

Introduction: Drugs Law and Practice in Indonesia, Singapore and Vietnam

This book offers an account of criminal law and practice relevant to drugs regulation in three Southeast Asian jurisdictions: Indonesia, Singapore and Vietnam. The core of the book comprises three country studies based on extensive fieldwork, each offering original analysis of criminal law and procedure in drugs regulation in three very different Southeast Asian states. We approach each country by examining, in turn, investigation, trial, and sentencing. The last category also includes the death penalty, as well as the different mechanisms available for pardon and clemency. In short, we frame our analysis to reflect how a defendant prosecuted for drugs offences is treated in each jurisdiction, in a loosely sequential order.

Although their legal systems are very different, the three countries selected for investigation share a commitment to the current international drugs law regime. This is based on three major United Nations (UN) conventions to which each is a signatory: the UN Single Convention on Narcotic Drugs, 1961 (as amended by the Protocol of 1972); the UN Convention on Psychotropic Substances, 1971; and the UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. The next chapter offers a brief overview of these conventions and the international system for regulation of drugs they establish. An indicative summary of the extent to which Indonesia, Singapore and Vietnam have met their obligations under the Conventions in their domestic laws appears in an appendix at the end of the book.

These three jurisdictions were selected because each has experienced controversy over its approach to drugs-related crime in recent years. They also represent different approaches to drug regulation, even though each is seen as adopting a hard line against drug offenders. A comparison of their legal regimes for drugs offences also highlights key differences in practice between civil and common law countries, as well as between liberal and authoritarian states.

The legal systems of Indonesia, Singapore and Vietnam are, in fact, fundamentally different. Indonesia has a plural civil law system that combines limited elements of Islamic legal tradition and *adat* (traditional customary law) within an overarching European civil law structure inherited from Dutch colonialism. Drugs are regulated within the civil law system, which is still strongly influenced by colonial legal culture but has followed its own trajectory since independence. *Reformasi* (Reformation) refers to the sweeping democratisation implemented after Soeharto's authoritarian rule collapsed in 1998. It triggered major efforts to reform the legal system, including the introduction of formal judicial independence. Many of the changes delivered

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by *Reformasi* are ambitious and potentially transformative. Their implementation, however, remains incomplete and this is particularly obvious in the judicial system.

Singapore, a tiny former British colony that has become a major East Asian commercial hub, has a sophisticated common law system. This is embedded within a one-party state that has been led by the People's Action Party (PAP) since independence in 1965. While Singapore adopted the British judicial model, its legal system also developed its own characteristics, many of which reflect the overwhelming political and social dominance of PAP and, in particular, its conservative social policies and tough 'law and order' approach.

Vietnam, by contrast, has a socialist legal system, in which the Communist Party of Vietnam is paramount. Little or no legal shadow remains from the French colonial period. This is particularly true in the north of the country, which has been socialist since 1945. The Vietnamese legal system has undergone widespread and fundamental reform since 1987. This has targeted both doctrine and institutions. Despite this, the Vietnamese system of criminal law remains largely influenced by communist ideology, led by the single-party state. In this, Vietnam is radically different to Indonesia and Singapore, which have long been regional bastions of opposition to socialism and still regard communism as inherently subversive.

Despite their differences, legal institutions in the three states selected for study in this book share a common vulnerability to government influence, albeit for different reasons. In Indonesia, legal institutions, while greatly reformed since Soeharto's fall, are still subject to pressure from political elites, as well as outright corruption. Bribery of police, prosecutors and judges continues to pervert many investigations and trials, with the justice system often dismissed by Indonesians as the *mafia peradilan* or 'judicial mafia'. In recent years, however, Indonesia has also become a site of creative litigation, as counsel and activists test the limits of law and the new democratic system through still-emerging and troubled institutions like the Constitutional Court.¹

While Singapore's criminal law is practised in open court, complete with due process and procedural safeguards, substantial unreviewable power is retained by law enforcement authorities. In particular, decisions whether to prosecute, and for what crimes, are made largely beyond the public gaze. This is also true of decisions about whether a defendant has provided sufficient assistance to the authorities to escape the death penalty that is otherwise mandatory for most drug offences. As in Indonesia, litigation is used in Singapore to test the limits of the law in relation to constitutional guarantees, such as, for example, the right to counsel. Defence lawyers also regularly test the PAP's position that the rights of the criminal defendants are always to be qualified by the interests of society in punishing criminal activity, although they do so with limited success.²

As mentioned, Vietnam's legal system differs significantly from those of Indonesia and Singapore. Its socialist roots remain strong, particularly in the field of criminal

¹ pp 49, 64, 65, 87–8, 94 and 135.

² See, for example, pp 142–4, 152–7, 163–4 and 179–81.

law, and this manifests in the way trials are conducted and how legal institutions relate to each other and their Party leadership. Courts are not independent, although they are now more transparently managed than before 1987. In that year, a program of wholesale economic reform was triggered by the introduction of the *đổi mới* (renovation) policy. This opened the country to international and global influence in the name of diversifying the economy and enabling foreign investment. While the initial focus was on laws and legal institutions that would enable investment, Vietnam's integration with global and regional regulatory systems has led to substantial reforms to its Constitution, the Penal Code 1999, the Criminal Procedure Code 2003, and a range of other drug-related laws.

These changes aim, among other things, to balance international approaches to drugs regulation, criminal procedure and human rights against Vietnamese Party-led authoritarian principles. A right to counsel and a presumption of innocence were, for example, constitutionally embedded as recently as 2013. They began to have effect from 2014. Attitudes to the death penalty are also changing, moving towards a less harsh position. There is, however, a real tension created by the fact that the Party-state continues to invoke the socialist ideology that privileges it, while at the same time expanding personal rights in the Constitution. This expansion is more aspirational than a matter of practice, not least because Vietnam does not have a constitutional court. As in Indonesia, there are also widespread accusations of corruption directed at police, investigating authorities and courts. Some suggest, however, that drugs cases are among those least affected by corruption because of the social opprobrium drug offences attract.

I. LOCATING DIFFERENCES AND SIMILARITIES

In summary, Indonesia, Singapore and Vietnam, have markedly different legal systems and, as a result, divergent criminal laws and practice. These differences are most apparent in criminal procedure and approaches to the death penalty, in both policy and practice. We now offer a brief overview of the ways in which these three jurisdictions regulate and practice drug-related law. We begin with substantive offences and then move to investigations, trials, sentencing, and, finally, the death penalty. All the issues raised below are covered in more detail in the individual country studies that follow. Our aim here is simply to demonstrate the diversity of approaches in the three countries, rather than offer a detailed comparative analysis of the three systems.

Applicable Law

All three countries have criminalised the cultivation and trafficking of narcotics, as is required by the international conventions to which they are signatories. In Indonesia and Singapore, drug use is also an offence, although Vietnam recently de-criminalised it. All provide rehabilitation for drug addicts, both voluntary and compulsory, although the extent to which this is actually implemented varies.

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Sentencing is harsh in all jurisdictions, with the death penalty firmly within the sentencing range. Generally speaking, the death penalty can currently apply for transporting in excess of 600 grams of heroin or cocaine across borders or within Vietnam,³ while in Singapore trafficking 15 grams attracts the death penalty.⁴ In Indonesia, the amount that triggers the possibility of a capital sentence is, in the case of plants, 1 kilogram or five plants, or 5 grams of non-plant substances.⁵

While all three states claim to be ‘tough on drugs’, Singapore is the only jurisdiction that retains a mandatory death sentence for some drugs offences, and is seen as the most punitive in practice. Being a foreigner has, however, been held by the Indonesian courts to be an aggravating circumstance and our research suggests that a foreign drug offender convicted of drugs offences in that country faces a higher likelihood of receiving the death penalty than a local convicted of the same crime. This is not the case in Singapore or Vietnam, where foreigners are, in fact, much less commonly executed.

Investigations

Despite increasing oversight of law enforcement agencies and their compliance with the law, police and investigators in Indonesia and Vietnam still enjoy a great deal of discretion, which sometimes involves entrapment and corruption. In Singapore, the prosecution has ‘potent’ powers of interrogation,⁶ with no video or tape recording of witness interrogation required. These are not compulsory in Indonesia or Vietnam either.

The right to counsel exists in the Constitutions of all three states but in each its implementation is weak. In Indonesia, the right to counsel is seldom a reality during the investigation phase. Many detainees are unaware of the right to counsel, and there are reports from some who seek to exercise it of being threatened by police.⁷ Outside major cities in Vietnam, the assistance of counsel during the investigation phase is inconsistently facilitated and often routinely blocked, partly or in full.⁸ Counsel also report real difficulties in obtaining timely approval of the certificate of defence needed to access or represent clients. In both countries, the court must appoint counsel if the defendant faces the death penalty but the quality of court-appointed counsel varies greatly. In Singapore, the court has held that there is, in fact, no right to be informed of the constitutional right to counsel⁹ and so access to representation during the investigation phase is limited. In any case, other judicial

³ pp 259–60.

⁴ pp 60–63.

⁵ This applies to producing, importing, exporting and dealing in both Category I (heroin, cocaine, marijuana, ecstasy, amphetamines and methamphetamines, etc) and II (morphine, codeine, etc) drugs, and causing death through their provision. See pp 60–63.

⁶ See *Muhammad bin Kadar v Public Prosecutor (PP)* [2011] 3 SIR 1205 at [57]–[60]. See also pp 177–78.

⁷ pp 83–90.

⁸ pp 293, 241–42.

⁹ pp 179–81.

decisions suggest that counsel does not need to be made available to the defendant if that would risk ‘obstructing’ the state’s investigation of cases, something surely inevitable in most instances.¹⁰

Counsel in Indonesia and Singapore have acknowledged status and rights in trials but in Vietnam they are deemed subordinate to both judges and the procuracy.¹¹ This severely compromises the capacity of counsel to take advantage of the recent developments in Vietnamese criminal law and procedure on behalf of their clients. Although fundamental reforms have introduced adversarial elements in Vietnamese criminal trials, the safeguards necessary to make them a standard feature are not yet in place.

All three jurisdictions provide for a presumption of innocence, although they also apply the internationally common presumption of ownership where a defendant is found with drugs, something that can significantly qualify the presumption. In the case of Vietnam, the presumption of innocence has, in any case, only existed constitutionally since 2014 and it is not yet clear how it will work in practice.¹² In Vietnam, defendants are still obliged to make a statement, so there is no right to silence.¹³ In Indonesia, while the presumption of innocence exists, it can be problematic in narcotics trials.¹⁴ Some argue there is an implicit right to silence arising from a Criminal Procedure Code provision that states that the defendant does not bear the burden of proof but not all accept that this is so.¹⁵ In Singapore, there is no constitutional right to silence, and jurisprudence in drugs cases states that an adverse inference may be drawn where defendant withholds information that might have assisted him or her.¹⁶

Trials

As mentioned, Indonesia and Vietnam both have inquisitorial legal systems ultimately derived from European models, including the Soviet Union in the case of Vietnam. A panel of judges (Indonesia) or a judge and two people’s assessors (Vietnam) decide the case on the basis of the evidence before it, which is presented by a prosecutorial agency. In both countries, the courts seek ‘the truth’ and there is no system of *stare decisis* or precedent, at least not in the way it is understood in common law countries.

The Vietnamese procuracy is a Soviet-style institution introduced in the 1960s to oversee the observance of laws by all government agencies.¹⁷ While its supervisory

¹⁰ pp 180–81.

¹¹ pp 252–53, 298.

¹² pp 236–38, 298.

¹³ p 238.

¹⁴ pp 70, 88.

¹⁵ p 88.

¹⁶ pp 177–78.

¹⁷ p 201.

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power has been reduced, the procuracy retains the power to supervise investigations and trials, including a now controversial power to review the work of courts. The Vietnamese courts meet with the procuracy (and usually separately with counsel) before the case to determine key issues and how to proceed. They also consult with more senior judges about particular cases.¹⁸ In addition, the courts remain susceptible to leadership (or manipulation) by the political leadership of the day, both central and local. As a result, criminal trials in Vietnam are not usually marked by substantive legal contests.

In Indonesia, there is a long-standing and much analysed law-practice gap, which often reflects the difficulties the courts have in understanding and properly implementing the formal independence granted them after 1998.¹⁹ More particularly, the courts remain vulnerable to manipulation and informal approaches by a range of actors, including police, prosecutors, parties and the political leadership of the day, whether local or centrally based. Trials in Indonesia are more adversarial than their Vietnamese counterparts but are moderated by both their civil law roots and the impact of politics, personalities and patronage. Further problems are created by the brevity and poor quality of many written decisions. This often creates real uncertainty about how laws are interpreted and applied, and serious and persistent problems of inconsistency in sentencing.²⁰

Singapore has an adversarial common law system that allows each party to lead and contest evidence. A system of precedent applies and there are established and firmly enforced rules of evidence derived from British common law practice. While trials are conducted within an explicitly anti-drug context that enables procedural and doctrinal constraints on defendants' rights, the trials themselves are relatively open and transparent.

Appeals

As a common law system, Singapore has a system of appeals to the next highest court in the hierarchy. These must be brought within 15 days and can be made against conviction, sentence or any order of the court,²¹ except where the accused

¹⁸ p 200.

¹⁹ For just a few of many examples of this literature, see Daniel Lev, 'Between State and Society: Professional Lawyers and Reform in Indonesia' in Daniel Lev and Ruth McVey (eds), *Making Indonesia* (Ithaca, Cornell University Press, 1996); Sebastiaan Pompe *The Indonesian Supreme Court: Fifty Years of Judicial Development* (Leiden, Leiden University Press, 1996); Simon Butt, 'Surat Sakti: The Decline of the Authority of Judicial Decisions in Indonesia' in Tim Lindsey (ed), *Indonesia: Law and Society* (Sydney, Federation Press, 2008) 346–62; David Linnan, 'Commercial Law Enforcement in Indonesia: The Manulife Case' in Tim Lindsey (ed), *Indonesia: Law and Society* (Sydney, Federation Press, 2008) 596–619; Daniel Fitzpatrick, 'Culture, Ideology and Human Rights: The Case of Indonesia's Code of Criminal Procedure' in Tim Lindsey (ed), *Indonesia: Law and Society* (Sydney, Federation Press, 2008) 499–514; and Simon Butt and Tim Lindsey, 'Judicial Mafia: The Courts and Illegality in Indonesia' in Edward Aspinall and Gerry van Klinken (eds), *The State and Illegality in Indonesia* (Leiden, KITLV Press, 2011) 189–216.

²⁰ pp 119–34.

²¹ pp 188–89.

has pleaded guilty, in which case only an appeal against sentence is allowed. The District and Magistrates Courts are able to submit a reference on a point of law for advice to the High Court of Singapore. These processes are open and transparent, particularly when compared with the appeal and review mechanisms operating in Indonesia and, in particular, Vietnam.

In Indonesia, there are three levels of appeal possible. First, the defendant and prosecution can appeal any first instance (that is, District Court) criminal decision, except decisions in expedited procedures. There are also restrictions on the prosecution's ability to challenge decisions of not guilty but appeals against acquittals are, in fact, often heard.²² All appeals from the District Courts are heard in the provincial level High Courts and must be lodged within seven days. From the High Court, appeal lies by cassation to the Supreme Court but solely on issues of law.²³ Applications must be lodged within fourteen days, and both appeal and cassation time limits are rigidly enforced. Although not strictly an appeal, the Criminal Procedure Code also allows for 'reconsideration' (*peninjauan kembali*, PK) by the Supreme Court of almost any decision of any court (including its own) that has acquired 'binding legal force', that is, in respect of which no further appeal or cassation is possible. Requests for reconsideration are lodged with the court of first instance, and there is no time limit applicable. The Supreme Court refuses to hear more than one reconsideration application in any case, despite a recent Constitutional Court decision holding that the number of reconsiderations may not be limited.²⁴

Generally speaking, criminal appeal, cassation and reconsideration decisions in Indonesia are notable for brevity and lack of detail in their reasoning. They are also often criticised for inconsistency and lack of predictability. In part, this reflects lack of basic curial skills in a newly-independent judiciary still struggling to emerge from more than three decades of repression and deliberate neglect under the Soeharto. It is also, however, the result of the continued influence of the so-called 'judicial mafia'. As mentioned, this term is understood in Indonesia as a reference to systems of institutionalised corruption within the legal sector, which have proved very resilient.²⁵

Vietnam also has three mechanisms by which a decision can be taken to a higher court: appeal, cassational review and the reopening of the case. Time limits apply, as do constraints on who can bring a particular type of application. Generally, the convicted person, his or her counsel or the procuracy may bring an appeal within 15 days to a higher court.²⁶ A policy decision is currently awaited as to the implications for this process of the introduction in 2014 of a new level of court, the High Court, which takes its place between the current Supreme and Provincial Courts.

²² pp 85–87.

²³ p 93.

²⁴ pp 87–88.

²⁵ pp 49–50, 100, 135.

²⁶ pp 266–68.

In the meantime, appeals must be brought to the next highest court in the hierarchy. Cassational review (essentially where there has been an error of law) is sought by the branch of procuracy at the next level up from that at which the trial was held.²⁷ Neither counsel nor a person convicted may seek cassational review. It is also not possible to seek cassational review of a case heard on appeal by the highest court, that is, where the Judicial Council of the Supreme Peoples Court has heard the case. Proposed reforms to the Criminal Procedure Code that are currently being debated include, however, a complex mechanism whereby cassational review from this body may eventually be possible. There is no time limit on cassational reviews and they are not limited in number although, again, they may only be initiated by the procuracy. Finally, an application can be made to reopen a case on the basis of new evidence.²⁸ While this application can only be made by the procuracy, anyone may request it to do so. There is no time limit on an application to reopen.

This trio of review options creates obviously difficulties for convicted persons and their counsel. The procuracy's monopoly on applications for cassation and reopening vests substantial discretionary decision-making in its hands, which is rarely exercised transparently. There is great scope for pressure to be brought to bear on the procuracy by influential figures linked to it and by local governments—and, of course, for outright corruption as well.

Death Penalty and the State: Indonesia, Singapore and Vietnam

Johnson and Zimring have recently argued that it is time to closely analyse the prospects for the 'export' to Asia of abolitionism.²⁹ Put another way, they ask whether what they see as a gradual global trend toward abolition of the death penalty is likely to be replicated in Asia. As this book shows, Indonesia, Singapore and Vietnam all retain the death penalty for drug trafficking and the courts in each country sentence certain traffickers to death, some of whom are eventually executed. The three governments also share a 'tough on drugs' rhetoric, with drugs cast as a serious social evil. There are, however, vocal critics of the death penalty both within and outside the political leadership in each country. These commonalities, however, obscure very different death penalty practices.

In none of these jurisdictions is the death penalty mandatory in all cases. In each, there is provision for minors to avoid the death penalty and, in the case of Vietnam, for pregnant women as well. In Indonesia and Vietnam, capital punishment is discretionary, although in Vietnam detailed court guidance effectively dictates that the death penalty currently applies where certain amounts of drugs are involved

²⁷ p 268.

²⁸ pp 270–71.

²⁹ David T Johnson and Franklin E Zimring, *The Next Frontier: National Development, Political Change and the Death Penalty in Asia* (New York, Oxford University Press, 2009).

and there are no extenuating circumstances.³⁰ Until 2012, the death penalty was mandatory in Singapore where a person was convicted of trafficking drugs in particular quantities.³¹ There is now a judicial discretion to avoid capital punishment where two specific conditions are met. First, the defendant must be held, on the balance of probabilities, to be courier; and, second, the Central Narcotics Bureau must certify to the court that the defendant provided information to it enabling the disruption of drug trafficking.³²

Each country has a different mode of execution and they execute at different rates. In Indonesia, numbers fluctuate, with execution policy influenced by domestic politics, including electoral cycles.³³ President Susilo Bambang Yudhoyono imposed an unofficial moratorium from late 2008 until 2013 but executions by firing squad resumed with his approval in 2014. At the end of that year, he was succeeded by President Joko ‘Jokowi’ Widodo, who, as at the time of writing (mid-2015), had presided over the execution of 14 people, mostly foreigners, despite strong international criticism.³⁴ A long delay of between 10 and 20 years before execution is not uncommon in Indonesia.

In Singapore, execution is by hanging and broadly speaking follows an established procedure and a time line that allows two years between sentencing and execution. These apply regardless of whether a foreign or local is being punished.³⁵ In Singapore, numbers executed have altered dramatically in the last twenty years. Between 1991 and 2004, this small nation state reportedly executed more than 400 prisoners.³⁶ It is suggested the current number of executions is now markedly lower, with only four executions in the five years from 2007 to 2012.³⁷

In Vietnam, sentencing to death has been common for trafficking offences involving more than 600 grams of heroin or cocaine. Since 2013, death is by lethal injection but the timing of executions appears to be uncertain—and perhaps vulnerable to manipulation. Time on death row varies, with Pascoe suggesting a range of between five months to four years.³⁸ Estimates suggest around 60 executions take place in Vietnam every year. These estimates vary substantially, however, and their reliability has been further compromised by a suspension of executions from mid-July to late 2013, because of a lack of a key ingredient needed for

³⁰ pp 259–62, 300.

³¹ pp 164–68.

³² pp 183, 190–92.

³³ Simon Rogers and Mona Chalabi, ‘Death Penalty Statistics, Country by Country’ *The Guardian* (London, 13 December 2013), www.theguardian.com/news/datablog/2011/mar/29/death-penalty-countries-world#data. Data for years 2007–12 suggest 11 executions over five years.

³⁴ pp 106–07.

³⁵ p 192. See also Daniel Pascoe, ‘Clemency in Southeast Asian Death Penalty Cases’, (2014) Centre for Indonesian Law, Islam and Society Policy Paper No 4; Asian Law Centre Briefing Paper No 1 (CILIS and ALC, Melbourne Law School, the University of Melbourne).

³⁶ pp 190–92.

³⁷ See also Rogers and Chalabi, ‘Death Penalty Statistics, Country by Country’, which provides a link to Amnesty International’s data at: <https://docs.google.com/spreadsheets/ccc?key=0AonYZs4MzlZbdGJiUzRwTVhlm25DWDlPdJbMnURjOUE&hl=en#gid=0>.

³⁸ Daniel Pascoe, ‘Explaining Death Penalty Clemency in the Socialist Republic of Vietnam’ (12 September 2015), see papers.ssrn.com/sol3/papers.cfm?abstract_id=2659417.

lethal injections.³⁹ Many foreigners, particularly Westerners, escape execution in Vietnam.⁴⁰

The three countries also have different mechanisms for, and attitudes to, clemency. In Indonesia, Constitution and statute provide that clemency must be sought from the President and it has recently become clear that his decision is not capable of review by a court. Applications have historically been successful in 24 to 33 per cent of cases, although clemency is now very rarely granted where the death penalty is imposed for trafficking.⁴¹ President Widodo has reportedly so far refused all applications for clemency made by drugs offenders.

In Singapore, the Constitution says that clemency can be sought from the President, acting on the advice of the Cabinet.⁴² Clemency rates generally are the lowest here in Southeast Asia⁴³ and, again, clemency is very unlikely in drug trafficking cases.

In Vietnam, the President holds the discretion to award clemency,⁴⁴ with the clemency rate suggested to be between 6 and 23 per cent.⁴⁵ Foreigners facing execution may hope for clemency in the form of commutation to a life sentence if they are from countries that enjoy good relations with the Vietnamese government and engage in high-level police co-operation, and their country of origin does not usually apply the death penalty.⁴⁶ There is no transparency about the clemency process and grants of clemency to foreigners are not reported in the Vietnamese press. Local convicts may also apply for clemency but it has not been possible to track the results of such applications with any confidence. Some are apparently successful judging by a comparison of the available death penalty sentencing rates with execution rates, although these figures are not reliable.

Pascoe has identified three key legal and political factors that influence the proportion of cases in which clemency is granted.⁴⁷ The first is that where there is discretion allowing lenient treatment at earlier stages in the proceeding there is less prospect of clemency. Second, Pascoe argues that the extent to which clemency enhances or detracts from political power is also relevant. In cases where the political leader is not elected, and where the granting of clemency can either ‘demonstrate

³⁹ p 276. Johnson and Zimring, *The Next Frontier*, compared with Hai Thanh Luong ‘The Application of Death Penalty for Drug-Related Crimes in Vietnam: Law, Policy, and Practice’ (2014) 17(1) *Thailand Journal of Law and Policy*, www.thailawforum.com/articles/Vietnam-death-penalty.html. See also Rogers and Chalabi (n 32), for a link to Amnesty International data. The data for 2007–12 suggests 58 executions over five years, including two years when no executions were possible.

⁴⁰ Daniel Pascoe, ‘Explaining Death Penalty Clemency’.

⁴¹ Daniel Pascoe ‘Clemency in Southeast Asian Death Penalty’, 5.

⁴² See pp 192, 198.

⁴³ Pascoe (n 35) 5.

⁴⁴ pp 285–88.

⁴⁵ Pascoe (n 35) 5.

⁴⁶ pp 288–90.

⁴⁷ Pascoe (n 35) 6.

benevolence' or act 'as a demonstration of power of life and death so as to gain authority over domestic constituents', it is more likely to be granted.⁴⁸ Likewise, where the prisoner is a foreign national, the decision to grant clemency is often seen as contributing to 'greater international legitimacy' for unelected leaders.⁴⁹ Pascoe notes that where a state promotes a 'rule of law' approach to criminal justice, and concurrently places great emphasis on 'law and order', clemency may be less likely to be exercised as doing so is seen as a 'political liability'.⁵⁰ He gives Singapore as an example of the latter approach. The third factor relevant to assessing the incidence of clemency is time spent on death row.⁵¹

The three states covered in the book are not abolitionist, even if abolitionism is used simply to refer to a trajectory that could possibly culminate in the removal of the death penalty as a sentencing option. Indonesia's approach to execution appears subject to the political leadership of the day and there has, in fact, been a significant increase in executions year-on-year over the last two decades. It is thus no longer even reductionist.

There is an argument, however, that Vietnam is reductionist. It has steadily reduced the incidence of the death penalty and is expected to do so further in late 2015.⁵² If the number of executions is used as the indicator, Singapore is also reductionist. In Singapore, violent crimes like murder seem likely, however, to continue to attract capital punishment, and this is true also of crimes against the state in Vietnam. Vietnam's move to execution by lethal injection and current debates about adopting an approach that allows the imposition of a suspended death penalty subject to good behaviour suggest it may be the most innovative of the three South-east Asian nations considered here, at least so far as reductionism is concerned (although Indonesia is now considering a similar proposal). There is considerable irony in the fact that the state ordinarily characterised as the most authoritarian of the three seems to be the one most willing to make changes to its death penalty laws and practices.

Other Drug-related Sentencing

Each of the three states investigated in this book has a range of non-custodial sentencing options available for drug offences, although most of those convicted of trafficking are jailed. Conditions in jails vary substantially. Singapore has reportedly some of the cleanest and most efficient jails regionally, if not globally.⁵³ They contrast markedly with the harsh conditions in Vietnamese jails where inmates are expected

⁴⁸ Pascoe (n 35) 9.

⁴⁹ Pascoe (n 35) 9–11.

⁵⁰ Pascoe (n 35) 12.

⁵¹ Pascoe (n 35) 13–16.

⁵² p 273.

⁵³ Peter Lloyd, *Inside Story: From ABC Foreign Correspondent to Singapore Prisoner #12988* (Sydney, Allen & Unwin, 2010). Lloyd was jailed for four months in Singapore for drug offences in 2008.

to have funds available to them from relatives to buy food and water, although basic supplies exist.⁵⁴ It is reported that foreigners have better jail experiences than locals with access to ‘airier rooms’ possible, and even television.⁵⁵ Indonesian jails show similar patterns to those in Vietnam but are also notable for the extent to which they allow media and public access.⁵⁶

In each jurisdiction, courts may also order detention in drug rehabilitation facilities. In Indonesia, the requirement is for medical and social rehabilitation, and detention for these purposes can be substituted for jail time, at least since reforms introduced in 2009.⁵⁷ That said, jail time remains more common, and only limited advantage is taken of the legislated alternatives, as the traditional punitive approach continues to dominate.

In Vietnam, addicts can access detoxification centres on either a mandatory or voluntary basis. Conditions are reportedly basic, if not exploitative.⁵⁸ In addition to state-run detoxification centres, the Vietnamese Party-state calls on community and family to take responsibility for those addicted to drugs. They are expected to either support a program of voluntary detoxification or report addicts to the police.

Singapore appears to have the most coercive and extensive rehabilitation regimes. Those arrested for drug use can be compulsorily detained in a rehabilitation centre managed by the Singapore Prison Service.⁵⁹ There have been recent changes to the system of compulsory detention for young drug users to enable them to retain links to community, including at work or school, and avoid exposure to hardened drug users.⁶⁰ There is an extensive program of post-release monitoring and supervision to minimise relapse into drug use.

In short, each country has adopted rehabilitation as a possible response to drug addiction, alongside the established highly punitive approach to sentencing drug offenders, particularly those found guilty of trafficking. Singapore’s extensive investment in detox and rehabilitation reflects the greater resources it has committed. It also illustrates the capacity of the PAP to design and implement a focussed anti-drugs agenda. This is made possible, at least in part, by the nation’s small population, unitary government, and history of assertive and intrusive law and order policies. In Indonesia and Vietnam, by contrast, the country studies demonstrate common challenges for uniform implementation of reforms, complicated by much larger populations, strong provincial and local governments, highly discretionary decision-making, and long-established patterns of institutionalised corruption.

⁵⁴ p 266.

⁵⁵ Interviewee 8, 4 June 2012.

⁵⁶ See, for example: SBS TV, ‘Condemned to Die’, SBS Dateline (17 July 2011), www.youtube.com/watch?v=fXjpQkPfnAY. See also Foreign Prisoner Support Service, ‘Exclusive Look inside Kerobokan Prison’ (2012), www.foreignprisoners.com/prison-indonesia03.html.

⁵⁷ pp 113–17.

⁵⁸ p 212.

⁵⁹ pp 194–95.

⁶⁰ p 194.

II. MAPPING THE LITERATURE

This book responds to a significant lack of comparative analysis of drugs-focused criminal law and practice in Southeast Asia, although the extent of material available does vary between the three countries selected for study. In Singapore, for example, there is a range of texts examining drugs law and criminal practice, many of which are written by, or for, practising lawyers. These often compare Singapore's criminal law with that of Malaysia, a country of which Singapore was once, briefly, a part (from 1963 to 1965).⁶¹ This literature is relatively long-standing, with analysis of criminal law in Singapore dating from at least the 1970s.⁶²

This rich body of work is not, however, replicated for either Indonesia or Vietnam. Unlike Singapore, neither of these countries experienced a long period of British rule, and there is a severe dearth of detailed English-language analysis of the applicable criminal and procedural law in drugs cases, or the ways in which these cases are litigated. In Indonesia and Vietnam, legal commentary on drugs law and the death penalty, like criminal law and procedure generally, is predominantly in the local language and often significantly limited in scope and quality.

Criminologists focusing on drugs regulation as a health and law and order issue have recently begun to explore trends in Southeast Asia.⁶³ In the main, their publications are edited papers or reports by international organisations gathering insights about drugs regulation and drug use across the region.⁶⁴ These are growing in

⁶¹ See, for example, Chan Wing Cheong, Stanley Yeo and Michael Hor, *Criminal Law for the 21st Century: A Model Code for Singapore* (Singapore, Academy Publishing, 2013); Judges of the Subordinate Courts of Singapore, *Practitioners' Library: Sentencing Practice in the Subordinate Courts* (Singapore, LexisNexis, 2013); Rafiah Salim and Cheong May Fong, *Evidence in Malaysia and Singapore: Cases, Materials, and Commentary*, 3rd edn (Malaysia, LexisNexis, 2013); Yock Lin Tan and S Chandra Mohan, *Criminal Procedure in Singapore and Malaysia* (Singapore, LexisNexis, 2012); Jennifer Marie (ed in chief) and Mohamed Faizal Mohamed Abdul Kadir (general eds), *The Criminal Procedure Code of Singapore: Annotations and Commentary* (Singapore, Academy Publishing, 2012); Keng Siong Kow, *Sentencing Principles in Singapore* (Singapore, Academy Publishing, 2009); Stanley Yeo, *Criminal Defences in Malaysia and Singapore* (Singapore, LexisNexis, 2005); Daljit Sen Adel, *Law of Dangerous Drugs: Cases and Commentaries* (Petaling Jaya, International Law Book Services, 2001); Chan Wing Cheong and Andrew Phang, *The Development of Criminal Law and Criminal Justice in Singapore* (Singapore, National University of Singapore, 2001); and Kheng Lian Koh, Christopher MV Clarkson and Neil A Morgan, *Criminal Law in Singapore and Malaysia: Text and Materials* (Singapore, Malayan Law Journal, 1989).

⁶² Examples include Molly Cheang, *Criminal Law of Malaysia and Singapore: Principles of Liability* (Kuala Lumpur, Professional Law Books Publishers, 1990); William Clifford, 'Some Characteristics of the Application of the Criminal Justice System in Japan and Singapore', Selected Issues in Criminal Justice, (1985) HEUNI Publication Series No 4 (Helsinki Institute for Crime Prevention and Control affiliated with the United Nations); and EA Pereira, 'Exercise of Prosecutorial Discretion in the Administration of Criminal Justice in Singapore', (1982) UNAFEI Resource Material Series No 22 (Tokyo, UNAFEI). This review does not include materials published before 1980.

⁶³ Liu Jianhong, Bill Heberton and Susyan Jou, *Handbook of Asian Criminology* (New York, Springer, 2013); M Emdad Ul Haq, *Drugs in South Asia* (London, Macmillan, 2000).

⁶⁴ See Fifa Rahman and Nick Crofts (eds) *Drug Law Reform in East and Southeast Asia* (Lanham, Lexington Books, 2013). See also UNODC (United Nations Office on Drugs and Crime), *World Drug Report 2014*, (Vienna, United Nations, June 2014) 48, www.unodc.org/documents/wdr2014/World_Drug_Report_2014_web.pdf.

number, in part provoked by increasing international focus on trade in drugs as a global phenomenon. There is also a robust critique of the ‘war on drugs’ that has provoked a search for new modes of regulation.⁶⁵ While informative on the development of drugs-focussed policy, these publications do not pay much attention to criminal law and practice and largely eschew sentencing issues, particularly as regards the death penalty.

Scholars of international law have also turned their attention to the need for global responses to drug trafficking.⁶⁶ This body of research includes work on the regulation of precursors and how to sustain supply of pharmaceutical drugs.⁶⁷ It does not, however, usually deal with substantive criminal law or sentencing issues in domestic jurisdictions as does this book.

This book also contributes to the literature on the death penalty.⁶⁸ As noted below, there is a real need for detailed studies of the death penalty in Asia, particularly regarding the positions regional states take on the abolition debate.⁶⁹ China has attracted much English language commentary about the death penalty but there has been comparatively less written about Southeast Asia.⁷⁰ While there is now detailed work emerging on clemency practice in Southeast Asia,⁷¹ most publications on the

⁶⁵ Howard Rahtz, *Drugs, Crime, and Violence from Trafficking to Treatment* (Lanham, Hamilton Books, 2012).

⁶⁶ See, for example, David R Bewley-Taylor, *International Drug Control: Consensus Fractured* (Cambridge/New York, Cambridge University Press, 2012); Neil Boister, *Drugs, International Regulation, and Criminal Liability* (New York, Oxford University Press, 2013); Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford, Oxford University Press, 2012); Hamid Ghodse, *International Drug Control into the 21st Century* (Aldershot, Ashgate, 2008); Gregory Lee, *Global Drug Enforcement: Practical Investigative Techniques* (Boca Raton, CRC Press, 2004); and Neil Boister, *Penal Aspects of the UN Drug Conventions* (The Hague/London, Kluwer Law International, 2001).

⁶⁷ Examples include Pierre-Louis Lexotre, *International Cooperation, Convergence and Harmonization of Pharmaceutical Regulations: A Global Perspective* (Oxford, Elsevier, 2014); Sally Shorthose (ed), *Guide to EU Pharmaceutical Regulatory Law* (The Hague, Kluwer, 2013); Leon Shargel and Isadore Kanfer (eds), *Generic Drug Product Development: International Regulatory Requirements for Bioequivalence* (New York, Informa Healthcare, 2010); and DC Jayasuria, *Regulation of Pharmaceuticals in Developing Countries: Legal Issues and Approaches* (Geneva, WHO Publications Center, 1985).

⁶⁸ See, in particular, Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective*, 5th edn (Oxford, Oxford University Press, 2015); Roger Hood and Surya Deva (eds), *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion* (Oxford, Oxford University Press, 2013); and Roger Hood, *The Death Penalty in Malaysia: Public Opinion on the Mandatory Death Penalty* (London, The Death Penalty Project, 2013), <http://portfolio.cpl.co.uk/DPP/Malaysia-report/2/>. See also Cornell Law School, ‘Death Penalty Worldwide’ (2015), www.deathpenaltyworldwide.org/index.cfm.

⁶⁹ Johnson and Zimring (n 29).

⁷⁰ Work on China includes Susan Trevaskes, ‘China’s Death Penalty: The Supreme People’s Court, the Suspended Death Sentence and the Politics of Penal Reform’ (2013) 53 *British Journal of Criminology* 482–99; Susan Trevaskes, ‘Suspending Death in Chinese Capital Cases: The Road to Reform’ in Roger Hood and Surya Deva (eds), *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion* (Oxford, Oxford University Press, 2013) 221; Susan Trevaskes (2015) ‘Lenient Death Sentencing and the “Cash for Clemency” Debate’ 73(1) *The China Journal* 38; Michelle Miao, ‘Examining China’s Responses to the Global Campaign against the Death Penalty’ in Roger Hood and Surya Deva (eds), *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion* (Oxford, Oxford University Press, 2013) 46; and Hong Lu and Terance D Miethe, *China’s Death Penalty: History, Law, and Contemporary Practices* (New York, Routledge, 2007) 66.

⁷¹ Pascoe (n 35). Pascoe also has a forthcoming book on clemency in the region. See also Pascoe (n 37).

death penalty in that region usually focus on single jurisdictions.⁷² They also only rarely consider the death penalty specifically in the context of narcotic crimes, despite the fact that a series of executions of drugs offenders in Southeast Asia have led to major international controversies over the last two decades.⁷³ This book, therefore, also scrutinises the administration of the death penalty in Indonesia, Singapore and Vietnam to contribute to the discussion about abolition and offer insights into death penalty practice in each jurisdiction.

Drug trafficking relies, in part at least, on mules and couriers to convey illegal narcotics across borders. Consequently, nationals foreign to the jurisdiction in which they find themselves facing prosecution are common defendants in drugs cases in all three countries. They face a range of problems, including as regards legal representation and, in some cases, politicisation of their cases and discriminatory treatment. This book has, therefore, also taken as part of its focus the treatment of those foreign to the prosecuting jurisdiction. Many practitioners who are also foreign to these jurisdictions generously give a great deal of their time and energy to assist their clients to navigate the criminal justice systems of Indonesia, Singapore or Vietnam. We hope this book may be of some use to them in the future, and, of course, to the consular officials and local lawyers with whom they work.

This brief review demonstrates that there is a gap when it comes to nuanced analyses of comparative criminal law and practice relating to drugs in Southeast Asia. This is despite the fact that there is a concerted effort emerging globally, including in Asian jurisdictions, to escalate criminal law reform generally and drugs law reform in particular. As suggested at the outset, although there are shared features of drugs law across the three jurisdictions, the actual practice of criminal law varies greatly between them. The nature of investigation and trial, the likelihood of conviction, and the standard sentences imposed for similar crimes differ so markedly that it is not possible to say that there is a standard Southeast Asian model—at least not one shared by Indonesia, Singapore and Vietnam. Instead, to understand how a defendant will fare in a drugs case in any one of these three countries, it is absolutely essential to have a detailed understanding of the specific laws applied in that country and recent decisions in comparable drugs cases in that jurisdiction. This book seeks to provide that information, at least in an introductory form, to students, English-speaking practitioners, and others interested in developments in this under-studied area of public law.

⁷² See, for example, Daniel Pascoe, 'Three Coming Legal Challenges to Indonesia's Death Penalty Regime' (2015) II(2) *Indonesian Journal of International & Comparative Law* 256; Tsan Hang Tey, 'Death Penalty Singapore-Style: Clinical and Carefree' (2010) 39 *Common Law World Review* 315; and David T Johnson, 'The Jolly Hangman, the Jailed Journalist, and the Decline of Singapore's Death Penalty' (2013) 8 *Asian Criminology* 41.

⁷³ The exceptions here are Colman Lynch, 'Indonesia's Use of Capital Punishment for Drug-Trafficking Crimes: Legal Obligations, Extralegal Factors, and the Bali Nine Case' (2009) 40 *Columbia Human Rights Law Review* 523; and Yingyos Leechaianan and Dennis R Longmire, 'The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia and Thailand: A Comparative Legal Analysis' (2013) 2 *Laws* 115.