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ANALYSIS

DR DAVE McRAE
Research Fellow
Tel: +61 2 8238 9033
dmcrae@lowyinstitute.org

A KEY DOMINO? INDONESIA'S DEATH PENALTY POLITICS

Indonesia is at a crossroads regarding the death penalty. Competing forces advocate for greater use of capital punishment and for its abolition. Additionally, the imperative to protect Indonesian citizens on death row abroad could provide a new pragmatic reason for abolition, a factor that could also affect emerging powers China and India.

Whether or not Indonesia abolishes the death penalty matters to Australia for principled and practical reasons. Two members of the 'Bali Nine' heroin smuggling ring, Andrew Chan and Myuran Sukumaran, face execution there, a situation that could severely disrupt bilateral relations. An abolitionist Indonesia potentially also could be a key domino that spurs other Southeast Asian states to abolish the death penalty. But Australia's position is compromised because successive Australian governments expressed support for the execution of the Bali bombers, and because of the self-interest embodied in the plight of Chan and Sukumaran.

Though it will be Indonesia that determines whether or when it will abolish the death penalty, Australia can and should do more to promote abolition. Multilaterally, the government should engage other Asian abolitionist states to encourage Indonesia to move towards abolition. Another key step is for the government to signal its opposition to all executions in Indonesia, even when unpopular within Australia, thereby creating space for bilateral advocacy. For advocacy to be effective, Australia must itself be a principled and consistent opponent of the death penalty. In its advocacy, also, the government must signal its genuine intent to encourage abolition, whilst acknowledging that Australia is not in a position of dictating terms.

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A KEY DOMINO?

From then Prime Minister Bob Hawke's characterisation of Malaysia's execution of two Australians as 'barbaric' to the furore surrounding the hanging of Australian Van Tuong Nguyen in Singapore, the application of the death penalty by Australia's Southeast Asian neighbours has placed a recurrent strain on bilateral relations. The only states in Southeast Asia that have abolished the death penalty are the Philippines, Cambodia and Timor-Leste. By contrast, Australia is an abolitionist country that last conducted an execution in 1967.¹ Consequently, when Australians are executed overseas – as occurred in Malaysia in 1986 and 1993 and Singapore in 2005 – it sharply highlights the differences between each country's legal systems and places significant stress on bilateral relations. Executions in Southeast Asia have also undermined Australia's commitment to abolition. In particular, successive Australian governments provided at least tacit, and on occasion overt, support for the 2008 execution of the three Bali bombers.²

Amongst Southeast Asian nations, Indonesia is of particular importance to Australia because the only Australians currently facing execution in Southeast Asia are in Indonesia. Andrew Chan and Myuran Sukumaran were each sentenced to death in 2006 for their involvement in the so-called 'Bali Nine' heroin smuggling plot. Both Chan and Sukumaran exhausted their final avenue of judicial appeal in 2011, and only a plea for clemency to Indonesia's President Yudhoyono now stands between the men and execution. Indonesia is also important because it receives the most Australian travellers of any Southeast Asian country, and a string of other Australians have been involved in narcotics cases there in recent

years.³ As the largest nation in Southeast Asia and an increasingly influential regional actor, trends in the application of the death penalty in Indonesia could potentially have ramifications elsewhere in the region.

Amplifying its importance to possible change in the death penalty in Southeast Asia, Indonesia remains at a crossroads concerning capital punishment, with competing forces arrayed both in favour of greater use of the death penalty and for its abolition. Several figures reflect Indonesia's current position:

- There are roughly twice as many people on death row at present (114 people) as have been executed in the past 30 years.⁴ Executions peaked in 2008, with ten executions in a single year, but Indonesia has carried out no executions at all since then.
- Indonesia's courts passed up two recent opportunities to repeal death penalty statutes, and capital punishment is retained in draft revisions to the Criminal Code. A third case challenging another death penalty statute is now before the Constitutional Court. But not all debates on capital punishment in specific laws result in its inclusion. A 2007 human trafficking law did not include the death penalty among its punishments, and debate continues on whether to retain the death penalty for corruption.
- Amendments in 2010 set new time limits on Indonesia's previously open-ended clemency process, but there remains no time limit under Indonesian law to determine when an execution must take place, and some of those responsible for administering

A KEY DOMINO?

executions would reportedly prefer that none took place under their watch.

- Public pressure to advocate effectively for Indonesians facing the death penalty abroad has emerged as a possible new pragmatic factor in Indonesia's death penalty debate, although this issue is yet to visibly affect policy towards death row inmates within Indonesia.

Any potential reconsideration of the death penalty in Indonesia presents a foreign policy opportunity for Australia, albeit one that Australia must overcome challenges to pursue. In the short term, moves towards abolition in Indonesia may benefit Chan and Sukumaran. While Canberra could support the pair's pleas for clemency without touching on the broader issue of capital punishment, it could also promote abolition as an additional strand of advocacy. Beyond this case, Australia's interests in abolition abroad are clear and have been frequently stated. Abolition elsewhere both protects Australians from the risk of execution, and consequently also helps to avoid the damage to bilateral relations that the execution of foreigners can cause. Consistently promoting abolition also helps the cause of Australians who may face execution in states that do retain the death penalty. As Fullilove states in his overview of Australia's death penalty diplomacy, consistent promotion of abolition enables 'the government to deal with the issue positively and continually, rather than negatively and sporadically'.⁵ Abolition also conforms with Australia's own stance on capital punishment and is a stated foreign policy position,⁶ even though this stance was compromised by government statements on the Bali bombers.

Death Penalty Statistics at a Glance*

- Indonesia has carried out 22 executions since *reformasi* in 1998: 14 for murder, 5 for narcotics crimes and 3 for terrorism.
- Five of the 22 people executed were foreigners; all five were executed for drugs crimes.
- There have been 134 death sentences under democratic rule: 72 for murder, 54 for narcotics and 8 for terrorism.
- There are currently 114 people on death row, 71 Indonesians and 43 foreigners.
- As of December 2011, 217 Indonesians faced possible execution overseas.
- One plea for clemency has succeeded in a capital case since 1990, out of a total of at least 36 pleas.
- Media polls generally indicate around 75 per cent support for the death penalty.
- There have been three constitutional court challenges to death penalty statutes, including a current case. In 2007, the court upheld the legality of the death penalty for narcotics crimes. In 2008, the court found that execution by firing squad did not violate constitutional protections against torture. A current case challenges the death penalty for aggravated robbery occasioning death.

*Indonesia typically releases only aggregate statistics for death row prisoners. Data here is based on NGO datasets, reconciled to eliminate inconsistencies, and supplemented with media data. The overall figure of 114 death row inmates is consistent with the latest Indonesian government announcement.

This paper aims to assess the nature of this policy opportunity. I first provide an overview of Indonesia's system of capital punishment and trends in its usage, before surveying the forces arrayed in favour of abolition and retention. The paper then closes by outlining

A KEY DOMINO?

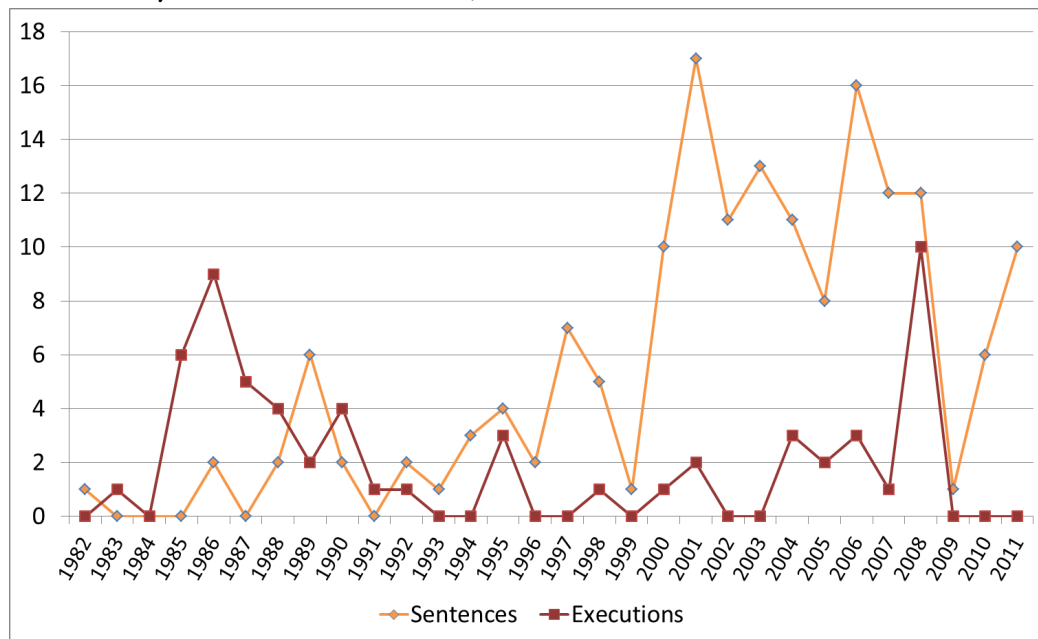
the steps Australia could and should take to promote abolition.

The death penalty in Indonesia

The death penalty is available as a punishment for a broad range of crimes in Indonesia, but under democratic rule it has been handed down only for narcotics crimes, premeditated murder and terrorism. Indonesia's use of the death penalty has not decreased since the 1998 democratic transition.⁷ If anything, Indonesia's courts appear to have handed down death sentences more frequently under democratic rule.⁸ But in terms of absolute numbers, Indonesia's use of the death penalty is modest compared to various other countries that also retain the punishment. The United States conducted 43 executions in 2011 alone, for example, whereas Indonesia has carried out 22 executions since 1998.⁹

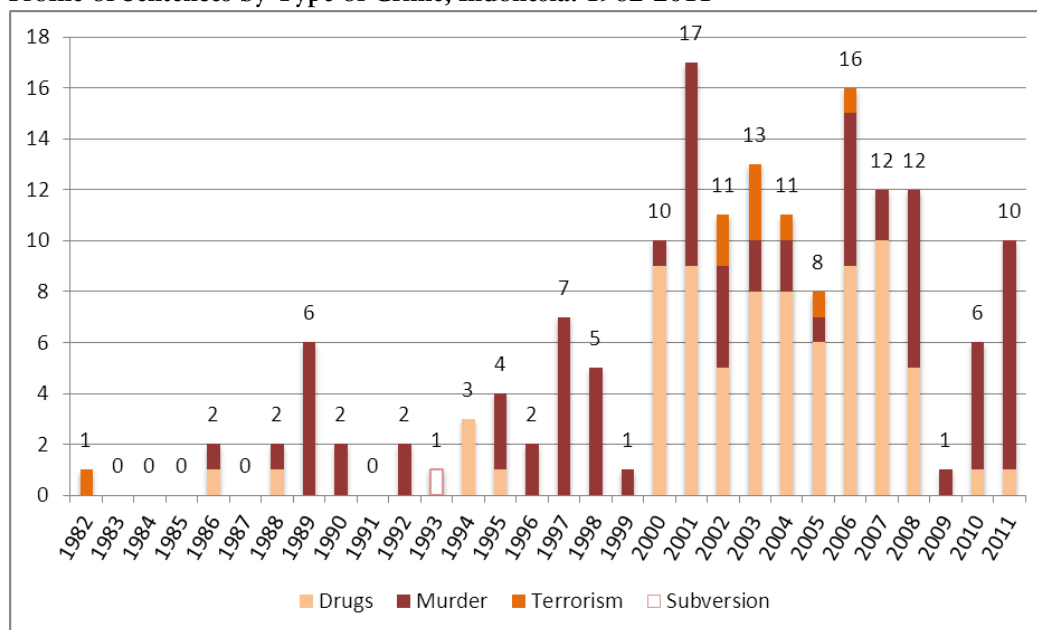
Of the 134 death sentences handed down under democratic rule, 72 sentences have been for narcotics crimes, more than the 54 sentences for murder and eight for terrorism. Almost all death sentences in the past three years have been for murder, however. It is unclear why death sentences for narcotics crimes have decreased sharply during this period. One judge at Indonesia's Supreme Court denied there has been any change of policy, and another explained more generally that the Supreme Court does not provide guidelines to judges on sentencing. Even an abolitionist activist said he thought the handing down of prison terms rather than death sentences in drugs cases had merely happened on a case-by-case basis.¹⁰ In criticising the courts in late 2011 for not handing down death sentences for drugs cases, by contrast, the head of Indonesia's National Narcotics Agency (BNN) attributed this trend to pressure by foreign NGOs and European governments for Indonesia to abolish capital punishment for narcotics.¹¹

Death Penalty Sentences and Executions, Indonesia: 1982-2011¹²



A KEY DOMINO?

Profile of Sentences by Type of Crime, Indonesia: 1982-2011¹³



Chan and Sukumaran are among 43 foreigners on death row in Indonesia, of whom 41 were sentenced for narcotics crimes. Not all of Indonesia's 114 death row inmates are yet subject to execution, as the appeals process after an initial sentence can last for several years. Death row prisoners have access to the same appeals process as those receiving prison sentences: if appeals to the provincial high court and national Supreme Court fail, they may request a judicial review (*peninjauan kembali*) by the Supreme Court and submit a plea for clemency to the president. Sentences may increase or decrease on appeal or at the judicial review stage, and commonly do so. The case of Scott Rush, another member of the 'Bali Nine', is illustrative. Rush's 2006 life sentence remained unchanged on appeal to the provincial high court but increased to death on appeal to the Supreme Court, before being reduced again to life imprisonment upon judicial review in 2011. The review panel found

it to be inconsistent that Rush had received a heavier sentence than his fellow mules, and stated that giving a death sentence to a drug courier, in view also of Rush's young age, did not comply with Indonesia's treaty obligations to make very selective use of the death penalty.¹⁴

Once a death sentence is upheld via judicial review, the chances of the sentence being commuted at the clemency stage are slim. There is only one known case of a death sentence being commuted through clemency in the past 30 years, and that was under exceptional circumstances.¹⁵ Clemency is a political decision made by the president, subject to the sole condition established by the constitution that the president is to consider the Supreme Court's deliberations on the plea. Neither the constitution nor the clemency law make any stipulation about the weight the president should attribute to the court's deliberations.¹⁶ A

A KEY DOMINO?

senior Supreme Court judge told the author that the court far more frequently writes in opposition to granting clemency than in favour, and that he personally had never written in favour. Asked under what circumstances clemency might be appropriate, the judge nominated humanitarian grounds such as advanced age, youth or chronic illness, or if a case could be made that the sentence was too severe or not fitting for the convicted.¹⁷

That is not to say that prisoners are invariably executed when a plea for clemency fails. Nothing in Indonesian law places a time limit on when an execution must take place. Prominent cases are likely to proceed to execution more quickly, because public scrutiny builds once clemency has been rejected. Each of the two highest-profile sets of executions in Indonesia in recent years took place within a year of the outcome of clemency being known. First, three Catholic men were executed in September 2006 for murder in connection with inter-religious violence in Central Sulawesi after their plea for clemency was rejected in late 2005.¹⁸ In the second case, the three Bali bombers were executed in 2008 on terrorism charges soon after they indicated definitively that they would not seek clemency.¹⁹

Beyond these cases, overall patterns are less clear. One man was executed just four months after his district court sentence,²⁰ whereas others remain on death row more than a decade after the rejection of their clemency pleas. Nor is there a definitive trend in the 22 executions carried out under democratic rule. Most executions have been for murder (14 executions), but there have been sufficient executions for narcotics crimes (5) and

terrorism (3) to indicate that further executions for either are equally possible.

In summary, democratisation has not decreased the rate at which Indonesia's courts hand down death sentences, and these sentences are rarely commuted by means of presidential clemency. But Indonesia has executed fewer than two people per year on average under democratic rule, a rate at which comparative scholars Johnson and Zimring judge that countries are likely to be able to abolish the death penalty at 'practically no pecuniary cost and without the need to refashion their systems of criminal justice or crime control'.²¹ All nations to have abolished the death penalty during the latter half of the twentieth century satisfied this precondition, Johnson and Zimring observe, with Germany the sole possible exception. There are no clear signs in its application of the death penalty that Indonesia is heading towards abolition, but it does share features with countries that have done so in the past.

Retention and abolition

If ambiguous conclusions are drawn from interpretation of trends in Indonesia's application of the death penalty, the same is true of a survey of the forces arrayed for and against retention. On the one hand, the death penalty has attained an impressive inertia in legislation; it is the beneficiary of favourable public opinion; and has strong supporters seeking its retention or even its intensified application. On the other hand, legislative debates do not always produce outcomes that favour retention; some civil servants who administer the death penalty express distaste for the task; and the plight of Indonesian

A KEY DOMINO?

migrant workers on death row abroad has emerged as a compelling foreign policy issue that could provide a pragmatic reason to support abolition.

Support for retention

The death penalty has been a part of Indonesia's legal system since before independence. Several recent developments have entrenched capital punishment within Indonesia's statutes, and underline support for the death penalty across Indonesia's courts, government, parliament, and public.

Indonesia's Constitutional Court heard two cases regarding death penalty statutes in 2007 and 2008 respectively, and upheld their constitutionality in each instance. The decisions of the Constitutional Court are final, meaning neither statute can be challenged again on the same grounds. Moreover, the current chief justice of the Constitutional Court has spoken publicly in support of the death penalty, specifically for corruption cases, dismissing doubts over its deterrent effect as 'humorous' and saying it was needed to make people 'afraid'.²² He will hold office until 2014. Nevertheless, two death row inmates have now lodged a challenge to a third death penalty statute, as discussed in the next section.

The first case was a challenge to the legality of the death penalty for narcotics crimes, filed by lawyers for Chan and Sukumaran in 2007. The court found in a majority decision that particularly serious narcotics crimes could rightly be classified as among 'the most serious crimes', the condition established under the International Covenant on Civil and Political Rights (ICCPR) for the imposition of the death

penalty. (Indonesia ratified the ICCPR in 2005.)

Subsequently, in 2008 the court unanimously rejected a challenge to the law governing the method of execution, filed by three of the Bali bombers.²³ Executions in Indonesia are conducted by firing squad, with provision for the commander of the firing squad to administer a finishing shot to the head from close range if the prisoner survives the initial volley. The applicants contended that this procedure acknowledged that death may not be instantaneous, and that the pain caused by this method of execution amounted to torture. The court disagreed, finding that any pain generated could not be considered to be torture because this pain was merely an inevitable by-product of the lawful act of executing a prisoner. Had the court struck down this statute, it would likely have prevented any further executions for some years. It is unlikely that Indonesia could have swiftly legislated to establish a new method of execution or that the government would quickly have taken steps to roll out the apparatus for this method.

For its part, the government has retained the death penalty in its draft amendments to Indonesia's Criminal Code. Admittedly, as they stand, the effect of the amendments is ambiguous. Death penalty articles are retained, but the draft also includes an amendment to allow judges to set a probation period for death sentences. If parliament were to retain this provision when it enacts the bill, this probation period may in fact further constrain actual executions, as will be discussed in the following section. There is no guarantee the amendments will be finalised in this parliamentary term, however.

A KEY DOMINO?

In addition to these steps, other developments might be classified as efforts to intensify the usage of the death penalty. One such measure is a 2010 amendment to Indonesia's clemency law.²⁴ Prior to this amendment, Indonesia's legislation imposed no time limit on the submission of a plea for clemency, meaning that death row prisoners could attempt to delay their execution indefinitely by omitting to submit a plea. If they did submit, prisoners also regained the right to apply for clemency again two years after an unsuccessful plea, if they had not been executed in the interim. The 2010 amendments took three steps to restrict and accelerate the clemency process. Each prisoner is now restricted to a single plea, which must be submitted within a year of a case gaining final legal standing (in the case of Chan and Sukumaran, by mid 2012). The amendment also reduced the time given to the Supreme Court to provide advice to the president, meaning the president must reach a decision within five months of the plea being lodged. (This deadline is not always kept to – as of mid-2010, there was a backlog of almost 2500 clemency pleas, although few of these pleas would be for death penalty cases.²⁵)

Various government agencies also periodically make public statements calling for greater use of the death penalty. The National Narcotics Agency (BNN) is particularly active in this regard. In 2006, officials from BNN told the author that the agency lobbied the president each year to include a stern statement on narcotics in the annual presidential address on the occasion of the International Day against Drug Abuse and Illicit Trafficking. In 2004

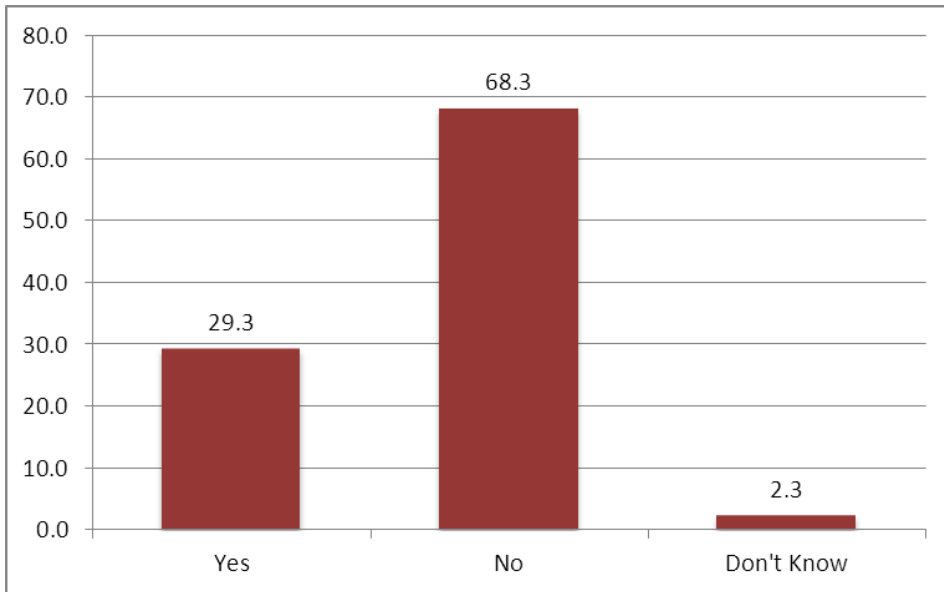
President Megawati Sukarnoputri chose this occasion to reject the clemency pleas of seven inmates on death row for narcotics cases.²⁶ On the same day in 2006, President Yudhoyono stated that he would not 'grant clemency to people destroying the nation's future'.²⁷ More recently, current BNN head Gories Mere has repeatedly highlighted the availability of the death penalty for possession of just five grams of drugs under amendments in 2009 to the Narcotics Law. In 2011 alone, Mere twice appealed publicly for greater use of the death penalty, and disclosed that he had gone to Iran to warn potential couriers that they faced a death sentence in Indonesia.²⁸ Another senior BNN official warned that prison alone would not deter drug syndicates.²⁹ As well as these public statements, there is also support for the death penalty in Indonesia's prosecutorial and judicial institutions. Discussions with a number of individuals revealed a feeling that, for certain crimes and perpetrators, only the death penalty served as fitting punishment and effective deterrent.³⁰

Outside state institutions, public support for the death penalty also appears strong. Polls are infrequent and do not always use rigorous methodology, but nevertheless show support for the death penalty consistently to be around 75 per cent. Occasionally, polls break down support for the death penalty by category of crime. The results of these polls vary, but they also consistently show support for the application of the death penalty to narcotics crimes.

A KEY DOMINO?

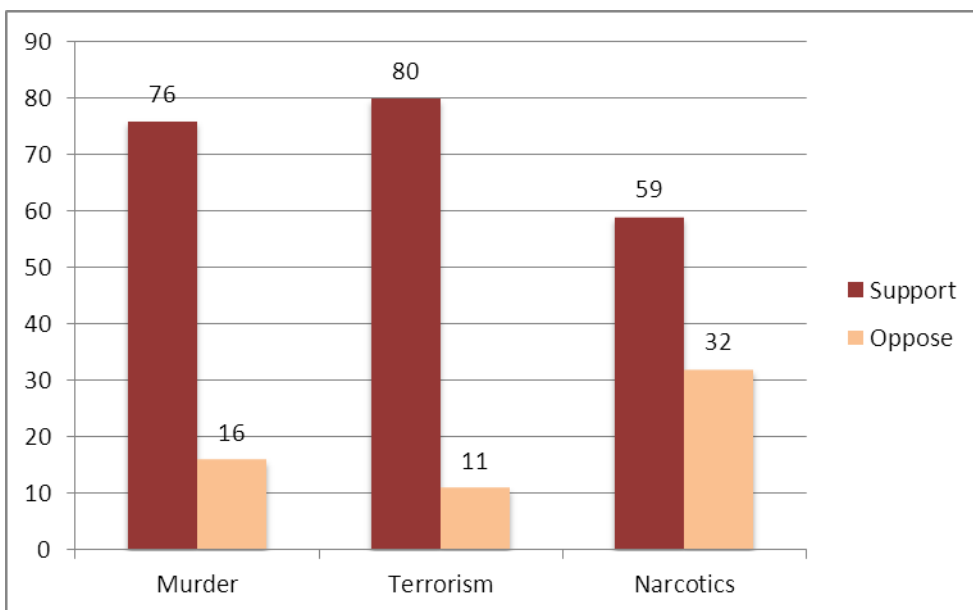
Selected Indonesian Media Polls on the Death Penalty

Poll 1: Do you agree the death penalty should be abolished?



Tempo magazine, January 2010, 937 respondents

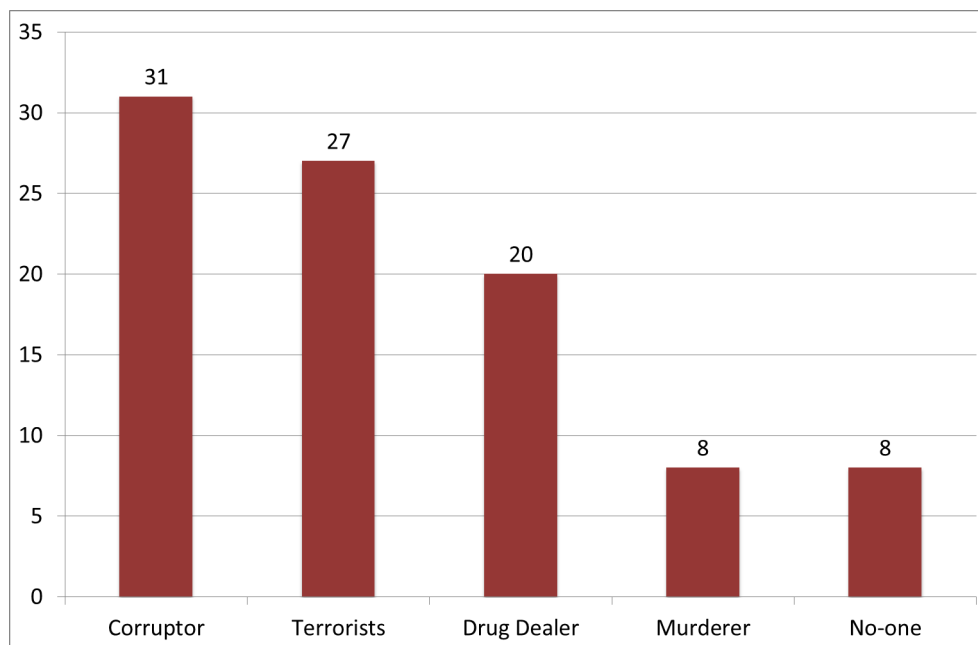
Poll 2: Attitudes to the death penalty for various crimes, 2010



Seputar Indonesia newspaper, 1-5 March 2010, polling in six cities, number of respondents not disclosed

A KEY DOMINO?

Poll 3: Who most deserves the death penalty?



Media Indonesia newspaper, 28 Sept 2006, 476 respondents

One factor underpinning this favourable public opinion is religious doctrine, in particular the explicit textual basis for capital punishment in the Qu'ran and the associated legal doctrine of Indonesia's majority religion of Islam.³¹ Not all Muslims interpret this textual basis to justify the death penalty; equally, several interviewees described right-wing Islamic groups as the most vocal opponents of abolition in Indonesia. Former Constitutional Court chief justice Jimly Ashiddiqie has also highlighted the connection between Islam and retention, noting that many citizens and Indonesian legal scholars fear that abolition would not accord with Islamic legal doctrine. Such fears hinder abolition at present, but in Ashiddiqie's view these differences are not irreconcilable, if one appreciates the differing natures of Islamic doctrine and the Indonesian constitution. In his view, Islamic

doctrine constitutes an unchanging source of values for Muslims, whereas the constitution is an evolving social contract reflecting Indonesia's diverse society, which consequently need not incorporate all elements of religious teachings.³²

Support for Abolition

Much as the forces arrayed in support of retention are impressive, the modest use of the death penalty suggests the influence of other forces pushing either for moderation or for abolition. A survey of such forces suggests that there are at least openings for a reconsideration of the position of the death penalty within the criminal justice system.

First, the position of the death penalty in each new or amended law is consistently a matter of debate, and one that does not always end in

A KEY DOMINO?

retention. One interviewee cited the 2007 human trafficking law as an example that did not include the death penalty, despite there being some community support for its inclusion because of the maltreatment of trafficking victims.³³ Draft government amendments to the corruption law also removed the death penalty, although the government withdrew this draft for further consideration in October 2011.³⁴ Various law enforcement officials have also cited the death penalty for certain offences as an impediment to the work of government. For example, the deputy attorney general for special crimes spoke out in support of the proposed abolition of the death penalty for corruption, saying it impeded Indonesia's cooperation with other countries to extradite fugitives and recover assets.³⁵ The Attorney General Basri Arief himself has also acknowledged this impediment for asset recovery, albeit without expressing opposition to retention.³⁶ Like the Attorney General, the Director for Narcotics in the Indonesia Police CID also stated in 2011 that the death penalty for narcotics crimes was impeding cooperation with the Dutch regarding a Netherlands-linked drug syndicate.³⁷

Moreover, the draft amendments to the criminal code could still undermine Indonesia's ability to execute those on death row. The proposed amendments would make available to judges the option of setting a ten-year probation period, during which execution would not take place and after which the death sentence may be reviewed. Such a provision would apply only prospectively, but in practice it would likely be difficult for Indonesia to execute existing death row inmates without extending this probation period to them as well. Otherwise, this disparity would be a clear

focus for lobbying efforts by legal counsel and by abolitionists, generating additional controversy around each execution.

A current Constitutional Court case to review the constitutionality of the death penalty for aggravated robbery occasioning death or serious injury³⁸ will provide another forum for debate. The applicants are two death row inmates from Kepulauan Riau province, reportedly sentenced over the killing and robbery of a father and his daughter, as well as the rape of the daughter.³⁹ At time of writing, the court had held only an initial session in which the court advised the men's legal team on how to revise and resubmit their application.⁴⁰ Among the applicants' arguments is the assertion that aggravated robbery is not one of the 'most serious crimes' for which signatories to the ICCPR may impose the death penalty. Inevitably, this case will revisit some of the points of debate from the 2007 Narcotics Law case. That case was a close decision, with the court upholding the constitutionality of the death penalty by a six to three margin, with then chief justice Jimly Asshidiqie stating publicly shortly afterwards that he too would have dissented except that he believed the chief justice should not be in the minority.⁴¹ Only one judge, H. Harjono, remains on the bench from the narcotics law case, but he supported the majority decision.

Second, it is clear that some of the civil servants responsible for administering executions find the task distasteful. The Attorney General's department, the department responsible for carrying out court decisions, has overall responsibility for administering executions. Prosecutors inform the condemned prisoner three days prior to their execution, receive any

A KEY DOMINO?

last requests or statements and give the order to the police firing squad to commence the execution. They must then observe the prisoner's body to confirm death, and write the paperwork associated with the execution.⁴² Several officials within this department would prefer that executions not take place within their term, a prosecutor speaking in a personal capacity recounted.

This distaste could contribute to the general pattern of political pressure being required to precipitate executions, and so may have contributed to the three-year pause in death row inmates being brought before a firing squad. Prosecutors' sense of duty means that if a high-profile case with strong public pressure to execute were to reach the end of appeals process, however, then an execution would most likely take place.

Third, and more speculatively, another factor that could work in favour of abolition (or at least a continued pause in executions) relates to President Yudhoyono's international ambitions. Yudhoyono is currently in his second term as president of Indonesia, and so cannot run for office again in 2014. There is some speculation that the president might aspire to the post of the UN Secretary General in 2016; a reputation for frequent application of the death penalty might count against him in any such bid. Along similar lines, some Indonesian activists perceive domestic human rights issues such as the death penalty to have been a factor in Yudhoyono being overlooked in 2008 for a Nobel Peace Prize for the Aceh peace process. The prize was instead awarded to former President of Finland Martti Ahtisaari, who mediated the peace talks for Aceh. Not everyone is convinced that international image is a dominant factor in

Indonesia's consideration of the death penalty, however. A former constitutional court judge expressed the view that Indonesia saw the death penalty more in terms of the sovereign right of each country to choose the forms of law that will apply within its borders.⁴³

The issue most likely to build broader opposition to the death penalty is the fact that more than one hundred Indonesian migrant workers face the death penalty abroad. The fate of migrant workers became a particularly prominent issue in Indonesian politics in 2011, following the execution in Saudi Arabia in June of Indonesian domestic worker Ruyati binti Satubi for stabbing her employer to death. Ruyati's case touched a raw nerve in Indonesia, because such murders often result from maltreatment by employers. Finding itself under attack for its perceived ineffectual efforts to assist Ruyati and other Indonesian citizens abroad, the Indonesian government imposed a moratorium on the sending of domestic workers to Saudi Arabia, formed a taskforce to advocate for migrant workers facing execution, and even took the extraordinary step of making a Rp. 4.7 billion (approximately \$500,000) blood money payment to free another Indonesian maid facing execution in Saudi Arabia. (By the time the government intervened, a private television station had already raised \$130,000 towards her release through a public appeal.⁴⁴) Indonesia has always sought to establish protections for migrant workers, but the rapid emergence of the death penalty as a foreign policy priority can be clearly seen by comparing successive Foreign Ministry yearbooks. The 2011 yearbook includes a 600-word section on the 217 Indonesians facing execution overseas and a full-page table detailing the status of their

A KEY DOMINO?

cases; the possible execution of Indonesians is also mentioned as a bilateral issue with Malaysia and Saudi Arabia. By contrast, not a single mention is made of the death penalty in the 2010 yearbook.⁴⁵

The migrant worker issue is particularly significant because it provides a pragmatic reason to abolish the death penalty for Indonesians not convinced by other arguments. There is a tension between a blanket policy of advocating for citizens facing the death penalty overseas but continuing to apply the death penalty domestically. Numerous interviewees noted that this situation left Indonesia without moral grounds to advocate for its own citizens living abroad. Despite the contradiction, the government has not taken steps towards pragmatic abolition to date. On the contrary, President Yudhoyono instead responded to the Ruyati execution in June 2011 by stating that he rejects almost all requests for clemency in capital cases from foreign nations, asking 'If our citizens receive the death penalty for very serious crimes and problems, why should we then grant clemency to other countries' citizens?'⁴⁶ Similarly, Foreign Minister Marty Natalegawa stated in early 2012 that the emphasis in Indonesia's advocacy and own administration of the death penalty was procedural fairness, meaning Indonesian advocacy did not raise questions over the position of the death penalty in the legal system.⁴⁷

These cases pose a dilemma that is unlikely to remain confined to Indonesia. Increasing human mobility and growing migratory labour forces mean that more and more states will find their nationals facing the death penalty abroad. At the same time, the governments of emerging

powers such as China and India (which each retain the death penalty) are coming under increasing pressure from their own people to protect their citizens across the globe.⁴⁸

Promoting abolition in Indonesia

Indonesia's complex consideration of the death penalty presents a policy opportunity for Australia. Abolition in Indonesia would contribute to the protection of Australian citizens and minimise the threat of disruptions to bilateral relations. More generally, abolition in Indonesia could build momentum towards other Southeast Asian nations discontinuing capital punishment. Abolition would also be consistent with Australia's stance on the death penalty. At present, though, Australia must overcome significant hurdles to pursue this opportunity effectively. Bilaterally, Australia's position to advocate for abolition is compromised, having so recently expressed support for the sentencing and execution of the Bali bombers, and with its clear self-interest embodied in the plight of Chan and Sukumaran.⁴⁹ Consequently, a multilateral approach is most likely to be effective, and should be an important component of Australia's advocacy. Two multilateral models have been proposed. The challenge for either model is that Indonesia is more likely the key domino that could influence other Southeast Asian nations to abolish the death penalty, rather than vice versa.

The first of these multilateral models is a proposal by the Lowy Institute's Michael Fullilove for Australia to initiate a regional coalition opposed to the death penalty, in which Australia would partner with the five

A KEY DOMINO?

other Asian abolitionist countries. The coalition would be governmental, but might be complemented by an advisory council of eminent persons. Fullilove recommends that such a coalition might focus its efforts on countries that are already de facto abolitionist, or more pertinently for Indonesia, propose interim reforms that would constitute steps along the way to abolition in each retentionist country.⁵⁰ Such interim reforms in Indonesia could include encouragement to adopt the probation period proposed in the draft criminal code and to extend it to existing death row prisoners, or to formalise the current pause in executions as a moratorium.

In a second model, the University of Melbourne's Tim Lindsey has proposed Australia partner with abolitionist countries in ASEAN to promote a protocol whereby retentionist countries would agree not to execute citizens from abolitionist countries. Lindsey's idea is that this protocol would appeal to retentionist countries as a way to avoid the diplomatic costs that inevitably arise from executing foreigners, without incurring the cost of being seen to provide special treatment to a particular country.⁵¹ At present, the six foreigner nationals from abolitionist countries on death row in Indonesia come from five different nations, spanning Europe, Africa, South Asia and Australia.

The chances of success for either model are constrained by the identity of the five Asian abolitionist states: Nepal, Timor-Leste, Bhutan and ASEAN members Cambodia and the Philippines. None are major regional players, nor are these countries likely to be able to exert particular influence on Indonesia, either individually or collectively. One source

nominated Singapore and in particular Malaysia as countries that might hold more sway were they to abolish the death penalty, because they are major destinations for Indonesian migrant workers and because Malaysia incorporates aspects of Islamic law into its legal system.⁵² But each of these countries also has a sterner stance on the death penalty than does Indonesia, with both imposing mandatory death sentences for certain crimes. Consequently, Malaysia has roughly seven times the number of people on death row as Indonesia, despite having a population only an eighth as large.⁵³

Asked specifically about the protocol, interviewees in Indonesia identified two further obstacles. According to the deputy chairperson of Indonesia's National Commission for Human Rights, Stanley Adi Prasetyo, ASEAN's principle of non-interference would be a particular impediment as it obstructs efforts to promote respect or advancement of human rights. An abolitionist activist also argued that the protocol could also easily be cast as foreign intervention. 'Hardliners in the parliament would say "Australia is determining our laws". There's only a small chance that the parliament would endorse [the protocol].'⁵⁴

Despite these obstacles, the multilateral approaches are currently the best available to Australia, and are worth focusing on to see whether either variant gains initial traction. Even if not effective in encouraging Indonesia to move towards abolition, exploratory multilateral diplomacy could enable more effective future regional diplomacy, by laying the groundwork of a mechanism for Indonesia or another influential state to engage in regional advocacy once it had abolished capital

A KEY DOMINO?

punishment. Alternatively, a multilateral model could be presented to Indonesia from the outset as an opportunity to lead efforts to push for regional abolition, whether through existing mechanisms such as the ASEAN Intergovernmental Commission on Human Rights or outside of these mechanisms. Former Constitutional Court Chief Justice Jimly Asshiddiqie's commentary regarding the court's decision on the death penalty for narcotics crimes reflects a line of thinking that would provide an opening for such an approach. If the court had instead found the death penalty to be unconstitutional and thus brought about abolition, Asshiddiqie writes, 'this would have been a turning point for the abolition of the death penalty in other majority-Muslim countries, which in general still apply capital punishment'.⁵⁵ (Turkey is the only majority Muslim country to have abolished the death penalty, which it did as part of its reform program in support of its bid to accede to the European Union.⁵⁶)

Beyond multilateral efforts, what might the Australian government do to create space for bilateral diplomacy? A key step would be to signal its opposition to any and all executions in Indonesia, to re-establish Australia's position of consistent and principled opposition to the death penalty. For Australia's bilateral advocacy to be credible, this opposition must include those prisoners for which the government may incur a domestic political cost for its stance. There are several prisoners in Indonesia who might strain Australia's commitment to abolition in the way the Bali bombers did:

- Ahmad Hasan and Iwan Darmawan alias Rois, each sentenced to death over their role

in the 2004 bombings of the Australian embassy in Jakarta.

- Umar Patek, who could potentially face the death penalty for his alleged involvement in the 2002 Bali bombings and other terrorist acts. His trial commenced in February 2012.

If Rois or Hasan appeared to be moving towards execution, or Patek were to receive a death sentence, Australia should state that as an abolitionist country it opposes the death penalty in these cases. Doing so would be an important step for the government to dissociate itself from its past stance on the Bali bombers. In doing so, Australia may well be accused of self-interest, given the plight of Chan and Sukumaran, but it is important to express this opposition if and when necessitated by the legal process for each prisoner. The challenge will be to make such a statement in a way that indicates that Australia genuinely opposes the executions, while acknowledging that Australia is not in the position of dictating terms.

A thornier issue for future bilateral diplomacy is whether there are further grounds to encourage abolition through Australia's law enforcement cooperation with Indonesia. The opposition some Indonesian government officials have expressed to the death penalty for certain offences, because of the obstacles it creates in law enforcement cooperation, highlights the potential of this area of advocacy. Under Australian law, extradition is subject to a blanket requirement to obtain undertakings that the death penalty will not be imposed or carried out, whereas other forms of cooperation are subject either to ministerial or police discretion.⁵⁷ Critics and supporters agree that the current restrictions in broad terms fulfil Australia's international treaty and domestic legal obligations, both as an

A KEY DOMINO?

abolitionist country regarding the death penalty and for international cooperation. Whether Australia could or should impose greater restrictions or exercise discretion to limit cooperation remains a matter of debate,⁵⁸ with critics arguing that to do so would unduly jeopardise Australia's cooperation obligations and harm the public interest by undermining policing of transnational crime.⁵⁹ At a minimum, the government could revisit restrictions on cooperation in seeking avenues for bilateral advocacy. As with all of the measures outlined in this section, the more consistent Australia is seen to have been in its opposition to the death penalty, the more scope there is likely to be to further explore bilateral advocacy.

Conclusion

Many of the ramifications for Australia of the retention of the death penalty in Southeast Asia are brought into focus by the ongoing cases of Andrew Chan and Myuran Sukumaran. The government faces the challenge of doing its utmost to assist these two Australian citizens; their possible execution also looms as a threat to bilateral relations. To date, there has not been a repeat in their case of the furore that surrounded the trial and sentencing of Schapelle Corby in 2005. The critical moment for bilateral relations will come once a decision is made on the men's clemency pleas, which are due to be submitted in mid-2012. If the pleas for clemency were to be rejected, there would likely be no other defence strategy left but to try to maximise public pressure on Indonesia not to execute. Such a situation would be precisely the environment under which popular Australian prejudices regarding Indonesia are

likely to be amplified, and in which public figures have in the past made pointed statements that would maximise tensions. Even if Chan and Sukumaran's clemency pleas succeed, the same scenario will remain a possibility in the future in Indonesia and in most other Southeast Asian nations.

Such circumstances underline the importance for Australia to do what is possible to promote abolition in Southeast Asia, with the evolving debate over the death penalty in Indonesia presenting a particular policy opportunity. In appraising this opportunity it is important to be realistic: in addition to the factors that might see Indonesia move towards abolition, there are numerous factors that bolster the country's retentionist position, meaning Indonesia may retain the death penalty for many years to come. Though it will be Indonesia that determines whether or when it will abolish the death penalty, Australia can and should do more to promote abolition through multilateral diplomacy and by creating space for bilateral advocacy. For either approach, the Australian government must avoid further equivocation on capital punishment. No advocacy will be effective if Australia is not a principled and consistent opponent of the death penalty.

A KEY DOMINO?

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NOTES

¹ Australia abolished the death penalty in 1973 for offences under Commonwealth, Territory and Imperial laws, and all states had abolished the death penalty from their laws by 1985. In 2010, the government also passed federal legislation to prohibit the death penalty in state laws, removing the possibility that a state could reintroduce the death penalty in the future. See Paula Pyburne, *Crimes legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2009*, Canberra, Parliament of Australia, 2010, p 15; New South Wales Council For Civil Liberties, *The death penalty in Australia and overseas*, 2005.

² Then Prime Minister Kevin Rudd made his most explicit endorsement of the executions approximately one month before they took place in 2008, commenting on Perth radio that the Bali bombers were 'cowards and murderers pure and simple' and that they 'deserve the justice that will be delivered to them'. John Howard was prime minister when the original death sentences were handed down to the three Bali bombers. He expressed his approval of the death sentence, saying 'The law of Indonesia requires that he [i.e. Amrozi, one of the bombers] be

executed, then I regard that as appropriate.' Howard also stated that were he to press the Indonesian government to reduce the sentence, he 'would offend many Australians who lost people, who legitimately feel, as decent Australians, that the death penalty is appropriate.' See Bali bombers are murdering cowards: Rudd, *AAP*, 2 October 2008; Australia torn over death penalty for Bali bomber, *Reuters News*, 8 August 2003; Australia PM defends jubilation over Bali Bomber verdict, *Dow Jones International News*, 8 August 2003.

³ In addition to Schapelle Corby and the members of the Bali Nine, at least fifteen other Australians have been arrested for narcotics crimes in Indonesia since 2004, mostly in Bali. Most have been convicted for personal use of narcotics, and consequently received sentences ranging from a few months to a year. The exception is Sydney man Michael Sacatides, sentenced to 18 years imprisonment in 2011 after arriving in Bali with 1.7 kilograms of methamphetamine. Compiled from various media reports.

⁴ Detailed statistics on the death penalty are drawn from data compiled by Indonesian human rights NGOs Kontras and Imparsial, with the two datasets checked against each other for consistency and supplemented by media reportage. The Indonesian Department of Law and Human Rights announced a figure of 113 people on death row in February 2012, after which there has been one further death sentence, which is consistent with the figure the author had arrived at. Repeated approaches were made to the Indonesian Attorney General's department to obtain official death penalty statistics, but these had not been made available at the time of publication.

⁵ Michael Fullilove, *Capital punishment and Australian foreign policy*, Sydney, Lowy Institute for International Policy, 2006.

A KEY DOMINO?

⁶ See, for example, Australia's statement to the United Nations Human Rights Council in 2010, which expressed Australia's support for 'the universal abolition of the death penalty', and noted that in 2010 Australia made bilateral representations to all retentionist countries regarding the death penalty: <http://www.geneva.mission.gov.au/gene/Statement225.html>.

⁷ Amnesty International identifies 58 retentionist countries worldwide, and classes 139 countries as 'abolitionist in law or practice', although this figure includes a number of countries that continue to impose death sentences but who appear to be refraining from conducting executions. Amnesty International, *Death sentences and executions 2010*, London, Amnesty International, 2011.

⁸ These comparisons do not cover extrajudicial executions, which far exceed judicial executions in Indonesia during the past 30 years. For example, death squads summarily executed several thousand suspected criminals and urban thugs during the Suharto authoritarian regime's infamous Petrus – or mysterious killings – campaign in the early 1980s.

⁹ Other retentionist states such as China and Iran typically conduct many times this number of executions in a single year. For recent figures see Amnesty International, *Death sentences and executions 2010*.

¹⁰ Interviews with a senior Supreme Court judge and Bhatara Ibnu Reza, Imparsial, November 2011; Dituding tak ada vonis mati, MA: kalau hakim yakin, sikat saja, *detik.com*, 28 December 2011.

¹¹ Pasca UU baru, tidak ada gembong narkoba yang dihukum mati, *detik.com*, 27 December 2011.

¹² Dataset drawn from Imparsial and Kontras data, supplemented with newspaper reports. See Tim Imparsial, *Menggugat Hukuman Mati di Indonesia*, Jakarta, Imparsial, 2010. Kontras, Death Penalty Log, August 2011. At the time of writing, there has

been one death sentence handed down in 2012, for murder.

¹³ Ibid.

¹⁴ Indonesian Supreme Court, Judicial review judgment in case of Scott Anthony Rush (Putusan Nomor : 28 PK/Pid.Sus/2011), 10 May 2011.

¹⁵ Imparsial, *Menggugat hukuman mati di Indonesia*. Imparsial identifies at least 36 prisoners to have submitted at least one plea for clemency since 1982. The successful plea was submitted by Thai national Kamjai Khong Thavorn, who had his death sentence from a drugs case in the late 1980s reduced to a twenty-year term of imprisonment in 1998. Prior to clemency being granted, Amnesty International had particularly highlighted this case, questioning the lack of interpreters at the trial and the subsequent emergence of new evidence suggesting the man was innocent. Thavorn was released in 2010, three years after his sentence had ended. Reportedly, his year of imprisonment was mistakenly typed as 1997 rather than 1987 in the letter reducing his sentence to 20 years, with the result that prison authorities did not realise that he had completed his term. See ' Karena salah ketik, napi kelebihan hukuman', *antaranews.com*, 7 April 2010.

¹⁶ Clemency in Indonesia is regulated by Law no. 22/2002 on Clemency as amended by Law no. 5/2010.

¹⁷ Interview and email communication with a senior Supreme Court judge, November 2011.

¹⁸ For details of this case, see Dave McRae, Criminal justice and communal conflict: a case study of the trial of Fabianus Tibo, Dominggus da Silva, and Marinus Riwu, *Indonesia*, 83, 2007, pp 79-117.

¹⁹ The three men indicated formally that they would not seek clemency in April 2008. Following this, they also unsuccessfully filed a challenge with the Constitutional Court regarding the constitutionality of the law governing the method of execution. They were executed in November 2008, subsequent to the

A KEY DOMINO?

15 October 2008 decision in the Constitutional Court case. See Amrozi cs tolak ajukan grasi, *detik.com*, 14 April 2008; Eksekusi undur-undur, *Tempo*, 10 November 2008.

²⁰ Dukun Usep telah dieksekusi, *kompas.com*, 19 July 2008.

²¹ David T. Johnson and Franklin E. Zimring, *The next frontier: national development, political change, and the death penalty in Asia*. Oxford; New York, Oxford University Press, 2009, p 9.

²² Mahfud setuju hukuman mati di RI, *Waspada Online*, 28 May 2011; Perlu dihukum berat - Mahfud MD: hukuman mati sepatasnya diterapkan, *Kompas*, 28 November 2011.

²³ Executions are governed by Law no. 2/Pnps/1964.

²⁴ Law no. 22/2002 on Clemency as amended by Law no. 5/2010.

²⁵ Presiden tunggak 2460 permohonan grasi, *Kompas.com*, 2 August 2011.

²⁶ Presiden tolak grasi terpidana mati, *detik.com*, 9 July 2004.

²⁷ Presiden tolak grasi penjahat narkoba, *bnn.go.id*, 13 July 2006.

²⁸ Miliki sabu-sabu di Iran, hanya pelanggaran biasa, *Surya Inside*, n.d.; Transaksi narkoba di Indonesia naik 300 persen dalam tujuh tahun, *Koran Tempo*, 3 February 2011; Pasca UU baru, tidak ada gembong narkoba yang dihukum mati, *detik.com*, 27 December 2011.

²⁹ Jaringan narkoba Nepal dibongkar, *Seputar Indonesia*, 7 January 2011.

³⁰ Discussions with individuals in prosecutorial and judicial institutions, some speaking in personal capacity, Jakarta, November 2011.

³¹ For discussion of penalties under Islamic criminal law, including the death penalty, see Rudolph Peters, *Crime and punishment in Islamic law*, Cambridge, Cambridge University Press, 2005, pp 30-38.

³² Interview and phone interview with Jimly Ashiddiqie, November, December 2011. See also

Jimly Ashiddiqie, *Kata pengantar*, in *Kontroversi hukuman mati di Indonesia: perbedaan pendapat hakim konstitusi*, eds. T.M. Lubis and A. Lay, Jakarta, Penerbit Buku Kompas, 2009, pp xiv-xvi.

³³ Interview with a member of drafting team, November 2011.

³⁴ Penarikan UU Tipikor untuk dikaji, *Suara Pembaruan*, 31 October 2011.

³⁵ Penghapusan hukuman mati bakal permudah pengembalian aset, *Mediaindonesia.com*, 30 March 2011.

³⁶ Penerapan hukuman mati di Indonesia hambat pengembalian aset koruptor, *voanews.com*, 7 October 2011.

³⁷ Polisi belum bisa sentuh pemasok narkotika dari Belanda, *kompas.com*, 21 December 2011.

³⁸ Article 365 (4) of the Indonesian criminal code.

³⁹ Dua terdakwa pembunuhan di karimun divonis mati: <http://www.antaraneews.com/print/1264702154>. Their convictions are classified under murder in the aggregate statistics of this paper.

⁴⁰ The Constitutional Court publishes transcripts of its sessions. For this session, see Risalah sidang perkara nomor perkara nomor 15/PUU-X/2012, 17 February 2012: http://www.mahkamahkonstitusi.go.id/Risalah/risalah_sidang_Perkara%20No.%2015.PUU-X.2012,%20tgl.%2017%20Feb%202012.pdf.

⁴¹ Top judge favoured Bali Nine death row appeal, *The Australian*, 24 January 2008.

⁴² Law no. 2/PNPS/1964 on the method of execution of death sentences.

⁴³ Phone interview with Maruarar Siahaan, former Constitutional Court judge, December 2011.

⁴⁴ After escaping death abroad, maid faces anger at home, *The Jakarta Globe*, 19 August 2011.

⁴⁵ See Kementerian Luar Negeri Republik Indonesia, *Diplomasi Indonesia 2010*, n.d.; Kementerian Luar Negeri Republik Indonesia, *Diplomasi Indonesia 2011*, n.d.

A KEY DOMINO?

⁴⁶ Transkripsi keterangan Presiden soal kasus Ruyati: <http://www.presidentri.go.id/index.php/pers/president/2011/06/23/561.html>.

⁴⁷ No new hope for Aussie pair on death row, *theAustralian.com.au*, 4 January 2012.

⁴⁸ For discussion of the issue for China and India of protecting their citizens abroad, see Andrew Erickson and Gabe Collins, China's new challenge: protecting its citizens abroad, *WSJ BLOG/China Real Time*, 12 February 2012: <http://blogs.wsj.com/chinarealtime>; Ramesh Thakur, Protecting citizens abroad, *DNA*, 7 May 2010: http://www.dnaindia.com/analysis/report_protecting-citizens-abroad_1380008.

⁴⁹ On the issue of self-interest and special pleading, see for example, Tim Lindsey, Sparing the Bali bombers, *Herald Sun*, 15 October 2007; Sian Powell, We're giving them enough rope to hang us, *The Australian*, 3 December 2005.

⁵⁰ See Michael Fullilove, *Capital punishment and Australian foreign policy*.

⁵¹ Interview with Tim Lindsey, 9 September 2011.

⁵² Interview and phone interview with Maruarar Siahaan, former Indonesian constitutional court judge, November, December 2011.

⁵³ For an approximate number of people on death row in Malaysia, see Abolition of death penalty in Malaysia, *BorneoPost Online*, 30 October 2011.

⁵⁴ Interview with Bhatara Ibnu Reza, Imparsial, October 2011.

⁵⁵ Jimly Asshidiqie, *Kata pengantar*, in *Kontroversi hukuman mati di Indonesia: Perbedaan pendapat hakim konstitusi*, eds. T.M. Lubis and A. Lay, Jakarta, Penerbit Buku Kompas, 2009, pp xi-xii. Asshiddiqie was part of the majority judgment that upheld the legality of the death penalty for narcotics crimes.

⁵⁶ Ergun Özbudun, Democratization reforms in Turkey, 1993–2004, *Turkish Studies*, 8 (2) 2007, p 186.

⁵⁷ Finlay, Lorraine. Exporting the death penalty? Reconciling international police cooperation and the abolition of the death penalty in Australia. *Sydney Law Review* 33 (95). The Attorney-General's department provides a factsheet on its website on mutual legal assistance in death penalty matters; the Australian Federal Police also make available on their website their 'Practical Guide on international police-to-police assistance in potential death penalty situations'. See [http://www.ag.gov.au/Documents/Fact%20Sheet%203%20-%20pdf%20\(internet\)%20version%20-%20How%20does%20mutual%20assistance%20work%20in%20death%20penalty%20cases.PDF](http://www.ag.gov.au/Documents/Fact%20Sheet%203%20-%20pdf%20(internet)%20version%20-%20How%20does%20mutual%20assistance%20work%20in%20death%20penalty%20cases.PDF); <http://www.afp.gov.au/about-the-afp/~media/afp/pdf/ips-foi-documents/ips/publication-list/OG00014%20-%20International%20police%20to%20police%20assistance%20in%20death%20penalty.ashx>

⁵⁸ For differing views, see Simon Bronitt, Directing traffick and the death penalty: policing the borders of drug law enforcement, *Criminal Law Journal*, 30, 2006, pp 270-274; Miriam Gani and Wendy Kukulies-Smith, Case and Comment: Rush v Commissioner of Police, *Criminal Law Journal*, 30, 2006, pp 314-321; Ronli Sifris, Balancing abolitionism and cooperation on the world's scale: the case of the Bali Nine, *Federal Law Review*, 35, 2007, pp 81-109; Finlay, Exporting the death penalty?.

⁵⁹ Finlay, Exporting the Death Penalty?.

ABOUT THE AUTHOR

Dr Dave McRae is a Research Fellow in the East Asia Program at the Lowy Institute for International Policy. He has researched conflict, politics, democratisation and human rights issues in Indonesia for over a decade. He wrote his Ph.D. at the Australian National University on post-authoritarian inter-religious violence in Indonesia, explaining why civil war intensity violence could suddenly occur in a previously quiescent region. As Lead Researcher for the World Bank's Conflict and Development Team in Indonesia between 2008 and 2010 he led a research program on interventions to prevent conflict and address its impacts. Prior to this, he worked for the Jakarta office of the International Crisis Group between 2004 and 2006, researching and writing reports on most of Indonesia's major conflict areas.

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