bouchard, *supra* note 15 at 512; Joanna Elizabeth Amirault et al, *supra* note 15 at 769; Joanna Elizabeth Amirault & Martin Bouchard, *supra* note 15 at 269.

³⁴ Brent Smith & Kelly Damphousse, *supra* note 13 at 289.

³⁵ Antje Missbach, "People Smuggling in Indonesia: Complexities, (Mis) conceptions and Their Consequences for Sentencing" (2016) 17:2 Australian Journal of Asian Law at 1.

on terrorism refers to 'the terms, assumptions, labels, categories and narratives used to describe and explain terrorism'.³⁶ He adds that an emerging feature of contemporary terrorism discourse in many academic and political texts is the notion of 'Islamic terrorism', a term that is deeply problematic because it is highly politicised and contestable.³⁷

Particularly in Southeast Asia, scholarship has emphasised the nature and presence of the 'Islamic terrorism'. Most studies of terrorism in Southeast Asia focus on international terrorist links, religious ideology and the root cause of terrorism. In the aftermath of the 9/11 attacks, the scholarship on terrorism focuses on an 'Al-Qaeda-centric paradigm' with Osama bin Laden at the core of the analysis. Zachary Abuza, one of the prominent terrorism experts from the US, contends that Al-Qaeda was able to penetrate and expand its network to Southeast Asia ideologically and financially.³⁸ He also provides a detailed explanation of the origins, evolution and development of Jamaah Islamiyah, which, according to Abuza, was Al-Qaeda's regional arm in Southeast Asia.³⁹ He contends that Osama bin Laden successfully entered Southeast Asia, establishing independent cells and assisting this group in posing threats to the region.⁴⁰ He then argues that Southeast Asia will be 'an important theatre of operation for it [terrorism] in the coming years'.⁴¹

Rohan Gunaratna also emphasises the presence of Islamic threats in Southeast Asia.⁴² He analyses how Islamist extremism, from the early eighties, has evolved into a global jihadi movement that extends from West

³⁶ Richard Jackson, "Constructing Enemies: 'Islamic Terrorism' in Political and Academic Discourse" (2007) 42:7 *Government and Opposition* 394–426..

³⁷ *Ibid.*

³⁸ Zachary Abuza, "Funding Terrorism in Southeast Asia: The Financial Network of Al Qaeda and Jemaah Islamiya" (2003) 25:2 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* at 169.

³⁹ Zachary Abuza, *Militant Islam in Southeast Asia: Crucible of Terror* (Colorado: Lynne Rienner Publishers, 2003).

⁴⁰ Zachary Abuza, "Tentacles of terror: Al Qaeda's Southeast Asian network" (2002) 24:3 *Contemporary Southeast Asia* at 427.

⁴¹ Zachary Abuza, *supra* note 39 at 231.

⁴² Rohan Gunaratna & Haynal Cleo, "Current and Emerging Threats of Homegrown Terrorism: The Case of the Boston Bombings" (2013) 7:3 *Perspectives on Terrorism*; Rohan Gunaratna, *Terrorism in the Asia-Pacific: threat and response* (Singapore: Eastern Universities Press, 2003).

Africa to the Philippines.⁴³ He also predicts the Islamic State's strategy to create chaos in Southeast Asia, including the Philippines, Indonesia and Malaysia. He warns that in 2016, the Islamic State was preparing to declare the 'eastern front of Islam', which will have enduring impacts on national security that should not be overlooked.⁴⁴

Turning to the Indonesian context, Sidney Jones, a political analyst and terrorism expert, examines the ongoing threats of jihadist groups in the Southeast Asian region.⁴⁵ She suggests that these groups have fragmented, mutated and changed their tactics,⁴⁶ making the task of mapping and understanding them more difficult.⁴⁷ She contends that a variety of jihadist groups operate in Indonesia, with links to other Southeast Asian countries, including the Philippines. Darul Islam splinter groups consist of Jamaah Islamiyah, Laskar Jundullah and Action Committee for Crisis Response (*Komite Aksi Penanggulangan Akibat Krisis* – KOMPAK), who continued to raise funds and supply weapons for 'jihad' in Indonesia, particularly in the conflict sites such as Ambon and Poso.⁴⁸

Some scholars have heavily criticised the mainstream discourses on terrorism in the post-9/11 era. Vedi Hadiz, an Indonesian scholar, argues that much of the literature on terrorism has 'succumbed to a more superficial security-

⁴³ Rohan Gunaratna, *The Global Jihad Movement* (Lanham, Maryland: Rowman & Littlefield, 2015); Rohan Gunaratna & Aviv Oreg, "Al Qaeda's Organizational Structure and its Evolution" (2010) 33:12 *Studies in Conflict & Terrorism* at 1043.

⁴⁴ Rohan Gunaratna, "The Islamic State's Eastward Expansion" (2016) 39:1 *The Washington Quarterly* at 49.

⁴⁵ Sidney Jones, "The Ongoing Extremist Threat in Indonesia" (2011) *Southeast Asian Affairs ISEAS - Yusof Ishak Institute* 91–104; Sidney Jones, "Briefing for the New President: The Terrorist Threat in Indonesia and Southeast Asia" (2008) 618:1 *The ANNALS of the American Academy of Political and Social Science* at 69.

⁴⁶ Sidney Jones, "The Changing Nature of Jemaah Islamiyah" (2005) 59:2 *Australian Journal of International Affairs* at 169; Sidney Jones & Solahudin, "ISIS in Indonesia" (2015) *Southeast Asian Affairs ISEAS - Yusof Ishak Institute* 154–163.154.

⁴⁷ Sidney Jones, "Terrorism in the Region: Changing Alliances, New Directions" in Russell Hiang-Khng Heng & Rahul Sen, eds, *Regional Outlook: Southeast Asia 2006–2007* (Institute of Southeast Asian Studies, 2006) at 8.

⁴⁸ *Jihadism In Indonesia: Poso on The Edge*, by International Crisis Group, 127 (International Crisis Group, 2007).

oriented approach' and 'its hyper-alarmist predilections'.⁴⁹ Bart Schuurman contends that topics in mainstream terrorism research favour applied research on topical themes, focusing on jihadism and are strongly tied to government-driven research policy.⁵⁰ John Sidel also sceptically views these research projects linked to government agencies, funding bodies, and other state powers.⁵¹ He further contends that the writings of terrorism experts have helped the government and policymakers to justify the 'war on terror' in the nation.⁵² Furthermore, Natasha Hamilton argues that mainstream terrorism studies are written by security-oriented political scientists or international relations analysts with close links to intelligence organisations. Thus, they result in selective and myopic studies of terrorism that have distorted the analysis.⁵³

Taking a different approach from that of mainstream terrorism studies, critical terrorism studies (hereafter CTS) applies a critical theory approach rooted in the Frankfurt School of Critical Theory and the Aberystwyth School's approach to the study of terrorism and criticises the current state of orthodox or mainstream terrorism studies.⁵⁴ A set of commitments also characterises CTS – one of the most important characteristics is an appreciation of the politically constructed nature of terrorism discourse.⁵⁵ This perspective aims to deconstruct existing understandings of terrorism

⁴⁹ Vedi R Hadiz, "Islamic Politics In Southeast Asia: A Critical Reassessment" (2013) 1:2 TRaNS: Trans-Regional and-National Studies of Southeast Asia at 215.

⁵⁰ Bart Schuurman, "Topics In Terrorism Research: Reviewing Trends And Gaps, 2007-2016" (2019) 12:3 Critical Studies on Terrorism at 463.

⁵¹ John Thayer Sidel, *The Islamist Threat In Southeast Asia: A Reassessment*, Policy Studies 37 (ISEAS & East-West Center Washington, 2007); John Thayer Sidel, *Riots, Pogroms, Jihad: Religious Violence In Indonesia* (Cornell University Press, 2007).

⁵² *Ibid.*

⁵³ Natasha Hamilton-Hart, "Terrorism In Southeast Asia: Expert Analysis, Myopia And Fantasy" (2005) 18:3 The Pacific Review at 303.

⁵⁴ Richard Jackson, "The Core Commitments of Critical Terrorism Studies" (2007) 6:3 European Political Science 244–251.

⁵⁵ Richard Jackson, *Terrorism: A Critical Introduction* (Palgrave Macmillan, 2011); Richard Jackson, *Routledge Handbook of Critical Terrorism Studies* (Routledge, 2016).

and complete and reformulate mainstream approaches to terrorism and counter-terrorism.⁵⁶

Another critical proposition of CTS is that the 'war on terrorism' is embedded into law enforcement institutions, including the legal system and the wider political culture, which is now fully normalised. Richard Jackson, a proponent of CTS, argues that the official language of counter-terrorism has been constructed in American foreign policy to develop a new discourse that Islamic terrorism has threatened to destroy lives, freedom and democracy.⁵⁷ The language of the 'war on terrorism' is a 'carefully constructed discourse' that is designed not only to serve the interests of the powerful,⁵⁸ but also several key political purposes to normalise and legitimise the current counter-terrorist approach; to empower the authorities and shield them from criticism; to discipline domestic society by marginalising dissent or protest; and to enforce national unity by reifying a narrow conception of national identity.⁵⁹

Instead of focusing on Al-Qaeda and their networks and emphasising the alarmist picture of aggressive Islamist movements, CTS scholars draw attention to political constructions of terrorism and call for a more balanced, nuanced, and contextualised analysis of Islamic terrorism to understand recent trends and developments and to appreciate the impacts for the regions in future.⁶⁰ They suggest that analyses based on historical sociology and political economy, which exhibit deep cultural knowledge and a profound understanding of local contexts, may provide alternative ways of understanding the evolution of Islamic politics in Southeast Asia.⁶¹

⁵⁶ Alice Martini, "Rethinking Terrorism and Countering terrorism from a Critical Perspective CTS and Normativity" (2020) 13:1 Critical Studies on Terrorism at 47.

⁵⁷ Richard Jackson, *Writing The War On Terrorism: Language, Politics And Counter-Terrorism* (Manchester: Manchester University Press, 2005).

⁵⁸ Farish Ahmad Noor, *Terrorising The Truth: The Shaping Of Contemporary Images Of Islam And Muslims In Media, Politics, And Culture: A Report On The International Workshop* (Just World Trust, 1997); Edward W Said & Christopher Hitchens, *Blaming the Victims: Spurious Scholarship and the Palestinian Question* (Verso, 2001).

⁵⁹ Richard Jackson, *supra* note 57.

⁶⁰ John Thayer Sidel, *supra* note 51.

⁶¹ Vedi R Hadiz, *supra* note 49; John Thayer Sidel, *supra* note 51.

V. TRIAL PROCESS IN INDONESIAN TERRORISM PROSECUTIONS

The investigation, prosecution, and trial processes, as well as the Indonesian criminal justice system, are briefly described in this section. The current criminal procedure law, *Kitab Undang-Undang Hukum Acara Pidana* 8/1981, was adopted by Indonesia in 1981 (Criminal Procedure Law – KUHAP). The KUHAP establishes the processes and liberties of people at various levels of the legal system, such as the police, the prosecutor, and the judge-led inquiry, prosecution, and adjudication. In situations involving terrorism, article 25 (1) of the ATL specifies that, unless the ATL determines differently, the investigation, prosecution, and trial process for terrorism offences shall be carried out under the current criminal procedural law (KUHAP).

The investigation of terrorism cases in Indonesia is conducted by Densus 88, Indonesia's counter-terrorism organisation. Investigators are required to investigate when there is a report or complaint about the occurrence of a terrorism offence. If Densus 88 believes insufficient preliminary evidence exists, they may request and employ intelligence reports following Article 26 (1) of the ATL. When Densus 88 launches an investigation,⁶² into a terrorist act, or when an inquiry is closed because of insufficient evidence, the prosecutor is to be notified.⁶³ Densus 88 may examine suspects and witnesses personally during this procedure, take their fingerprints and photographs, conduct searches and seizures, obtain expert reports, interview them, and take other investigative steps specified in the KUHAP.⁶⁴ The investigators are required to transmit the offence dossier to the prosecutor as soon as the investigation is finished and filed.⁶⁵ Densus 88 is authorised to hold the alleged terrorist in custody for a maximum of six months to conduct an investigation and bring charges (Article 25(2) of the ATL).

When someone is accused of committing a terrorist offence, the prosecutor (of the Public Prosecution Service) initiates the prosecution process by

⁶² Article 106 of the KUHAP.

⁶³ Article 109 (1) (2) of the KUHAP.

⁶⁴ Article 7 of the KUHAP

⁶⁵ Article 110 (1) of the KUHAP.

putting the matter before a court with the authority to provide a decision⁶⁶. The prosecutor decides whether the case dossier satisfies the standards for the case to be brought to court,⁶⁷ after receiving or accepting the return of a complete dossier of the case from Densus 88. The prosecutor then drafts a bill of indictment, which includes: (1) the suspect's full name, place of birth, age or date of birth, gender, nationality, address, religion, and line of work; and (2) an accurate, clear, and comprehensive description of the offence that is the subject of the accusation, including the date, time, and location of the alleged offense.⁶⁸ Before the date of the trial is established, they may alter a bill of indictment to strengthen or end the prosecution.⁶⁹

When the head of the district court receives a letter instituting an action and believes the matter falls within its purview, they appoint at least three judges and fix the day of trial.⁷⁰ The KUHAP recognises a pre-trial hearing as a mechanism by which a suspect can challenge the legality of his or her arrest or detention on a technical level, the legality of the decision to end the investigation or the prosecution, as well as the availability of compensation or rehabilitation in cases of illegal detention.⁷¹ As in most civil legal systems where powers are distributed among the public prosecutor and the judges who adjudicate criminal charges and impose sentences,⁷² the Indonesian court system reflects the inquisitorial⁷³ nature of civil law, where several judges investigate and lead the examination at trial.⁷⁴ On the day of the trial, the examination of the presented evidence is led by the chief of the judicial

⁶⁶ Article 137 of the KUHAP.

⁶⁷ Article 139 of the KUHAP.

⁶⁸ Article 143 (2) of the KUHAP.

⁶⁹ Article 144 (1) of the KUHAP.

⁷⁰ Article 152 (1) of the KUHAP.

⁷¹ Article 77 of the KUHAP.

⁷² V Scheirs, K Beyens, & S Snacken, "Belgian Sentencing as a Bifurcated Practice?" (2016) 45 *Crime and Justice* 267–306.

⁷³ An inquisitorial system is 'characterised by a process that's is not open to the public, the parties do not automatically have a right to be heard, the judges play an important and active role in collecting the evidence and an emphasis is placed on collecting written documentation to prove or disprove the case'. Catherine Elliott, *French Criminal Law* (Routledge, 2001) at 13.

⁷⁴ Tim Lindsey, *Indonesian Trial Process and Legal System* (Asian Law Centre The University of Melbourne).

panel (*Hakim Ketua*). At the same time, the prosecutor and defendant remain passive, and the process focuses on legal argument rather than fact development.⁷⁵ A prosecutor and lawyer may also ask the defendant questions after permitted by the judge who chairs the trial (*Hakim Ketua*).

The Indonesian criminal justice system differs from the common law system in key ways, including some of its practices and guiding ideas. Although some judges may see the value in adhering to earlier decisions and may even follow *yurisprudensi* (the collecting and compilations of valuable past decisions/judgments), Indonesia does not adhere to a theory of precedent recognised in common law jurisdictions.⁷⁶ Judges in civil law countries simply have to establish the facts of the case, apply the remedies given in the law, and follow prior judgments if needed. In contrast, judges in common law systems rely on precedent (established by previous courts) to interpret the laws and apply them to the cases.⁷⁷

A pre-trial review may be held to address the following issues: (1) whether arrest and/or detention is legal or not; (2) whether the conclusion of the investigation or prosecution is legal or not; and (3) a request for compensation or rehabilitation from a suspect, his family, or another party whose case has not been brought before the court (Article 1(10) of the KUHAP). Unlike the common law system, Indonesian trials do not recognise a guilty plea process. Also, the Indonesian Constitutional Court made a ruling (No. 21/PUU-XII/2014) that broadened the scope of pre-trial matters. This includes determining the legality of actions such as arrest, detention, termination of investigation or prosecution, as well as the identification of suspects, search and confiscation activities. Additionally, it includes compensation and rehabilitation for individuals whose cases are terminated at the investigation or prosecution stage.

⁷⁵ Robert R Strang, "More Adversarial, But Not Completely Adversarial: Reformasi Of The Indonesian Criminal Procedure Code" (2008) 32:1 Fordham International Law Journal at 188.

⁷⁶ Tim Lindsey, *supra* note 74.

⁷⁷ John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3rd ed (Stanford: Stanford University Press, 2007); Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2010).

In terms of court organisation, the highest court in Indonesia lies in *Mahkamah Agung* or the Supreme Court. Public courts, religious affairs courts, military courts, and administrative courts⁷⁸ are all subordinated to *Mahkamah Agung*. The District Court (Pengadilan Negeri), the Court of Appeal (Pengadilan Tinggi), and the Supreme Court make up the hierarchy of the court's jurisdiction, from lowest to highest (*Mahkamah Agung*).⁷⁹

Mahkamah Agung has also issued a number of *Surat Edaran* (circular letters) to uphold judicial accountability and independence. The Circular Letters (*Surat Edaran Mahkamah Agung*, SEMA), which are authoritative pronouncements of the law, are now required to be observed by all lower courts and judges who operate under the authority of Mahkamah Agung.⁸⁰ They are no longer restricted to the administrative realm. The Circular Letter Number 14 of 2009 is pertinent to terrorism trials because it instructs judges to avoid sentencing disparity by holding periodic discussions on pertinent subjects.

VI. TERRORIST VIOLENCE & STATE RESPONSES ON A POST-AUTHORITARIAN INDONESIA

The findings of this research demonstrate that investigating the history of radical Islam in Indonesia is imperative for comprehending the phenomena of terrorist violence in the nation. The issue of the problematic character of political and religious identities from colonial times to the post-Soeharto era is raised more broadly. The historical study illustrates how individuals involved in the long-standing political battle against colonial rule and later a postcolonial authoritarian regime in Indonesia have been labelled as "terrorists". Muslims who envisioned the establishment of an Islamic state

⁷⁸ The Supreme Court of the Republic of Indonesia, The Organisational Structure of the Supreme Court, <<https://www.mahkamahagung.go.id/id/struktur-organisasi-mahkamah-agung-ri>>.

⁷⁹ *Ibid.*

⁸⁰ Sebastiaan Pompe, *The Indonesian Supreme Court: A Study Of Institutional Collapse* (Cornell University Press, Southeast Asia Program Publications at Cornell University, 2005).

strove to realise their goals.⁸¹ However, colonial and authoritarian administrations consistently repressed Islamic reformist groups by fragmenting and excluding them from the political system.⁸² Due to this circumstance, Islamist organisations are prepared to use extreme and violent means to further their political objectives.

These organisations were not previously referred to as terrorist organisations. However, the state has started to utilise the term "terrorism" since 9/11 and the Bali Bombings in 2002,⁸³ keeping the threat of terrorism and national insecurity at the forefront of public discourse in Indonesia. As a result, the rhetoric surrounding the "war on terror" has normalised the oppressive and severe counter-terrorism tactics. For example, the state responded harshly against a small, poorly equipped gang of armed men in Poso, Central Sulawesi, known as *Mujahidin Indonesia Timur* (East Indonesia Mujahideen, or MIT).⁸⁴ To counter the threat posed by this organisation, the security forces dispatched at least 3000 personnel to Poso. Densus 88 has received applause for its accomplishments in the counter-terrorism campaign to disarm the MIT group. However, there is substantial evidence that the agency engaged in extrajudicial murders and other human rights violations. The terrorist activity follows a more intricate pattern that requires a broader comprehension than the limited assumption that it is motivated by the radical Islamist movement connected to transnational terrorist organisations. Undoubtedly, extremist organisations associated with global radical Islamism have operated in conflict areas, recruiting and directing locals to carry out assaults and murders.

⁸¹ Amira Paripurna, *The Use of Intelligence in Indonesian Counter-Terrorism Policing* (PhD Thesis, University of Washington, 2017).

⁸² IPAC, *supra* note 4.

⁸³ Rachael Diprose & Muhammad Najib Azca, "Past Communal Conflict and Contemporary Security Debates in Indonesia" (2019) 49:5 *Journal of Contemporary Asia: Two Decades of Reformasi in Indonesia: An Illiberal Turn?* at 780.

⁸⁴ Kathrin Rucktäschel & Christoph Schuck, "Tracing Indonesia's Counter-terrorism Measures Since the 2002 Bali Bombings", *The Diplomat* (4 September 2019), online: <<https://thediplomat.com/2019/09/tracing-indonesias-counterterrorism-measures-since-the-2002-bali-bombings>>.

Indonesian radical Islam is not just a result of global radical Islamism but also a result of violent resistance and political struggle against colonial authority and the harsh administrations that followed. Ultimately, this raises a crucial point about how terrorist violence is now constructed. Terrorist violence, on the one hand, develops from a "carefully constructed discourse"⁸⁵ of US foreign policy after 9/11 and the "war on terror" discourse. On the other hand, it emerges from a deeply ingrained and protracted political struggle during the Soekarno and Soeharto regimes.

Islamist organisations who are ready to use violent and extreme measures to further their political objectives have emerged,⁸⁶ as a result of the Soekarno and Soeharto administrations' efforts to drive Islamic reformist forces to the outside of Indonesian politics. The Darul Islam uprising and the Gerakan Aceh Merdeka (Free Aceh) movement exemplify how Soekarno and Soeharto used military force to exclude and repress these communities in the name of nationalism.

In conclusion, this section informs the reader that terrorist violence is "carefully produced" by the state even though these concepts are generated from an investigation of certain historical features that uniquely occur in the Indonesian setting.⁸⁷ Furthermore, considering how terrorist offences are socially created to suit certain sites of power or interest, it is crucial to grasp this political context while making sentencing judgments.⁸⁸

VII. ANALYSIS OF DEVID ANNUGRAH CASE⁸⁹

In 2013, Devid Annugrah was charged and convicted of assisting terrorism offences under Article 13 of ATL. He was sentenced to 2 years and six months because he buried a 25 kg paint bucket filled with explosive material. His sentence length was below the minimum sentence prescribed in article

⁸⁵ Richard Jackson, *supra* note 57.

⁸⁶ Jayson S. Lamchek, *supra* note 8.

⁸⁷ *Ibid.*

⁸⁸ Adriany Badrah, "The Long Road to Peace in Poso Indonesia at Melbourne", *Indonesia at Melbourne* (11 April 2016), online: <<https://indonesiaatmelbourne.unimelb.edu.au/the-long-road-to-peace-in-poso/>>.

⁸⁹ District Court of East Jakarta, Decision number 1357/PID.SUS/2013/PN.JKT.TIM.

13 of ATL, which states that any person who intentionally provides assistance for or facilitates an act of terrorism by: (a) giving or lending money, property or assets to the perpetrator of a terrorism crime; or (b) hiding the perpetrator of a terrorism crime; or (c) concealing information about a terrorism crime, faces punishment of minimum three years imprisonment and maximum fifteen years imprisonment. The Elucidation to Article 13 states that ‘assistance’ means the provision of ‘assistance before or during the commission of the crime’ whereas ‘facilitation’ is defined as the provision of ‘assistance after the commission of the crime’.⁹⁰

A. Relevant Facts

In 2011, Devid Annugrah worked in a goat herd and arranged with neighbour Ibrahim to keep his goats in Ibrahim's backyard. He frequently visited the backyard to care for the goats. In July 2011, Ibrahim told Devid that his friend Naim came with a 25kg paint bucket filled with explosive materials and asked him to keep it. Ibrahim then asked Devid to bury the bucket near the goat cage. Devid was terrified and worried that the bucket he had to bury was explosive material, but he did what Ibrahim had instructed. In May 2013, Devid was arrested by police and accused of assisting terrorism offences. According to the verdict, Devid knew that he buried illegal and dangerous materials but did not report it to the police. It was also mentioned that explosive materials were supposed to be used in high-profile incidents in Solo, arranged by Ibrahim, Naim and other terrorist group members. After his arrest, Devid Annugrah cooperated with police investigators and played a role as an informant to reveal other terrorist groups.

⁹⁰ The Elucidation is the formal explanatory memorandum accompanying all Indonesian statutes and many other types of law.

B. Aggravating and Mitigating Factors

There is only one aggravating factor in his verdict: 'The action of the accused was opposed to the government's program in combating terrorism.'⁹¹ The mitigating factors in Devid's case include: the accused had never been convicted, he was polite, he regretted his actions, he cooperated with the police as an informant and revealed other terrorist groups, and he had responsibility for his wife and children.⁹²

C. Analysis of Judicial Decision

This case is worth scrutiny because the sentence handed down by judges was below the mandatory minimum sentence requirement. The judges held that even though Devid was involved in assisting terrorism offences, the minimum sentence of three years of imprisonment required by the legislation was 'not appropriate' (*dipandang tidak tepat*).⁹³ The judges then emphasised that the 'accused had made a major contribution in counter-terrorism effort by creating safe spaces in the community and preventing a terrorist attack in future.'⁹⁴ Judicial discretion like this potentially creates uncertainty in sentencing. The consequence of this decision is that a minimum of three years of imprisonment, written in Article 13 of the ATL, is not legally binding. However, this is not unusual: judges sometimes impose sentences less than the mandatory minimum in other types of crime. For instance, Missbach and Crouch found that in cases involving people smuggling, judicial approaches and decisions have been inconsistent and seem to assume that judicial independence exempts judges from adhering to minimum sentencing requirements mandated by legislation.⁹⁵

The issue of mandatory minimum sentencing and judicial discretion in criminal sentencing is contentious. On the one hand, mandatory minimum sentencing laws are designed to ensure that certain crimes are punished

⁹¹ District Court of East Jakarta, Decision 1357/PID.SUS/2013/PN.JKT.TIM. 28.

⁹² *Ibid.* 29.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ Missbach and Crouch, above n 14. 20.

severely and consistently, regardless of individual circumstances. On the other hand, there are concerns that mandatory minimums limit judicial discretion and may result in harsh and disproportionate sentences.

One way that judges can address this tension is by punishing below mandatory minimums. In such cases, judges decide that the mandatory minimum sentence is too severe and that a lower sentence is more appropriate given the particular circumstances of the case. This approach can be seen as a way for judges to exercise some level of discretion within the confines of mandatory sentencing laws. However, the ability of judges to deviate from mandatory minimums is not absolute. In some cases, judges may be limited by the law and unable to deviate from the minimum sentence. In other cases, judges may face pressure from prosecutors or the public to impose harsher sentences. Judges may set aside statutory regulations in certain complex cases and apply the "Contra Legem Doctrine." This doctrine allows judges to disregard existing laws and regulations when faced with exceptional circumstances. However, this is a controversial approach, as it essentially allows judges to go against the letter of the law to achieve what they see as a just outcome.

Overall, the tension between mandatory minimum sentencing and judicial discretion is a complex issue that requires careful consideration. While punishing below compulsory minimums can be seen as a way for judges to exercise some discretion, judges must also be aware of the limitations of their authority and the potential consequences of deviating from the law. The Contra Legem Doctrine should also be approached with caution, as it raises questions about the role of judges in interpreting and applying the law.

The Devid Annugrah case also illustrates the limited justifications provided by the judges to establish Devid's intention to commit a terrorist act and his association with extremist groups. The court provided further justification in the verdict stating that 'Devid is proven guilty ... and his action [that he did not inform Police that he buried a 25kg bucket filled with explosive materials] fulfils an element of assisting terrorist act.'⁹⁶ In this case, a terrorist act did not occur, and he was not associated with any extremist group. The

⁹⁶ District Court of East Jakarta, Decision 1357/PID.SUS/2013/PN.JKT.TIM. 29.

only association provided in the legal facts is based on neighbourhood relations between Devid and Ibrahim.

There was also limited evidence to prove that Devid was associated with the extremist group. Judges only briefly mentioned that 'Devid knew Ibrahim because he placed his three goats in Ibrahim's backyard.'⁹⁷ Judges also emphasised that 'Devid knew that the paint bucket was filled with explosive materials, and he was afraid, but he did not report this event to the police.'⁹⁸ They then clarified that 'Devid's action, where he did not report this to police, is categorised as hiding information on terrorism offences and assisting terrorism offences.'⁹⁹

However, to establish the required mental element, judges had to prove that Devid intended to create a widespread atmosphere of terror in society and cause harm/damage to victims or property. Proving intention, in this case, requires further analysis that raises a question: if little was known about Devid's involvement with the extremist group and if there was no evidence to indicate that Devid was involved in any way in supporting Ibrahim and the extremist group in the preparation of the terrorist attack, what was the basis upon which judges determine that Devid's intention fulfilled the mental element? For example, was it that Devid intended to spread an atmosphere of terror in society?

According to some scholars, the mental element of the accused person in a case of terrorism offences must demonstrate that this specific intent is to spread terror among the population.¹⁰⁰ Golder and Williams argue that terrorist acts must be 'political, religious or ideologically motivated violence that causes harm to people or property.'¹⁰¹ Furthermore, Antonio Cassese argues that the motive behind the offence is an element unique to terrorism offences. Terrorism offences must not be caused by a personal end, for

⁹⁷ *Ibid* at 21.

⁹⁸ *Ibid* at 22.

⁹⁹ *Ibid* at 25.

¹⁰⁰ United Nations Office on Drugs and Crime (UNODC), "E4J University Module Series: Counter Terrorism", *United Nations Office on Drugs and Crime (UNODC)*, online: <<https://www.unodc.org/e4j/en/tertiary/counter-terrorism.html>>.

¹⁰¹ Ben Golder & George Williams, "What Is 'Terrorism'? Problems Of Legal Definition" (2004) 27:2 *University of New South Wales Law Journal* at 270-289.

example, revenge or personal hatred,¹⁰² and motive must be based on political, ideological or religious motivations.¹⁰³ This is crucial because it serves as a basis or legal ground to differentiate terrorism offences from general criminal offences such as murder, kidnapping or assault. The verdict of Devid Annugrah did not establish guilt with a specific intent or motive to spread terror in society, nor did he have any intention or motive of religious ideology to support or assist the act. He was intimidated by Ibrahim and thus buried the bucket and did not inform the police. From the above legal reasonings, it seems that judges were unwilling to require a finding of a mental element as a prerequisite in the Devid Annugrah case. Instead, the court focused on the failure to report the crime.

Apart from the issue of the absence of the mental element in Devid's case, more troubling legal reasonings were found in the verdict. In this case, judges introduced a 'preventive principle' emphasising the unique nature of terrorism offences and that terrorism is an organised crime with a substantial threat that requires an exceptional response. The judges wrote that:

The possession of highly explosive materials associated with Badri and his friends, including Rudi, Naim, Ibrahim and others, is arranged by an organised criminal group to create terror in Solo by placing explosive materials.¹⁰⁴ The judges also mentioned in the verdict that despite feeling scared and worried about committing this act, the accused failed to report his actions until he was arrested by the police, based on the legal evidence presented during the trial.¹⁰⁵

The Devid Annugrah case shows that Indonesian courts implicitly recognise the precautionary principle based on 'remote harm' or 'potential harm'.¹⁰⁶

¹⁰² Antonio Cassese, "The Multifaceted Criminal Notion Of Terrorism In International Law" (2006) 4:5 *Journal of International Criminal Justice* at 933.

¹⁰³ Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2008).

¹⁰⁴ District Court of East Jakarta, Decision number 1357/PID.SUS/2013/PN.JKT.TIM. 22.

¹⁰⁵ *Ibid* at 27.

¹⁰⁶ For more discussion on the concept of 'remote harm', see Jeroen Ten Voorde, "Prohibiting Remote Harms: On Endangerment, Citizenship and Control" (2014) 10

Proposals to extend the harm principle in present-day criminal law are rationalised based on the state's duty to protect its citizens and to use whatever means to attain this protection.¹⁰⁷ The KUHP and the ATL do not stipulate the precautionary principle. However, in the elucidation part of the ATL, it states that 'counter-terrorism policy is based on an anticipatory and proactive approach.'¹⁰⁸

A detailed elaboration on the precautionary approach could be found in the academic document in an attempt to amend the ATL. In 2011, the National Law Development Agency of Indonesia (BPHN - *Badan Pembinaan Hukum Nasional*) appointed Romli Atmasasmita, an Indonesian Criminal Law expert, as a team leader for preparing the draft. According to the academic document, traditional principles of criminal law could not be applied to terrorism offences. Therefore, 'the principle of criminalisation should be extended to counter the potential harm'.¹⁰⁹ The academic document mentions:

The war on terrorism could not rely upon the 'conventional criminal law' principle and then apply the principle of '*mens rea*' and '*actus reus*', which means a criminal offence requires a person to intend (mental element) and to cause the specific result (physical element). This traditional principle is based on 'reactive law enforcement' ... and in reality, the 'reactive approach' impedes the counter-terrorism strategy that aims to protect civilians and to

Utrecht Law Review at 163; Shlomit Wallerstein, "Criminalizing Remote Harm And The Case Of Anti-Democratic Activity" (2006) 28 *Cardozo Law Review* at 2697.

¹⁰⁷ Jude McCulloch & Sharon Pickering, "Pre-Crime and Counter-Terrorism" (2009) 49:5 *The British Journal of Criminology* at 628; Phil Palmer, "Dealing With The Exceptional: Pre-Crime Anti-Terrorism Policy And Practice" (2012) 22:4 *Policing and Society* at 519; Genevieve Lennon, "Precautionary Tales: Suspicionless Counter-Terrorism Stop And Search" (2015) 15:1 *Criminology & Criminal Justice* at 44.

¹⁰⁸ The Elucidation of the ATL paragraph 4.

¹⁰⁹ *Analysis and Evaluation of the Anti-Terrorism Law: Law Number 15 Year 2003 / Prepared by team under supervision of Romli Atmasasmita (Analisis dan evaluasi peraturan perundang-undangan tentang pemberantasan tindak pidana terorisme: Undang-Undang Nomor 15 Tahun 2003/disusun oleh tim di bawah pimpinan Romli Atmasasmita)*, (National Law Development Agency of Indonesia Ministry of Law and Human Rights (Badan Pembinaan Hukum Nasional Kementerian Hukum dan Hak Asasi Manusia RI), 2012) at 62.

prevent a terrorist act. Therefore, to effectively prevent terrorism, 'a forward-looking' approach combined with proactive law enforcement is needed.

Moreover, Indonesian President Joko Widodo emphasised that this approach is necessary for countering the exceptional threat to maintaining the 'best interest of the country and society' (*demi kepentingan bangsa dan negara*).¹¹⁰ Indonesia is not the only country criticised for using a preventive approach in terrorism prosecutions. This preventive approach taken by several countries has been recognised as a valid measure in prosecuting terrorism cases,¹¹¹ and this may lead to even more severe and harsh legal measures.¹¹² Such an approach has important legal implications. The conflict between the precautionary principle and the civil rights of the accused is a situation that requires scrutiny, and this decision may set a dangerous sentencing precedent for the prosecution of terrorism offenders.

¹¹⁰ Tempo, "Jokowi Asks to Take Extraordinary Measures in Fighting Terrorism", *Tempo* (22 May 2018), online: <<https://en.tempco.co/read/918662/jokowi-asks-to-take-extraordinary-measures-in-fighting-terrorism>>; Media Indonesia, "Noor Rochmad and Asep N Mulyana (Head and Committee of Indonesian Prosecutor's Association), Pursuing Anti-Terrorism Law as Proactive Law Enforcement (Menjadikan UU Terorisme sebagai Proactive Law Enforcement)", *Media Indonesia* (21 May 2018), online: <<https://mediaindonesia.com/opini/162276/menjadikan-uu-terorisme-sebagai-proactive-law-enforcement>>.

¹¹¹ Gabrielle Appleby and John Williams examined the creep of anti-terror laws into law and order context in the Australian context, see Gabrielle Appleby & John Williams, "The Anti-Terror Creep: Law and Order, the States and the High Court of Australia" in Andrew Lynch, Nicola McGarrity, & George Williams, eds, *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, 2010) at 150. Nicola McGarrity also argued that 'counter-terrorism laws have become a permanent fixture of the legal landscape. Over time, that were once seen as extraordinary laws have become accepted as normal' see Nicola McGarrity & George Williams, "When Extraordinary Measures Become Normal: Pre-emption in Counter-Terrorism and Other Laws" in Nicola McGarrity, Andrew Lynch, & George Williams, eds, *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) at 131. See also George Williams, "A Decade Of Australian Anti-Terror Laws" (2011) 35:3 Melbourne University Law Review at 1136.

¹¹² Rebecca Ananian-Welsh & George Williams, "The New Terrorists: The Normalisation And Spread Of Anti-Terror Laws In Australia" (2014) 38 Melbourne University Law Review at 362.

VIII. THE VIOLATION OF FAIR TRIAL AND DUE PROCESS IN THE CONTEXT OF WAR AND TERROR

The case of Indonesia serves as an example of how the enduring legacies of colonialism and authoritarianism have shaped sentencing practices for terrorism offences. The local religious and cultural dynamics, the centralised state authority, the punitive attitude towards criminals and weaknesses in the judiciary found during colonial and post-colonial eras remain persistent until today. However, in the context of terrorism sentencing, these aspects are reproduced in the name of the 'war on terror' and are seen as necessary to protect national security. As many jurisdictions in the South has a history of colonialism or authoritarianism, likely, similar issues with criminal sentencing are not unique to Indonesia. This article, therefore, emphasises the importance of expanding terrorism sentencing research to the broader international community, particularly in the Global South.

We need to explore the contours and dynamics of the living law and socio-cultural values in society for terrorism sentencing. The findings of this research call for a rethinking of what is meant by local context and local values manifested in criminal sentencing. How do the judges decide which living law and cultural values are most important? To what extent do dominant social attitudes influence sentencing decisions? How do we define dominant social attitudes in a pluralistic society such as Indonesia, which is well-known for its diverse races, religions and ethnicities? While this article offers a sociological explanation to help understand sentencing decisions within the Indonesian context, further research is needed to include sociological theories in understanding terrorism sentencing decisions.

Another finding that must be highlighted is that the judges rely extensively on an academic document (*naskah akademik*) to justify their sentencing decisions. For example, the preventive and precautionary measures found in the legal reasoning of the verdicts can be traced back to the academic document. The academic document also becomes a guidance or legal basis to extend the *actus reus* or criminal act of terrorism offences. This sentencing practice has raised a fundamental question on the judicial role in interpreting the law. The view of judicial interpretation is that judges should look

primarily to the words of the legislation instead of the academic document. Judicial interpretation is necessary, and it is of central importance to the daily task of all judges. However, this thesis shows that judicial interpretation in terrorism offences is still ambiguous and needs to be critically examined in future research.

Under Soeharto's regime, the government's tendency to protect its political interest in the courts compelled the *Mahkamah Agung* to strengthen its control over the lower courts.¹¹³ Under the New Order, the *Mahkamah Agung* functions as a political mechanism for ensuring the authority and legitimacy of the regime.¹¹⁴ Twenty years after the Reformation Era, Assegaf has warned that the *Mahkamah Agung* fails to ensure legal certainty and protection for justice seekers.¹¹⁵ Future research needs to explore the judicial functions of the *Mahkamah Agung* to consider the extent to which its power is not merely as an appellate court but also as an authority to safeguard the political interest of the central government, particularly in terrorism cases.

Terrorism sentencing practices also exemplify a trend in which national security trumps the basic procedural rights of terrorist offenders. Terrorism sentencing practices have paved the way for the central government to exercise a preventive approach which shows the depth of the authority and discretion that the state maintains in terrorism cases.

This finding, in turn, shows that the judges do not work as isolated individuals but rather work together with other actors in the court system, like the police and prosecutors.

More worryingly, recent work has shown that key actors in the court system (such as prosecutors) are not free from allegations that they also safeguard the political interest of the regimes. Although the 1945 Constitution guarantees judicial independence, Afandi warned that 'the militaristic culture within the public prosecution continues ... [and] prevents the public

¹¹³ Sebastiaan Pompe, *supra* note 80 at 207.

¹¹⁴ *Ibid.*

¹¹⁵ Rifqi S Assegaf & Melissa Crouch, "The Supreme Court: Reformasi, Independence, and the Failure to Ensure Legal Certainty" in *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia* (Cambridge: Cambridge University Press, 2019) at 31.

prosecutor from reforming.’¹¹⁶ If this is the case, this situation could endanger judicial independence and judicial impartiality. Therefore, this article recommends that future research critically examine the role of other actors, such as police and prosecutors, in shaping judicial decision-making, particularly in terrorism cases.

All these reasons require us to rethink the generalisability of the findings that may be useful to explain different court settings and jurisdictions. Similar to the Indonesian context, terrorism studies in the Global South cannot be fully understood without their colonial and post-colonial past. There is a need to examine to what extent colonial laws may shape the current sentencing practices in the Global South. A deep understanding of the broader contexts of historical, social and political aspects of post-colonial society is an essential first step. This understanding can significantly contribute to comprehending the impact of criminal sentencing regimes in the Global South. The sharing of theoretical frameworks, experiences and the search for commonalities between the Global South has been instrumental for the possible development of the Southern criminology movement.¹¹⁷

There is an asymmetry of knowledge where criminology has borrowed assumptions from the Global North. This has prevented and silenced the Global South from developing its knowledge and narratives.¹¹⁸ Leon Moosavi highlighted this issue by pointing out that Northern Scholars have been neglecting essential works coming from the Global South,¹¹⁹ such as the case of Indonesia. The present study has shown that the Global South can be a valuable source of analysis and insights with the potential to expand and refine sentencing scholarship and the Southern criminology movement. Therefore, this thesis calls for the recovery of the other silenced voices and

¹¹⁶ Fachrizal Afandi, “The Indonesian Prosecution Service at Work: The Justice System Postman” in Melissa Crouch, ed, *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia* (Cambridge: Cambridge University Press, 2019) at 86.

¹¹⁷ George Radics, “Seeking Commonalities from Across the South” in Pablo Leandro Ciocchini & George Baylon Radics, eds, *Criminal Legalities in the Global South: Cultural Dynamics, Political Tensions, and Institutional Practices* (Abingdon, Oxon; New York, NY: Routledge, 2020).

¹¹⁸ Kerry Carrington, *supra* note 24 at 3-17.

¹¹⁹ Leon Moosavi, *supra* note 26 at 229.

seeks to initiate South-South dialogue on terrorism sentencing practices in which we can learn from each other.

IX. CONCLUSION

Indonesian judicial systems have frequently come under fire for inefficiency, political interference, and corruption. Although there hasn't been any systematic or philosophically grounded study on sentencing patterns in terrorism cases, these claims affect sentences in convictions for terrorist acts. Overall, the analysis of sentences imposed for terrorism-related offences in Indonesia demonstrates that sentencing procedures have significant socio-political aspects and that these contextual elements influence sentencing results. According to the research that has been held, judges have little guidance from the ATL when deciding how long to sentence terrorism convicts to prison. The ATL creates a new sentencing regime for terrorist offences. In contrast, the KUHP outlines the basic sentencing framework, including forms of punishments, the minimum age of responsibility, and variables that may raise or lessen sentence harshness.

Applying a Southern criminology perspective can help us comprehend the ongoing effects of colonialism and state repression, affecting how terrorist offences are prosecuted legally and how sentences are handed out. This article also serves as a reminder to readers that the narrative surrounding the "war on terror" minimises the historical and cultural context of terrorist violence and homogenises it. Other Southern researchers would be encouraged to engage in these efforts and broaden our understanding of sentencing in the global South. These studies, therefore, offer a voice to the criminal justice experiences of the developing world and open the door to debate and mutual learning on sentencing between the North and South.

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CONFLICT OF INTEREST

The authors declare no competing interests.

ETHICS APPROVAL

The corresponding author states that no human participants or animals are involved in this research.

INFORMED CONSENT

On behalf of all authors, the corresponding author states that no human participants are involved in this research, therefore, informed consent is not required by them.

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