

BOOK REVIEW

DRUGS LAW AND LEGAL PRACTICE IN SOUTHEAST ASIA: INDONESIA, SINGAPORE AND VIETNAM BY TIM LINDSEY AND PIP NICHOLSON (HART PUBLISHING, 2016) 367 PAGES. PRICE USD 78.00 (HARDCOVER) ISBN 9781782258315.

I BACKGROUND

Despite shifting global attitudes towards drug criminalisation, the death penalty for drug offences is making a comeback in Southeast Asia. Under President Joko 'Jokowi' Widodo's leadership, Indonesia executed 18 persons for drug trafficking offences during 2015 and 2016,¹ with further executions planned,² after relatively sporadic use under previous Indonesian administrations. After a pause in executions during 2012 and 2013, Singapore is again enforcing death sentences for murder and drug trafficking, although execution 'rates' are comparatively much lower than during the 1990s.³ Likewise, in Vietnam, a two-year hiatus in executions from mid-2011 to mid-2013, as the government switched from shooting to lethal injection as a method of execution, has now ended.⁴ An as yet unverified government report suggests that 429 executions occurred by lethal injection between August 2013 and July 2016,⁵ many of which will have been for narcotics crimes.⁶ Brunei's adoption of a hardline Islamic penal code in 2014 may eventually lead to the resumption of executions in that state.⁷ To date, no executions have taken place in the Sultanate

¹ Phelim Kine, 'Indonesia President Jokowi May Rethink Death Penalty Policy' (Dispatch, Human Rights Watch, 10 November 2016) <<https://www.hrw.org/news/2016/11/10/indonesia-president-jokowi-may-rethink-death-penalty-policy>> archived at <<https://perma.cc/TSS8-LM2G>>.

² Katharina R Lestari, 'Indonesia Vows More Executions This Year', *La Croix International* (online), 1 March 2017 <<https://international.la-croix.com/news/indonesia-vows-more-executions-this-year/4771>> archived at <<https://perma.cc/P79F-FW9K>>.

³ See Cornell Center on the Death Penalty Worldwide, *Death Penalty Database: Singapore* <<https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Singapore>> archived at <<https://perma.cc/BRT5-LC8U>>.

⁴ Amnesty International, 'Death Sentences and Executions in 2013' (Report No ACT 50/001/2014, Amnesty International, 27 March 2014) 28 <<https://www.amnesty.org/en/documents/act50/001/2014/en/>>. See also Tim Lindsey and Pip Nicholson, *Drugs Law and Legal Practice in Southeast Asia: Indonesia, Singapore and Vietnam* (Hart Publishing, 2016) 276–7.

⁵ The Kha, 'Vietnam to Build Five More Lethal Injection Venues', *DTiNews* (online), 9 February 2017 <<http://dtinews.vn/en/news/017/49419/vietnam-to-build-five-more-lethal-injection-venues.html>> archived at <<https://perma.cc/QCZ4-GH6N>>.

⁶ See International Federation for Human Rights, 'The Death Penalty in the Socialist Republic of Vietnam' (Report, 9 October 2008) <<https://www.fidh.org/en/region/asia/vietnam/The-Death-Penalty-in-the-Socialist,5906>> archived at <<https://perma.cc/4R2U-MFFH>>; Hai Thanh Luong, 'The Application of the Death Penalty for Drug-Related Crimes in Vietnam: Law, Policy, and Practice' (2014) 17(1) *Thailand Journal of Law and Policy* 1, 4 <<http://www.thailawforum.com/articles/Vietnam-death-penalty.html>> archived at <<https://perma.cc/H62G-ZRAX>>.

⁷ Bill Ozanick, 'The Implications of Brunei's Sharia Law', *The Diplomat* (online), 21 May 2015 <<http://thediplomat.com/2015/05/the-implications-of-bruneis-sharia-law/>> archived at <<https://perma.cc/6ZMX-99L9>>.

since 1957.⁸ Finally, the Philippines House of Representatives recently voted to reinstate capital punishment, following two previous abolitions in 1987 and 2006.⁹ After President Rodrigo Duterte's open encouragement of the extrajudicial killings of suspected drug dealers by police and vigilantes,¹⁰ the Philippines' resumption (if approved by the Senate) is likely to include narcotics offences.

It is in this increasingly punitive context that Hart's publication of *Drugs Law and Legal Practice in Southeast Asia: Indonesia, Singapore and Vietnam*, the new monograph co-authored by Professors Tim Lindsey and Pip Nicholson from the University of Melbourne, proves so timely. The authors are amongst the world's most highly regarded scholars on Southeast Asian legal systems. Tim Lindsey is the Redmond Barry Distinguished Professor, holds the Malcolm Smith Chair of Asian Law at Melbourne Law School and is also the Director of the Centre for Indonesian Law, Islam and Society. Pip Nicholson is Professor of Law and Director of the Asian Law Centre at Melbourne Law School. Their new text, funded by a Discovery Project grant from the Australian Research Council, outlines the drugs laws and criminal justice practice of three Southeast Asian nations that retain capital punishment — Indonesia, Singapore and Vietnam — following trilingual archival and interview-based fieldwork in those jurisdictions. The authors choose these three case studies because, as far as foreign drugs defendants are concerned in the Association of Southeast Asian Nations ('ASEAN') region, this is 'where the action is'.¹¹ Indonesia possesses the largest domestic drugs market in Southeast Asia,¹² and is experiencing an aggressive capital punishment revival under President Jokowi, noted above. Singapore arguably possesses the region's most draconian drugs policies,¹³ including mandatory death sentences in most large-scale trafficking and manufacturing cases.¹⁴ Finally, in Vietnam, foreigners recently arrested for narcotics offences originate from a variety of neighbouring ASEAN states, plus Australia, Canada, China, Nigeria, Russia and the United States.¹⁵ As the authors note, each of these three jurisdictions under study has attracted international attention and controversy over its approach to narcotics control in recent years.¹⁶

⁸ Anti-Death Penalty Asia Network, *Brunei — Update on Shariah Penal Code and Death Penalty* (9 June 2016) <<https://adpan.org/2016/06/09/brunei-update-on-shariah-penal-code-and-death-penalty/>> archived at <<https://perma.cc/2G8A-P5JS>>.

⁹ David T Johnson and Franklin E Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (Oxford University Press, 2009) 103–4 ('*The Next Frontier*'); Delon Porcalla, 'House OKs Death Penalty', *The Philippine Star* (online), 2 March 2017 <<http://www.philstar.com/headlines/2017/03/02/1677123/house-oks-death-penalty>> archived at <<https://perma.cc/N773-HR3S>>.

¹⁰ Amnesty International, *Philippines: The Police's Murderous War on the Poor* (31 January 2017) <<https://www.amnesty.org/en/latest/news/2017/01/philippines-the-police-murderous-war-on-the-poor/>> archived at <<https://perma.cc/F9TW-HXLN>>.

¹¹ See Franklin E Zimring and David T Johnson, 'Law, Society, and Capital Punishment in Asia' (2008) 10 *Punishment and Society* 103, 104.

¹² Lindsey and Nicholson, above n 4, 41.

¹³ *Ibid* 142–3; Zou Keyuan, *China–ASEAN Relations and International Law* (Chandos Publishing, 2009) 162; Johnson and Zimring, *The Next Frontier*, above n 9, 407, 415.

¹⁴ *Misuse of Drugs Act* (Singapore, cap 185, 2008 rev ed) arts 5–7, 59, sch 2.

¹⁵ Lindsey and Nicholson, above n 4, 211.

¹⁶ *Ibid* 1.

Although the original idea for the book may have been prompted by the death sentences imposed on Australian and other foreign nationals for drug offences in Southeast Asia during the 2000s,¹⁷ Lindsey and Nicholson's text goes far beyond the polemic argument over capital punishment as a state response to drug crimes. The authors' legal analysis extends to *all* narcotics cases, rather than merely covering death-eligible crimes or cases where the defendant is a Western national. However, Lindsey and Nicholson's monograph is still likely to be of primary interest to English-speaking legal advocates charged with defending foreigners accused of drugs crimes in the three countries under study¹⁸ — lawyers who are initially less familiar with the local legal terrain and its idiosyncrasies. The book's dedication page and foreign language glossary reveal as much,¹⁹ and its contents will prove critical in assisting advocates' strategic decisions in narcotics litigation, for example in advising clients on pleas and plea bargaining, available defences and due process-related challenges, whether to appeal a conviction or sentence, the rehabilitative activities perceived favourably by parole authorities, or how to draft a successful pardon or commutation petition to the relevant head of state.

II STRUCTURE AND CONTENT

The authors set out their text in five chapters. Chapter 1 provides a comparative overview of the drugs laws and criminal justice practice of Indonesia, Singapore and Vietnam, noting similarities and differences in the three nations' present approaches. This introductory chapter also maps the academic literature relevant to narcotics law and practice in Southeast Asia, including comparative studies on the death penalty, as well as on narcotics control from a public health perspective. Chapter 2 outlines the various international and regional frameworks for drug control, covering agreements under the auspices of the UN, as well as formal and informal ASEAN-based arrangements. This is an important contextual addition to the monograph, given that international treaty frameworks have prompted and shaped the increasingly punitive stances of Southeast Asian governments towards drug use, cultivation and trafficking since the 1961 *Single Convention on Narcotic Drugs*,²⁰ albeit to a level of severity perhaps not originally intended by the treaty drafters. The

¹⁷ See Elliot Brennan, 'Death Sentences & Diplomacy: Australia's Strained Indonesia Ties', *The Diplomat* (online), 5 February 2015 <<http://thediplomat.com/2015/02/death-sentences-diplomacy-australias-strained-indonesia-ties/>> archived at <<https://perma.cc/XW7U-HJTN>>.

¹⁸ Lindsey and Nicholson, above n 4, 15. Three prominent examples in the Australian context over the past 15 years are Barristers Julian McMahon from Gorman Chambers, Michael O'Connell SC from William Crockett Chambers and the Hon Lex Lasry QC, now a Justice of the Supreme Court of Victoria. British lawyers who have acted or advised in recent capital cases in Southeast Asia alongside local lawyers include Zoe Bedford and George Havenhand from the London-based NGO Reprieve and Parvais Jaabar and Saul Lehrfreund, Executive Directors of the Death Penalty Project.

¹⁹ 'This book is dedicated to the courageous pro bono lawyers who defend men and women on death row around the world'. See also Lindsey and Nicholson, above n 4, 15, 341–5.

²⁰ *Single Convention on Narcotic Drugs*, opened for signature 30 March 1961, 520 UNTS 151 (entered into force 13 December 1964) ('*Single Convention on Narcotic Drugs*').

book's orderly appendix summarises each nation's compliance with the various United Nations *Drug Conventions* (1961; 1971; 1972; 1988).²¹

Chapters 3, 4 and 5 represent the authors' most important contribution towards an understanding of drugs law and practice in Indonesia, Singapore and Vietnam, respectively. Each of the three country chapters begins by setting out historical and modern patterns of drug trade and consumption, which inform current laws and policies. Thereafter, the authors draw on primary textual sources, secondary and historical analysis, media reports, case law surveys and interview-based fieldwork to provide legal commentary on the investigatory powers, rehabilitation and diversionary programs, criminal procedures (including pre-trial detention and bail), criminal laws (including offences and available defences), sentencing laws, parole and remissions procedures and executive clemency powers applicable to drug offences in the three jurisdictions under study. The authors' empirical data is particularly welcome, given marked differences between Southeast Asian positive law and its enforcement in narcotics cases, due to factors such as pervasive corruption, wide discretionary powers and even a lack of current legal awareness among criminal justice practitioners.²²

Several examples of the authors' empirical findings that are, at least to my own limited knowledge, novel within the regional criminal justice literature are as follows:²³

- In Indonesia, the authors' multi-court survey of sentencing decisions reveals that foreign drug offenders stand a higher chance of receiving the death penalty as compared with local drug offenders convicted of the same crime.²⁴ Being foreign has been held by the Indonesian courts to be an aggravating circumstance in sentencing, whereas 'honesty, remorse, politeness, youth and parental status are usually significant mitigating factors'.²⁵

²¹ Lindsey and Nicholson, above n 4, 303–19. These are the 1961 *Single Convention on Narcotic Drugs*, the 1972 *Protocol Amending the Single Convention on Narcotic Drugs*, opened for signature 25 March 1972, 976 UNTS 3 (entered into force 8 August 1975), the 1971 *Convention on Psychotropic Substances*, opened for signature 21 February 1971, 1019 UNTS 175 (entered into force 16 August 1976) and the 1988 *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 1582 UNTS 95 (entered into force 11 November 1990).

²² See Lindsey and Nicholson, above n 4, 201.

²³ One further useful empirical addition would have been a summary of the effect of the landmark changes brought by Singapore's *Misuse of Drugs (Amendment) Act 2012*. These amendments allow for limited judicial discretion in place of the mandatory death penalty for drug trafficking where the offender is a) a drugs courier rather than a trafficking 'mastermind' and either b) the defendant 'substantively assist[s]' the Central Narcotics Bureau to combat drug trafficking, as certified by the Public Prosecutor or c) the defendant is mentally impaired: see *Misuse of Drugs Act* (Singapore, cap 185, 2008 rev ed) s 33B, as inserted by *Misuse of Drugs (Amendment) Act 2012* (Singapore) s 14. For case law interpreting these new provisions, see Wing-Cheong Chan, 'The Death Penalty in Singapore: In Decline but Still Too Soon for Optimism' (2016) 11 *Asian Journal of Criminology* 179, 192–7.

²⁴ Lindsey and Nicholson, above n 4, 66.

²⁵ *Ibid* 66, 120.

- In Indonesia, a suspect's right to counsel, while present in the positive law,²⁶ is seldom fulfilled during the investigatory phase, with some defendants threatened by police if they attempt to assert the right.²⁷
- In Vietnam, the authors find that approximately 60 executions per year were carried out by shooting before the government's shift to lethal injection in 2011.²⁸ In contrast, a previous survey of academic, NGO and media sources from 1993–2014 identified *minimum* figures of only 18–44 executions per year.²⁹
- In Vietnam, there is controversy over whether a voluntary confession operates as a mitigating factor in sentencing. A literal view based on Vietnam's *Criminal Code* would allow this in all cases.³⁰ However, the apex Supreme People's Court does not consider a confession to be a mitigating circumstance if made in the context of an ongoing investigation, without further actions by the prisoner to demonstrate remorse.³¹

III CONTRIBUTION

As the authors note in Chapter 1, the book fills a notable gap in the academic literature.³² Although comparative death penalty scholars are increasingly tackling Southeast Asia as a 'barometer' of the death penalty's popularity worldwide³³ and public health scholars have written on harm minimisation as an alternative approach to narcotics control in the region,³⁴ drug offences in Southeast Asia (especially non-capital ones) have received little academic attention. Although there are numerous criminal law textbooks written about Singapore,³⁵ there are few, if any, equivalents in the English language on Indonesia and Vietnam,³⁶ where foreign lawyers have been forced to learn 'on their feet' when consulting on local cases. Moreover, it is a shame that in Southeast Asia, as in Australia and the United Kingdom, narcotics law receives

²⁶ *Criminal Procedure Code* (Indonesia) Law No 8 of 1981, arts 54–5.

²⁷ Lindsey and Nicholson, above n 4, 135–6.

²⁸ *Ibid* 9, 276.

²⁹ See Daniel Pascoe, 'Explaining Death Penalty Clemency in the Socialist Republic of Vietnam from 1986 to 2015' (2016) 10 *Vienna Journal on International Constitutional Law* 165, 173–4, 174 n 59.

³⁰ See *Criminal Code* (Vietnam) Law No 15 of 1999, art 46(1)(o): 'Offenders make honest declarations and reports and show their repentance'. See also *Criminal Code* (Vietnam) Law No 100 of 2015, art 51(s).

³¹ Lindsey and Nicholson, above n 4, 233.

³² *Ibid* 13–15.

³³ See, eg, Johnson and Zimring, *The Next Frontier*, above n 9; Daniel Pascoe, *Last Chance for Life: Clemency in Southeast Asian Death Penalty Cases* (Oxford University Press, 2017) (forthcoming); Dave McRae, 'Indonesian Capital Punishment in Comparative Perspective' (2017) 173 *Bijdragen tot de Taal-, Land- en Volkenkunde* 1; 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(2) *Laws* 115.

³⁴ See Lindsey and Nicholson, above n 4, 13 nn 63–4 for examples.

³⁵ See *ibid* 13 nn 61–2 for a list of examples on Singapore.

³⁶ *Ibid* 13.

only occasional attention as a specialised subject among textbook writers. A practice-inspired redesign of criminal law teaching might well employ narcotics and traffic offences as curriculum centrepieces, rather than serious violent crimes, given the latter's infrequency.³⁷ Lindsey and Nicholson make up for this deficiency in drug law-focused publications in the region with their well-researched text.

From a sequential perspective, Chapters 3, 4 and 5's most important components are those that cover drugs in the criminal process *before* adjudication on guilt and innocence, as well as *after* sentencing appeals are finalised. Legal and criminal justice scholars arguably devote disproportionate time and attention to case adjudication and sentencing decisions.³⁸ In Southeast Asia, as in other world regions, far more drugs cases are filtered out of the criminal justice system by police and prosecutorial discretion at the 'front end', compared with those cases which eventually reach trial. Particularly for foreign national defendants, extradition treaties and negotiations will also affect a case's disposition well before trial. Thereafter, at the 'back end' of the criminal justice process, parole, remissions, executive clemency decisions and prisoner transfer agreements will be strongly determinative of an offender's total time spent incarcerated, or of that offender's odds of escaping execution.

Likewise, the vast majority of drugs offenders successfully *prosecuted* in Southeast Asia are dealt with by diversionary measures, non-custodial penalties or prison sentences, rather than with capital punishment.³⁹ Nonetheless, the prevailing criminal law literature on the region is disproportionately focused on the death penalty, due to its status as an ultimate punishment ('death is different'),⁴⁰ its potential impact on international relations when enforced on foreign nationals,⁴¹ and its contravention of international human rights norms when administered for drugs offences.⁴² Again, Lindsey and Nicholson's text covers *all* narcotics cases in detail, rather than merely those serious enough to warrant the death sentence in retentionist jurisdictions.

IV CRITICAL EVALUATION

If I would offer one criticism of this otherwise excellent text, it relates to the authors' project design and methodology. The relatively short introductory chapter is the only part of the book where comparisons between the three jurisdictions are made explicit. Therefore, each of the three country case studies feels isolated from each other. In Chapter 1, the authors acknowledge as much, stating: '[o]ur aim here is simply to demonstrate the diversity of approaches in

³⁷ Kris Gledhill and Ben Livings, 'Introduction' in Kris Gledhill and Ben Livings (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge, 2017) 1, 19.

³⁸ Mathias Siems, *Comparative Law* (Cambridge University Press, 2014) 140.

³⁹ Nick Crofts et al, 'Law Enforcement and Drug Policy in Southeast Asia' in Fifa Rahman and Nick Crofts (eds), *Drug Law Reform in East and Southeast Asia* (Lexington Books, 2013) 59, 59; Kate Dolan and Ana Rodas, 'Drug Users and Imprisonment' in Fifa Rahman and Nick Crofts (eds), *Drug Law Reform in East and Southeast Asia* (Lexington Books, 2013) 39, 44–7.

⁴⁰ *Gregg v Georgia*, 428 US 153, 188 (1976).

⁴¹ See Johnson and Zimring, *The Next Frontier*, above n 9, 318.

⁴² See William A Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge University Press, 3rd ed, 2002) 110.

the three countries, rather than offer a detailed comparative analysis of the three systems'.⁴³ Indeed, many readers who purchase the book will likely do so with only one of the three constituent countries in mind: Indonesia, Singapore or Vietnam.

For comparative scholars, the book does contain invaluable empirical data and authoritative interpretations of local laws. Nevertheless, other than the relatively brief introductory chapter (15 pages) and the book's appendix on treaty adherence, my query is whether the text adds significantly to the *comparative* criminal justice and death penalty literature, absent a lengthy 'discussion' section following Chapter 5. Rather than a comparative study, the book reads more like a three-part practitioners' manual, which reflects its origins and primary justification, described above. In the acknowledgements section and in Chapter 1, the authors hint at both an empirical and comparative project.⁴⁴ Empirical it certainly is, with data collection comprising a case law survey from Indonesia (a civil law jurisdiction where cases are collated and synthesised less often than in the common law world), local and foreign media reports, together with interviews with decision makers and experts, including 20 legal professionals in Vietnam (a notable achievement in an environment of pervasive state secrecy).⁴⁵

Comparativeness, however, is where the volume is lacking. The comparative possibilities of the project, despite comprising three legal systems of different types (common law, civil law and socialist law) are tantalising, given the authors' narrow thematic focus on narcotics crimes. Presently, Lindsey and Nicholson's readers are largely left to make their own comparative conclusions at the end of Chapter 5. Although the authors are surely correct in stating that the differences between the three jurisdictions in handling drug crimes 'differ so markedly that it is not possible to say that there is a standard Southeast Asian model',⁴⁶ comparative criminal law and criminal justice scholars could develop Lindsey and Nicholson's work much further, perhaps by adopting the 'most different systems' design in a search for explanatory commonalities.⁴⁷ In doing so, comparative scholars will also be hard-pressed to ignore the death and prison sentences passed for narcotics offences, including against foreigners, in other ASEAN nations (notably Thailand and Malaysia, both still in the 'active retentionist' camp at the time of writing in 2017).⁴⁸

As they take up the slack, future researchers will not only require a mastery of primary legal sources and political culture in the countries chosen for study, but will also need to undertake comprehensive archival and interview-based fieldwork so as to describe and evaluate the law 'in practice', rather than merely the law 'on the books'. It is to the great credit of Professors Lindsey and

⁴³ Lindsey and Nicholson, above n 4, 3.

⁴⁴ Ibid 1, 13, 15.

⁴⁵ Johnson and Zimring, *The Next Frontier*, above n 9, 389.

⁴⁶ Lindsey and Nicholson, above n 4, 15.

⁴⁷ See Adam Przeworski and Henry Teune, *The Logic of Comparative Social Inquiry* (Wiley-Interscience, 1970) 34–9.

⁴⁸ See International Federation for Human Rights, 'The Death Penalty for Drug Crimes in Asia' (Report No 665a, October 2015) 40, 58 <https://www.fidh.org/IMG/pdf/asia_death_penalty_drug_crimes_fidh_wcadp_report_oct_2015_pdf.pdf> archived at <<https://perma.cc/6RCF-YQTW>>; Luong, above n 6; Anti-Death Penalty Asia Network, above n 8.

Nicholson that they have already managed this in three linguistically diverse jurisdictions from contrasting legal ‘families’ that each exhibit a degree of state secrecy.

DANIEL PASCOE*

* Assistant Professor, School of Law, City University of Hong Kong; Visiting Research Fellow, Fordham Law School. Email: dcpascoe@cityu.edu.hk.