

PERSPECTIVE

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Spectacle of the Scaffold? The Politics of Death Penalty in Indonesia

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EXECUTIVE SUMMARY

- As part of what President Joko Widodo has coined the “war against drugs”, Indonesia has over two occasions this year executed a total of 14 drug convicts – most of them foreign nationals. The authorities have indicated that there will be a third group of executions, although the date for that has not been decided.
- There has been a massive international outcry against Indonesia’s death penalty, especially from the countries whose nationals have stood on death-row. This has in some cases culminated in the recalling of ambassadors.
- Meanwhile, a survey shows that the majority of Indonesians (86%) support the death penalty, and that the minority in opposition to it do so based on human-rights considerations.
- Most observers debate the presumed deterrent effect of the death penalty for drug offences, and little has been said about the political function of capital punishment in Indonesia. Given the high level of support for the death penalty, the intense media coverage on the subject may have been used to politically consolidate and boost the government’s waning popularity in light of problems in other pressing issues, such as corruption.



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INTRODUCTION

On 22 June 2015, an Indonesian administrative court rejected French national Serge Atlaoui's final appeal against the death sentence, making him the latest foreigner to face execution for drug trafficking.¹ Atlaoui had been granted last-minute reprieve and was left out of last April's execution of 8 convicts, to allow him to appeal against a rejection of clemency by Indonesian President Joko Widodo.²

Earlier in June in an open letter published by *The Lancet* (a leading UK-based medical journal), prominent Indonesian academics and experts called on the government to rethink its current punitive policy on drug-related offences, voicing serious concerns that unreliable data had been used to legitimize the policy.³ According to them, the methods of the studies leading to such data were not publicly inaccessible and an unorthodox method had been used to indirectly estimate drug-related mortality. In various media articles prior to the second group of executions of drug convicts, many of whom were foreign nationals, President Joko Widodo had repeatedly cited such data gained from the National Narcotics Board (BNN), which estimated that there were as many as 50 deaths per day due to drug-related causes.⁴ These data became one of the main arguments for the recent executions.

Meanwhile, a survey found that 84.6% of Indonesians support the death penalty for drug offences; 60.8% citing that drugs "destroy the young generation" and 23.7% that the punishment has a deterrent effect.⁵ The minority who oppose the death penalty do so based on human-rights considerations (28.4%) and maintain that there are alternative ways for punishing the offenders (36.2%).⁶ At first glance, this reflects the worldwide debate on the deterrent effect of the death penalty.⁷ However, in the Indonesian case, 86.3% of death penalty supporters maintain that this punishment has to be conducted despite the threat from other countries to limit diplomatic and trade relations.⁸ This indicates that the ensuing media reports has made many in Indonesia to consider the issue of death penalty mainly as part of the country's struggle to fight off "foreign pressure".

¹ "French convict on Indonesian death row loses clemency appeal"

<http://www.reuters.com/article/2015/06/22/us-indonesia-executions-france-idUSKBN0P20A220150622> (accessed 26 June 2015).

² "Indonesia rejects French death row convict Serge Atlaoui clemency"

<http://www.bbc.co.uk/news/world-asia-33220239> (accessed 26 June 2015).

³ "Evidence-informed response to illicit drugs in Indonesia", *The Lancet* 385, June 6 (2015). 2249-2250,

[http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(15\)61058-3.pdf](http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(15)61058-3.pdf) (accessed 10 June 2015).

⁴ "Jokowi: Setiap hari 50 orang mati karena narkoba"

<http://nasional.tempo.co/read/news/2015/02/04/078639866/Jokowi-Setiap-Hari-50-Orang-Mati-karena-Narkoba> (accessed 6 June 2015).

⁵ "Survei: Mayoritas masyarakat dukung Jokowi eksekusi mati tahap II"

<http://news.liputan6.com/read/2221660/survei-mayoritas-masyarakat-dukung-jokowi-eksekusi-mati-tahap-ii> (accessed 6 June 2015).

⁶ *Ibid.*

⁷ See for example, Carol S. Steiker, "No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty." *Stanford Law Review* (2005): 751-789. Paolo G. Carozza, "My Friend is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights", *Scholarly Works*. Paper 536 (2003).

http://scholarship.law.nd.edu/law_faculty_scholarship/536; James H. Wymann, "Vengeance Is Whose: The Death Penalty and Cultural Relativism in International Law." *Journal of Transnational Law & Policy* 6 (1996): 543.

⁸ Survei: Mayoritas masyarakat dukung Jokowi eksekusi mati tahap II.

<http://news.liputan6.com/read/2221660/survei-mayoritas-masyarakat-dukung-jokowi-eksekusi-mati-tahap-ii> (accessed 6 June 2015).

Notably, six months into his presidency, the popularity of President Jokowi has decreased to around 44% due to various policy problems.⁹ Amid the international protests and the domestic polemics on whether or not the death penalty is a relevant penal instrument for drug-related offences, little has been said about the political function of capital punishment for a government that is facing multiple policy problems. The article does not purport to assess whether or not death penalty is necessary, yet observe how this punishment, or rather, the spectacle of it, may be used to politically consolidate and boost the government's waning popularity at home.

RECENT EXECUTIONS OF DRUG CONVICTS

On 29 April 2015, amid massive international outcry,¹⁰ the Indonesian government executed eight convicted drug smugglers at a high-security prison in West Java. This was the second in the series of group executions of drug-related convicts this year: the first one was done on 18 January, which resulted in the Netherlands and Brazil recalling their ambassadors. The second execution unsurprisingly harvested a much bigger uproar, partly due to the prolonged legal process and the massive polemics in the media. Among the eight convicts who were executed in April were two Australians, Andrew Chan and Myuran Sukumaran, ringleaders of the so-called "Bali Nine" drug-smugglers who drew significant public attention due to the series of protests launched by the Australian government. As lawyers prepared their last clemency pleas in the beginning of the year, Australian Prime Minister Tony Abbot's controversial statement reminding Indonesia of Australia's 2004 tsunami aid of A\$1bn (US\$0.78bn) irritated many Indonesians. The President himself repeatedly maintained that Indonesia has sovereignty to implement its law, and that he would not grant clemency to death-row drug convicts.

Meanwhile, Mary Jane Veloso, a young Filipina who had also been on death-row, drew media attention due to the complications in her case.¹¹ The fact that she was a poor migrant-worker and a possible victim of human trafficking struck a chord with Indonesians, who are familiar with horror stories of the mistreatment of Indonesian migrant workers abroad, many of whom are on death-row in Saudi Arabia for killing their employers in self-defence.¹² Veloso managed to get a last-minute temporary reprieve upon the request by the Philippines' government who was working on the legal case against her alleged trafficker currently in custody in Manila.

⁹"6 bulan pemerintahan, tingkat kepuasan publik atas Jokowi-JK masih rendah"

<http://nasional.kompas.com/read/2015/04/19/14323621/6.Bulan.Pemerintahan.Tingkat.Kepuasan.Publik.atas.Jokowi-JK.Masih.Rendah> (accessed 3 July 2015).

¹⁰ UN Secretary Ban Ki Moon was among those who expressed concern on Indonesia's death sentences. "U.N. chief appeals to Indonesia to stop death row executions." <http://www.reuters.com/article/2015/02/14/us-indonesia-executions-un-idUSKBN0LH2IT20150214> (accessed 19 July 2015).

¹¹ "Who is the woman behind Filipina Mary Jane Veloso's last minute reprieve from execution?" <http://www.straitstimes.com/news/asia/south-east-asia/story/who-the-woman-behind-filipina-mary-jane-velosos-last-minute-reprieve> (accessed 30 May 2015).

¹² "Mary Jane Veloso: Why was she spared in the Indonesian executions?" <http://www.theguardian.com/world/2015/apr/30/indonesian-executions-why-was-mary-jane-veloso-spared> (accessed 10 June 2015).

THE DEATH PENALTY, THE MEDIA AND POLITICS

Scholars argue that public support for the death penalty is based on the assumption that it is a relevant punishment (as a retribution and/or for its deterrent effect) or as a symbolic attitude.¹³

In general, a retentionist (pro death penalty) policy is made legitimate by the assumption of deterrence. One of the most prominent retentionist countries is the US, where there have been 1,411 executions since 1976.¹⁴ The number of sentences has decreased significantly, from 279 in 1999 to 73 in 2014, which coincided with a drop in the national murder rate, and which subsequently led many to believe that capital punishment did not deter murderers.¹⁵ However, others consider this argument to be faulty—the number of death sentences may be currently decreasing, but that does not mean that potential murders have not been deterred by past implementation of that penalty.¹⁶

Studies in the US also show that citizens' support of the death penalty is more a reflection of their basic values (religion, political ideology, etc.) and less of their specific concern about crime.¹⁷ Consequently, people do not change their views about the death penalty even when they receive new information that contradict those views.

In penal history, the communicative quality of corporal and capital punishment was used to serve a political function.¹⁸ The public display of punishment was designed for its deterrent effect. Foucault referred to this as the "spectacle of the scaffold":¹⁹ while the offender may seem to be the target of the punishment, in reality, the main objective of the execution was the effect on the public. The act of public punishment was an opportunity for the state to display its power and emphasize the asymmetry between the individual and the State. Similarly, according to Garland, "Penal law [...] reinforces these claims by coercive sanctions as well as symbolic displays."²⁰ In this manner, the purpose of simple deterrence from repeating the offense became the deterrence from challenging the authority of the State. In modern times, although executions are no longer done in public, extensive media coverage can produce societal effects similar to those of public punishments in the past.

While both deterrence and symbolic motives are relevant in the Indonesian case, the role of media exposure is crucial in distributing the "message" of death sentence, and in the making of public opinion on capital punishment. Government and parliament leaders reportedly cited

¹³ Tom R. Tyler, and Renee Weber. "Support for the death penalty; instrumental response to crime, or symbolic attitude?" in *Law and Society Review* (1982): 21-45.

¹⁴ <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>. Lethal injection is the most common method, and is used almost exclusively for aggravated murder. The US had a four-year moratorium in 1972-1976, following the death sentence overturn in the case of Furman vs Georgia. The offender Furman was given death sentence due to the murder of the owner of the house that he robbed. However, the murder was later proven to be accidental.

¹⁵ Thom Brooks, *Punishment*, Routledge, 2012, pp.163-164;

<http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>

¹⁶ Brooks, 2012, pp.163-164.

¹⁷ Tyler and Weber, 1982.

¹⁸ Druzin, Bryan H. "The Theatre of Punishment: Case Studies in the Political Function of Corporal and Capital Punishment" in *Washington University Global Studies Law Review* 14 (2015).

¹⁹ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage, 1977) pp.32-72.

²⁰ David Garland, *Punishment and Modern Society* (Chicago, IL: University of Chicago Press, 1990). P.123.

data used by the President to show support for the death penalty.²¹ Moreover, the support sought, and granted him, by the President on this issue from Indonesia's largest Muslim organizations, the NU and Muhammadiyah, also legitimized the death penalty from a religious perspective.²² It is claimed that it was as a result of this, that as many as 86% of the aforementioned survey respondents expressed their support for capital punishment.²³

BRIEF HISTORY ON THE DEATH PENALTY IN INDONESIA

Indonesia inherited the death penalty from its former colonial master, the Netherlands.²⁴ It was abolished in the Netherlands in 1870 yet it has continued to be practiced in the colonies.

Currently in Indonesia, the following crime examples may invoke the death penalty as a discretionary punishment: premeditated murder,²⁵ terrorism,²⁶ drug-trafficking,²⁷ some acts of corruption,²⁸ treason,²⁹ espionage,³⁰ some military offences,³¹ war crimes (crimes against humanity and genocide),³² and usage of chemical weapons.³³ In practice, however, the crimes for which death sentences were passed had been limited to murder, terrorism, drug-trafficking and treason (subversion) under President Soekarno (1945-1967) and Soeharto (1967-1998).³⁴ During the Soekarno era, three executions were due to the attempted assassination of the President, while during the Soeharto era, in 1975-1998, there were 41 executions: 22 due to the alleged communist coup, 6 due to Islamic terrorism, and only 1 related to drugs.³⁵ In the reform era, in 1998-2013, there were 27 executions: 17 due to murder, 3 due to the 2002 Bali bombing and 7 related to drugs.³⁶ In comparison with other retentionist countries, such as the

²¹ "Indonesia darurat narkoba, ketua MPR dukung hukuman mati" <http://www.tribunnews.com/nasional/2015/04/28/indonesia-darurat-narkoba-ketua-mpr-dukung-hukuman-mati> (accessed 20 July 2015); "Menhan dukung eksekusi mati gembong narkoba" <http://www.republika.co.id/berita/nasional/hukum/15/03/19/nlfqpb-menhan-dukung-eksekusi-mati-gembong-narkoba> (accessed 20 July 2015).

²² "NU dan Muhammadiyah dukung hukuman mati untuk pengedar narkoba" <http://www.aktualita.co/nu-dan-muhammadiyah-dukung-hukuman-mati-untuk-pengedar-narkoba/1533/> (accessed 1 July 2015).

²³ "Survei: 86% rakyat dukung hukuman mati pengedar narkoba" <http://www.beritasatu.com/nasional/268928-survei-86-rakyat-dukung-hukuman-mati-pengedar-narkoba.html> (accessed 6 June 2015).

²⁴ See Robert Cribb, "Legal Pluralism and Criminal Law in the Dutch Colonial Order." *Indonesia* (2010): 47-66.

²⁵ Penal Code of Indonesia, art.340, 1915, as amended through to February 27, 1982.

²⁶ Penal Code of Indonesia, art.438-441, 444, 479, 1915, as amended through to February 27, 1982.

²⁷ Indonesia Law on Psychotropic Substances, Law. No.5/1997, Indonesia Narcotics Law; Law No. 22/1997, articles 80-82.

²⁸ Indonesia Law on the Eradication of Corruption, Law. No.31/1999 as amended by Law No.20/2001 article 2(2).

²⁹ Penal Code of Indonesia articles 104, 111(2), 124(3), 140(3), 1915, as amended through to February 27, 1982.

³⁰ Law No. 31/PNPS/1964 articles 22, 23. Cited in Death Penalty Worldwide: Indonesia, Cornell University. <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Indonesia> (accessed 6 June 2015).

³¹ Indonesian Military Penal Code. Cited in Death Penalty Worldwide: Indonesia.

³² Indonesian Law on Human Rights Courts Law No.26/2000 articles 8, 9, 37, 38,

³³ Law No. 9/2008 articles 14, 27.

³⁴ Daniel Pascoe "Three Coming Legal Challenges to Indonesia's Death Penalty Regime". *Indonesian Journal of International & Comparative Law* 2 (2015): 239-280.

³⁵ Daniel Pascoe, 2015.

³⁶ Pascoe, 2015.

United States, Indonesia's use of the death penalty is considerably less: in 2011 alone, the US carried out 43 executions³⁷ in comparison with Indonesia's 27 executions in 1998-2013.

Contrary to the general perception, Indonesia does not have a mandatory death penalty, and reports and legislations indicate that criminal laws permit judicial discretion.³⁸ In relation to drug offences, there have been two cases in which a death penalty sentence was commuted to a term of imprisonment. The first case involved Hanky Gunawan, an Indonesian national whose death sentence in 2006 was commuted to 15 years' imprisonment after the Supreme Court ruled that the death sentence was unconstitutional because the Indonesian Constitution provides an absolute right to life,³⁹ as do Article 3 of the Universal Declaration of Human Rights ("Everyone has the right to life...") and Indonesia's Human Rights Law.⁴⁰ The Supreme Court also commuted the death sentence of Nigerian national Hillary Chimezie to 12 years' imprisonment on the same grounds.⁴¹

These cases show that the death penalty has been non-mandatory. However, as a civil law country, Indonesia is not bound to a system of precedent or sentencing consistency.⁴² Although Indonesia ratified the International Covenant on Civil and Political Rights (ICCPR) in 2006, the Constitutional Court in 2007 drew on article 6(2) of the ICCPR which allows death penalty for "the most serious crime", and argued that narcotic offences fall under this category because they affected "the economic, cultural and political foundations of society and carried "danger of incalculable gravity."⁴³ A similar claim was made by the President to legitimize the current war on drugs.

THE POLITICAL FUNCTION OF DEATH PENALTY IN INDONESIA

To gain a "deterrent effect", the death penalty relies on the exposure of the media. However, in the Indonesian case, the aggravated media exposure may serve more (political) functions than mere deterrence:

Firstly, it may serve as a means to show coherence in Indonesia's weakening rule of law. The issue of the death penalty was heightened amidst other serious policy problems in Indonesia, for example, the inconsistency of the government's stance against corruption. The demonstration of the strong position against the death penalty, therefore, may have been to compensate for the weakness of the rule of law in other policy areas.

³⁷ Dave McRae. "A Key Domino? Indonesia's Death Penalty Politics." *Lowy Institute for International Policy* (2012).

³⁸ Death Penalty Worldwide: Indonesia.

³⁹ Indonesian 1945 Constitution article 28A states that "Each person has the right to live and the right to defend his life and existence.

⁴⁰ Indonesia's Human Rights Law, Law No. 9/1999 article 9 stated that:

- (1) Everyone has the right to life, to sustain life, and to improve his or her standard of living.
- (2) Everyone has the right to peace, happiness, and well-being.
- (3) Everyone has the right to an adequate and healthy environment.

⁴¹ Simon Butt, "Asia-pacific: Judicial responses to the death penalty in Indonesia." *Alternative Law Journal* 39.2 (2014): 134-135.

⁴² In May 2015, a Yogyakarta court gave a life-sentence to a female drug-convict (instead of the death-sentence requested by the prosecution) due to the consideration that she was pregnant. "Kurir sabu-sabu lolos dari hukuman mati karena hamil" <http://www.jpnn.com/read/2015/05/30/306793/Kurir-Sabu-sabu-Lolos-dari-Hukuman-Mati-karena-Hamil> (accessed 27 July 2015).

⁴³ Simon Butt, 2014.

Secondly, it may be aimed at showing Indonesia's political strength to Indonesians. The extensive media coverage on death-row convicts who were mostly foreign-nationals, as well as government's statements preceding the execution seemed to lead the public to think of drugs as a problem originated "outside" of Indonesia and brought into the country by "foreigners", in the process portraying Indonesian youths as victims of foreign perpetrators.⁴⁴ Such a portrayal of the death penalty as a struggle against foreign influence seemed to have helped in consolidating support for capital punishment among Indonesians. The usage of the aforementioned statistics, as well as statements like "war against drugs"⁴⁵ have emphasized the premise of "foreign negative influence", a strategy that never fails to entice support from Indonesians. The presumed existence of "foreign" pressure was indicated in, for example, the President's statement on "the sovereignty of our law"⁴⁶, and the statement of the Home Affairs Minister that the UN and foreign governments would not be able to stop the execution.⁴⁷ In addition, media coverage of the President's seeking guidance from the largest Muslim's organizations further legitimized the death penalty based on Indonesian religious and societal perspectives.⁴⁸ Less exposed to media attention was the domestic pressure against the death penalty which came mostly from Indonesian human rights NGOs such as KontraS and the Coalition Against Death Penalty (consisting of 11 human rights organizations).⁴⁹

In the Indonesian case, death penalty may have become a means to demonstrate state power, while the legal aspect of death penalty itself, including the lack of clear categorization of different levels of accountability and the non-mandatory nature of the punishment – which had led to the commutation of punishment in several cases – was given much less attention. In the heightened media coverage, the death penalty may have become a "spectacle" that diverts the public attention from other crucially aggravated issues such as policy problems and corruption, and portrays an image of a coherent legal sovereignty at a time when the rule of law is in fact weakening.

⁴⁴"Jokowi dengan suara meninggi: Tulis! 18 ribu anak muda Indonesia meninggal karena narkoba" <http://m.tribunnews.com/nasional/2015/04/27/jokowi-dengan-suara-meninggi-tulis-18-ribu-anak-muda-indonesia-meninggal-karena-narkoba> (accessed 21 July 2015); "Hukuman mati, presiden diminta tidak takut intervensi asing" http://rri.co.id/post/berita/160868/nasional/hukuman_mati_presiden_diminta_tidak_takut_intervensi_asing.html (accessed 21 July 2015).

⁴⁵"Presiden nyatakan perang terhadap narkoba" <http://www.antaraneews.com/berita/503644/presiden-nyatakan-perang-terhadap-narkoba>; "Jokowi tegaskan perang terhadap narkoba" <http://nasional.kontan.co.id/news/jokowi-tegaskan-perang-terhadap-narkoba> (accessed 1 July 2015).

⁴⁶"Eksekusi mati gembong narkoba, Jokowi tak peduli tekanan internasional" <http://www.beritasatu.com/nasional/256505-eksekusi-mati-gembong-narkoba-jokowi-tak-peduli-tekanan-internasional.html> (accessed 1 July 2015).

⁴⁷"Mendagri tegaskan tekanan asing tidak pengaruhi eksekusi mati" <http://www.antaraneews.com/berita/482904/mendagri-tegaskan-tekanan-asing-tidak-pengaruhi-eksekusi-mati> (accessed 1 July 2015).

⁴⁸"NU dan Muhammadiyah dukung hukuman mati untuk pengedar narkoba" <http://www.aktualita.co/nu-dan-muhammadiyah-dukung-hukuman-mati-untuk-pengedar-narkoba/1533/> (accessed 1 July 2015).

⁴⁹"Koalisi masyarakat sipil anti hukuman mati desak Presiden hentikan rencana eksekusi 10 terpidana mati" <http://icjr.or.id/koalisi-masyarakat-sipil-anti-hukuman-mati-desak-presiden-hentikan-rencana-eksekusi-10-terpidana-mati/>

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