

# CAPITAL PUNISHMENT FOR DRUGS TRAFFICKING IN SOUTHEAST ASIA: A VIOLATION OF HUMAN RIGHTS LAW?

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## Abstract

International law does not specifically prohibit states imposition of capital punishment, but its restriction is arranged by Article 6(2) of the International Covenant on Civil and Political Rights. The article specifically states that “[...] death sentence may be imposed only for the most serious crimes by the law in force.” According to a report produced by Harm Reduction International under a grant from the European Commission, from 2000 onwards more states have revoked capital punishment for all crimes, and others have eradicated the sentence as a possible punishment for drugs. This is partly because there is a rising argument that capital punishment for drugs is a violation of international human rights law. Whereas abolitionist norms have become a global trend, the death penalty, especially on drugs trafficking case, is still practiced in Southeast Asia nations: Indonesia, Singapore, Malaysia, Vietnam and Philippine. The paper challenges constructivist beliefs that international norms wield over state’s policy by taking a closer look at the validity of death penalty for drugs traffickers.

*Keywords: death penalty, drugs, trafficking, international law, Southeast Asia*

## Introduction

While within these past few years most European and Central European states have nullified capital punishment from their laws, capital punishment still can be found in Asians and Middle Eastern states law. Death sanction in drugs law

is still practiced by Southeast Asian countries, especially ASEAN largest member states. Indonesia, Singapore, Malaysia, and Philippine often make international headlines for their tough stance against drugs traffickers. According to a 2012 report by Harm Reduction International, there are 33 countries with capital drugs law (Gallahue, Gunawan, Rahman, El Mufti, U Din, & Felten, 2012).

Even though the International Covenant on Civil and Political Rights, or any other UN Bill of Rights, does not prohibit the imposition of capital punishment, it arranged numerous restrictions on the enforcement (The Death Penalty Under International Law: A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty, 2008). Similarly, the international customary law does not say that capital punishment is unconstitutional, yet the worldwide trend is moving towards its retraction.

The ICCPR Article 6(2) states that “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes [...]” This underlines that the enforcement of capital punishment should be highly selective, that capital punishment must only be carried out under ‘strict condition.’

That capital punishment should only be applied to “the most serious crimes” was endorsed by the UN General Assembly’s 1984 ECOSOC resolution which maintains nine safeguards on death penalty including its limitation to “lethal or other extremely grave consequences.”

In states with the retention policy, drug convicts compose the majority of those who are sentenced to die. According to a report (Gallahue, 2011), every year there are hundreds of people executed for a drug-related offense. This number does not include those states that keep their death sentence figures a secret.

Concerns over international standards of adequate trial process, as in the case of Yemen 2009 Specialised Criminal Courts and Egypt May 2010 emergency law, drew the attention of UN Human Rights Committee and the UN Working Group on Arbitrary Detention. Both bodies have denounced these tribunals for ‘failure to meet the provisions of fair trials.’ Issues over the standard of the judicial system have been found in countries with capital drugs laws.

According to 2007 Harm Reduction International report, concerns over poor trial standards have raised against China, Thailand, Indonesia, Saudi Arabia, Sudan, Egypt, Syria, North Korea, Iraq, Myanmar and Cuba. Again in 2015, Harm Reduction International produced a report Death Penalty for Drug

Offences: Global Overview 2015 stating that as of 2015, there are 900 people on death row for drugs in Indonesia, Malaysia, Singapore and Vietnam with hundreds similar cases can also be found in China, Iran and Pakistan (Gallahue & Lanes, October 2015).

The paper will look into the claim that death sentence for drugs offenses is a violation of international law by using constructivism as a theoretical framework. That there are 33 countries prescribing to capital drug laws means that the opposite of constructivists claim, international norms do not always influence states policy. Especially in negative cases such as capital punishment (Thornley, 2011).

Often viewed as a continuation of politics, International Law offers a framework and vocabulary for the conducts of politics. Different from the realists and institutionalists that tend to think the law as if all laws were modeled on criminal law, constructivists view international law as modeled on a private law conception. They not only see international law as modeled on a private law conception; but also about facilitating behavior (Klabbers, 2013, p. 16).

In 'National Interests in International Society,' Finnemore (1996, p. 218) addresses the issues of 'states identities and interests' with focus on norms of international society. He argues that states' identity and interests are defined by the norms of behavior embedded in international society. The norms of international society are transmitted to states through international organisations. They shape national policies by 'instructing' states what their interests should be. Finnemore claims that international norms promoted by international organisations can decisively influence national guidelines by pushing states to adopt these norms in their national policies (p.219).

The paper thereby addresses capital drugs law in Southeast Asia by using constructivism framework on these following questions: does capital punishment for drugs trafficking a violation of international human rights law? Then why Southeast Asian states, on the contrary to the rising trend of abolitionist, retaining their capital drugs law?

### **"The Most Serious Crimes" Definition & Limitation**

The international law stipulated that capital punishment should be limited only to "the most serious crimes." There is no clear definition nor agreement on the term. The Economic and Social Council in 1984 announced the Safeguards Guaranteeing the Protection of the Rights of Those Facing the

Death Penalty, a non-legally binding standard that suggests “the most serious crimes should not go beyond intentional crimes with lethal or other extreme grave consequences.” That it was endorsed by the UN General Assembly suggests a strong international support on the procedural standard it proposed. Likewise, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions established that capital punishment should be dismissed for “economic crimes, drug-related offences, victimless offences, and actions relating to moral values including adultery, prostitution and sexual orientation” (2008, p. 4).

However, because many countries rejected this interpretation, it cannot be noted as universally accepted. For instance, most Islamic countries place adultery and apostasy within the category of “the most serious crimes.” Western states, on the other hand, regard political and economic crimes seriously. But these different views are not specified at the international level. Human Rights Committee has arranged that the “imposition of the death penalty for offences which cannot be characterised as the most serious, including apostasy, committing a homosexual act, illicit sex, embezzlement by officials, and theft by force, is incompatible with Article 7 of the Covenant”.

Even though the Committee has interpreted the ICCPR persuasively, it is again, a non-binding standardisation. However, it does imply that the imposition of capital punishment can only be carried as an ‘exceptional measure under strict conditions’ (2008, p. 6)

Numerous methods of execution, for instance, gas chamber, stoning and other forms of public execution, have been found to be incompatible with human dignity or unacceptable to international law standard.

The use of the electric chair and lethal injection in the United States have also been debated since it is considered to be extremely painful, with the later one is continue to be legal at the international stage.

The blurring line between “inhuman,” “cruel,” “torture” and “degrading treatment” have stipulated argument that capital punishment is identical to torture, especially considered the extreme mental impact it gives to a person that already finds his life under strict government’s watch (2008, p. 6). Moreover, the living conditions found on death convicts worldwide: solitary confinement, lack of food and nutrition, extreme temperatures, and lack of time outside of cells, may themselves constitute violations of human rights (Gallahue, 2011).

The definition of torture according to Article 1 of the Convention against Torture is as follow: “any act by which severe pain or suffering,

whether physical or mental, is intentionally inflicted on a person for such purposes as [...] punishing him for an act he [...] has committed.” The comparison between torture and death sentence draw attention to the logic of international law. Since threatening to kill a prisoner is seen illegal but the sentencing and execution of a prisoner may be lawful (Hanowsky & Newman, 2010, p. 16).

The United Nations Office on Drugs and Crime has been actively calling the UN member states to follow the international standards concerning prohibition of the death penalty for drug-related crimes. Their argument is based on the view that capital drug laws violate international law (Gallahue & Lines, 2015, p. 9).

### **Unfair Victimisation: Singapore’s Case**

States retaining capital punishment for drug offenses often use “protecting the nation from the potential effects of drugs” as a reason to justify their laws. However, those who are sentenced to die are hardly major players in the drug cartel. Most of them are poor and vulnerable people, some of them accidentally found themselves being set up by trafficking gangs.

As in the case of Nigerian, Iwuchukwu Amara Tochi, a young man who left his country to pursue a career as a football player. When he was stranded without enough money to get to a team try-out in Dubai, a man that he met while living in Pakistan offered him a 200 US Dollar money to deliver a package of medicine to Singapore. After his arrival at the Changi airport, Tochi immediately got arrested. He claimed that he did not know that there were 25.6 ounces of heroin in the package given to him (Gallahue, 2011, p. 19).

A summary submitted by the United Nations Special Rapporteur on extrajudicial observes that the trial judge seems to have believed that Tochi could have been unaware that he was carrying heroin, saying that, “There was no direct evidence that he knew the capsules contained diamorphine, or that he had found that out on his own”. But the judge observation did not save him apart pleas from UN Human Rights monitors and the Nigerian President, Olesgun Obasanjo. The Singapore government executed in January 2007, two years after the arrest (p.19).

Singaporean authorities insisted that capital drug laws are necessary to remind others of what is at stake from smuggling drugs to Singapore. Answering to a question about Tochi, who had been sentenced at just 21 years of age, Singapore Law Minister stated, “If he escapes the death penalty, drug

barons will think the signal is that young and vulnerable traffickers will be spared and can be used as drug mules.”

The Singapore case serves as evidence that capital punishment within the context of a ‘draconian drug laws’ would be a pillar of simplification. Capital drug laws based on the generalisation that “all people are evil” while the government keeps stating that “it is a state’s sovereign right to defend its citizens from lethal threats such as drugs.”

### **Disproportionality Case**

A report by Human Rights Programme of Harm Reduction International in 2007 found there was a discrepancy on the application of capital drug laws. Non-national often compose a majority of death convicts. This puts into attention the ‘discriminatory law enforcement practices and sentence,’ including ‘failures to honor due process norms and provide access to consular assistance.’

The 2015 executions against drug convicts in Indonesia underlined these arguments. The first round of execution was done in January, in which six drugs convicts (one Dutch, one Brazilian, one Vietnamese, one Malawian, and one Nigerian) were executed. Three months later in April 2015, eight men mostly foreign nationals (two Australians, one Brazilian, one Indonesian, and Nigerians) were ordered to face the firing squad for drugs trafficking.

The second round execution of Andrew Chan and Sukumaran perhaps is the case that has drawn the most of media attention in 2015. The duo was arrested in Bali Ngurah Rai Airport for trafficking 8.3 kg of heroin with seven other Bali Nine members. Chan and Sukumaran later convicted to death sentence on September 2006 (Louys & Giorgetta, 2016, p. 6)

Chan and Sukumaran filed for appeals to have their death sentence reduced to life imprisonment. Indonesian Supreme Court rejected their clemency. Then in January 2015, their final plea for clemency was rejected by Indonesian president, Jokowi, and an execution taken place three days after the announcement.

A report from the Commission for Missing Persons and Victims of Violence and Community Legal Aid Institute identified irregularities in the legal process of seven death-sentence cases in Indonesia. For instance, the absence of an independent interpreter for convicted foreigners during the legal process, a lack of competent legal representatives and court corruption.

Another issue arises regarding the imposition of death sentence to drugs convicts is the execution procedures. The law on execution procedures classifies that prisoners cannot be executed within 72 hours after they receive notification. Fourteen death-row convicts from the latest round of executions in Indonesia received their notification on July 26 around 3 pm, the execution then proceeded the next day. Ignoring that at the earliest execution could only be done on 29 July. Several of them facing the firing squad in July 2016 claimed that they had been convicted based on evidence from confessions obtained through torture (Louys & Giorgetta, 2016, p. 7)

It should be noted that previously in 2010, during Chan and Sukumaran trial, a human rights scholar Professor William Schabas submitted to the court that drug offenses do not meet the standard of "the most serious crimes," thus a violation of international law. Indonesia is a signatory of International Covenant of Civil and Political Rights and should have been obeyed the treaty it made. The court rejected this appeal (2016, p. 8)

#### Death Row Phenomenon, a Violations of Human Rights Law?

Extreme delays in the imposition of a death sentence can be found in many death row cases in Southeast Asia, for instance, the execution of Bali Nine ringleaders has taken place nine years after an Indonesian court sentenced them to death in 2006. The length of delay between the pronouncement of death and the actual execution may cause emotional distress to prisoners on death row, "the death row phenomenon."

The "death row phenomenon" is a combination of circumstances found on death row that produce physical deterioration and mental trauma in prisoners under those sentences, for instance: fluctuating moods, depression, confusion, an overwhelming sense of fear and helplessness, as the result from anxiously awaiting one's own execution in a tiny cell without nothing much to do (Hanowsky & Newman, 2010).

The allegation that death sentence is a cruel and inhuman punishment appear in the period of delay that could lead to the death convicts' mental deterioration which is called "death row phenomenon." In his article on "the death row phenomenon," Hudson (2000) claims *Soering vs. the United Kingdom and Germany* has set the standard for other courts to follow.

Jens Soering, the son of a German diplomat, was accused of stabbing his then-girlfriend parents Elizabeth Hayson to death. He and Hayson were arrested in London six months after the murder. Soering contested his extradition because under Virginia's appeal system, the state where he grew up and conducting the crime; he would be found guilty and sentenced to

death. After careful examination, the European Commission and Court of Human Rights decided that Soering extradition to the United States would be a violation of Article 3.

Hudson (2000) points out that in countries with capital punishment, inmates usually file for appeals to numerous tribunals and this cause a long pending before the execution finally taking place. For instance, it normally takes more than ten years for states to execute death convicts. He asks us to imagine the transformation that the inmates will go through, from human being to “caged animals” with nothing to do except to contemplate the upcoming execution date. The situation could potentially lead to mental deterioration. Hudson, therefore, claims that “a state allowing such a delay may be in a violation of human rights law prohibiting cruel punishment” (p. 836).

He raises the question, “Who should be considered at fault for the delay when the prisoner is pursuing reasonable appeals?” Hudson argues that basic human instinct to survive will lead the inmates to cling to the slimmest hope of life, enduring dehumanising conditions for years, rather than lay down their life to execution. “What is more make sense,” states Hudson, “Is to place fault on the system which allows the delays. This will be more reasonable because the system can change because human rights law demands a careful review of a date sentence”.

Lengthy delays in the imposition of death sentence may constitute violations of Article 6 (the right to life), Article 7 (prohibition against torture or cruel, inhuman and degrading treatment or punishment) and Article 10 (right to humane treatment when deprived of liberty) of the ICCPR (Hanowsky & Newman, 2010, p. 19)

### **Analysis: Human Rights and Abolitionist Norms**

Klabbers states (2013), it is one thing to say that all human enjoy human rights, it is quite a different matter to make those rights become a reality. Although human rights are said to be universal, in practice the universality of human rights exists more on the level of abstraction than on the concrete level. Since the exercise of the right will have to take local contexts and circumstances into account.

Under international law, capital punishment is restricted to an exceptional measure under strict conditions. However, the phrase ‘strict condition’ as well as ‘the most serious crimes’ open up to different



interpretation depends on each state's own custom and values. This further complicates the definition of "the most serious crimes" and the legality of capital punishment under international law. For states like Singapore, drugs trafficking is regarded as part of 'the most serious crimes'; for states like Australia, tax crime is a 'serious crime.' However, 'the most serious crimes' threshold cannot be defined as 'those with lethal or other extremely grave consequences,' this view was later endorsed by the UN General Assembly.

Apart from the interpretation dilemma, above findings exposed several forms of weaknesses and 'cruelty' in the judicial system of states with a retention policy. The long delay of execution under what is described as 'inhuman' condition, the death row phenomenon, is proved to be a violation of the prisoners' human rights.

Another thing about criminal justice system is, "it is prone to human-made error." The states' government could have claimed that the trial was fair and all rights of the death convicts have been fulfilled, yet the Singapore and Indonesia case pointed out the otherwise. Moreover, execution sometimes being proceeded for 'sending a strong message' without regard to the human life it costs.

When the 1929 Geneva Convention developed its first international treaty to limit death sentence, the treaty defined capital punishment as 'a penalty on prisoners of war taken in armed conflict.' It purposely did not include the prohibition of capital punishment out of fear that the United States will refuse to ratify the agreement. According to death sentence expert, Professor William Schabas, the ICCPR's goal at the time was the voluntary abolition of capital punishment by states with retention policy (2008, p. 9).

In arguing that the death sentence for drug crimes is a breach of the government's international legal obligations, lawyers around the world often used international standards set up by abolitionist states. Moreover, drug control is frequently described by international human rights groups as a "shared responsibility" within the international community.

In terms of human rights norms, constructivists Finnemore and Sikkink (1998), and Thornley (2011) introduced the term 'norm entrepreneurs.' Within the first cycle of 'norm emergence,' 'norm entrepreneurs' attempts to convince a critical mass of states (norm leaders) to embrace new norms". Norm entrepreneurs 'bring to attention the issue' or otherwise 'create new issues' by the use of "language that names, interprets, and dramatizes" them. In regard to human rights norms, norm entrepreneurs are typically

'transnational advocacy networks,' in which they aim to change understandings of appropriate behavior (Thornley, 2011). Two prominent human rights groups advocating for the abolition of capital punishment are Amnesty International and the Council of Europe. They typify the 'norm entrepreneurs' in their work campaigning for a change of state policies toward the abolishment of capital drug laws.

In the view of constructivist, "norms constrain behavior because they are intimately connected with the sense of Self." A state's identity is formed through the 'fundamental need of the state elites to understand.' State's identity defines how the state handles the object it encounters (Thornley, 2011).

A 2016 report submitted by International Federation of Human Rights points out that Asia has the highest number of retentionist states in the world. Eight in ten members of ASEAN retain capital punishment. Capital drugs law is highly applied by the retentionist states in the region, and Southeast Asia is one of the world's largest markets for synthetic drugs (Wright, 2014).

This paper seeks to answer why Southeast Asian states are retaining their capital drugs law apart from the world's abolitionist trend. Keck & Sikkink (1998, p. 99) provided an answer to this question; both believe that "issues involving harm to populations perceived as vulnerable or innocent are more likely to lead to effective transnational campaigns than other kinds of issues."

Drawing from above statements, "as convicted drug criminals are rarely regarded as innocent," campaigning for a change of state policies to abolish capital punishment is the most difficult forms of human rights campaign. This, however, cannot explain why there are states that refuse to follow the abolitionist norms. Constructivism does not come into play here, as the obvious answer is: the retaining states choose to put their national interest above the (abolitionist) trend.

States with retention policy often defended their stance by arguing that "death penalty deters crime and prevent re-offenses," yet their claims cannot be supported by any recognised studies. Moreover, according to a report by International Bar Association: "[...] many countries that adopt a moratorium before the final abolition of the death penalty find that the death penalty does not have a deterrent effect in practice" (2008, p. 13).

Southeast Asian states view drugs offenses as such a profound threat to the society and like this have 'zero-tolerance approach' to drugs. But the punitive measures on drugs applied by ASEAN member states have been proven as not effective in overcoming the problem (Lasco, 2016).

## **Conclusion**

To conclude, capital punishment has been viewed as one of the most extreme sanctions for drug offenders. Capital punishment is arguably an arrogant way to justify state's crime. It is nothing but a form of murder. States with capital drugs law should consider a more humanistic approaches such as law enforcement and public policies to handle their drugs problem. Above findings have pointed out that drugs offenses do not fall under the definition of "the most serious crimes." Given that the 'the most serious crimes' threshold was clarified by the UN General Assembly to mean that such offences were limited to those with lethal or other extremely grave consequences, capital punishment for drug-related crime is, therefore, a violation of international law. However, the lack of clarity and open interpretation of "the most serious crimes" definition exposed another weakness of international law. Especially since states would find ways to expose this 'weakness' to justify their policies and place their national interest above international norms.

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