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## Policy Paper

Death Penalty and the Road Ahead:

A Case Study of Indonesia

Professor Todung Mulya Lubis



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# DEATH PENALTY AND THE ROAD AHEAD: THE CASE OF INDONESIA

## ABSTRACT

*Indonesia has been criticised nationally and internationally for its use of the death penalty. Critics argue the death penalty does not deter crime and there has never been any solid empirical evidence suggesting it can. They say the objective of punishment should be to re-educate and rehabilitate people, giving them the opportunity to reintegrate with society, not to kill them. Globally only a small number of states still execute.*

*Indonesia does give weight to these objections but domestic support for the death penalty still seems overwhelming. Few governments anywhere are willing to abolish the death penalty if they have to pay a high political cost and the government of President Joko Widodo is no exception. Some sort of compromise or alternative has to be found. One solution would be to formulate a policy respecting human rights (especially the right to life) but still allowing executions in exceptional circumstances. The Indonesian government seems to be trying to do this in its new draft Criminal Code. This says that if a death row convict demonstrates rehabilitation, his or her sentence can be reduced to either life or 20 years in prison. If this had been the law earlier this year, it could have saved the two Australians recently executed, Myuran Sukumaran and Andrew Chan.*

*Debate on the Draft of Criminal Code is a perfect opportunity for both proponents and opponents of the death penalty. There is, however, a new momentum towards abolition in Indonesia, and this paper argues that it should be used to the maximum possible extent to prevent more executions, and outlines a strategy for how this might be done.*



## PROFESSOR TODUNG MULYA LUBIS



Professor Todung Mulya Lubis was the lead Indonesian defence lawyer for Myuran Sukumaran and Andrew Chan. He is one of Indonesia's leading human rights lawyers and most influential legal thinkers.

He completed his undergraduate Law degree at the University of Indonesia (1974); his LLM at the University of California, Berkeley; a second LLM at Harvard Law School; and his JSD at the University of California, Berkeley. He has been a senior Adjunct Member of the Faculty of Law of the University of Indonesia since 1990, where he was first appointed in 1975. From 1980-1983, he was Director of Indonesia's famous dissident NGO, the Legal Aid Institute, where he worked for many years.

His influential book *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order 1966-1990* has played an important role in thinking about human rights in Indonesia.

Professor Lubis is also Founding and Senior Partner of a prominent law firm in Jakarta and has been lead counsel in a number of major human rights cases, often on a pro bono basis. These include acting for the Bali Nine in an attempt to convince Indonesia's Constitutional Court to abolish the death sentence, and against former President Soeharto. He has also held a series of senior government appointments. In 2014, he was appointed as Honorary Professor in the Melbourne Law School.

# DEATH PENALTY AND THE ROAD AHEAD: THE CASE OF INDONESIA

PROFESSOR TODUNG MULYA LUBIS<sup>1</sup>

*Thank you for believing in us. I hope this is the last execution, and [there are] no more executions after this. Your duty is to abolish the death penalty, and you can do it. Only you can do it.*

*Myuran Sukumaran*<sup>2</sup>

Myuran Sukumaran and Andrew Chan were executed in Indonesia three months ago, together with six other individuals. I still remember vividly Myuran's words when I hugged him before I left the prison. He said he appreciated my persistence in defending their right to life over the past eight years. They both knew I was initially reluctant to take up their case – because it was clearly related to the drug business; I am not only against drugs, I am even against smoking.<sup>3</sup> It took me almost a month before I agreed to take the case, which I did only on the condition that I would limit my involvement to challenging the constitutionality of the death penalty in the Law on Narcotics,<sup>4</sup> the provision relied on by both prosecutors and judges when they applied the death penalty to Myuran and Andrew.

The judicial review application I filed in the Constitutional Court asked the judges to rule the death penalty unconstitutional, thereby invalidating those clauses in the Law on Narcotics that allow it to be imposed. I hoped that with such a ruling I could overturn all death penalty verdicts in all Indonesian courts.<sup>5</sup> I was confident that the judicial review

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- 1 Edited version of the address by Professor Mulya Lubis at the Melbourne Law School on Monday 24 August 2015. Professor Mulya Lubis' visit to Melbourne was funded by the Melbourne Asian Century Visiting Fellowship.
  - 2 A farewell statement from Myuran Sukumaran to me, 11 hours before his execution, Nusa Kambangan Prison, 28 April 2015.
  - 3 I am an adviser to the National Committee on Tobacco Control in Indonesia. The Committee has been active and outspoken in criticising government's policy in accommodating the tobacco industry to grow. Indonesia is one of the biggest markets for tobacco products.
  - 4 In that case, Law No 22 of 1997 on Narcotics, since replaced by Law No 35 of 2009 on Narcotics.
  - 5 See, Constitutional Court Decision No 2-3/PUU-V/2007.  
See also, [www.mahkamahkonstitusi.go.id](http://www.mahkamahkonstitusi.go.id); and Lubis and Lay, 2009: 343-433.

would be granted, particularly because the court had recently ruled that the right to life could not be derogated from under any circumstances.<sup>6</sup> The Constitutional Court, however, rejected our argument, declaring that the death penalty did not conflict with the right to life in the constitution.

Indonesia has had the death penalty since the Dutch colonial period, when the Criminal Code (*Kitab Undang-Undang Hukum Pidana* – KUHP) was introduced.<sup>7</sup> Article 10 of the Criminal Code stipulates that penalties are divided into: primary penalties and additional penalties. Primary penalties consist of the death penalty, imprisonment, detention (such as ‘city’ detention or house arrest) and fines. Additional penalties cover the revocation of certain rights, the confiscation of assets and the public announcement of court verdicts (Hukumonline, 2005). Legally, the inclusion of the death penalty in other laws is based on its presence in art 10 of the Criminal Code. Existing laws that provide for the death penalty include: the 1997/2009 Narcotics Law;<sup>8</sup> the 2003 Terrorism Law;<sup>9</sup> the 2011 Law on Corruption Eradication;<sup>10</sup> and the Law on the Human Rights Court.<sup>11</sup> In Aceh, a special autonomous province where Islamic criminal law (*Qanun Jinayah*) applies, the death penalty has also been introduced for the crimes of adultery and rape, although it has not yet been implemented.<sup>12</sup> Indonesia, like most Muslim-majority countries, appears to have no intention of changing its status as a retentionist country (Hood, 2002: 23-74).

According to the Department of Law and Human Rights, there are at least 127 people on death row in Indonesia.<sup>13</sup> They are predominantly Indonesians but there are also several foreigners, most with death sentences for drug trafficking including 11 from Malaysia, seven from Nigeria, five from China, and two each from the Netherlands and South Africa.

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6 See, Constitutional Court Judgment No 019-020/PUU-III/2005.

7 Indonesia’s Criminal Code originated from the Dutch colonial times and effectively came into force on 1 January 1918. See, BPHN, 2010.

8 See, Law No 22 of 1997 on Narcotics.

9 See, Law No 15 of 2003 on Terrorism.

10 See, Law No 31 of 1999 as amended by the Law No 20 of 2011.

11 See, Law No 26 of 2000 on Human Rights Court.

12 See, Sorotnews, 2013; see also, Nur, 2013.

13 Data provided by Victor Teguh Prihartono, Division Head of Data and Information, Directorate General of Penitentiary Institution, Department of Law and Human Rights, 19 May 2015.

**Table 1: People on Death Row (2015)**

	Narcotics / Psychotropic	Murder	Burglary / Theft	Terrorist	Tax	Other	TOTAL
South Africa	1	0	0	0	0	0	1
Hong Kong	1	0	0	0	0	0	1
Philippines	1	0	0	0	0	0	1
Indonesia	20	57	10	2	1	1	91
Iran	1	0	0	0	0	0	1
India	1	0	0	0	0	0	1
China	4	0	0	0	1	0	5
UK	1	0	0	0	0	0	1
Malaysia	11	0	0	0	0	0	11
Zimbabwe	2	0	0	0	0	0	2
Netherlands	2	0	0	0	0	0	2
Nigeria	7	0	0	0	0	0	7
Singapore	1	0	0	0	0	0	1
Pakistan	1	0	0	0	0	0	1
Unknown	1	0	0	0	0	0	1
<b>TOTAL</b>							<b>127</b>

Source: Directorate General of Corrections, Ministry of Law and Human Rights of the Republic of Indonesia

There are also 463 people serving life sentences in Indonesia, 405 of whom are Indonesian citizens. Foreigners doing life include Malaysian, Iranian, Australian, Nigerian, Taiwanese, Filipino and Thai nationals, all of whom have received sentences for drug offenses, as shown below.<sup>14</sup>

**Table 2: People Serving Life Sentence (2015)**

	Narcotics / Psychotropic	Murder	Burglary / Theft	Terrorism	Corruption / Tax	Child Abuse	Sharp Weapons / Firearms / Explosives	Arson	Other	Total
South Africa	3	0	0	0	0	0	0	0	0	3
Australia	5	0	0	0	0	0	0	0	0	5
Philippines	3	0	0	0	0	0	0	0	0	3
Indonesia	92	249	31	13	9	2	2	2	5	405
Iran	11	0	0	0	0	0	0	0	0	11
Japan	1	0	0	0	0	0	0	0	0	1
Germany	1	0	0	0	0	0	0	0	0	1
UK	1	0	0	0	0	0	0	0	0	1
Malaysia	13	0	0	0	0	0	0	0	0	13
Mexico	1	0	0	0	0	0	0	0	0	1

14 Data provided by Victor Teguh Prihartono, Division Head of Data and Information, Directorate General of Prisons, Department of Law and Human Rights, 14 May 2015.

	Narcotics / Psychotropic	Murder	Burglary / Theft	Terrorism	Corruption / Tax	Child Abuse	Sharp Weapons / Firearms / Explosives	Arson	Other	Total
Nepal	1	0	0	0	0	0	0	0	0	1
Nigeria	5	0	0	0	0	0	0	0	0	5
France	1	0	0	0	0	0	0	0	0	1
Singapore	1	0	0	0	0	0	0	0	0	1
Sweden	0	0	0	0	0	0	0	0	1	1
Taiwan	5	0	0	0	0	0	0	0	0	5
Thailand	2	0	0	0	0	0	0	0	0	2
<b>TOTAL</b>										<b>463</b>

Source: Directorate General of Corrections, Ministry of Law and Human Rights of the Republic of Indonesia

Within ASEAN (the Association of South East Asian Nations), seven other countries retain the death penalty: Brunei Darussalam, the Lao People's Democratic Republic, Malaysia, Myanmar, Singapore, Thailand and Vietnam, although their approach to the sentence varies. Two countries, the Philippines and Cambodia, have abolished the death penalty entirely (UN Human Rights, 2013b: 19), as has Indonesia's closest neighbour, East Timor. Brunei Darussalam, Laos and Myanmar retain the death penalty in their domestic laws but seem to be abolitionist in practice (UN Human Rights, 2013b: 19-28). Myanmar commuted all death sentences in January 2014, and has conducted no executions since 1998 (UN Human Rights, 2013b: 19).

Indonesia, Singapore, Malaysia, Thailand and Vietnam still carry out executions. Indonesia appears to execute more than the other four countries mentioned.<sup>15</sup> Like Malaysia, Singapore has conducted fewer executions in recent years; Vietnam

<sup>15</sup> In 2015 alone, there have so far been 14 individuals, Indonesians and foreigners, executed for murder and drug trafficking. There

held at least seven executions in 2013 and three in 2014. Thailand executed only two people in 2009, and none since (UN Human Rights, 2013b: 19-28). Malaysia and Thailand are seriously considering applying a moratorium. Vietnam also plans to restrict the application of death penalty (UN Human Rights, 2013b: 24).

Understandably, it is not easy to abolish the death penalty, especially in countries where there are still strong cultural notions of retribution and revenge. In countries where Islam is the religion of the majority, the notion of the death penalty for certain crimes seems to be non-negotiable, and those who promote abolition can be accused of being anti-Islamic. Some progressive Islamic scholars, however, have reinterpreted Islamic texts (or *ijtihad*), commenting that retribution or revenge should be weighed against forgiveness.<sup>16</sup>

In some communities, the belief that the death penalty will not only act as a deterrent, but will also restore order and honour, complicates abolition further (Lubis, 1993: 19–21). In Papua, South Sulawesi and Central Kalimantan, for example, killing is seen as an act to restore a wronged person's reputation (Lubis, 1993: 19–21).

Despite this, ideas of retribution and revenge are losing favour internationally, and people have started to consider other forms of punishment. The fact that moratoriums are being discussed is an indication of a growing awareness that the treatment of prisoners must also be changed.

In ASEAN, not all members have supported a proposed moratorium, but more countries see it as a more realistic option, as shown in Table 3. Indonesia eventually moved from opposition to a moratorium to abstaining from voting on it in 2012.

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were also executions of three of those involved in the Bali bombing in 2008, under the previous government.

16 See, An-Na'im, 1990: 31–54. An Na'im does not specifically discuss the death penalty issue but he describes an interesting debate within Islam about the place of human rights. See also Asshiddiqie, 2015.

**Table 3: Voting on Moratorium on the Use of the Death Penalty by 11 Southeast Asian Countries**

Country	2007	2008	2010	2012	Change
Brunei Darussalam	against	against	against	against	-
Cambodia	for	for	for	for	-
Indonesia	against	against	against	abstain	against-> abstention
Lao PDR	abstain	abstain	abstain	abstain	-
Malaysia	against	against	against	against	-
Myanmar	against	against	against	against	-
Philippines	for	for	for	for	-
Singapore	against	against	against	against	-
Thailand	against	against	abstain	abstain	against-> abstention
Timor-Leste	for	for	for	for	-
Vietnam	abstain	abstain	abstain	abstain	-

Source: United Nations Human Rights Office of the High Commissioner for Human Rights 2013

Unfortunately, Indonesia's 2012 policy of abstaining from voting on the ASEAN moratorium proposal, did not last long domestically. In 2013, the year before the general election, Indonesia resumed executions. Five people were executed, two for drug trafficking and three for premeditated murder.<sup>17</sup> Over the ten years of President Susilo Bambang Yudhoyono's rule, 16 individuals were executed in total (Onlineindotv,

17 UN Human Rights, 2013b: 22. It is interesting to note that in 2003, one year before a general election, an execution also took place. Have all these executions taken place simply so governments can demonstrate a policy of being tough on crime?

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Since Joko 'Jokowi' Widodo became President in October 2014, there have been two rounds of executions: six people were executed in January 2015, and another eight in April, most for drug trafficking, and only a few for premeditated murder.<sup>18</sup> The Prosecutor General (or Attorney General), Muhammad Prasetyo, has announced a third round of executions, although the place and time are yet to be determined (Jpnn.com, 2015).

The last two rounds of executions were a serious and dangerous setback for democracy and human rights compliance. The international community reacted openly and harshly (The Guardian, 2015). Social media went wild, with many posts accusing Indonesia of being barbaric. The Secretary General of the United Nations, Ban Ki Moon, appealed to Indonesia to refrain from using the death penalty for drug-related crimes (UN News Centre, 2015). The Australian Prime Minister, Tony Abbott, even asked Indonesia to remember Australia's help after the 2004 tsunami and spare the life of Myuran and Andrew, a comment that quickly proved counterproductive.

Protests and criticism also came from Indonesians. A noted poet and novelist, Laksmi Pamuntjak, penned an emotional piece for the *Guardian*, in which she painted Joko Widodo as an inhumane person and commented that he had been called a murderer and his name painted in blood:

**Jokowi, We Voted for a Humble Man, Now You've Taught a New Generation about Killing**

You listen to the news, read the occasional tweet. Social media peaks to a frenzy; the world, it seems, is in a frenzy. And suddenly your name is being painted in blood. You have been accused of playing God. You have been called a murderer, a heartless man no different than the strongmen of yesteryear, who had resorted to violence to suppress dissent of all stripes.

Next to your portrait on the cover of Time magazine was the headline 'A New Hope'. Now it seems you are really 'A New Hopelessness.' (Pamuntjak, 2015)

Human rights organisations also pleaded with the government not to execute, arguing that the right to life is constitutionally guaranteed. In the meantime, protests were issued by leading human rights organisations, such as KontraS, Imparsial, Legal Aid Institute (LBH) and the Human Rights Working Group (HRWG).<sup>19</sup>

In death penalty cases, Indonesian law provides that the accused must be given

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18 See, 'Kerincinews, 2015; Andika, Ramdhani and Faisal, 2015; Detik News, 2015; and Gabrillin, 2015.

19 See, Rakhmatulloh, 2015; Istanto, 2015; Taufiqurrohman, 2015a.

time to exhaust any and all available legal recourses. The Chairman of the National Commission on Human Rights (Komnas HAM), Hafid Abbas, stated that it was necessary to improve legal infrastructure, not prioritise the execution of death row prisoners (Rakhmatulloh, 2015). The government, however, argued that backing down would tarnish its international reputation, and was unwilling to wait for the legal process to finish.

Joining the protest, singer, Anggun C Sasmi (now a French citizen), posted eight objections to the death penalty on her Facebook account. These included that she ‘opposes the death penalty for every individual regardless of his/her nationality’ and ‘Indonesia can demonstrate to other countries about its commitment to human rights’ (Pandansari, 2015). Sasmi’s protest was quoted by almost every major media outlet in Indonesia, prompting anger from people on the far right, who accused her of being legally ignorant and unaware of the unprecedented risks faced by young people if the death penalty were opposed (Ferdian, 2015; Zikri, 2015).

It is my view, however, that the government of Indonesia should have cancelled the executions in the name of human rights, especially the right to life as guaranteed by the 1945 Constitution.

## **CONTRADICTION IN NORMS**

Article 28A of the 1945 Constitution stipulates that ‘Every person shall have the right to live and to defend his/her life and living’. This is a norm that binds state and society at large. (Lubis, 2009).

Article 6(1) of the International Covenant on Civil and Political Rights – which was ratified as part of Indonesian law in 2005 – stipulates that ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life’.

The right to life thus stands as the most fundamental or supreme human right in the most absolute sense (UN Human Rights, 2013b: 8-10). Article 6(2) states, however, that in countries that have not abolished the death penalty, it may only be imposed for ‘the most serious crimes.’<sup>20</sup> Ban Ki Moon, General Secretary of the United Nations, has rightly said that the term ‘most serious crimes’ must be understood in a very restrictive sense, meaning that it is limited to premeditated murder or intentional killing (UN Human Rights, 2013a: 7).

Debates on the right to life during the drafting of the Universal Declaration of Human

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20 Lubis, 2009. A good discussion of ‘the most serious crimes’ can be found in Pillay, 2012, Foreword. It is important to note that many serious crimes like war crimes, crime against humanity, act of aggression and genocide do not result in a death sentence under the Rome Treaty, arts 5 and 77.

Rights were always linked to the issue of the death penalty, because countries like the United States and the United Kingdom then insisted that death penalty should be an exception to the right to life (Schabas, 2002: 29). The concept of 'the most serious crimes' therefore emerged as a compromise during the drafting process. At the time of drafting, only a minority of countries had taken an abolitionist stance.

The 1945 Constitution takes a different approach, however. It clearly recognises the right to life as a 'non-derogable human right', in art 28I(1):

The right to life, the right not to be tortured, the right of freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognised as a person before the law, and the right not to be prosecuted under retroactive law are human rights which may not be derogated under any circumstances whatsoever.

There is no ambiguity in art 28I(1) of the 1945 Constitution. It plainly states that the right to life, along with seven other fundamental human rights, cannot be diminished under any circumstances. The 1945 Constitution thus undoubtedly embraces the progressive notion of human rights, making the Indonesian constitution one of the most comprehensive constitutions in the region in terms of respect for human rights.

The question is whether the courts recognise this.

## **CONSTITUTIONAL COURT INCONSISTENCIES**

The Constitutional Court issued a ruling in case No. 019-020/PUU\_III/2005, two years before I proposed a judicial review on behalf of Andrew and Myuran. In that decision, the court reaffirmed the non-derogable nature of the right to life. Specifically, it stated that it was:

[...] of the opinion that human rights recognises the fundamental rights of the people. It can be said that among all the rights, the right to life, the rights to defend his/her life and living, are regarded as the most important human rights. The importance of the right to life has obliged article 28I of the 1945 Constitution to affirm that the right to life cannot be derogated under any circumstances.<sup>21</sup>

The judicial review application I put forward challenging the constitutionality of the death penalty was therefore based on convincing constitutional and universal human rights grounds. As mentioned, the Constitutional Court nonetheless seemed to change

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21 See, Constitutional Court Decision No 019-020/PUU-III/2005 regarding Judicial Review of Law No 39 of 2004 on Placement and Protection of Indonesian Migrant Workers in Foreign Countries.

its position and refused to declare the death penalty unconstitutional.<sup>22</sup> That Decision was not unanimous, however, with three judges disagreeing and producing separate dissenting opinions.<sup>23</sup>

In its decision in the case I brought (Constitutional Court Decision No 2-3/PUU-V/2007), the majority of judges stated that it would be misleading to solely emphasise the right to life without considering that its implementation may violate other rights, including the right to life of other people. The Court argued that art 28I(1) must therefore be read in conjunction with art 28J(2) 2:

In exercising his/her rights and freedoms, every person has the duty to accept the restrictions established by law for the sole purpose of guaranteeing the recognition and respect of the rights and freedoms of others and to satisfy just demands based upon considerations of morality, religious values, security and public order in a democratic society.

Interestingly, art 28J(2) of the 1945 Constitution is very similar in its construction to art 29(2) of the Universal Declaration of Human Rights:

In the exercise of his/her rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The framers of the post-Soeharto amendments to the 1945 Constitution appear to have supported the idea that the exercise of human rights must be subject to prevailing laws. Perhaps they did not consider whether people opposed to human rights, who view these rights as a Western construct, could use this provision to negate or even violate human rights. Legislation containing the death penalty was enacted both before and after the amendment to the 1945 Constitution and nowhere does it mention art 28J(2). When disputes or challenges arise, however, it is likely that article will be referred to.

Unfortunately, the Constitutional Court has not been consistent in its judgments. In Decisions No 019-020/PUU-III/2005 and No 013/PUU-I/2003, the non-derogable human rights in art 28I were recognised. In Decision No 2-3/PUU-V/2007, however, these rights were denied, albeit in an inconsistent way:

The Constitution is the highest law! The state cannot negate the Constitution because if it can, it will attack its own body (...). [A]rticle 28J paragraph 2 of

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22 See, Constitutional Court Decision No 2-3/PUU-V/2007. See also, [www.mahkamahkonstitusi.go.id](http://www.mahkamahkonstitusi.go.id)

23 Ibid.

the 1945 Constitution containing the possibility of restricting human rights as stipulated in article 28I paragraph 1 is not enforceable due to the phrase ‘under any circumstances’.

This upholds the right to life but the next statement, from the same judgment, seems to deny it.

[...] the Court is of the opinion that all human rights can be restricted *unless stated otherwise* (emphasis added).<sup>24</sup>

In Decision No. 065/PUU-II/2004, Judge Achmad Roestandı issued a dissenting opinion along the same lines, in which he stated:

There are a number of human rights guaranteed by the 1945 Constitution. Based on article 28J every human right can be restricted for specific reasons except the rights mentioned in article 28I paragraph 1. Once again, it must be read along that line because if the seven human rights stipulated in article 28I paragraph 1 can be derogated pursuant to article 28J, it means that there is no difference between the seven human rights and other human rights. In this case, what is the point of stipulating the seven human rights in article 28J?

The Constitutional Court, in its majority opinion, argued, however, that even in international law, the death penalty is still permissible, especially for ‘the most serious crimes’, provided that the state has not yet abolished the death penalty and the right to life therefore could be derogated from.<sup>25</sup>

It is extremely hard to understand the reasoning used by the government, the legislature and the judiciary to undermine the constitutional norm, by arguing that no one single human right can be above other rights, when the Constitution itself specifically says that seven specific rights do, in fact, rank above the others.

## CONTRADICTION IN POLICIES

Human rights are important to Indonesia, but it has often failed to live up to its commitments in the implementation of these rights. The recent executions of prisoners are blatant examples of disregard for the right to life. This policy contradicts Indonesia’s efforts to save the lives of Indonesian migrant workers facing the death penalty abroad.

The government should, of course, defend its citizens abroad but from a moral point of view, its policies of defending its own citizens while executing foreigners are conflicted at best, if not even hypocritical (McRae, 2012: 14). Dave McRae aptly describes the

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24 Decision No 2-3/PUU-V/2007, p 30.

25 Ibid, pp 353-74

tension:

... There is a tension between a blanket policy of advocating for citizens facing death penalty overseas but continuing the death penalty domestically. Numerous interviewees noted that this situation left Indonesia without moral grounds to advocate for its own citizens living abroad. (McRae, 2012: 14)

According to information obtained from the Ministry of Foreign Affairs, there are currently at least 211 Indonesians – most of whom are migrant workers – facing the death penalty in Saudi Arabia, Malaysia, China, Iran, Singapore, Brunei Darussalam, Thailand, Laos, United Arab Emirates and Vietnam,<sup>26</sup> with the highest numbers in Malaysia, followed by Saudi Arabia and then China.

**Table 4: Migrant Workers Facing Death Penalty in Foreign Countries (as of June 2015)**

Period	Total Cases per Year	Escape from Death Penalty	Ongoing Cases
2011 – 2012	331	113	218
2013	71	51	238
2014	60	59	239
2015 (as of June)	8	34	211
<b>TOTAL</b>	<b>470</b>	<b>259</b>	<b>211</b>

Source: Directorate for the Protection of the Indonesian Citizens and Legal Entities, Directorate General of Protocol and Consular Affairs, Ministry of Foreign Affairs of the Republic of Indonesia

The original number of Indonesians on death row overseas was 470<sup>27</sup> but around 259 people have now been released. The Indonesian government has done a great job in securing the release of these 259 but the remaining 211 still need advocacy.

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26 Information provided by Ministry of Foreign Affairs.

27 Data obtained from the Ministry of Foreign Affairs. 470 is actually the number of Indonesians facing death penalty over the period 2011 until 2015.

It is the government's responsibility to provide legal assistance to its citizens on death row, irrespective of offenses they have committed. Most Indonesians sentenced to death abroad have committed offences related to drug trafficking. Is it not the duty of a government to do its utmost to defend all its citizens overseas, even if they have committed drug related crimes?

**Table 5: Offenses Committed by Migrant Workers (1999-2011)**

No	Type of Case	TOTAL
1	Murder	85
2	Narcotics	209
3	Violence	1
4	Others	8
	<b>TOTAL</b>	<b>303</b>

Source: BNP2TKI

Although the data presented here is from 1999 to 2011, it is fair to assume that after 2011 the type of offenses committed will be similar. Interestingly, the locus for the crimes are in Malaysia, China, Singapore, Laos and Vietnam, where the death penalty can be imposed for drug trafficking. This poses an obvious dilemma for the government of Indonesia. How can the government attempt to advocate for its own citizens who are drug traffickers, while at the same time executing foreign drug traffickers in Indonesia? (O'Connell, 2013; Jong, 2015).

Reconciling conflicting policies will not be easy. The majority of Indonesian people still favour the death penalty as a means of deterrence. On the other hand, there are people who value the right to life as a constitutional right, despite believing that the death penalty does not deter crime.<sup>28</sup> In this kind of situation, abolition may not be possible, which raises the question of whether a moratorium is a practical answer.

There is another contradiction that should be mentioned, namely, the objective of

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28 See, Brata, 2015. See also, Lubis and Lay, 2009: 65-71. These two publications describe the continuing tension between the two opposing opinions regarding the deterrent effect of death penalty.

punishment: should it be retribution or rehabilitation and re-education? It seems that the government oscillates between these two opposing philosophies of sentencing. Law No 12 of 1995 on Corrections<sup>29</sup> includes provisions designed to rehabilitate inmates back into society, as outlined in arts 2 and 3, below:

### **Article 2**

The prison system is administered with the aim of transforming the inmate into a better person, who realises his/her wrongdoings, corrects him/herself and promises not to repeat the crimes, in order to be accepted by society, and in the hope that he/she will take part in development and live normally as a responsible being.

### **Article 3**

The function of the prison system is to prepare inmates to be able to integrate into society; and freely and responsibly participate as a member of society.

The government must therefore design a systematic program of education and rehabilitation, avoiding 'punishment' in a traditional sense. Anyone is capable of making mistakes. He or she should be given the opportunity to correct that mistake and prove to society that he or she can participate in the development process. This is a noble idea but it is much easier said than done.

Indonesian prisons are crippled by overcrowding. In June 2015, according to the Directorate General of Corrections' online database, Indonesian prisons had 172,144 inmates. Over the entire prison system, the overcrowding rate is approximately 45 per cent but this reaches more than 400 per cent in some prisons. Given the small budgets dedicated to the corrections system, it is very difficult to create a healthy environment, not to mention rehabilitation programs. Reports of gang violence, poor hygiene and disease are common (Tempo, 2012; Hatta, 2013).

Indonesian prisons have, in fact, become schools of crime, where people learn to upgrade their skills, and reoffend when they are released. Prisons have also become places for all kinds of illicit transactions, especially drugs (Sumarwoto, 2013; Prabowo, 2013). Of course, it is not just the inmates, who are to blame for facilitating such transactions. Wardens and other prison officials are also involved.

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29 The term used in Bahasa Indonesia is *Undang-Undang tentang Pemasyarakatan*, and this can be translated as the 'Law concerning Penitentiaries', or, more precisely Socialisation (*pemasyarakatan* is literally the 'returning [of prisoners] to the society' or 'socialisation') but this sounds odd. The law deals with the inmates in detention and in penitentiaries, and therefore, in order to avoid confusion the translation used in this paper is 'Law on Corrections'.

If imprisonment is so inhumane and torture continues, why are offenders forced to spend so many years in prison? Prisoners on death row, in fact, face triple punishment: they are deprived of their freedom, they are deprived of a healthy and hygienic life, and they must wait for execution, an additional punishment in itself. Many spend years on death row, constantly worried and tense, and often ill, with little time to participate in educational and rehabilitation programs.<sup>30</sup>

The government ignores the objectives of education and rehabilitation outlined in arts 2 and 3 of the Law on Corrections,<sup>31</sup> and it seems unconcerned by this contradiction in policies. It may pay a high price for this contradiction as it has lost the respect of many of its own people, as well as the international community.

## **FOUR REASONS WHY THE DEATH PENALTY IS NOT THE ANSWER**

### **(1) There is no evidence that it is a deterrent**

In addition to contradictory norms and policies, the belief that the death penalty deters crime has not been proven. Speaking before the Indonesian Constitutional Court, Jeffrey Fagan, a law professor from Columbia University, argued that there has been no empirical evidence to suggest that death penalty has deterred crime.<sup>32</sup> Fagan referred to the American experience, where crime rates have never fallen, including in states where death penalty is retained. In states where death penalty has been abolished, the crime rate has not increased (Lubis and Lay, 2009: 143-98).

William A Schabas, a law professor from Ireland National University, argues that the real issue is whether the death penalty is more of a deterrent than other forms of punishment, such as life or long-term imprisonment. If the answer is no, then the death penalty has arbitrarily threatened the right to life. Schabas argues there is no empirical evidence that the death penalty has been a deterrent in America. It can only be a deterrent if a drug trafficker considers the possibility of being caught (Lubis and Law, 2009: 107-42). If law enforcement does not function properly, then crime will never be deterred.

Public opinion is that the death penalty will deter crime, and Saudi Arabia, Singapore

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30 Myuran and Andrew spent ten years in Krobokan Penitentiary. Iwao Hakamada served 47 years in solitary confinement for murder in Japan before he was released from prison. Only DNA testing finally released Hakamada from death row.

31 Dave McRae, 2012: 13-16. McRae describes the contradiction of policies in his explanation about migrant workers facing death sentence and the fact that Indonesia retains death penalty in its various laws.

32 A short version of Jeffrey Fagan's testimony can be read in Lubis and Lay, 2009: 143-98.

and Malaysia are held up as examples where the crime rate is declining.<sup>33</sup> Evidence from Indonesia has not, however, supported this contention. On the contrary, crime rates have not declined despite the fact that executions have taken place regularly.

Dave McRae states 'Indonesia's use of death penalty has not decreased since the 1998 democratic transition' (McRae, 2012: 5). McRae finds, in fact, that Indonesia's courts appear to have handed down death sentences more frequently since democracy was introduced (McRae, 2012: 5).

President Joko Widodo has argued that the death penalty is necessary because Indonesia is facing a drug emergency. President Jokowi has, however, failed to support this contention with reliable data, and his claims have been challenged by both scholars and activists.<sup>34</sup>

## **(2) The risk of wrongful convictions**

The death penalty is, of course, irreversible. Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, once said that,

No judiciary, anywhere in the world, is so robust that it can guarantee that innocent life will not be taken, and there is an alarming body of evidence to indicate that even well-functioning legal systems have sentenced to death men and women who were subsequently proven innocent.<sup>35</sup>

Wrongful convictions happen. In America, opponents of the death penalty have argued that hundreds, or perhaps thousands, of innocent people have been sentenced to death. According to the Death Penalty Information Center in June 2015, 155 people in the US have been freed from death row since 1973.<sup>36</sup> A study by James S Liebman et al (2000) found that 68 per cent of all death sentences decided between 1973 and 1995 were reversed. This shows that the possibility of error is too great to be ignored.<sup>37</sup>

The Indonesian criminal justice system has made mistakes. It is run by human beings

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33 Minister of Foreign Affairs K Shanmugam from Singapore contends that the application of the death penalty to drug traffickers is for the protection of society (Shanmugam, 2014).

34 See Suara Pembaruan, 2015. According to this report, which quotes the National Narcotics Agency, there are around 4 million people who consume narcotics of whom more than 12,000 die every year. It has been estimated that about 33 people die every day. This data has been challenged many, including for example, Stoicescu (2015).

35 Zaid Ra'ad Al Hussein's statement is quoted in UN Human Rights, 2013b: 11.

36 See: [www.deathpenaltyinfo.org/innocence-and-death-penalty](http://www.deathpenaltyinfo.org/innocence-and-death-penalty), accessed 25 August 2015.

37 See also, Carter, Kreitzberg and Howe, 2012: p 7-21.

with all their limitations and weaknesses. Wrongful convictions have happened in the past, for example in the famous Indonesian case of Sengkon and Karta, who were convicted of a murder they never committed. Eventually, a confession was made by a person who claimed to be the killer, and that forced the court to re-examine the case, leading to their acquittal (Dheny 2014). It is inevitable that errors will be made by judges, prosecutors, or police. The death penalty is an irreversible sentence. A wrongful conviction can be disastrous.

### (3) Judicial corruption

Among judges and lawyers, as well as prosecutors and police,<sup>38</sup> corruption is systemic, endemic and widespread in Indonesia. It was recently found at the highest levels of the judicial system, when former Constitutional Court Chief Justice Akil Mochtar was sentenced for electoral corruption (Tempo, 2014). Corrupt interaction between judges, prosecutors and police is referred to in Indonesia as the 'judicial mafia' (Tribun Nasional, 2013). The Global Corruption Barometer lists the police and courts as the most corrupt institutions in Indonesia (Transparency International, 2013). It is therefore unlikely that the judiciary will reform itself or get rid of the corrupt judges within its own institution. Reform requires changes to recruitment, remuneration, promotion, supervision, rewards and punishment (Konsorsium Reformasi Hukum Nasional, 1999: 13-64). This is a big job.

Muhammad Rifan, the lawyer for Myuran and Andrew at the court of first instance, accused the judges of asking for bribes in exchange for lighter sentences but said the negotiations ended abruptly after the judges received an order from their superiors that the death sentence must be imposed.<sup>39</sup> Rifan submitted a statement to the Judicial Commission implying that some transactions took place before this order came.<sup>40</sup> It is difficult to determine the truth of this statement but it was clearly the duty of the Judicial Commission to investigate the matter further. Regretfully, the investigation did not take place before Myuran Sukumaran and Andrew Chan were executed, and, unfortunately, the Commission never called for a delay to allow its investigation to take evidence from them. It is not clear why it did not do so in this case.

In light of these allegations of bribery, all legal proceedings should have been declared null and void.<sup>41</sup> A retrial should have been undertaken. Neither Myuran nor Andrew

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38 See, Transparency International, 2007. This publication defines what is meant by judicial corruption and what kind of practices take place within legal institutions.

39 See Topsfield and Rosa, 2015; Topsfield, Rompies and Allard, 2015.

40 A statement signed by Rifan was submitted to Judicial Commission. There is also a recorded phone conversation involving Rifan.

41 That is, of course, one of the purposes of filing a report with the Judicial Commission: to

should have been executed, as the trials were legally invalid. Justice was obviously not served by imposing a death sentence through defective trial proceedings, which were never properly scrutinised. It is a miscarriage of justice.

#### (4) Clemency as the final recourse

The 1945 Constitution, art 14(1), stipulates that ‘the President may grant clemency and restoration of rights and shall in so doing have regard to the opinion of the Supreme Court’. The implementing regulation, Clemency Law No 22 of 2002, describes clemency as pardon in form of commutation, reduction or nullification of sentence.<sup>42</sup> A petition for clemency can only be filed by those having a legally final and binding judgment, or their family.<sup>43</sup>

Once a clemency petition is filed, the President has the power to grant or reject the clemency petition. Thus, clemency is the ultimate recourse for a death row inmate. In the case of Myuran and Andrew, their clemency petitions were never examined by the President or the Supreme Court.<sup>44</sup> There was never any assessment of the petitions conducted.<sup>45</sup> No reason was ever given for rejecting the clemency petitions: they were simply rejected outright. This was totally unacceptable and an insult to the right to life and sense of justice.

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investigate alleged bribery and corruption during the trial.

42 See Law No 22 of 2002 on Clemency, art 4.

43 See Law No 22 of 2002 on Clemency, art 1. Law No 22 of 2002 has been amended by Law No 5 of 2010. The amendment did not substantially change the substantive meaning of clemency, and simply introduced a time line. See also art 6(4) of International Covenant on Civil and Political Rights which says ‘anyone sentenced to death shall have the right to seek pardon or commutation of sentence. Amnesty, pardon and commutation of the sentence of death may be granted in all cases.’

44 Daniel Pascoe (2015) wrote an interesting and compelling article on the rationale of clemency in a situation where politics seems to intervene. Pascoe criticised President Joko Widodo for rejecting all clemency petitions for one blanket reason, that is, the drug emergency situation. Clemency must be evaluated on a case by case basis if it is to be fair.

45 The Chief Judge of the Denpasar District Court, Mr Sugeng Riyanto, has argued that an assessment of the clemency petitioners should be conducted by Supreme Court as well as President. They have to know the full circumstances of the petitioners. Have they changed and rehabilitated? If they have been rehabilitated, then clemency should be granted. There is no point in executing if they have already been rehabilitated: surely the objective of punishment is to educate and socialise inmates?

## NO ABOLITION, NO MORATORIUM, BUT...

The government has never declared a moratorium on the death penalty. The fact that a de-facto moratorium occurred under President Susilo Bambang Yudhoyono does not mean that this was the official position of the government. Nevertheless, Indonesia is not a completely retentionist country either. Indonesia has never carried out as many executions as China and Pakistan, for example. Lately, however, the government has taken a more aggressive position, especially toward people convicted of premeditated murder and narcotics offenses (Istman, 2015).

Indonesia does listen to all objections and criticisms. Internally, discussions were conducted involving academia and civil society, but unfortunately support for the death penalty was overwhelming. It will be almost impossible for the government to abolish the death penalty considering the high political cost that it would have to pay. As mentioned, some sort of compromise or alternative has therefore to be found. The most strategic approach is, therefore, to formulate a policy that respects human rights, especially the right to life, but still provides for the death penalty in exceptional circumstances.

The government has formulated a new draft of the Criminal Code, and it has been submitted to the House of Representatives for debate (Taufiqrohman, 2015b). The accompanying policy paper states:

.... that it is necessary to postpone the implementation of death penalty or conditional death penalty for a 10-year probationary period. The rationale is in order to maintain the balance between the abolitionists and the retentionists whose number is very significant including those who are ambivalent about death penalty in international forum.<sup>46</sup>

Moreover, the policy paper explains that the death penalty should not be considered a primary punishment. It is appropriate to retain the death penalty as a secondary punishment, as a compromise to the retentionists.<sup>47</sup>

Article 66 of the draft Criminal Code lists five primary punishments: imprisonment, detention, supervision, fines and social work. The death penalty is stipulated in art 67, which says that the 'death penalty is regarded as a specific punishment, charged alternatively'. This differs from the current Criminal Code, where the death penalty is listed as a primary punishment under art 10.<sup>48</sup> Further, art 89 of the draft code stipulates that the death penalty can only be implemented once clemency is rejected by the president. The draft Criminal Code then allows for a 10-year probationary period

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46 See, Academic Draft of Criminal Code, p 36-37.

47 Ibid, p 56.

48 Criminal Code, art 10.

before the execution may take place. Execution will not be undertaken if the death row prisoner demonstrates that he or she has been rehabilitated and shown regret for his or her crimes. In that case, the Minister of Law and Human Rights may commute the sentence to either life or a 20-year sentence.<sup>49</sup>

The government appears to have considered various opinions and objections and attempted to balance the conflicting positions while accommodating human rights principles. The elucidation to art 91 of the draft Code sums up the government's position:

In this Criminal Code, the death penalty is no longer a principal punishment; it is a specific punishment. Its imposition will be very selective. The judges first and foremost must consider whether in that particular case, an alternative punishment like life sentence or 20 years imprisonment can be imposed. If the judges are in doubt about the alternative punishments then they may consider imposing a conditional death penalty. If the convict demonstrates that he/she has been changed and rehabilitated within 10 years, the Minister of Law and Human Rights can commute the sentence into one of the alternative punishments. It is therefore clear that this Criminal Code will restrict the imposition of death penalty in line with sense of justice of the society. The probation period is counted from the date of clemency rejection.<sup>50</sup>

Public discourse on the death penalty will continue and deliberation of the new Criminal Code in the DPR<sup>51</sup> is the perfect forum for proponents and opponents of the death penalty to continue this debate. The fact that the death penalty is not mandatory and is now considered an alternative punishment is a step forward. Certainly, this is a compromise, a typically Indonesian response but it may pave the way for future debate.

Will human rights, especially the right to life, be honoured as a basic constitutional right? It remains to be seen. The new draft Criminal Code provides us with some optimism (or guarded optimism, at least). We should not rule out the possibility that, in line with the global trend of abolishing the death penalty, Indonesia may, eventually, follow suit. That is certainly my deep hope.

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49 Elucidation of Draft of Criminal Code, p 158, 189.

50 Elucidation of Draft of Criminal Code, p 189.

51 *Dewan Perwakilan Rakyat*, People's Representative Assembly, the national Legislature.

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Criminal Code, art 10

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## **International Laws**

International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, in accordance with Article 49.

Rome Treaty (Rome Statute of the International Criminal Court), arts 5 and 77

## **Decisions**

Constitutional Court Decision No 019-020/PUU-III/2005

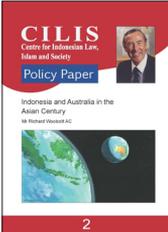
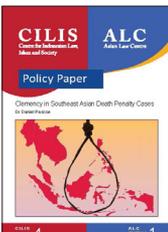
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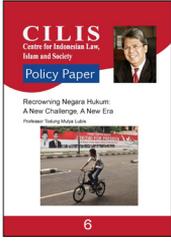
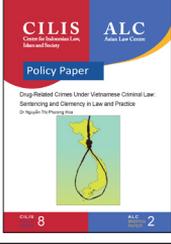
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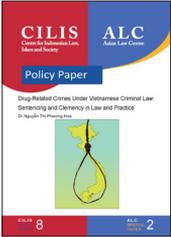
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