

Compounded vulnerability: foreign national women and the death penalty in Southeast Asia

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Amnesty International's most recent report on the death penalty in Malaysia made headlines when it was revealed that 'nearly half [of those] facing the gallows are foreigners'.¹ While this may have come as a surprise to the public, researchers and practitioners within the abolition movement recognise the vulnerability of foreign national defendants to the death penalty, especially in the Asiatic and Middle Eastern regions.²

Yet foreign national defendants are by no means a homogenous group; indeed, they typically face distinct disadvantages along intersectional lines. Here we reference the work of African American feminist scholars on intersectionality theory, which finds that 'each person has an assortment of coalesced socially constructed identities that are ordered in an inequitable social stratum', and examines the multiple, intersecting forms of disadvantage a person may experience (such as race, gender, socio-economic status, disability and sexuality).³ Crucially, the sum total of the interactions of these different identity markers is greater than each component.

Recent criminological scholarship suggests that citizenship is a key vector of disadvantage – and increasingly a source of criminalisation – in an era when 'more and more people are on the move worldwide, [and] legal and philosophical questions about belonging have come to define our era'.⁴ Research has stressed the unique needs of foreign national female prisoners⁵; nevertheless, this critical approach has not yet been applied beyond a Western penal context nor to death row. This article focuses upon the specific plight of foreign national women at risk of the death penalty in Southeast Asia, with particular attention to Indonesia and Malaysia, where we are currently conducting research.

The plight of foreign national capital defendants and the experiences of female capital defendants, have received some, limited attention individually, but gender and citizenship are rarely considered as interrelated categories. Over half a century ago, the rights of foreign national defendants were enshrined by the Vienna Convention on Consular Relations 1963 (ratified by 179 states), which offers a framework for consular relations between states, aimed at securing procedural equality between foreign nationals and citizens. Of relevance here, Article 36 states that when a foreign national is arrested, detained or imprisoned abroad, the relevant authorities should inform the person's embassy without delay. Nonetheless, it has only been in the past decade that a few academics and NGOs have paid any attention to this group.⁶

Much more recently, the female population of death row inmates worldwide has received some attention. On the 2018 World Day Against the Death Penalty, the United Nations called for a gender-based approach to capital punishment.⁷ This announcement coincided with the publication of a Report by Cornell Law School, *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty*. This argues that the largely invisible population of approximately 500 women who face the death penalty worldwide are victims of gender-based discrimination.⁸ But again, there has been little by way of rigorous scholarship here.

While juveniles and those with intellectual disabilities benefit from categorical exemptions from capital punishment in most countries, and the aged are excluded in many jurisdictions, neither foreign nationals nor women at risk of the death penalty constitute legally protected groups (unless they are pregnant or new mothers⁹). That said, women are only a tiny proportion of death sentenced prisoners in countries that retain the death penalty primarily for murder, such as the US and in most retentionist African countries.¹⁰ The picture is different when we turn our gaze to jurisdictions that use the death penalty for drug crimes, a practice regarded by the international community as a violation of the 'most serious offences' standard for the imposition of the death penalty.¹¹ In Asia, the percentage of people on death row for drug offences is high: in 2019 it was 98% in Lao, 70% in Malaysia and around two-thirds in Singapore, Thailand, and Indonesia. During that year, all new death sentences in Singapore, and almost all in Vietnam, were for drug offences, with about

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three-quarters of the death sentences imposed in Indonesia and Malaysia similarly so.¹² At the same time, the majority of women on death row across Asia are there for drug offences, despite most of them being low-level couriers.¹³

The majority of women facing the death penalty for drug offences worldwide are foreign nationals, from low socio-economic backgrounds, usually acting as mere 'mules'.¹⁴ In particular, death rows in Southeast Asia are mainly populated by those sentenced for non-violent drug offences. As a new report by Amnesty International made clear, of the 141 women currently on death row in Malaysia, 134 were sentenced to death for drug trafficking, 134 (95%) of which are foreign nationals.¹⁵ There is no accurate information on the nationalities of these women, although citizens of Nigeria, Indonesia, Iran, India, the Philippines, and Thailand are represented in the death row population as a whole.¹⁶ However, there is a higher proportion of female foreign nationals (86%) than male (39%) showing that here, at least, gender and citizenship are clearly intersecting variables.¹⁷

Meanwhile in Indonesia we see a similar picture. Of the 22 women charged with capital offences between 2000 and 2018, 18 were convicted of a drug offence.¹⁸ Most recent statistics show that there are 274 inmates under sentence of death, 29% of which are foreign nationals, primarily Chinese, Malaysians, Taiwanese, and Nigerians.¹⁹ There are currently seven women under sentence of death; four for drug trafficking, and three of the four are foreign nationals.²⁰ Many of the women on death row have exhausted all of their legal appeals with only a presidential pardon standing between them and the executioner and yet President Widodo has declared that he will not grant clemency to drug traffickers.²¹ Furthermore, in the most recent three batches of executions that occurred in Indonesia between 2015 and 2016, 15 of the 18 prisoners executed were foreign nationals and two were women—Rani Andriani (Indonesian) and Tran Bich Hanh (Vietnamese).²²

We can address the issue of foreign women and the death penalty in Southeast Asia on two levels: first, by assessing the particular vulnerabilities that may lead women to commit capital offences; and second, by evaluating the ways in which a foreign criminal justice system may render women more vulnerable to receiving a death sentence. To deal with the first concern, we can turn to the criminological literature on 'feminist pathways to crime', a theoretical framework that emerged in the 1970s and aims to discern the factors that cause women to offend. These include significant life events, such as childhood abuse and sexual victimisation, and less tangible conditions such as 'socialized gender roles, structural oppression, vulnerability to abuse from males, and female responses to male domination'.²³

With this approach in mind, our research suggests that the main pathways and precipitants of female capital offending in Southeast Asia fall into three overlapping categories: the need to provide for or protect dependent(s); duress or deception; and romantic relationships.²⁴ Other pathways studies on general female prison populations in Southeast Asia reveal that these are regional trends.²⁵ In the majority of cases, women's involvement in offending stems from their relationships, be it with their dependents, intimate romantic partners, friends, or relatives. Take, for example, the case of the Briton, Lindsay Sandiford, who is currently on death row in Indonesia for drug trafficking, who alleges she was forced to traffic drugs in response to a threat against her son by a drug syndicate.²⁶

Likewise, deception in intimate relationships is commonly cited as the cause of women's involvement in drug trafficking. In 2019, the Australian woman, Maria Exposto, was acquitted from death row in Malaysia, as it was held that she was the victim of an online romance scam in which she was groomed online for several years by a former member of the US military. He had persuaded her to transport a bag for him from Shanghai to Melbourne (via Malaysia), which unbeknownst to her contained crystal methamphetamine.²⁷ A number of our cases have similar details, with women arrested for drug trafficking offences at Kuala Lumpur International airport in Malaysia recounting experiences of 'romance scams' resulting in their transporting drugs, either aware or ignorant of the drugs hidden in their luggage, following weeks or months of online 'grooming' by those they believed to be in love with them.²⁸ Most notably, we find that the romance pathway is gendered;

while all the women sentenced to death in Indonesia between 2000 and 2018 were manipulated by men²⁹, romance is not cited as a motivator or factor in the accounts of male drug traffickers.³⁰

The predicament of migrant domestic workers warrants particular attention, given the number of migrant workers across Asia, as well as the very high proportion of Asian nationals sentenced to death in the Middle East. Indeed, this is most clearly highlighted by the case of Mary Jane Veloso, a Filipina migrant worker on death row in Indonesia, who many believe was the victim of human trafficking. Veloso is a single-mother of two, who was formerly a domestic worker in Dubai, but fled following an attempted rape.³¹ She was subsequently recruited for another job overseas, and in the process was duped into smuggling drugs into Indonesia.³² This case has received considerable media attention, particularly in the build up to her scheduled execution in 2015, culminating in an online petition #SaveMaryJane with over 200,000 signatures; at the time, the fastest growing petition on change.org.³³ The case resonated with the Philippine population, as one of the lawyers who assisted with her case stated, 'Filipinos can recognise themselves in a woman so impoverished she had to go overseas to support her children'.³⁴ Perhaps as a result of this media attention and calls on the Indonesian government to halt her execution, she received a temporary reprieve. Astonishingly, Veloso's traffickers came forward to the police and have been convicted in the Philippines; we are yet to see what impact this will have on Veloso's case in Indonesia.³⁵

American academic, Jennifer Chacon argues that from their inception, 'international efforts to regulate trafficking have generated thorny questions about whether unauthorised cross-border migrants caught in exploitative working conditions should be treated as trafficking victims worthy of protections, or as violators of international sovereignty subject to punishment'.³⁶ Practitioners too are increasingly recognising that there is a nexus between drug trafficking and human trafficking, as in many cases the former satisfies the UNODC definition of human trafficking with regards to the methods of recruitment, transportation and exploitation.³⁷ Chacon's work in the US shows the goal of victim protection to be subsidiary to the goal of prosecuting noncitizen traffickers and using anti-trafficking legislation as a de-facto form of migrant control.³⁸ Our cases in Southeast Asia suggest that there too the desire to prosecute and impose harsh penalties on those who cross borders with illicit substances is guiding border policing, rather than a concern to identify vulnerable victims of trafficking.

In general, migrant domestic workers are one of the most vulnerable groups of foreign workers due to the fact that their employment occurs in the domestic sphere and is thus hard to regulate and the workers are less likely to benefit from the protections provided by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families³⁹; indeed there have been reports of systemic human rights abuses within this population.⁴⁰ Furthermore, they are an attractive proposition to drug syndicates due to their possession of a passport and their economic need, indeed oftentimes desperation.⁴¹

We will now turn to the treatment – and resulting vulnerability - of female capital defendants in a foreign criminal justice system. Notwithstanding the Vienna Convention on Consular Relations, foreign nationals in general are typically at a disadvantage within criminal justice systems. They face a range of practical difficulties which include being unaware of their rights and especially their right to consular assistance; being unable to understand the language of their interrogators; not understanding the country's legal system, including its criminal procedure rules and protections; and—in most cases—the inevitable lack of support from family and friends, living at a distance, while detained or incarcerated. By way of example, in Malaysia, though the Vienna Consular obligations have been incorporated into the country's domestic law, the police rarely notify embassies in good time that one of their nationals has been detained and is undergoing investigation (and prisons appear to be only slight more likely to honour their notification obligations).

These failures leave foreign nationals without support or assistance at the crucial pre-trial stage. They can be subject to interrogation without the assistance of a lawyer or an interpreter and may have to sign evidential statements in a language they do not understand, without legal advice. Furthermore, though at trial they will

be represented and benefit from interpretation, these services can be poor and come too late to protect defendants from the effects of earlier breaches of their due process rights. Without the opportunity to benefit from timely consular assistance, they cannot provide their legal representatives with information that could assist their defence or mitigation pleas.

Cornell's report argues that women are especially disadvantaged in the criminal justice process and are 'sentenced to death by courts that failed to consider their history as survivors of gender-based violence and other forms of gender-based oppression'.⁴² The Amnesty International report on the Malaysian death penalty provides an example of a female foreign national defendant who, during her interrogation, had all of her questions answered by her boyfriend as he, but not she, could speak English; subsequently she received the death penalty but he did not.⁴³ This touches upon a pertinent issue in drug trafficking cases; women being arrested and tried alongside an intimate partner – potentially without separate counsel – in a process which fails to protect women whose male partners coerced them into the drugs trade. The unique status of female defendants has been recognised in Indonesia, with guidelines being issued by the Supreme Court on the treatment of female defendants in the criminal justice system, in an attempt to combat gender bias in judicial proceedings.⁴⁴ But further research is necessary to examine the interactive effects of gender and foreign national status on capital trials and post-conviction procedures.

The plight of female foreign nationals at risk of the death penalty in Southeast Asia can no longer be ignored. Elsewhere, there is a dearth of data on the experiences of female domestic workers in the Middle East. However, occasional news reports of women sentenced to death in that region for homicide under circumstances that suggest they acted in self-defence or under duress intimate that this is a high-risk population.⁴⁵ An examination of the conditions for women on death row across Asia and the Middle East would also address a gap in our knowledge. In these jurisdictions, access to data poses considerable challenges, and thus more creative methodologies are required. The example of female foreign national defendants at risk of capital punishment reminds us of the need for analytical tools that can address the interactive effects of gender, citizenship, ethnicity, and socio-economic status that lead to a situation of compounded vulnerability.

¹ The Star, 'Nearly half of those facing the gallows are foreigners, Nigerians the majority', 10 October 2019 at <https://www.thestar.com.my/news/nation/2019/10/10/nearly-half-facing-the-gallows-are-foreigners-nigerians-the-majority>

² Reprieve, *Honored in the Breach: The United States' Failure to Observe its Legal Obligations under the Vienna Convention on Consular Relations (VCCR) in Capital Cases, 2012*; J. Quigley (2018) *Foreigners on America's Death Rows*, Cambridge University Press; C. Hoyle, 'Capital Punishment at the intersections of discrimination and disadvantage: the plight of foreign nationals' in C. Steiker and J. Steiker (eds), *Comparative Capital Punishment*, Edward Elgar publishing; Hoyle, C. and Girelli, G. (2019) *The Death Penalty for Drug Offences: Foreign Nationals*, Briefing Paper, Harm Reduction International at <https://www.hri.global/files/2019/03/12/death-penalty-foreign-nationals.pdf>

³ H. Potter (2015) *Intersectionality and Criminology: Disrupting and revolutionizing studies of crime*, Routledge Publishing, p. 3.

⁴ A. Aliverti & M. Bosworth, *Introduction: Criminal Justice Adjudication in an Age of Migration*, 20 *New Criminal Law Review*, 1, 1-11, 2 (2017).

⁵ L. Hales & L. Gelsthorpe (2012) 'The Criminalisation of Migrant Women', Institute of Criminology, University of Cambridge at https://www.crim.cam.ac.uk/global/docs/loraine-gelsthorpe/criminalreport29july12.pdf/at_download/file; M. Tomaszewska (2016) 'Alien Experience? A qualitative investigation into the experiences of foreign national women in English prisons: A case study', The Howard League John Sunley Prize Winner, at <https://howardleague.org/wp-content/uploads/2016/11/Alien-experience.-A-qualitative-investigation-into-the-experiences-of-foreign-national-women-in-English-prisons.pdf>; A. Schliehe (2018) 'Women's Imprisonment and the Experiences of Foreign Nationals' *Border Criminologies Blog*, at <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/05/womens>

⁶ *Supra* note 2.

⁷ UNHR, 'World Day Against the Death Penalty 10 October 2018: women and girls on death row require specific gender-based responses and policies', 10 October 2018, at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23705&LangID=E>

⁸ Cornell Center on the Death Penalty Worldwide, *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty*, www.deathpenaltyworldwide.org/pdf/judged-for-more-than-her-crime.pdf, Sep. 2018. A Factsheet co-produced by the World Coalition Against the Death Penalty, Cornell Law School and Penal Reform International can be found at https://cdn.penalreform.org/wp-content/uploads/2018/10/PRI-Women-on-death-row-briefing-paper_SINGLES-003.pdf

⁹ Of those countries that still use the death penalty, in only Belarus and Zimbabwe are women excluded from capital punishment by law, though in all countries, women are a minority on death row. Article 6 (5) of the International Covenant on Civil and Political Rights protects pregnant women from execution, and a 1984 Economic and Social Council Resolution (1984/50; Safeguard 3) extended this protection to 'new mothers'.

¹⁰ In the US, see, Death Penalty Information Center data on female death row prisoners at <https://deathpenaltyinfo.org/death-row/women>; on Africa, see S. Mahtani (2019, 'The Invisibles: Women on death row in Africa', Africa Portal at <https://www.africaportal.org/features/invisibles-women-death-row-africa/> (on the particular vulnerabilities of women sentenced to death for murder in Ghana and Sierra Leone, following domestic abuse, see A. Peters (2019) 'Compounded Violence: Domestic Abuse and the Mandatory Death Penalty in Ghana and Sierra Leone, Death Penalty Project, at https://www.deathpenaltyproject.org/wp-content/uploads/2019/08/Anjuli-Peters_DPP-Research-Summary_.pdf

¹¹ International Covenant on Civil and Political Rights (Art. 6(2)).

¹² Harm Reduction International, 2020, *The Death Penalty for Drug Offences: Global Overview 2019* at https://www.hri.global/files/2020/02/28/HRI_DeathPenaltyReport2019.pdf

¹³ Id.

¹⁴ Fleetwood, J. & L. Seal, 2017, 'Women, Drugs and the Death Penalty: Framing Sandiford', *The Howard Journal of Crime and Justice*, vol. 56(3), pp. 358-381 at p. 364.

¹⁵ Amnesty International (2019) *Fatally Flawed: Why Malaysia Must Abolish the Death Penalty*, <https://www.amnesty.org/download/Documents/ACT5010782019ENGLISH.pdf> pp. 19-20.

¹⁶ Id.

¹⁷ Id.

¹⁸ Maidina, R. (2019) *Analyzing Fair Trial Aspects of Death Penalty for Drug Cases in Indonesia. Policy and Implementation: Special Cases on Women*, 4 Jakarta: Institute for Criminal Justice Reform and PITCH.

¹⁹ Institute of Criminal Justice Report (2019) *A Game of Fate: Report on Indonesia Death Penalty Policy in 2019*, <http://icjr.or.id/data/wp-content/uploads/2019/12/A-Game-of-Fate.pdf> pp. 20-22.

²⁰ Supra note 19 at p. 24.

²¹ BBC News, 'Indonesia's Widodo vows no amnesty for death row drug traffickers', 27 January 2015 at <https://www.bbc.com/news/world-asia-30996233>

²² Jakarta Post, '15 foreigners among 48 handed death penalty in Indonesia last year: Amnesty', 11 April 2019 at <https://www.thejakartapost.com/seasia/2019/04/11/15-foreigners-among-48-handed-death-penalty-last-year-amnesty.html>

²³ J. Belknap and K. Holsinger (2013) 'Violence Against Girls Provokes Girls' Violence: From Private Injury to Public Harm', in M. Chesney-Lind and L. Pasko (eds) *Girls, Women, and Crime*. SAGE. p.103.

²⁴ L. Harry and G. Girelli (2019) 'The Death Penalty for Drug Offences: The Impact on Women', Harm Reduction International Briefing Paper at <https://www.hri.global/files/2019/03/12/death-penalty-impact-women.pdf>

²⁵ S. Jeffries, C. Chuenurah & R. Wallis (2018) 'Gendered pathways to Prison in Thailand for Drug Offending? Exploring Women's and Men's Narrative of Offending and Criminalization' *Contemporary Drug Problems*, 46 (1), 78-104. <https://doi.org/10.1177/0091450918818174>; S. Jeffries & C. Chuenurah (2019) 'Vulnerabilities, victimisation, romance and indulgence: Thai women's pathways to prison in Cambodia for international cross border drug trafficking' *International Journal of Law, Crime and Justice*, 56 (1), 39-52. <https://doi.org/10.1016/j.ijlcj.2018.12.001>

²⁶ Supra note 14.

²⁷ BBC News, 'Malaysia grants reprieve to Australian 'love scam' drug mule', 26 November 2019 at <https://www.bbc.com/news/world-australia-50555286>

²⁸ On romance scams see, M. T. Whitty and T. Buchanan (2015) 'The online dating romance scam: The psychological impact on victims – both financial and non-financial' *Criminology and Criminal Justice*, 16(2), 176–194. <https://doi.org/10.1177/1748895815603773>

²⁹ Supra note 19.

³⁰ J. Fleetwood (2014) *Drug Mules: Women in the International Cocaine Trade*, Palgrave Macmillan, p.108.

³¹ Supra note 8, pp. 12-13.

³² Id.

³³ Rappler, 'How the viral petition to save Mary Jane Veloso reached Jokowi', 30 April 2015 at <https://www.rappler.com/move-ph/91652-viral-petition-save-mary-jane-veloso-jokowi>

³⁴ Mail Online, 'Spared 30 minutes from execution: The inside story of how a Darwin woman saved a death row inmate due to be shot alongside Andrew Chan and Myuran Sukumaran', 6 July 2015 at <https://www.dailymail.co.uk/news/article-3150692/Is-dead-No-s-alive-woman-saved-Filipina-death-row-inmate-Mary-Jane-Veloso-firing-squad-30-MINUTES-led-Andrew-Chan-Myuruan-Sukumaran.html>

³⁵ Rappler, 'Mary Jane Veloso's recruiters found guilty of illegal recruitment of separate case', 30 January 2020 at <https://www.rappler.com/nation/250553-mary-jane-veloso-recruiters-guilty-illegal-recruitment-separate-case>

³⁶ J Chacon, *Human Trafficking, Immigration Regulation, and Subfederal Criminalization*, 20 NEW CRIMINAL LAW REVIEW, 1, 96-129, 102 (2017).

³⁷ F. Gerry QC, T. Harré, N. Naibaho, J. Muraszkiwicz, N. Boister (2018) 'Is the Law an Ass When It Comes to Mules? How Indonesia Can Lead a New Global Approach to Treating Drug Traffickers as Human Trafficked Victims' *Asian Journal of International Law*, 8 (1), 166-188. <https://doi.org/10.1017/S2044251316000230>; United Nations Office on Drugs and Crime (2004) 'United Nations Convention against Transnational Organized Crime and the Protocols Thereto' at <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

³⁸ Supra note 10 at p. 108.

³⁹ The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was adopted by General Assembly resolution 45/158 of 18 December 1990 but to date only 49 states have ratified it.

⁴⁰ Human Rights Watch, 'Swept Under the Rug: Abuses against Domestic Workers Around the World', 27 July 2006 at <https://www.hrw.org/report/2006/07/27/swept-under-rug/abuses-against-domestic-workers-around-world>

⁴¹ Supra note 8, p. 12.

⁴² Supra note 8, p. 3.

⁴³ Supra note 15, p. 7.

⁴⁴ Masyarakat Pemantau Peradilan Indonesia (2018) 'Pedoman Mengadili Perkara Perempuan Berhadapan Dengan Hukum', The Supreme Court of Indonesia Guidelines at <http://mappifhui.org/wp-content/uploads/2018/01/Pedoman-Mengadili-Perkara-Perempuan-Berhadapan-dangan-Hukum-MaPPI-FHUI-2018.pdf>

⁴⁵ See, for example, the case of the Indonesian domestic worker, Tuti Tursilawati, who was executed in Saudi Arabia in 2018 for the murder of her abusive employer; or the case of Siti Zainab, another Indonesian domestic worker who was executed in Saudi Arabia in 2015, despite claims that she acted in self-defence.

The New York Times, 'Indonesia Protests Saudi Arabia's Execution of Maid', 1 November 2018 at <https://www.nytimes.com/2018/11/01/world/asia/indonesia-maid-executed-saudi-arabia.html>;

BBC News, 'Indonesia protests at execution of maid in Saudi Arabia', 15 April 2015 at <https://www.bbc.com/news/world-middle-east-32318131>