

# THE PENAL CONSTRUCTION OF DRUG-RELATED OFFENSES IN THE CONTEXT OF “ASIAN VALUES”

## - THE RISE OF PUNITIVE ANTI-DRUG CAMPAIGNS IN ASIA

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### ABSTRACT

*This article examines the penal construction of drug-related offenses as “the most serious offenses” in the context of “Asian values”. It explains that there are at least three ways in which the serious nature of drug-related criminality is constructed – populism, moral culpability and security – all of which are deeply embedded in the political culture and practices in Asian countries which adopt a punitive approach to drug-related offenses. The article explores social and*

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*political discourses in support of state reliance on harsh penal sanctions to tackle complex drug-related problems. It shows that these discourses are frequently exploited and distorted for political motives. The article concludes that "Asian values" can neither provide valid rationales for the campaigns of "War on Drugs" or offer solid justification for the erosion of the rights, liberty, and life of those who are involved in the war against illicit drugs.*

## KEY WORDS

### War on Drugs, Asian Values, Punitiveness

#### I. INTRODUCTION

In recent years, whilst Asian countries still cling to coercive drug control regimes, the rest of the world has gradually moved away from a drug control approach primarily relying on harsh punishment. In 2014, the government representative of Iran, on behalf of 14 Asian countries, Egypt and the Sudan, expressed the opinion that the death penalty is an important penal instrument to deter "the most serious offenses," including drug trafficking<sup>1</sup>, at the fifty-seventh session of the Commission on Narcotic Drugs. In contrast, on the eve of United Nations General Assembly Special Session on the World Drug Problem in 2016, one thousand world leaders and activists, most of whom are/were from non-Asian jurisdictions, signed a letter to UN Secretary General to end punitive wars on drugs, stating that such an approach "[f]ocused overwhelmingly on criminalization and punishment" and "has proven disastrous for global health, security and human rights."<sup>2</sup>

Harsh anti-drug laws which are implemented by many Asian jurisdictions appear to be out of step with a balanced evidence-based approach. This new approach, which devotes considerable resources to treatment and prevention, has been gaining grounds with/in the rest of the world.<sup>3</sup> The willingness of Asian countries to use the ultimate penalty to punish drug-related offenses is a good measure of the severity of overall punitiveness of their anti-drug policies. According to Harm

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<sup>1</sup> Ayesha Riyaz, *Asia Group Statement At The Opening of the 59th Session of the Commission on Narcotic Drugs*, UNITED NATIONS OFFICE ON DRUGS AND CRIME (2016), [http://www.unodc.org/documents/commissions/CND/CND\\_Sessions/CND\\_59/Statements/05\\_Asia-Pacific\\_Group.pdf](http://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_59/Statements/05_Asia-Pacific_Group.pdf).

<sup>2</sup> *A Public Letter to UN Secretary General Ban Ki-moon*, DRUG POLICY ALLIANCE (Apr. 14, 2016), <http://www.drugpolicy.org/ungass2016>.

<sup>3</sup> *Asia is Still Just Saying No to Drugs*, THE ECONOMIST (Jan. 14, 2017), <http://www.economist.com/news/asia/21714344-prohibition-may-be-falling-out-fashion-west-singapore-and-its-neighbours-remain>.

Reduction International's 2015 report, of the 33 countries and territories around the world that retain the death penalty for drug offenses, 26 of them are geographically located in the continent of Asia.<sup>4</sup> This figure further translates into 50% of the 52 Asian countries and territories<sup>5</sup> use death as a punishment to suppress drug offenses. Of the twelve countries which actively applied the death penalty to drug offenses (rather than merely symbolically retain the death penalty on the statutes books) in the most recent years, seven are in East and Southeast Asia.

Most recently, leaders of the Association of Southeast Asian Nations (ASEAN) – Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei, Cambodia, Laos, Myanmar (Burma), and Vietnam - renewed their joint “commitment to a zero-tolerance approach in realizing the regional vision of a drug-free ASEAN.”<sup>6</sup> On March 7, House of Representatives in the Philippines has approved a bill to reinstate capital punishment for drug-related offenses.<sup>7</sup> If approved, this legislative development will make Cambodia the sole exception among ASEAN member states which does not provide the death penalty for drug-related offenses.

In contrast, even the sole North American country which imposes the death penalty for drug offenses<sup>8</sup> – the United States – has drifted away from a law-enforcement-only approach. As of 2017, the use of both recreational and medicinal marijuana has been legalized in seven states and the District of Columbia.<sup>9</sup> In contrast with the “War on

<sup>4</sup> Patrick Gallahue & Rick Lines, *The Death Penalty for Drug Offences: Global Overview 2015*:

*The Extreme Fringe of Global Drug Policy*, HARM REDUCTION INTERNATIONAL (Oct. 2015) [https://www.hri.global/files/2015/10/07/DeathPenaltyDrugs\\_Report\\_2015.pdf](https://www.hri.global/files/2015/10/07/DeathPenaltyDrugs_Report_2015.pdf); a few exceptions include one country in North America – the United States, one in Latin America – Cuba, three in the Middle East – Libya, Egypt and Palestine and two in Africa – Sudan and South Sudan.

<sup>5</sup> UNITED STATE CENSUS BUREAU, INTERNATIONAL PROGRAMS, <https://www.census.gov/population/international/data/idb/informationGateway.php>.

<sup>6</sup> *Leaders to promote drug-free ASEAN*, THE PHILIPPINE STAR (Sept. 9, 2016), <http://www.philstar.com/headlines/2016/09/09/1621898/leaders-promote-drug-free-asean>.

<sup>7</sup> United Nations Human Rights Office of the High Commissioner, *UN Experts Urge Filipino Legislators to Reject Death Penalty Bill*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Mar. 16, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21388&LangID=E#sthash.nLNHSeWr.dpuf>; Carlos H. Conde, *The Philippines' Alarming Death Penalty U-Turn*, HUMAN RIGHTS WATCH (Mar. 7, 2017), <https://www.hrw.org/news/2017/03/07/philippines-alarming-death-penalty-u-turn>.

<sup>8</sup> *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (explaining that the Eighth Amendment requirement that the death penalty is reserved for a narrow category of crimes and offenders does not concern ‘crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State’).

<sup>9</sup> *State Marijuana Laws in 2017 Map*, GOVERNING MAGAZINE (Mar. 23, 2017) <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>; Christina Ng et al., *Colorado, Washington Become First States to Legalize Recreational Marijuana*, ABC NEWS (Nov. 7, 2012), <http://abcnews.go.com/Politics/OTUS/colorado-washington-states-legalize-recreational-marijuana/story?id=17652774>.

Drugs” (also referred to as the “War”) in the late 20th century, the Obama administration, in particular during its second term, has adopted an approach “based on science, not ideology”<sup>10</sup> to “[r]eform the Nation’s criminal justice system to reduce incarceration and recidivism.”<sup>11</sup> The reform provides alternatives to incarceration such as drug courts and supportive services which combine treatment and accountability and facilitates both recovery and re-entry.<sup>12</sup>

Why is there such a growing gap in drug-control law and practice between Asia and the rest of the world? It has been suggested that “Asian Values” and “a deep cultural and moral gulf” between “libertarian Western cultures” and Asian culture may offer the explanation.<sup>13</sup> Yet, admittedly, the concept of “Asian Values” itself is open to a variety of interpretations. Over the years, “Asian Values” has been interpreted variably as strong families, hard work, self-discipline, thrift in spending, the pursuit of academic and educational excellence, avoidance of confrontation, the dominance of family capitalism,<sup>14</sup> consensus-building diplomatic strategy,<sup>15</sup> Confucian legacies,<sup>16</sup> and an “alternative mode of domestic governance and development.”<sup>17</sup>

The concept has also attracted much controversy, mainly understood as the antithesis of “Western” notion of human rights.<sup>18</sup>

<sup>10</sup> EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, NATIONAL DRUG CONTROL STRATEGY iii (2013).

<sup>11</sup> EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, NATIONAL DRUG CONTROL STRATEGY I (2016).

<sup>12</sup> *Id.*

<sup>13</sup> Stephen Harner, *Asia Says ‘No’ To Drugs And Means It, An Example For The Libertine West*, FORBES (Feb. 25, 2015), <https://www.forbes.com/sites/stephenharner/2015/02/25/asia-says-no-to-drugs-and-means-it-an-example-for-the-libertine-west/#156ae4c62a40>; Cf Rick Lines et al., *Guest Post: The Death Penalty for Drug Offences: ‘Asian Values’ or Drug Treaty Influence?*, OPINIO JURIS (May 21, 2015), <http://opiniojuris.org/2015/05/21/guest-post-the-death-penalty-for-drug-offences-asian-values-or-drug-treaty-influence/>.

<sup>14</sup> Family business is believed to play an important role in the emerging Asian markets. 85% of the companies in Asia-Pacific are family-owned businesses. Examples of the centrality of family companies include, for instance, Ayala corporation in the Philippines, Indonesia’s Ciputra Group, Samsung in South Korea, Li Ka-shing’s Hutchison Whampoa in Hong Kong, Formosa Petrochemical in Taiwan, Charoen Pokphand Group in Thailand, Suntory Group in Japan, etc. Despite the dominance of state-owned enterprises in other countries, such as China, family business is thriving. See EY Global Family Business Center of Excellence, *Family business in Asia-Pacific - Facts and figures*, EY GLOBAL FAMILY BUSINESS CENTER OF EXCELLENCE (2014), <http://familybusiness.ey.com/pdfs/page-72—73.pdf>; The Economist, *Asian Values*, THE ECONOMIST (Apr. 18, 2015), <http://www.economist.com/news/special-report/21648174-worlds-most-dynamic-region-family-companies-occupy-commanding-heights>.

<sup>15</sup> Chandran Nair, *Rodrigo Duterte’s Pivot to Asia is a Rational Move*, FINANCIAL TIMES (Nov. 18, 2016), <https://www.ft.com/content/8d65f6c4-acb7-11e6-ba7d-76378e4fef24>.

<sup>16</sup> Fred Dallmayr, “*Asian Values*” and Global Human Rights, 52 PHILOS. EAST WEST 159, 178 (2002).

<sup>17</sup> Li-ann Thio, *Implementing Human Rights in ASEAN Countries: “Promises to keep and miles to go before I sleep”*, 2 YALE HUM. RTS. & DEV. L. J. 1, 2 (1999).

<sup>18</sup> A Malaysian version of Asian values advocated by Mahathir Mohamad, former Prime Minister of Malaysia from 1981 till 2003, summarized that the Malaysian perspective of ‘Asian

Critics of “Asian values” believe the concept was a self-serving ideological justification for authoritarianism that needs to be swept away.<sup>19</sup> It is believed to be primarily a political device for authoritarian elites to deflect domestic criticisms and seek legitimacy.<sup>20</sup> The validity of “Asian values” is further complicated by inter-state heterogeneity in Asia: critics dismiss the concept as an illusion, as Asia is a vast and dynamic continent comprising a multitude of religious traditions, political arrangements, economic conditions, and historical and cultural norms.<sup>21</sup>

This article focuses on a policy area that is featured prominently in recent regional and international discourses in criminal justice, human rights, politics, and public health – the penal treatment of drug offenders. It surveys institutional forces and political dynamics in multiple Asian jurisdictions, describing the warped social and policy discourses surrounding drug offenses. The article consists of four interrelated main sections. The first section reviews the concept of “Asian Values”, with a particular focus on the binary division between individualism and collectivism. Section two provides some analysis on populist discourses which deems the rights of some individuals – suspects and criminals – as dispensable during Asian war on drugs. Section Three examines the stigmatization attached to the war on drugs: why are nonviolent drug offenses considered the most morally culpable? The perception that illicit drugs pose a grave threat to Asian communities and therefore justify harsh penal treatment and even extrajudicial punishment is addressed in the last section.

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values’ is premised on Malay-Islamic culture and should be protected against corruption by Western values. This is also called ‘The Mahathir Model’. Mohd Azizuddin Mohd Sani et al., *Malaysia in Transition: A Comparative Analysis of Asian Values, Islam Hadhari and Imalaysia*, *J. Pol. L.*, Sept. 2009, at 110.

<sup>19</sup> JOANNE R. BAUER & DANIEL A. BELL, *Introduction*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* 3, 5-9 (Joanne R. Bauer & Daniel A. Bell, eds., Cambridge University Press 1999); Thompson, M. R., *Whatever Happened to “Asian Values”?*, *J. DEMOCR.*, Oct. 2001, at 154, 159 (observing that ‘the real issue involved is not “Asia” versus the “West,” but rather authoritarian versus democratic modernity’).

<sup>20</sup> GARRY RODAN & KEVIN HEWISON, *A “Clash of Cultures: Or the Convergence of Political Ideology*, in *PATHWAYS TO ASIA: THE POLITICS OF ENGAGEMENT* 29, 29-55 (Richard Robison, ed., St Leonards 1996).

<sup>21</sup> Jean-Pierre Lehmann, *Identifying Asian Values for an Integrated Market*, *THE JAKARTA POST* (Feb. 21, 2015, 9:16 AM), <http://www.thejakartapost.com/news/2015/02/21/identifying-asian-values-integrated-market.html> (arguing that ‘the space that covers Asia is far too diverse to allow for generalization [of the concept of “Asian Values”]). A possible counterargument is that the validity of Asian values does not require strict historical, religious or cultural homogeneity. A salient example is that the even the formation of a European identity require no such preconditions.

## II. REVISITING THE CONCEPT OF "ASIAN VALUES"

In spite of controversies, "Asian Values" have proven not to be a passing intellectual fad.<sup>22</sup> The origins of the concept can be traced back to the mid-1980s. A media database search finds more than 16,100 entries in 100 global media outlets.<sup>23</sup> The general trend demonstrated by the data features a spectacular rise of popularity of the term towards the end of the 1980s, its peak in 1998 and an uptrend towards the early-2010s (See figure 1). The term seems to be a barometer of domestic and international perception of the region's economic development and social models. Its ascendancy in the 1990s was pegged to the much acclaimed "Asian Economic Miracle";<sup>24</sup> its controversy fuelled by the Asian financial crisis during which many countries suffered a loss of demand and confidence throughout the region.<sup>25</sup> In recent years, there has been a mild uptrend, especially in the wake of the 2008 global financial crisis, triggered by U.S. the subprime mortgage bubble, that contributed to the European sovereign-debt crisis and led to a new order in which emerging and developing economies have driven global GDP growth. See Chart on Page 52.

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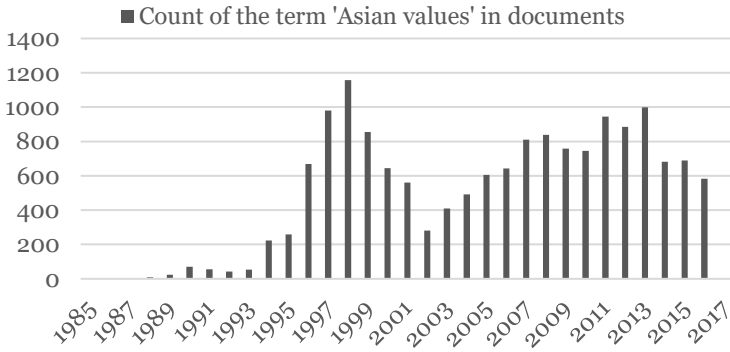
<sup>22</sup> DANIEL A. BELL, *EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA* 8 (Princeton University Press 2000) (noting "it would be a mistake to conclude that nothing of theoretical significance has emerged from East Asia.").

<sup>23</sup> The search was conducted in the database of FACTIVA by Dow Jones. The search term was 'Asian values' and the date range which found usage of the term is 1985 to 2017. The newspapers searched include Major newspapers such The Wall Street Journal, The New York Times, The Washington Post, The Times, Straits Times, South China Morning Post, The Globe and Mail, The Australian and Business Line (the Hindu). See Figure 1.

<sup>24</sup> Barbara Crossette, *U.N. Survey Finds Rich-Poor Gap Widening*, N. Y. TIMES, (July, 15 1996), <http://www.nytimes.com/1996/07/15/world/un-survey-finds-world-rich-poor-gap-widening.html>.

<sup>25</sup> See STEPHAN HAGGARD, *THE POLITICAL ECONOMY OF THE ASIAN FINANCIAL CRISIS* (Institute for International Economics, 2000); Amartya Sen, *Human Rights and Economic Achievements*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* 88, 89 (Joanne R. Bauer & Daniel A. Bell, eds., Cambridge University Press 1999) (stating that 'even though the evident thrill in the power of Asian values has somewhat diminished' with the 1997-98 Asian financial crisis, 'enough has been achieved in the region . . . to make it legitimate to continue to celebrate the economic performance of East Asia over the decades'.

Figure 1: Count of the term “Asian Values” in global news outlets



The concept of “Asian Values” clearly has a richer connotation than mere geographical ties. To date, the most prominent discussants on the topic include the Singaporean school,<sup>26</sup> the Malaysian group<sup>27</sup> and former President Jiang Zemin of the People’s Republic of China.<sup>28</sup> A multi-dimensional discourses on “Asian Values” meant both for domestic and foreign audiences<sup>29</sup> contain at least three interrelated sets of tensions: 1) the promotion of what are deemed universal human rights ideals and an emphasis on particularistic local conditions in Asia; 2) the conflict between promoting the first generation of civil and political rights, championed by the West and the advancement of second and third generation rights such as socioeconomic, cultural and indigenous rights, advocated by non-Western countries; and 3) the need to serve community common good rather individual rights.

In the context of the first tension between “Asian Values” emphasis on localism and the universal protection of human rights, Chandra Muzaffer challenges both the domination of Western hegemony in the name of human rights

<sup>27</sup> Singapore’s former Prime Minister, Mr Lee Kuan Yew, is a representative of the so-called Singaporean school who advocated Asian values, the members of which include the former Prime Minister of Malaysia, Mahathir Mohamed, for instance, was a high-profile advocate for Asian values.

<sup>28</sup> E.P. Mendes, *Asian values and human rights: Letting the tigers free*. Ottawa: Human Rights Research and Education Centre, University of Ottawa (1995), cited by KERRY J. KENNEDY, *Searching for Citizenship Values in an Uncertain Global Environment*, in *CITIZENSHIP EDUCATION IN ASIA AND THE PACIFIC 9* (W.O. Lee et al. (eds.), Kluwer Academic Publishers 2004).

<sup>29</sup> Tim Harper, “Asian Values” and Southeast Asian Histories, 40 *HIST. J.* 507, 507-17 (1997).

and the suppression of individual rights under the auspices of "Asian Values." According to him, the non-Western world is "skeptical and critical" of the West's domination and control in ways which are more subtle and sophisticated but no less destructive and devastating than the colonial rule.<sup>30</sup> This clash of values on the supranational level has domestic roots, i.e. the conflict between different generations of human rights and the tension between individual rights and community interests.

Most proponents of "Asian Values" have had at-length discussions on what was believed to be a unique type of state-society relationship that is at the heart of Asian distinctiveness. According to the Singaporean School, "Asian Values" represents "a sense of community and nationhood, a disciplined and hardworking people, [with] strong moral values and family ties."<sup>31</sup> Lee Kuan Yew, Singapore's former prime minister, stated that "communitarian values where the interests of society take precedence over that of the individual" suit Asia better than "the individualism of America."<sup>32</sup> Malaysia's former Prime Minister Mahathir also agreed that under community-oriented Asian values, responsibility towards "family and community" comes before "individual privileges" and respect for authority is seen to "guarantee stability for the whole society."<sup>33</sup> China's Permanent Representative to the U.N., similarly, explained that "public matters, in the name of justice, should take precedence over private matters. Social progress relied not simply on the freedom of individuals, but on the existence of a well-organized and disciplined collective body."<sup>34</sup>

Taken together, the advocacy for the supremacy of community interests, in the context of "Asian Values", consists of at least three core components: collectivism, morality, and order. First, individuals bear responsibilities towards collective entities, including family, local community, and the state. Individual preferences, accordingly, are hierarchically inferior to the greater good at collective levels. Second, members of these communities share a commitment to a common set of moral values. Third, order, stability, and security of the community are regarded as paramount and are cautiously guarded against risk and threat. As Jack Donnelly pointed out, the legitimacy of the political power derives from its assurance of harmony, order, and prosperity of the society.<sup>35</sup>

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<sup>30</sup> CHANDRA MUZAFFER, *From Human Rights to Human Dignity*, in DEBATING HUMAN RIGHTS: CRITICAL ESSAYS FROM THE UNITED STATES AND ASIA 25, 26, 28, 30 (Peter Van Ness, ed.) Routledge, 1999.

<sup>31</sup> Chok Tong Goh, *Social values – Singapore style*, 90 CURR. HIST. 417, 417-22 (cited in Mendes, *supra* note 28, at 417).

<sup>32</sup> Speech by Lee Kuan Yew, I.H.T., 9–10 November 1991.

<sup>33</sup> MOHAMAD MAHATHIR, *A NEW DEAL FOR ASIA* 69 (Pelanduk Publications 1999).

<sup>34</sup> Sub-Commission on Prevention of Discrimination and Protection of Minorities, Comm'n H.R., Report No. E/CN.4/Sub.2/1998/SR.4, *Summary Record of the 4th Meeting* (1998).

<sup>35</sup> Jack Donnelly, *Human rights and Asian values*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 60, 66 (Joanne R. Bauer & Daniel A. Bell, eds., Cambridge University Press 1999).



This article will examine, in the context of Asian “Wars on Drugs” (also referred to as the “War”) and how “Asian Values” have been translated into three interrelated features of Asia’s War: populism, moral stigmatization, and a preoccupation with security. This research contributes to the existing literature on Asian values by moving the debates beyond the normative basis of the concept of “Asian Values.” Rather than providing a critique of the “oughtness:” of the concept, this study focuses on “how” and “why”. For example, it has been cogently argued, in the debate of individualism versus collectivism, that the protection of individual liberty and the enhancement of community-based interests are not necessarily mutually exclusive.<sup>36</sup> As Amartya Sen said: “it is hard to make sense of the view that the basic ideas underlying freedom and rights in a tolerant society are ‘Western’ notions, and somehow alien to Asia, though that view has been championed by Asian authoritarians and Western chauvinists.”<sup>37</sup> In other words, individuals are *not inescapably* committed by their cultures and traditions to sacrifice individual liberty. However, this analysis does not explain *what forces*, if not culture and traditions, impedes the fulfillment of the rights, dignity, and liberty of Asian citizens in real life, but *how* these forces take place in Asian societies and *why*. This article will offer an in-depth explanation on these important topics in the context of the Asian “Wars on Drugs.”

### III. WARS ON DRUGS IN ASIA: RISING PUNITIVENESS

The War has no doubt been a highly controversial issue on Asian countries’ criminal justice agenda. Standing in stark contrast to a comprehensive approach to tackling illicit drugs which incorporate prevention and treatment, most Asian countries are still clinging to tough criminal punishment as the primary coping mechanism to drug-related problems.<sup>38</sup> Former UN Secretary General Ban Ki Moon called on Asian countries to rectify this punitive approach, stating that no one should be stigmatized or discriminated against because of their dependence on drugs. He called on Asian governments to amend outdated criminal laws that criminalize the most vulnerable sections of society, and take all the measures needed to ensure they live in dignity.<sup>39</sup>

Recently, Philippines’ high-profile War has garnered the attention of global media. Since assuming his presidency in May 2016, Rodrigo R. Duterte has stuck to his campaign pledge to launch a relentless and sustained anti-drug campaign. A total of 184 suspected drug pushers and drug lords were killed between May 19,

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<sup>36</sup> Li Xiaorong, “Asian values” and the universality of human rights, PHILOS. PUBLIC AFF., 1996, 18, 18-23.

<sup>37</sup> Amartya Sen, HUMAN RIGHTS AND ASIAN VALUES, 187-88, 1997.

<sup>38</sup> Tom Fawthrop, *The New War on Drugs: ASEAN Style*, THE DIPLOMAT (Nov. 30, 2012), <http://thediplomat.com/2012/11/the-new-war-on-drugs-in-southeast-asia/>.

<sup>39</sup> U.N. Secretary General, Remarks on the handover of the report of the Commission on AIDS in Asia, (Mar. 26, 2008), <https://www.un.org/sg/en/content/sg/speeches/2008-03-26/remarks-handover-report-commission-aids-asia/>.

2016 and July 7, 2016.<sup>40</sup> In his first state of the nation address on July 25, 2016, he called on “the Philippine National Police, the barangay chairmen, the Mayors, the Governors and all those occupying seats of power and authority” to double and triple the efforts to crack down on drug suspects.<sup>41</sup> He then further extended promised target to eradicate illicit drugs within three to six months after he took power.<sup>42</sup> The ongoing drug war has so far resulted in more than 8,000 vigilante killings of drug offenders and users.<sup>43</sup>

Rising use of illicit drugs is by no means a unique problem to the Philippines. An elder twin of Duterte’s belligerent War was the 2003 Thai anti-drug campaign led by Thai Prime Minister Thaksin Shinawatra, which resulted in imprisonment, executions and extrajudicial killings of defendants, suspects, and innocent persons. In a letter to the Secretary of State in 2004, the then Thai Foreign Minister estimated that during the first three months of the campaign, of the 2,593 recorded homicide cases, merely about half were “considered by the Royal Thai Police (RTP) to have been probably drug-related.”<sup>44</sup> A junta investigation concluded in 2008 that over half of those killed had no links to the drugs trade.<sup>45</sup> The report, which has never been made public, said that of 2,819 people killed between February and April 2003, more than 1,400 were unrelated to drug dealing or had no apparent reason for their killings.<sup>46</sup> In parallel to extrajudicial killings were growing death sentences. A peak of 447 death sentences was imposed on first-trial in 2002 during unofficial anti-drug offensives.<sup>47</sup>

Under the rule of Thaksin, Thailand became one of the Asian countries where the majority of the death sentences were associated with drug-related offenses; Thailand also acquired the status of a country with the highest

<sup>40</sup> Adrian M. Tamayo, *Determining Statistical Pattern on the Drug-Related Killing in Philippines Using ARIMA and Poisson Techniques*, 46 J. of Drug Issues, 5 (forthcoming August 2016), <https://mpr.ub.uni-muenchen.de/72518/>.

<sup>41</sup> Rodrigo Duterte, *Philippine President, President Duterte’s First State of the Nation Address*, PHILIPPINE DAILY INQUIRER (Jul. 25, 2016) in INQUIRER.NET, <http://newsinfo.inquirer.net/799060/full-text-president-rodrigo-duterte-first-sona-state-nation-address-2016#ixzz4bU4m8OU>.

<sup>42</sup> Tamayo, *supra* note 40, at 2.

<sup>43</sup> Manuel Mogato, *Philippine Drugs War Gets Complex as Duterte Creates New Super-Agency*, REUTERS Mar. 10, 2017, <http://www.reuters.com/article/us-philippines-drugs-idUSKBN16H1YV>. This figure includes both deaths caused by police operations and vigilante-style or unexplained killings; Reuters, *Rodrigo Duterte impeachment papers filed in Philippine Congress*, THE GUARDIAN, (Mar. 16, 2017), <https://www.theguardian.com/world/2017/mar/16/rodrigo-duterte-impeachment-papers-filed-in-philippine-congress>.

<sup>44</sup> United States Bureau of International Narcotics and Law Enforcement Affairs, *International Narcotics Control Strategy Report*, United States Department of State (Mar., 2004), <https://www.state.gov/j/inl/rls/nrcrpt/2003/vol1/html/29837.htm>.

<sup>45</sup> *Thailand’s drug wars Back on the Offensive*, THE ECONOMIST, (Jan 24<sup>th</sup> 2008).

<sup>46</sup> *Thailand: Prosecute Anti-Drugs Police Identified in Abuses*, HUMAN RIGHTS WATCH (Feb. 7, 2008), <https://www.hrw.org/english/docs/2008/02/07/thaila17993.htm>.

<sup>47</sup> DAVID T. JOHNSON AND FRANKLIN E. ZIMRING, *THE NEXT FRONTIER: NATIONAL DEVELOPMENT, POLITICAL CHANGE, AND THE DEATH PENALTY IN ASIA*, 401 (2009).

incarceration rate per 100,000 population.<sup>48</sup> This punitive approach continued in the post-Thaksin regimes. Most recently, 201 and 233 persons were sentenced to death for drug-related offenses, respectively, in 2014 and 2015, despite that there has been no execution since 2009.<sup>49</sup> As of the end of 2014, approximately forty seven percent (302 people) of the 645 prisoners on the death row had been convicted of drug trafficking.<sup>50</sup> Thailand has approximately forty percent of the Association of Southeast Asian Nations' prison population, while it makes up only ten percent of the group's total population.<sup>51</sup> In July 2016, Thailand had a prison population of 321,347, with around seventy percent jailed for drugs offenses.<sup>52</sup>

In Asian countries where extrajudicial killings rarely take place, the death penalty and long prison terms are key weaponry in the arsenal of law enforcement agencies fighting the war on drugs. Indonesia is a country whose "tough on drug" initiatives yielded high-profile judicial executions in recent years. After President Joko Widodo took the presidency in October 2014, fourteen people were executed within four months, among them twelve foreign nationals, the highest number of executions within a short span of time in the history of Indonesia.<sup>53</sup> In response to international criticisms on Indonesia's use of the death penalty for drug-related offenses, in particular the executions of eight drug traffickers including two Australian citizens in 2015,<sup>54</sup> foreign minister Retno Marsudi defended capital punishment as "part of Indonesian law."<sup>55</sup> Inspired by the Philippine's War, Indonesia's anti-narcotics chief announced his plan to ramp up the country's fight against drugs by bolstering its police force with more personnel and heavy weaponry.<sup>56</sup> Substantial portions of those on death row in Indonesia are there for drug-related crimes, with a considerable number of them being foreign nationals.<sup>57</sup>

<sup>48</sup> *Id.* at 400.

<sup>49</sup> Human Rights Comm., Replies of Thailand to the list of issues in relation to the second periodic report of Thailand, 7-8, U.N. Doc. CCPR/C/THA/Q/2/Add.1, Nov. 15, 2016. Two men were executed for the offence relating to disposal narcotics of category I (Meth/Amphetamine) without permission under the Narcotics Act (1979) in August 2009. *Id.* at 8.

<sup>50</sup> *2015 World Day Against The Death Penalty: Not The Solution To Drug-Related Crime*, 21 (2015), <https://www.amnesty.org/download/Documents/ACT5026342015ENGLISH.pdf>.

<sup>51</sup> Reuters, *Soaring Prison Population Prompts Thailand to Re-Think 'Lost' Drug War*, THE STRAIT TIMES, July 17, 2016, 11:08 AM, <http://www.straitstimes.com/asia/se-asia/soaring-prison-population-prompts-thailand-to-re-think-lost-drug-war>.

<sup>52</sup> *Id.*

<sup>53</sup> Nithin Coca, *Indonesia's Tragic War On Drugs*, EQUAL TIMES, May 5, 2016, <https://www.equaltimes.org/indonesia-s-tragic-war-on-drugs?lang=en#.WNVFPzuGO01>.

<sup>54</sup> Jason Scott & Neil Chatterjee, *Indonesia Executions Spur Australia to Recall Ambassador*, BLOOMBERG, Apr. 29, 2015, <https://www.bloomberg.com/news/articles/2015-04-28/indonesia-executes-foreigners-for-drug-crimes-despite-protests>.

<sup>55</sup> John Fraher & Chris Brummitt, *Indonesia to Keep Applying Death Penalty for Drug Crimes*, BLOOMBERG, Mar. 18, 2016, <https://www.bloomberg.com/news/articles/2016-03-18/indonesia-to-keep-applying-death-penalty-for-drug-crimes>.

<sup>56</sup> JD Lovrencic, *What is Malaysia's Commitment to Fight the Drug War?*, MALAYSIAKINI (Sep. 7, 2016, 5:56 PM), <https://www.malaysiakini.com/letters/355004#ixzz4cTmg1L6eA>.

<sup>57</sup> As of April 2015, there were at least 121 prisoners under sentence of death. These include 54 people convicted of drug-related crimes. At least 35 foreigners are currently on death row as of Oct. 2015. See Amnesty International, *supra* note 50. See also, Coca, *supra* note 53. An

As of 2015, 70% of Indonesia's prison population was imprisoned for drug-related offenses.<sup>58</sup>

As one of the region's most populous countries, China's fight against illicit drugs since the 1980s has also mainly relied on harsh punishment.<sup>59</sup> Most recently, Justice Ma, from China's Supreme People's Court, disclosed that drug-related offenders receive comparably harsher penalties than criminal offenders convicted of other types of offenses. According to him, approximately 20% of the 137,198 convicts received imprisonment above five years, life imprisonment or the death penalty and that the number of drug-related convictions increased by 25.08% in 2015.<sup>60</sup> In April 2016, China's top court toughened up punishment for drug-related offenses via a judicial interpretation.<sup>61</sup> The new rules expanded the list of illicit drugs which attract criminal responsibilities, lowered the threshold of conviction of offenses involving some precursor chemicals, and imposed heavier penalties for drug crimes committed by state officials and the distribution of narcotics to juveniles.<sup>62</sup> Drug offenses, along with murder, infliction of grievous bodily harm, and robbery, attract most death sentences in China.<sup>63</sup>

Singapore is also well known for its tough stance on drug offenses. The execution of 110 people for drug-related crimes between 1999 and 2003 earned Singapore the reputation as the world's highest per capita executioner.<sup>64</sup> Anti-narcotics policies and laws are featured prominently on the Singaporean penal agenda. During the same 2012 parliamentary debate which led to the allowance of judicial discretion in mandatory death sentencing,<sup>65</sup> it was nonetheless made clear that Singapore was committed to maintaining a "zero tolerance" policy against

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alternative sources reports that as of September 16, 2016, there were at least 178 people on death row, 105 for drug offences. *See Summary of Stakeholders' Submissions on Indonesia*, Rep. of the Office of the United Nations High Commissioner for Human Rights, at 24-25, A/HRC/WG.6/27/IDN/3 (Feb. 20, 2017).

<sup>58</sup> *Sambutan Presiden RI pd Peresmian Pembukaan Rakornas Penanganan Narkoba [Inauguration celebration speech for the President of the Republic of Indonesia on coordination Meeting of National Drug Treatment 2015]*, KEMENTERIAN SEKRETARIAT NEGARA REPUBLIK INDONESIA (Feb. 4, 2015), [http://www.setneg.go.id/index.php?option=com\\_content&task=view&id=8712&Itemid=26](http://www.setneg.go.id/index.php?option=com_content&task=view&id=8712&Itemid=26).

<sup>59</sup> For a brief history of the state's initiatives to fight illicit drugs, *see* Hong Lu and Bin Liang, *Legal Responses to Trafficking in Narcotics and Other Narcotic Offenses in China*, 18 INT. CRIM. JUSTICE REV. 212-218, (2006).

<sup>60</sup> Sina Justice, *139,000 Drug-related Cases were Concluded by Courts Nationwide in 2015*, CHINANEWS.NET (Apr. 7, 2016), <http://finance.sina.com.cn/sf/news/2016-04-07/111526382.html>.

<sup>61</sup> Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Drug-Related Criminal Cases, No. 8 (2016), <http://www.court.gov.cn/fabu-xiangqing-19122.html>.

<sup>62</sup> *Id.*

<sup>63</sup> These four types of capital offenses attract the vast majority of capital sentences despite 46 capital offenses remaining on the books. The number of death sentences and executions are held as a state secret and the disclosure of these figures is a criminal offense.

<sup>64</sup> AMNESTY INT'L, *Singapore: The death penalty - A hidden toll of executions*, at 5, AI Index ASA 36/001/2004 (Jan. 15, 2004), <https://www.amnesty.org/en/documents/ASA36/001/2004/en/>.

<sup>65</sup> Misuse of Drugs Act (Cap 185, Rev Ed, 2008), s 33(b).

illicit drugs.<sup>66</sup> In 2016, Singapore's Minister for Home Affairs and Law, Mr. K. Shanmugam, spoke at the U.N. General Assembly indicating that Singapore's anti-drug regime was one of the most effective around the globe; therefore, the country would not consider softening its drug policies.<sup>67</sup>

Similarly, Malaysia's drug control practices rely primarily on harsh punishment. Today, Malaysia still retains the mandatory death penalty for drug-related offenses. This is because, according to Malaysia's Inspector-General of Police, abolishing the mandatory death penalty would be equivalent to taking a "step backward" in the war against drugs.<sup>68</sup> Amnesty International noted that at least 38 people in Malaysia were sentenced to death and two executed in 2014; 70% of these convictions were for drug-related offenses.<sup>69</sup> As of 2015, there were 1,043 prisoners on death row, of which 480 were convicted for drug-related offenses.<sup>70</sup>

Vietnam is also classified by Harm Reduction International as a country where the imposition of death sentences on drug-related crimes is a regular and mainstream part of the criminal justice system.<sup>71</sup> From 2001 to 2010, Vietnam courts sentenced 1,421 drug-related offenders, of which 569 defendants (40%) were sentenced to death.<sup>72</sup> This percentage has increased in recent years. Amnesty International recorded that in 2014 at least 72 death sentences were imposed, 80% of which were for drug trafficking.<sup>73</sup> There are several reasons for this. First, the manufacturing, distribution, and trafficking of illicit drugs are organized through networks across national borders.<sup>74</sup> Second, and related to this point, as foreign nationals can be prosecuted, tried, sentenced, and executed, the use of domestic penal punishment may generate a "spill over" effect on countries which no longer use the death penalty to punish drug-related offenses. Third, through the process of regional acculturation,<sup>75</sup> countries in the same region may mimic and learn from each other. The recent legislative proposal put forward in the Philippines is a salient example of this trans-border socialization process. Legislative and policy

<sup>66</sup> Singapore Parliamentary Debates, Official Report (November 14, 2012) Vol. 89 (Misuse of Drugs Amendment Bill).

<sup>67</sup> Jeremy Au Yong, *Singapore will not Soften its Stand on Drugs* THE STRAIT TIMES (Apr. 21, 2016, 12:00 PM), <http://www.straitstimes.com/singapore/singapore-will-not-soften-its-stand-on-drugs-shanmugam-tells-un>.

<sup>68</sup> *Cops Back Death Sentence Review, but Total Scrapping a Step Backward*, MALAY MAIL ONLINE (Aug. 27, 2015), <http://www.themalaymailonline.com/malaysia/article/igp-cops-back-death-sentence-review-but-total-scrapping-a-step-backward>.

<sup>69</sup> *Id.*

<sup>70</sup> Gallahue & Lines, *supra* note 4, at 15.

<sup>71</sup> *Id.*

<sup>72</sup> Hai Thanh Luong, *The Application of the Death Penalty for Drug-Related Crimes in Vietnam: Law, Policy, and Practice*, THAILAND JOURNAL OF LAW AND POLICY (2014), <http://www.thailawforum.com/articles/Vietnam-death-penalty.html>.

<sup>73</sup> Amnesty International, *supra* note 50, at 22.

<sup>74</sup> Kongpetch Kulsudjarit, *Drug Problem in Southeast and Southwest Asia*, 1025 ANNALS. N. Y. ACAD. SCI., 446, 446-49 (2004).

<sup>75</sup> See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L. J. 621-703 (2004).

changes like this cast doubt on whether mutual-learning and peer influences will necessarily lead to great strides towards penal moderation.

#### IV. ENTRENCHED POPULISM

“War on Drugs” is embedded in the demagoguery statements of politicians for advancing their political and institutional agenda in many Asian countries. The most detrimental impact of the War on Asian societies, arguably, is the entrenchment of populism and the politicization of criminal justice policies. Justifications in support for the War commonly seen in Asian jurisdictions, which appeal to the wider citizens, are two-fold: public support and public protection. The belligerent rhetoric and inflammatory proclamations of the “War on Drugs” usually produce deeply divisive discourses concerning a war between the people on the one hand and the evil criminals on the other.

The recent politics of anti-drug campaigns in the Philippines is a pertinent example. Duterte’s views, echoed by politicians such as Justice Secretary Vitaliano Aguirre II and Solicitor General Jose Calida, were that criminals and suspects deserve no recognition of their human rights or protection of their due process rights.<sup>76</sup> He crafted his War as if it is the only effective and legitimate means to shield the general public from the threats of illicit drugs. This powerful dichotomy between “us” and “them” and between the “people” and the “criminals” clearly mirror the “Asian Values” argument – the rights of *some* individuals are dispensable for maximizing the benefits of the community. Although described as a community for all, this is, in fact, a community that only protects the interests of the dominant majority. There are no real “common” interests as a segment of the society is clearly excluded. Instead of promoting the values of the collective “all,” the “War on Drugs” undermines it.

This stands in contrast with a belief that the advancement of individual rights, dignity and liberties extends to all – innocent persons, suspects and criminals included – is desirable. As Manila Archbishop Luis Antonio Cardinal Tagle stressed: “whether a person is guilty or not, life should be cared for and respected. And if a person is guilty, give him new life – the opportunity to rise from his old life.”<sup>77</sup> In contrast, the exclusive rhetoric of “War on Drugs” labels drugs suspects and criminals as “the enemies of the people.” Moreover, the process of determining who falls into which category is often determined by law enforcement and even politicians, rather than via due process promised by impartial court proceedings.

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<sup>76</sup> Audrey Morallo, *What some international groups say about the Philippine war on drugs*, THE PHIL. STAR (Mar. 3, 2017, 6:00 PM), <http://www.philstar.com/news-feature/2017/03/03/1677617/what-some-international-groups-say-about-philippine-war-drugs>.

<sup>77</sup> Julie M. Aurelio, *Denounce all forms of killings, Tagle urges*, PHIL. DAILY INQUIRER (Aug. 30, 2016, 1:10AM), <http://newsinfo.inquirer.net/810940/denounce-all-forms-of-killings-tagle-urges#ixzz4c0u4uijw>.

In May 2016, Duterte pocketed huge electoral benefits from waging a war against drugs and won the election in a landslide after building a reputation as “the Punisher” and sending out relentless anti-crime messages to the voter.<sup>78</sup> Whilst his War has been challenged domestically and internationally since he took the presidency,<sup>79</sup> Duterte has maintained strong domestic support. He enjoyed an 83% support rate nationwide seven months into his War; his popularity is the highest among the poor who are most affected by illicit drug problems and, ironically, his “War on Drugs.”<sup>80</sup> Even family members of the casualties of his War, despite insisting their loved ones’ innocence, support the “violence.”<sup>81</sup> The Philippine’s Vice President Robredo remains one of few public figures who is “willing to speak out against the war.”<sup>82</sup> Many domestic critics of the War have been ridiculed and discredited, with “some subject to fierce barbs from the president’s huge online support base.”<sup>83</sup>

The fusion of “punitiveness” and populism has formed a significant obstacle to the protection of the rights of the stigmatized minority. The most disturbing side of the Philippines War is neither its sheer brutality nor the violation of due process. Rather, the catchy and simplistic phrases which are widely circulated in the mass media and drummed into people’s minds are most detrimental to the country’s political and social life. Under this populist logic, criminal justice issues are at once popularized and politicized: politicians arouse and tap into the public’s punitive sentiments for their own political gains. Extravagant promises are flashed up and the message that complex social problems are curable by tough and swift punishment are accepted by the populace. The “War on Drugs” precipitated rising punitiveness on the one hand, and warped perceptions of reality on the other.

Killings linked to the “War on Drugs” may cease, but the influences of militant anti-drug wars on public psyche will linger. A brief survey finds hundreds of emotionally-charged comments posted on YouTube, social network sites, and online communities. For example, in response to the comment “Rodrigo Duterte is a butcher!”, a reply says “butchers kill so innocent people can eat :) best president

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<sup>78</sup> Philip Sherwell, *Who is ‘The Punisher’ Rodrigo Duterte - the tough-talking mayor poised to become the next Philippine president?*, THE TELEGRAPH (May 9, 2016, 2:07 PM), <http://www.telegraph.co.uk/news/2016/05/08/philippines-poised-to-elect-tough-talking-punisher-rodrigo-duter/>.

<sup>79</sup> Apart from the serious concerns of the international communities, Philippine Vice President Leni Robredo released a video in March 2017, calling for closer international scrutiny of the abuse of human rights of suspected drug offenders and their relatives and slamming the summary executions of drug offense suspects and users. See Joseph Hincks, *Philippine Vice President Slams Duterte’s Drug War in a New Video*, TIME (Mar. 13, 2017), <http://time.com/4700506/philippine-vice-president-robredo-drug-war/>.

<sup>80</sup> Kristine Angeli Sabillo, *Duterte approval rating at 83%—Pulse Asia*, THE PHIL. DAILY INQUIRER (Jan. 6, 2017, 1:59PM), <http://newsinfo.inquirer.net/859906/duterte-approval-rating-at-83-pulse-asia>.

<sup>81</sup> See Patrick Symmes, *The List*, N.Y. TIMES MAG., Jan. 15, 2017, at MM48.

<sup>82</sup> Manuel Mogato, *Philippine vice president decries Duterte’s drug war tactics in video to U.N.*, REUTERS (Mar. 15, 2017, 4:36 PM), <http://uk.reuters.com/article/uk-philippines-drugs-robredo-idUKKBN16M0XR?il=0>.

<sup>83</sup> *Id.*

ever!”<sup>84</sup> In another video of Duterte’s inaugural speech, one commenter stated, “[j]ust like flies and mosquitoes. I have no problem killing pests of society.”<sup>85</sup> Others show admiration of Duterte with comments like, “[m]ake our race great Duterte! Asia for the Asians!”<sup>86</sup> and “[y]ou may not like how President Duterte runs our country but for most Filipinos 91% of us, we support him all the way.”<sup>87</sup> These comments demonstrate the populace’s indifference to the rights and interests of victims of the war on drugs. Meanwhile, public discourse has not been informed by important facts, namely that the “War on Drugs” has, in fact, been a “war on the poor.”<sup>88</sup> While middle and upper classes, as well as overseas Filipino, are relatively unaffected, the War has led to “entrench[ed] disadvantage[s] among the country’s poor.”<sup>89</sup>

Closely resembling the popularity of Duterte’s War, Thaksin Shinawatra’s iron-fisted war on drugs (2003) also gained considerable popular support in Thailand. A poll showed that 90% of the population supported the populist leader’s crackdown on drugs.<sup>90</sup> According to another survey conducted by Suan Dusit College in 2003, 75% of Thai people fully supported Thaksin’s hard line stand on the drug war, with 12% approving the killing of drug dealers by law enforcement.<sup>91</sup> The Thaksin administration was clearly aware how it could gain political capital by tapping into public fear and anxiety against the expansion of illicit drugs. Thaksin’s near control of the media helped hide “most of the campaign’s worst abuses from public view and allowed the government’s message that all of those killed and targeted were dangerous criminals—and not men, women, and children against whom no charge had been laid—to gain popular acceptance.”<sup>92</sup>

In the post-Thaksin era, harsh measures against drug traffickers further fueled public anxiety about Thailand’s illicit drugs problems. Thus, vows to eliminate illicit drugs swiftly are politically popular. During the 2008 election

<sup>84</sup> Al Jazeera English, Comment to *Rodrigo Duterte’s drug war: Do human rights matter?* - *UpFront* (Arena), YOUTUBE (Aug. 13, 2016), [https://www.youtube.com/watch?v=rte\\_MSX2w5E](https://www.youtube.com/watch?v=rte_MSX2w5E).

<sup>85</sup> Rappler, Comment to *President Rodrigo Duterte’s inaugural speech*, YOUTUBE (June 29, 2016), <https://www.youtube.com/watch?v=0Dx4SiyERVg>.

<sup>86</sup> Al Jazeera English, Comment to *Rodrigo Duterte interview: Death, drugs and diplomacy - Talk to Al Jazeera*, YOUTUBE (Oct. 15, 2016), <https://www.youtube.com/watch?v=S2KtLTXXej8>.

<sup>87</sup> *Id.*

<sup>88</sup> See Joseph Franco, *The Philippines’ War on Drugs Is Really a War on the Poor*, IPI GLOBAL OBSERVATORY (Aug. 10, 2016), <https://theglobalobservatory.org/2016/08/philippines-duterte-drugs-extrajudicial-killing-tokhang/>.

<sup>89</sup> *Id.*

<sup>90</sup> See Marvin Bionat, *Gains from Thailand’s bloody war on drugs proved fleeting*, INQUIRER (July 9, 2016, 12:33 AM), <http://globalnation.inquirer.net/140782/gains-from-thailands-bloody-war-on-drugs-proved-fleeting#ixzz4btQiXogU>.

<sup>91</sup> See *Thailand – Not Enough Graves: The War on Drugs, HIV/AIDS, and Violations of Human Rights*, 16 HUMAN RIGHTS WATCH, no.8, 8 n.8 (2004), <https://www.hrw.org/reports/2004/thailand0704/thailand0704.pdf>.

<sup>92</sup> *Id.* at 8.



campaign, the new Interior Minister Chalerm Yubumroong promised to continue the “punitive” approach: “[d]rug suppression in my time as Interior Minister will follow the approach of [former Prime Minister] Thaksin. If that will lead to 3,000-4,000 deaths of those who break the law, then so be it.”<sup>93</sup> In 2009 and 2010, Thai Prime Minister Abhisit Vejjajiva launched a new War, echoing the populist campaign of his political foe.<sup>94</sup> In 2011, Yingluck Shinawatra, then Prime Minister-in-waiting, pledged “a new war on drugs” to eradicate illicit drugs within 12 months.<sup>95</sup> The current military regime in Thailand has also cracked down on drugs, resulting in 2,749 arrests over two years.<sup>96</sup>

The “zero tolerance” rhetoric on drugs was central to the consolidation of political power and the cultivation of political popularity under Thaksin regime. The War in the Thaksin era symbolizes a dangerous conflation of political will and the “public opinion” constructed and misled by politicians.<sup>97</sup> Punitiveness towards drug-related social problems has been married to Thaksin’s populist response to the demands and insecurities of the grassroots mass. Punitive messages have been drummed into the heads of the generations brought up during the war on drugs. Constitutional Court judge Jaran Pukditanakul explained: “[i]t’s not easy to educate society [now], particularly when you have to go against the concept that has been planted in their heads.”<sup>98</sup> Non-punitive treatment for drugs becomes alien to the society: “[i]t’s like telling people in Thailand not to eat rice.”<sup>99</sup>

A similar populist and punitive pattern can be found in Indonesia. At an event marking International Day Against Drug Abuse and Trafficking, Indonesia’s President Joko “Jokowi” Widodo told a crowd that: “I want to remind all of us, chase them! Catch them! Hit them!”<sup>100</sup> According to an official statement from the presidential palace, the crowd cheered louder when Jokowi said: “remember ladies and gentlemen, 40 - 50 [of] our youths died because of drugs. If the laws allowed it – bang (shoot) them!”<sup>101</sup>

<sup>93</sup> *Thailand’s ‘war on drugs’: International Harm Reduction Association and Human Rights Watch briefing paper*, HUMAN RIGHTS WATCH (Mar. 12, 2008), <https://www.hrw.org/news/2008/03/12/thailands-war-drugs>.

<sup>94</sup> Newsroom, *Thai PM launches new ‘war on drugs,’* MACAU DAILY TIMES (Mar. 19, 2009), <http://macaodailytimes.com.mo/archive-2007-2009/thai-pm-launches-new-war-on-drugs.html>.

<sup>95</sup> Tania Branigan, *Rights groups fear wave of deaths as Thailand faces new drugs crackdown*, GUARDIAN (Jul. 10, 2011, 6:45 PM), <https://www.theguardian.com/world/2011/jul/10/thailand-war-on-drugs-rights-groups>.

<sup>96</sup> Michael Peel, *Thai generals declare victory over corruption and weeds*, FIN. TIMES (Sept. 15, 2016), <https://www.ft.com/content/cc2bed94-7b18-11e6-ae24-f193b105145e>.

<sup>97</sup> M CHAEL K. CONNORS, *Ambivalent about Rights: “Accidental” Killing Machines, Democracy and Coups D’etat*, City University of Hong Kong, SEARC, (Nov., 2009) 13-15.

<sup>98</sup> *Id.*

<sup>99</sup> Tan Hui Yee, *A failing drug war triggers new approach in Thailand and Myanmar*, THE STRAITS TIMES (Aug. 6, 2016), <http://www.straitstimes.com/opinion/a-failing-drug-war-triggers-new-approach-in-thailand-and-myanmar>.

<sup>100</sup> Lauren Farrow & Heru Rahadi, *“Chase and Hit” Drug Dealers: Jokowi*, NEWS.COM.AU (June 26, 2016), <http://www.news.com.au/world/breaking-news/chase-and-hit-drug-dealers-jokowi/news-story/9309a52d0287c32637896dcb242db0c>.

<sup>101</sup> *Id.*

As Sudirman Nasir pointed out, similar to Philippine's fight against illicit drugs, populism is one of the main drivers of Indonesia's War.<sup>102</sup> He explained that the problem of illicit drugs has been chosen as the main policy platform for populist political leaders because it is "an easily-exploitable issue to gain popular support and to hide their weaknesses in dealing with arguably more important issues . . . such as corruption, poverty, unemployment, and inequality."<sup>103</sup> The projection of the simplistic belief that harsh punishment is the panacea for all drug-related social problems are based on unfounded optimism which easily resonates with common-sensical popular beliefs. In a similar vein, Nurkholis Hidayat described how Indonesian politicians win public support by encouraging anger, anxiety, and ignorance among the mass, rather than relying on evidence-based rational thinking. The storm of popular "punitiveness", once formed, exerts great pressure on courts and law enforcement via media, resulting in an erosion of the rule of law, judicial independence, and individual rights.<sup>104</sup>

The "War on Drugs" in the Singapore has also been packaged for public consumption. In 1975, when the mandatory death penalty was introduced to punish unauthorized trafficking, manufacturing, importing, and exporting of certain controlled drugs, the rationale provided by lawmakers was that harsh punishment may frustrate the "[c]ommunist plan to use narcotics to corrupt and soften the population of the various states in South-East Asia . . . [and] undermine the productivity of the populace, thereby "strik[ing] at the very foundations of our social fabric and undermin[ing] our economy."<sup>105</sup> The discourses surrounding the necessity to adopt harsh punishment of drug offenses were clearly framed in a strong emphasis on political ideology.

It has been claimed that the public opinion was in support of a punitive approach towards drug-related offenses.<sup>106</sup> Singapore's Court of Appeal stated in ` that "we also respectfully [disagree] . . . that our society is indifferent to whether a convicted drug trafficker is hanged or imprisoned for life . . . . The mandatory death penalty imposed under the MDA (Misuse of Drugs Act) reflects our society's abhorrence of drug trafficking, and counsel presented nothing before this court to show that society's views have changed on this issue."<sup>107</sup> Michael Hor believed that this conclusion lacks the support of solid evidence: "I know of no statistically significant study of what public opinion in Singapore is concerning the

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<sup>102</sup> Sudirman Nasir, *Behind Jokowi and Duterte's "War On Drugs"*, Asia & the Pacific POLICY FORUM (Sept. 21, 2016), <http://www.policyforum.net/behind-jokowi-dutertes-war-drugs/>.

<sup>103</sup> *Id.*

<sup>104</sup> Nurkholis Hidayat, *What explains Indonesia's enthusiasm for the death penalty?*, INDONESIA AT MELBOURNE (July 21, 2016), <http://indonesiaatmelbourne.unimelb.edu.au/what-explains-indonesias-enthusiasm-for-the-death-penalty/>.

<sup>105</sup> Peggy Pao-Keerthi Pei Yu, *Looking Beyond Prospective Guidance: Sentencing Discretion in Capital Drug Framework and Lessons from the US*, 26 SINGAPORE ACAD. L. J. 520, 525 (2014) (citing Singapore Parliamentary Debates, Official Report (20 November 1975) Vol. 34, at Col. 1380 (Chua Sian Chin, Minister for Home Affairs and Education)).

<sup>106</sup> *See for example*, Chew Seow Leng v. Public Prosecutor (2005), SGCA 11.

<sup>107</sup> *Id.* *See also* Misuse of Drugs Act, Cap 185, (2001).

death penalty.”<sup>108</sup> And even if there is evidence of public support, “whether or not public opinion is sufficiently informed” is in doubt.<sup>109</sup>

Populism in the arena of criminal justice transcends national borders and thrives in different political cultures, from democracy to authoritarianism.<sup>110</sup> Authoritarian regimes demonstrate a high level of resilience by adapting to changes and performing to the demands of the populace.<sup>111</sup> China’s practice of imposing harsh criminal sanctions for drug-related offenders is a pertinent example. Three former and current presidents of the Supreme People’s Court of China (“SPC”) in the past decades, have repeatedly and consistently expressed such opinions. Even Mr. Xiao Yang, former President of the SPC (1998-2008) and leader of the most significant judicial reforms, claimed that justice must “serve the people.”<sup>112</sup> His successor, Mr. Wang Shengjun, who headed the SPC from 2008 to 2012, encouraged courts, in handling death penalty cases, to base their discretion upon additional legal factors in order to “safeguard the mental and physical health of the masses and maintain social harmony and stability.”<sup>113</sup> Primary life-or-death sentencing factors, according to Mr. Wang, include “the feelings of the masses and the social impact of criminal cases.”<sup>114</sup> The present head of the SPC, Justice Zhou Qiang, called on judges to “make great efforts to let the populace feel justice and fairness in each individual case.”<sup>115</sup>

Despite scarce empirical evidence concerning public opinion on the death penalty and the complex relationship between public sentiments and courts, public opinion has always been used as a prominent rationale of the state’s punitive responses to drug offenses. Yet despite high-profile propaganda on drug wars, how criminal punishment is administered for drug offenses and who is subject to such punishment remain outside public scrutiny. In China, for example, the numbers of death sentences and executions remain state secrets and the publication of such statistics, a criminal offense.

<sup>108</sup> See MICHAEL HOR, *Death, Drugs, Murder and the Constitution*, in SINGAPORE ACADEMY OF LAW CONFERENCE 2006 - DEVELOPMENTS IN SINGAPORE LAW BETWEEN 2001 AND 2005 513-516 (Teo Keang Sood ed., 2006).

<sup>109</sup> *Id.*

<sup>110</sup> J. Pratt & M. Miao, *Penal Populism: The End of Reason*, THE CHINESE UNIVERSITY OF HONG KONG FACULTY OF LAW (2017 forthcoming), [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2903819](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2903819); WENFANG TANG, *POPULIST AUTHORITARIANISM: CHINESE POLITICAL CULTURE AND REGIME SUSTAINABILITY*, 15 (Oxford University Press, 2016)).

<sup>111</sup> Andrew J. Nathan, *Authoritarian Resilience*, 14 J. OF DEMOCR. 1, 6 (2003).

<sup>112</sup> See generally Xiao Yang, *Chinese Justice: Challenges and Reform*, 1 Peoples Judicature 4, 4 (2005).

<sup>113</sup> *Id.*

<sup>114</sup> Shengjun Wang, *Supreme Court: the masses should feel as one of the basis for the death penalty*, China News Serv. (Apr. 11, 2008, 6:06 PM), <http://news.sina.com/ch/chinanews/102-101-101-101/2008-04-10/18062803940.html>.

<sup>115</sup> 2015 *Work Report of the Supreme People’s Court*, China Law Translate (March 12, 2015), <http://www.chinalawtranslate.com/2015spcworkreport/?lang=en>.

The net outcome of such misinformation is irrational and misinformed public support. In 2016, the huge commercial success of Operation Mekong,<sup>116</sup> a blockbuster which portrayed heroic figures of anti-drug agents demonstrated the popular appeal of law-and-order narratives on drug control. The movie, which was based on a criminal case, features Chinese and Burmese law enforcement agents arresting and extraditing drug lords from the notorious Golden Triangle region.<sup>117</sup> A public opinion poll conducted between 2008 and 2009 in China indicated that the majority of the Chinese public believed that trafficking, manufacturing, distributing and smuggling of illicit drugs should be subject to execution.<sup>118</sup>

## V. THE PENAL CONSTRUCTION OF MORAL CULPABILITY

In many contemporary Asian jurisdictions, drug offenders have acquired the image of being a public enemy, and drug offenses are labeled as the most serious offenses. But exactly why are non-violent drug offenders—producers, importers, distributors, and traffickers—deemed as equally culpable as the most heinous violent offenders such as murderers and rapists? “War on Drugs” is not merely a campaign to eradicate illicit drugs; it is also a process of symbolically constructing the “devil” who are involved in illicit drug trade. Sometimes the targets of stigmatization and condemnation even include drug users. Stigmatization runs parallel to and is an indispensable part of the wars against drug offenders. Framing the War in such moral language echoes an essential component of the “Asian Values” argument that Asian societies are “built not around individual rights, but around a deeply engrained moral code that is the basis for strong social structures and community life.”<sup>119</sup>

The Philippine’s House of Representatives Speaker Pantaleon Alvarez, who co-authored the legislative bill to reintroduce the death penalty for drug offenses, mocked the Catholic bishops’ objection to the bill: “[h]ere comes the church, [which] wants to protect the evil-doers. Why do you want to protect evil? Why do you want evil to triumph over good?”<sup>120</sup> In the “War on Drugs”, all drug offenders and suspects were not only criminalized but also demonized. President Duterte himself has made degrading remarks about drug users. In 2016, he said: “are they

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<sup>116</sup> The movie grossed 1.17 billion in Chinese RMB.

<sup>117</sup> Naw Kham, the ring leader, was sentenced to death in 2012 in Yunnan, China and executed in 2013.

<sup>118</sup> Dietrich Oberwittler & Shenghui Qi, *Public Opinion on the Death Penalty in China: Results from a General Population Survey Conducted in Three Provinces in 2007/08*, MAX PLANCK INST. FOR FOREIGN AND INT’L CRIMINAL L., at 11 (2007), [https://www.mpicc.de/files/pdf2/forschung\\_aktuell\\_41.pdf](https://www.mpicc.de/files/pdf2/forschung_aktuell_41.pdf).

<sup>119</sup> Mendes, *supra* note 28, at 12.

<sup>120</sup> Mara Cepeda, *Alvarez on Church Opposition to Death Penalty: ‘Why Protect Evil?’* RAPPLER (Feb.5, 2017), <https://www.rappler.com/nation/155511-alvarez-church-death-penalty-why-protect-evil>.

humans? What is your definition of a human being?”<sup>121</sup> Similarly, the Philippine Justice Secretary commented on Feb 2017: “how can that be when your war is only against those drug lords, drug addicts, drug pushers. You consider them humanity? I do not.”<sup>122</sup>

The grim reality, however, seems to contradict narratives of the official authorities that punitive sanctions and vigilante killings only targeted the most serious criminals. The stigmatization led to an approach to fight the evil with even greater evilness. Based on 110 interviews and the documentation of 33 cases, Amnesty International concluded in January 2017 that the “War on Drugs” in the Philippines has been “a war on the poor.”<sup>123</sup> The report presented evidence that the war targeted the poorest segments of the society based on informal “watch lists” whose accuracy was not even systematically verified. That is, there was no way to ensure that those who were killed during police operations were truly the most death-deserving persons. The stigma attached to the killings not only affects the suspects themselves but also their family members, many of whom felt ashamed of their own beloved ones.<sup>124</sup> Moreover, stigmatizing discourses make little effort to distinguish various types of drug offenses and the different categories of substances involved—be it relatively harmless substances such as marijuana and those generally deemed more dangerous ones.

In Indonesia, President Jokowi has called on people to “chase, catch and hit” drug dealers, stating the dealers have found new ways to “trick people” and must be stopped.<sup>125</sup> The Philippine Deputy Attorney General for General Crimes, Noor Rachmad, seconded the announcement made by Jokowi, saying that the War “was done not in order to take lives but to stop evil intentions, and the evil act of drug trafficking.”<sup>126</sup> Jokowi war on the “narcotics emergency” is followed by reports from Indonesia’s National Narcotics Agency (BNN), which concluded that the drug problems were extremely rampant in Indonesia with “more than 14,000 people [d]ying annually from drugs in the country.”<sup>127</sup> International experts and

121 James Rothwell, *Philippines leader Rodrigo Duterte says being sexually abused as a child had major influence on his politics*, THE TELEGRAPH (Oct. 16, 2016, 5:18 PM), [http://www.telegraph.co.uk/news/2016/10/16/philippines-leader-rodrigo-duterte-says-being-sexually-abused-as/?WT.mc\\_id=tmg\\_share\\_tw](http://www.telegraph.co.uk/news/2016/10/16/philippines-leader-rodrigo-duterte-says-being-sexually-abused-as/?WT.mc_id=tmg_share_tw).

122 Agence France-Presse, “*Drug war isn’t crime vs humanity*”: Aguirre says criminals not human, ABSCBNEWS (Feb. 1, 2017), <http://news.abs-cbn.com/news/02/01/17/drug-war-isnt-crime-vs-humanity-aguirre-says-criminals-not-human>.

123 *Philippines: “If You Are Poor, You Are Killed”*: Extrajudicial Killings in the Philippines’ “War on Drugs”, AMNESTY INTERNATIONAL (Jan. 31, 2017).

124 *Id.*

125 Lauren Farrow & Heru Rahadi, “*Chase and hit*” drug dealers: Jokowi, NEWS.COM.AU (June 26, 2016), <http://www.news.com.au/world/breaking-news/chase-and-hit-drug-dealers-jokowi/news-story/9309a52d0287c32637896dcb242db0c>.

126 Luke Hunt, *Executions Cast a Pall Over Indonesia and Its “War on Drugs”*, THE DIPLOMAT (Aug. 4, 2016), <http://thediplomat.com/2016/08/executions-cast-a-pall-over-indonesia-and-its-war-on-drugs/>.

127 Charlotte Greenfield, *Experts question data behind Indonesian president’s war on drugs*, REUTERS (May 8, 2015), <http://www.reuters.com/article/us-indonesia-drugs-idUSKBN0NT15A20150508>.

researchers, however, questioned the soundness of the methodology, observing that BNN presented “very stigmatising language for drugs user, for instance those who have tried drug once are considered as drug addicts.”<sup>128</sup>

The formality and degree of stigmatization vary across societies. Compared with the retributive moral justification of ‘eye-for-an-eye’ underlying the condemnation of murderers, the production, trafficking, importation, and distribution of drugs often lacks equal moral basis. The lethal consequences are normally neither part of the offender’s mens rea nor a direct result of drug-offenses.<sup>129</sup> Judicial authorities, legislators, law enforcement agencies and politicians use various methods to construct the link between drug-related offenses and lethal consequences which are normally not caused by such activities. In Malaysia, the former Lord President of the Federal Court and elected King justified the use of the death penalty by asserting that “those trafficking in drugs . . . [are] no less than engineers of evil and peddlers of death.”<sup>130</sup> Similarly, Singaporean judicial discourses attached stigmas to the penal status of drug offenders who are able to be punished by the death penalty, stating that the “social evil caused by trafficking . . . is broadly proportionate to the quantity of addictive drugs brought on to the illicit market.”<sup>131</sup> To justify their death-deservedness, drug offenders are portrayed as “merchants of death”.<sup>132</sup>

Under this logic, drug-related activities are punishable by death either if they directly cause lethal consequences or indirectly result in the loss of life. The casual chain can be strained to cover harmful consequences which may neither be envisaged by the offender nor necessarily a direct outcome of her drug-related activities. A letter from the Registrar of the Supreme Court of Singapore to an Amnesty International member illustrates this point: “[y]ou would no doubt appreciate the harm to society that is brought about by the activities of these drug traffickers whose actions, more often than not, lead to the indiscriminate loss of life. In that sense, they are no better than murderers and serial killers.”<sup>133</sup> Importantly, although the Registrar admits that not all drug trafficking leads to the loss of life, whether a particular transaction of drug trafficking leads to the loss of life is not a sentencing factor under the revamped Singapore Misuse of Drugs (Amendment) Act 2012.<sup>134</sup> Moreover, under the amended law, the courier bears

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<sup>128</sup> Amnesty International, *supra* note 50, at 14.

<sup>129</sup> Rick Lines, *The Death Penalty for Drug Offences: A Violation of International Human Rights Law*, 2007 INTERNATIONAL HARM REDUCTION ASSOCIATION (Dec. 10, 2007), at 12.

<sup>130</sup> S. L. Harrington, *Death, Drugs and Development: Malaysia’s Mandatory Death Penalty for Traffickers and the International War on Drugs*, 29 COLUMBIA J. TRANS. LAW 365, 380 (1991).

<sup>131</sup> Ong Ah Chuan v. P.P., Sing.L.R., (1981) A.C. 648.

<sup>132</sup> Michael Hor, *Singapore’s Innovations to Due Process*, 9, paper presented at the International Society for the Reform of Criminal Law’s Conference on Human Rights, and the Administration of Justice, Johannesburg (2000).

<sup>133</sup> *Singapore: The death penalty - A hidden toll of executions*, AMNESTY INTERNATIONAL 13 (Jan. 15, 2004), <https://www.amnesty.org/en/documents/ASA36/001/2004/en/>.

<sup>134</sup> The two mitigating factors are (i) the Public Prosecutor certifies that the accused has

the burden of proof to demonstrate that his role was merely a “courier” which may justify mitigation.<sup>135</sup>

The consequence is that, rather than kingpins, the penal code targets couriers, who are poor, desperate and exploited, to receive the harshest punishment.<sup>136</sup> Singapore’s Minister of Law, K. Shanmugam, in support for the retention of the death penalty, argued that if drug couriers are exempted from the ultimate punishment, drug lords will “think the signal is that young and vulnerable traffickers will be spared and can be used as drug mules.”<sup>137</sup> This is to say, ironically, in order to send the deterrent message to drug lords, drug mules are subject to the death penalty. According to the Global Commission on Drug Policy in 2011, the majority of arrests for drug-related activities are “low-ranking ‘little fish’ in the drug market” who are “most visible and easy to catch, and do not have the means to pay their way out of trouble.”<sup>138</sup> In other words, those who are exposed to the risk of being arrested, stigmatized, and punished are *not necessarily* the most culpable. This contradicts the claim that drug offenders are subject to the harshest penal sanctions because of deeply ingrained moral codes in Asian societies.

In China, the stigmatization of drug-related offenses has a subtle political overtone. Since 2000, China’s National Narcotics Control Commission (CNNCC) publishes annual reports on anti-drug initiatives, drug use, and drug-related offenses. Its first annual report in 2000 characterized drugs as a “disaster of the country and calamity of the Chinese people.”<sup>139</sup> The report portrayed drugs as the “deepest pains” which “ruined” the Chinese nation and people in history, alluding to the 19th-century Opium Wars<sup>140</sup> between Britain and Qing dynasty.<sup>141</sup> The report then linked the success of China’s anti-drug campaigns to the “survival of

substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore (the “Substantive Assistance limb”); or (ii) the accused proves he was suffering from such abnormality of mind as substantially impaired his mental responsibility for committing the offence (the “Diminished Responsibility limb”).

<sup>135</sup> Section 33B(2)(a), The Misuse of Drugs Act (2012).

<sup>136</sup> Amnesty International, *Singapore: The death penalty - A hidden toll of executions*, AMNESTY INTERNATIONAL, 13 (Jan. 15, 2004), <https://www.amnesty.org/en/documents/ASA36/001/2004/en/>.

<sup>137</sup> Michael Hor, *Singapore’s Death Penalty: The Beginning of the End?*, in CONFRONTING CAPITAL PUNISHMENT IN ASIA: HUMAN RIGHTS, POLITICS AND PUBLIC OPINION 141, 150 (Roger Hood & Surya Deva, eds., 2013).

<sup>138</sup> Jeraldine Phneah, *Singapore and the Death Penalty*, THE DIPLOMAT (Nov. 20, 2013), <http://thediplomat.com/2013/11/singapore-and-the-death-penalty/>.

<sup>139</sup> The Press Conference of the State Council, *China’s National Narcotics Control Commission, China’s Anti-Drug Initiatives (zhongguo de jindu)*, XINHUANET (June, 2000), <http://www.china.com.cn/chinese/2000/Jul/1824.htm>.

<sup>140</sup> The Opium Wars marked the beginning of the modern era of China. The Sino-British agreements acceded after the military triumph of Britain Wars forced the Chinese imperial authorities to make concessions to the British forces to allow the latter to smuggle drugs into China and colonize Chinese coastal regions and cities. This was regarded by the Chinese as the commencement of ‘a century of humiliation.’

<sup>141</sup> Xinhuanet, *supra* note 141.

the Chinese nation".<sup>142</sup> This ideology-based narrative has taken root in all subsequent annual reports, with the most recent 2017 report stating that anti-drug campaigns were associated with the safety of the country, the prosperity of the nation and the welfare of the people.<sup>143</sup>

In this sense, the ideal of a drug-free country is part and parcel of the political identity constructed by the current Chinese authorities. The War represents the power and strength of the current regime to tackle a complex social problem and keep the society from contamination by the vices of illicit drugs. Historically speaking, harsh anti-drug stances also symbolize a rejection of China's semi-colonial past, when a weak China was humiliated by western military powers. In addition, under the paternalistic tones of these reports, the state shoulders an overall responsibility to "save" drug users from inflicting further harms on themselves by engaging in drug-related activities. In this way, the state's crackdown on drugs is correlated with the legitimacy of the current political regime and reflects the state-individual relations in the contemporary Chinese society.

A politicization of "Wars on Drugs" is not singular to China, given the common heritage of colonialism in many Asian countries. Singapore, for instance, explained that harm caused by the legalization of opium during the British colonial era lingers even after its attainment of independence in 1965.<sup>144</sup> Singapore prides itself with its draconian penal regime and its relatively low crime rate involving illicit drugs. The city-state's "punitive" approach to drugs is regarded as one of its central achievements, alongside high-speed socio-economic development, education, public housing, and affordable health care.<sup>145</sup> A ruthless attitude towards drugs thus connotes a sense of achievement, a redefined and rejuvenated identity and a rejection of the domination by colonial forces.

In essence, Asian countries are not historically or traditionally committed to a zero-tolerant approach of illicit drugs. It is the contemporary political dynamics and institutions which determined the authorities' option to treat illicit drug use and drug offenses as morally culpable and depraved. An "Asian Values" justification for Asia's war on drugs in the contemporary era cannot be substantiated by Asian culture or traditions alone. The penal construction of drug-related offenses as "the most serious offenses" has a political heart. Punitive measures are used to construct the political identity of many ruling regimes in the region and secure political interests of rulers who seek to gain public support.

<sup>142</sup> *Id.*

<sup>143</sup> China's National Narcotics Control Commission, *Annual Report on Drug Control in China*, NCCC626.COM (Mar., 2017), [http://www.nccc626.com/2017-03/30/c\\_129521742.htm](http://www.nccc626.com/2017-03/30/c_129521742.htm).

<sup>144</sup> Commission on Narcotic Drugs Singapore, *Singapore Statement 59<sup>th</sup> Session of the Commission on Narcotic Drugs*, UNITED NATIONS OFFICE ON DRUGS AND CRIME (Mar. 14-16, 2016), [https://www.unodc.org/documents/commissions/CND/CND\\_Sessions/CND\\_59/Statements\\_14\\_March\\_PM/01\\_Singapore.PDF](https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_59/Statements_14_March_PM/01_Singapore.PDF).

<sup>145</sup> *Id.*



## VI. DRUG OFFENSES ARE A THREAT TO SECURITY

Security is a common justification for anti-drug campaigns. Oftentimes security-based arguments are built on exaggerated accounts of risk and harm, representing a form of politically inspired “moral panic.”<sup>146</sup> In many Asian societies, rising drug-related problems are viewed as “a threat to societal values and interests,” presented in a “stereotypical fashion by the mass media” and are primarily framed by “politicians and other right-thinking people” who hold positions of power and prestige.<sup>147</sup> Discourses resonating with moral panic cultivate heightened senses of anxiety and fear. Promoters of moral panic often identify the populace as victims and blame criminals for crimes and complex social problems which can be solved only by attacking their root causes.”

A salient example of such moral panic is President Duterte’s War in the Philippines. He made inflammatory statements in defense of the escalation of his punitive response to illicit drugs by referring to it as an “emergency” which was spiraling toward a “narco state.”<sup>148</sup> Duterte advocates for the elimination of those who pose danger to the community, resonating with Filipinos who “feel insecure and unsafe” in a society riddled with chronic ailments including poverty, corruption, abuse of civil rights and crimes.<sup>149</sup> In doing so, he proposes harsh punishment and endorses extrajudicial killings which are inappropriate and disproportion to the nature of drug offenses. Situating crackdown on illicit drugs as a prioritized national policy agenda is politically astute: he offers an easy and quick fix to the citizens who believe only killings and imprisonment of drug-related offenders may save them from the threat of illicit drugs.

Recently, Singapore’s Minister for Home Affairs and Law stated at the U.N. General Assembly: “drug traffickers impose immense penalties, including the death penalty, on their victims. Thousands of people die. We have stopped that in Singapore. We want to protect our people from becoming victims, and to protect our society.”<sup>150</sup> Similar statements have been made by politicians in other Asian jurisdictions which have adopted a “punitive approach to drug offenses. These discourses make reference to the penal construction of drug offenders’ moral culpability. They also resemble populist

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<sup>146</sup> STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF MODS AND ROCKERS* (MacGibbon & Kee 1972).

<sup>147</sup> *Id.* at 9.

<sup>148</sup> Human Rights Watch, *License to Kill: Philippine Police Killings in Duterte’s “War on Drugs,”* HUMAN RIGHTS WATCH (Mar. 1, 2017), <https://www.hrw.org/report/2017/03/01/license-kill/philippine-police-killings-dutertes-war-drugs>.

<sup>149</sup> Rishi Iyengar, *Inside Philippine President Rodrigo Duterte’s War On Drugs*, TIME MAGAZINE (Sep. 15, 2016), <http://time.com/4495896/philippine-president-rodrigo-duterte/>.

<sup>150</sup> Minister for Foreign Affairs Singapore, *Transcript of Statement by Minister for Foreign Affairs and Minister for Law K Shanmugam at the High-Level Side Event at the 69th Session of the United Nations General Assembly “Moving Away from the Death Penalty: National Leadership,”* MINISTRY OF FOREIGN AFFAIRS SINGAPORE (Sept. 25, 2014), [https://www.mfa.gov.sg/content/mfa/media\\_centre/press\\_room/pr/2014/201409/press\\_20140926\\_1.html](https://www.mfa.gov.sg/content/mfa/media_centre/press_room/pr/2014/201409/press_20140926_1.html).

justifications based on a disturbing “us vs. them” dichotomy. Most importantly, they present a distorted account of the harm caused by illicit drugs and advocate punitive responses to these crimes. Meanwhile, their roots causes have been largely neglected.

Well-informed public discourses should cast a critical eye on the evidential basis of punitive drug policies. It is unsurprising that the statistical reliability of Duterte’s claims about national drug use was questionable. A Reuters report, based on a systematic review of official government data and interviews with the President’s top anti-drug officials, reveals that “data on the total number of drug users, the number of users needing treatment, the types of drugs being consumed and the prevalence of drug-related crime is exaggerated, flawed or non-existent.”<sup>151</sup> The number of 3.7 million drug addicts, for instance, include very occasional users or those who took only marijuana. And there is barely any basis for the claim that 75% of serious crimes in the Philippines are drug-related.<sup>152</sup>

Oftentimes, populist rhetoric on drug wars places a great emphasis on the protection of the young and the vulnerable from the vile influences of illicit drugs. Duterte, for instance, proclaimed that the Wars were necessary to protect “the next generation”<sup>153</sup> and “preserve the Filipino people and the youth of this land.”<sup>154</sup> His statements resemble demagoguery claims which were advanced by other politicians before his rise to the presidency. In 2015, Senator Grace Poe, chairperson of the Senate Committee on Public Order and Dangerous Drugs, claimed that more than 13,000 illicit drug “pushers” had been arrested in 2014 and that the illicit drugs problem stole “the Filipino youth’s dreams for a better nation” and badly affected their families.<sup>155</sup>

Essentially, these discourses echo “Asian Values” arguments that the interests of the community should take precedence over the protection of the rights of individuals, including drug users, suspects, and offenders. Killing the poor in the most impoverished barangays, who “have no other opportunity for income” to support their family other than the illegal drug business, however, will not necessarily provide long-term security or advance the collective interests of the society.<sup>156</sup> At most, this War and its many casualties give the public an illusion

<sup>151</sup> Clare Baldwin & Andrew R.C. Marshall, *Suspect Stats: As death toll rises, Duterte deploys dubious data in ‘war on drugs’*, THE REUTERS (Oct. 18, 2016, 11:40 AM), <http://www.reuters.com/investigates/special-report/philippines-duterte-data/>.

<sup>152</sup> *Id.*

<sup>153</sup> Chris Riotta, *Philippines War on Drugs: President Rodrigo Duterte Slams Barack Obama, Says He’s “Protecting Next Generation”*, INT’L BUS. TIMES (Dec. 27, 2016, 9:51 AM), <http://www.ibtimes.com/philippines-war-drugs-president-rodrigo-duterte-slams-barack-obama-says-hes-2465831>.

<sup>154</sup> Christina Mendez, *No Reason to Declare Martial Law, Says Panelo*, THE PHILIPPINE STAR (Jan. 18, 2017, 12:00 AM), <http://www.philstar.com/headlines/2017/01/18/1663779/no-reason-declare-martial-law-says-panelo>.

<sup>155</sup> Senate of the Philippines, *SUPPORT THE YOUTH IN FIGHT AGAINST ILLEGAL DRUGS—POE*, SENATE PHIL (Sept. 1, 2015), [http://www.senate.gov.ph/press\\_release/2015/0901\\_poe1.asp](http://www.senate.gov.ph/press_release/2015/0901_poe1.asp).

<sup>156</sup> Rishi, *supra* note 155.

that their society will be risk-free once a short-term ruthless war against drugs is waged.

Indonesia's proponents of their War follow a similar logic. Official discourses contain exaggeration of the actual risk of drug offenders and use panics to engineer social consensus that disproportionately harsh penalties should be applied to deal with a seemingly top threat to public security. Indonesia's anti-drugs chief Budi Waseso proposed building a prison on an island guarded by crocodiles for death row drug convicts in order to prevent them from escaping. Anti-drug agency spokesman Slamet Pribadi explained that traffickers are so dangerous that they must be stopped "from mixing with other prisoners and potentially recruiting them to drug gangs."<sup>157</sup> The rigorousness of the methodology used to generate official statistics in Indonesia, however, was widely questioned by experts and scholars.<sup>158</sup>

In Asian jurisdictions, which retain the death penalty for drug offenses, security is a convenient rationale which justifies executions. Singapore's Prime Minister Lee Hsien Loong defended the execution of Australian drug-runner Van Nguyen by stating: "drug trafficking is a crime that deserves the death penalty. The evil inflicted on thousands of people with drug trafficking demands that we must tackle the source by punishing the traffickers."<sup>159</sup> Official accounts of drug offenses exaggerate the harm associated with drugs as well as the deterrence effect of capital punishment. Singapore's Foreign Minister Vivian Balakrishnan explained that "Singapore is probably one of the few countries in the world" which have won its battle against illicit drugs because capital punishment for drug-related offenses "has been a key element in keeping Singapore drug free and keeping Singapore safe."<sup>160</sup> If fact, there has been no evidence to support such a causal link. Would a balanced approach eliminating capital punishment but enhance treatment and has a lower deterrent effect? We don't know. Singapore strikes "its own balance between the rights of the individual and the rights of society," retaining capital punishment as an integral part of its anti-drug strategy, which has "saved tens of thousands of lives from the drug menace."<sup>161</sup>

In Malaysia, "with drug use rising rapidly in the early 80's, the then Prime Minister Mahathir Mohamad identified 'dadah' (the Malay word for drugs) as a

<sup>157</sup> Agence France-Presse, *Indonesia plans to use crocodiles to guard death row drug convicts*, THE GUARDIAN (Nov. 10, 2015, 00:56 AM), <https://www.theguardian.com/world/2015/nov/10/indonesia-plans-to-use-crocodiles-to-guard-death-row-drug-convicts#comments>.

<sup>158</sup> See Amnesty International, *supra* note 50.

<sup>159</sup> Agence France-Presse, *Drug trafficking "deserves death penalty": Singapore PM*, ABCNEWS (Nov. 29, 2005, 8:30 PM), <http://www.abc.net.au/news/2005-11-29/drug-trafficking-deserves-death-penalty-singapore/751244>.

<sup>160</sup> Jeremy Au Yong, *Take more balanced view on death penalty, Singapore's Foreign Minister Vivian Balakrishnan urges world leaders*, THE STRAIT TIMES (Sep. 22, 2016, 5:00 AM), <http://www.straitstimes.com/world/take-more-balanced-view-on-death-penalty-vivian-urges-world-leaders>.

<sup>161</sup> Michael Teo, *Singapore's policy keeps drugs at bay*, THE GUARDIAN (June 5, 2010, 4:00 PM), <https://www.theguardian.com/commentisfree/2010/jun/05/singapore-policy-drugs-bay>.

threat to national security.”<sup>162</sup> This remains so to the present day. Malaysia’s Country Report 2014 labeled “illicit drug use” “as major social intimidation in Malaysia, [which] has been declared as a threat to national security, i.e. Malaysia’s number ONE enemy.”<sup>163</sup> The Inspector-General of Police Tan Sri Khalid Abu Bakar, for instance, believes that “[a]bolishing the death sentence would be a step backward,” saying “[t]he anti-drug war is ongoing as drugs continue to be a major menace threatening the young people of this country.”<sup>164</sup> This line of argument is logically flawed and intellectually untenable. Even if the authorities could establish that illicit drugs, compared to poverty, inequality, and corruption, is a top threat to social security in Malaysia, it is hard to sustain the argument that death sentences for drug offenders alone are necessary and proportionate responses to such social problems.

In Thailand, Deputy Prime Minister Chalerm Yubamrung proposed in a 2012 amendment to the Criminal Procedure Code so that drug convicts are executed within 15 days after their death sentences are upheld by the Appeal Court.<sup>165</sup> He claimed that the degree of risk and threat posed by drug convicts necessitate swift procedures so that they would not be allowed to deal drugs from behind bars and mingle with other criminals: “I won’t listen to National Human Right Commission or NGOs because I answer to the country and the public President, who considers the drug problem a threat to national security.”<sup>166</sup> In a country statement to the Commission on Narcotic Drugs special session, the Thai representative stated that his country has “put the fight against narcotic drugs” as one of the top priorities on Thailand’s national agenda to tackle a major “threat to the well-being to the society and individuals.”<sup>167</sup>

In Muslim jurisdictions in Asia, a punitive approach to drug-related offenses, rather than being part of primary Islamic law, has been developed through judicial

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<sup>162</sup> Steven Erlanger, *Intensive War on Drugs by Malaysia and Singapore Shows Mixed Results*, NEW YORK TIMES (Dec. 15, 1989), <http://www.nytimes.com/1989/12/15/world/intensive-war-on-drugs-by-malaysia-and-singapore-shows-mixed-results.html?pagewanted=all>.

<sup>163</sup> MALAYSIA COUNTRY REPORT, MINISTRY OF HOME AFFAIRS, MALAYSIA (May 2, 2014), [http://www.na.gov.la/docs/AIPA/aifocom11/Doc\\_for\\_AIFOCOM/COUNTRY%20REPORT/\(11\)%20Annex%20M-%20Country%20Report%20of%20Malaysia.pdf](http://www.na.gov.la/docs/AIPA/aifocom11/Doc_for_AIFOCOM/COUNTRY%20REPORT/(11)%20Annex%20M-%20Country%20Report%20of%20Malaysia.pdf).

<sup>164</sup> Malay Mail Online, *IGP: Cops back death sentence review, but total scrapping a “step backward”*, MALAY MAIL ONLINE (Aug. 27, 2015), <http://www.themalaymailonline.com/malaysia/article/igp-cops-back-death-sentence-review-but-total-scrapping-a-step-backward#sthash.OLymso8O.dpuf>.

<sup>165</sup> The Editor, *Chalerm wants Drug Convicts Executed 15 Days after Loss of Appeal*, CHIANGRAI TIMES (Mar. 23, 2012), <http://www.chiangraitimes.com/chalerm-wants-drug-convicts-executed-15-days-after-loss-of-appeal.html>.

<sup>166</sup> *Id.*

<sup>167</sup> Chaikasem Nitisiri, *General statement of Mr. Chaikasem Nitisiri Minister of Justice of Thailand, at High-Level Segment of the Fifty-Seven Session of the Commission on Narcotic Drugs*, UNITED NATIONS OFFICE ON DRUGS AND CRIME (Mar. 14, 2014), [https://www.unodc.org/documents/commissions/CND/CND\\_Sessions/CND\\_57/HLS/Statements/Fri\\_14th\\_AM/06\\_Thailand\\_140314am.pdf](https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_57/HLS/Statements/Fri_14th_AM/06_Thailand_140314am.pdf).

discretion.<sup>168</sup> Like non-Islamic countries, security, domestic and foreign, has been adopted as a key rationale for defending the use of harsh penal sanctions. Similarly, on behalf of the Organization of Islamic Cooperation in 2015, Pakistan spokesperson stated that the world drug problem “constituted a challenge to safety, national security, the health and well-being of populations, socioeconomic and political stability and sustainable development, especially because of the illicit activities of criminal organizations connected to it.”<sup>169</sup> Pakistan prides itself in being the “vanguard of the anti-drug campaign and remains committed to it,” encouraging all societies to “overcome this menace and save our future.”<sup>170</sup> Ramin Mehmanparast, the former spokesperson for Iran’s Foreign Ministry who announced that 80% of executions in Iran were drug related, reasoned that “if the Islamic Republic of Iran decides not to fight drugs, western and European and other countries will be directly harmed. Therefore, our efforts are towards [making sure that] other countries are not harmed in this relation.”<sup>171</sup>

The proclaimed success to fight drug-related offenses in Pakistan, however, cloaks the flawed administration of capital punishment,<sup>172</sup> which includes low standards of police investigation, the lack of judicial independence, and the paucity of legal aid. The Qisas and Diyat provisions further skew the outcome of judicial proceedings in favor of the wealthy and powerful as disadvantaged defendants are unable to meet the costs of compensation demanded by the victims’ family.<sup>173</sup> A consequence of such flawed proceedings is that 70% of death sentences imposed by lower courts are quashed by higher courts.<sup>174</sup> As most drug offenders susceptible to execution under Pakistan’s criminal justice system are “indigent defendants who cannot afford competent lawyers or settle their cases through the (infamous) Qisas and Diyat laws,” the Pakisanti War is essentially another “war on the poor.”<sup>175</sup>

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168 Penal Reform International, *Sharia law and the death penalty: Would abolition of the death penalty be unfaithful to the message of Islam?*, Penal Reform International (July, 2015) 26, <https://www.penalreform.org/wp-content/uploads/2015/07/Sharia-law-and-the-death-penalty.pdf>.

169 Human Rights Council, *Human Rights Council holds panel discussion on the impact of the world drug problem on the enjoyment of human rights*, THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (Sept. 28, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16515&LangID=E#sthash.ytFh7krs.JcZ0VLv3.dpuf>.

170 *Id.*

171 *Spokesperson for Iran’s Foreign Ministry Defends Executions*, CENTER FOR HUMAN RIGHTS IN IRAN (Feb. 10, 2011), <https://www.iranhumanrights.org/2011/02/foreign-ministry-defends-executions/>.

172 International Federation for Human Rights and Human Rights Commission for Pakistan, *Slow March to the Gallows: Death Penalty in Pakistan*, INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, 6 (Jan., 2007), <https://www.fidh.org/IMG/pdf/Pakistan464angconjointpdm.pdf>.

173 *Id.*

174 Irfan Ghauri, *Drug smuggling cases: 70% of death sentences quashed by higher courts*, EXPRESS TRIBUNE (Mar. 27, 2014), <https://tribune.com.pk/story/687816/drug-smuggling-cases-70-of-death-sentences-quashed-by-higher-courts/>.

175 Abira Ashfaq, *Does the death penalty target criminals or the poor?*, THE EXPRESS TRIBUNE BLOGS (Apr. 9, 2016), <http://blogs.tribune.com.pk/story/33687/does-the-death-penalty-target-criminals-or-the-poor/>.

Across various Asian jurisdictions, those who are subject to executions for drug-related offenses are often from the most disadvantaged sectors of society. Compared with drug kingpins who often escape arrest, prosecution, and execution, those caught by the punitive regimes are often people with few alternative economic opportunities, including foreign nationals who are duped into transporting drugs from impoverished countries.<sup>176</sup> Punishing the poor, the unprivileged and the addicted does little to address complex social problems, nor does this approach advance the interests of the community by identifying and eradicating real threats. Rather, it imposes further hardship on families and communities left behind, where its marginalized residents have few alternatives to earn a living by engaging themselves in the illicit drug business and thus produces insecurity in its own way.

## VII. CONCLUSION

In the context of anti-drug law and policy in Asia, this article examines one of the core tensions sitting at the heart of the “Asian Values” claim: the tension between community interests and individual rights. From three angles - entrenched populism, the construction of the moral culpability of drug-related activities, and conceptualizing illicit drugs as threats to community security – this article demonstrates *how* and *why* political discourses on the “War on Drugs” in multiple Asian jurisdictions have been distorted and misinformed. In the penal construction of drug-related offenses as “the most serious offenses”, the “punitive” state is portrayed as a benevolent guardian of the good majority and a popular punisher of “devils” who are involved in drug use and trade. This article demonstrates that the penal construction of drug-related crimes as the most serious offenses is politically motivated and breeds further division in the community.

To this effect, “Asian Values” arguments can hardly justify an East-West divide in the understanding of individual rights in the criminal justice field. The view that a relatively lenient, comprehensive drug control approach is “Western” whilst Asian societies must follow a punitive path under which individual liberties, rights, and lives are sacrificed in exchange for the possibility that illicit drug problems might be eradicated is intellectually untenable. Although it seems that nowadays many Asian jurisdictions are more inclined to utilize a law-and-order, hard-line approach to tackle drug problems, such a coping strategy has also been championed by conservative forces in Western countries. Rather than rooted in traditional norms or religious practices, the Asian approach to drugs are embedded in the political culture and practices in many of the countries in the contemporary era.

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<sup>176</sup> Iran: *Addicted to death: Executions for drugs offences in Iran*, AMNESTY INTERNATIONAL (Dec. 15, 2011), [https://www.amnesty.org/en/documents/mde13/090/2011/en/?utm\\_source=twitter&utm\\_medium=article&utm\\_term=&utm\\_campaign=social](https://www.amnesty.org/en/documents/mde13/090/2011/en/?utm_source=twitter&utm_medium=article&utm_term=&utm_campaign=social).