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Diversion or death? The moral framework shaping bifurcated punishments for drug offences in Indonesia

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ABSTRACT

Background: As the UN urges states to move from harsh punishments for drug offences towards treatment programmes, Indonesia has adopted a bifurcated penal policy. Most of those convicted are sentenced to imprisonment or death, but some 'minor' offenders are diverted to drug treatment centres. We explore the moralities that shape drug policy, justice professionals' interpretation and application of laws and policies, and judgements about who is deserving of diversion.

Methods: We draw on experiences and perceptions of 136 Indonesian criminal justice professionals, through in-depth qualitative interviewing and focus groups, to reveal the moral landscapes shaping policy and practice.

Results: Justice narratives blur penal concerns with moral judgments about drug offending, with normative responses shaping punishments in law and practice. While there is some compassion for 'minor' drug offenders, driving rationales for diversion, drug traffickers are regarded as morally deserving of prison and capital punishment, with traditionalist perceptions of harm amplified by a purgative rationale.

Conclusion: This article highlights the analytical potential of moralities such as 'compassion' and 'traditionalism' in criminal justice research and policy in Southeast Asia. Understanding the formation and navigation of these normative values may assist in challenging harsh penal policy in Indonesia and the wider region.

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Introduction

Contemporary drug policy across Southeast Asia has its roots in United Nations conventions aimed at eliminating the manufacture, distribution, possession and use of illegal drugs (Ritter, 2022, p. 9). Since US President Nixon called for an international 'war on drugs' in 1971, Southeast Asian countries have been key combatants, developing policies focused on police, military and intelligence efforts, prioritising criminalisation and securitisation over health and welfare (Buxton & Burger, 2020, p. 12; Raffle, 2021). Asian states have increasingly sought justice in capital punishment.

At the end of 2023, 34 countries retained the death penalty for drug offences, responsible for roughly 42% of all confirmed executions globally (Harm Reduction International, 2024). At least 467 drug-related executions were carried out (excluding China, Vietnam, and North Korea, where no reliable data are available), representing a 44% increase from 2022. Confirmed death sentences for drug offences increased by more than 20% from 2022, with around half passed by courts in Vietnam (188+) and a quarter in Indonesia (114+). Four of the nine countries that make regular use of the death penalty for drugs – 'high application' countries – were in Southeast Asia (Indonesia, Malaysia, Singapore and Vietnam).

In Indonesia, 94% of known death sentences are for drug offences, accounting for about 52% of people on death row (Harm Reduction International, 2024).

Despite the increase in death sentences and long terms in prison, Indonesia and her neighbours have not seen reductions in the production and trafficking of illicit drugs. In 1998, the Association of Southeast Asian Nations declared that it would eradicate the production, trafficking and use of illicit drugs by 2020 (Pushpanathan, 1999). Not only was this target not met, but by 2020 the illicit production and trafficking of drugs in Southeast Asia had reached record levels, while the types of drugs available had multiplied (Wojcik, 2020). The limited available evidence suggests there has been no deterrent effect from executions in Indonesia (Winarso et al., 2019). Meanwhile, policies driven by penalisation have led to expanding prison populations across the region (Walmsley, 2017), not least in Indonesia (Sudaryono, 2021). As the UN urged states to move away from harsh punishments towards treatment programmes (both in 2009 and 2023), some Southeast Asian nations, such as Indonesia and Thailand, have put into practice a bifurcated penal policy, under which most who trade in drugs are sentenced to prison or to death, while – less commonly – 'minor' offenders are diverted to drug treatment centres.

In theory, Indonesia has allowed for a medicalised, therapeutic approach for some drug offenders since 1976, when a Narcotics Act introduced both the death penalty for drugs and court-imposed orders for low-level users to attend compulsory drug treatment centres. However, mandatory rehabilitation centres were not established until after 2010, and the penal rehabilitation track remains underused (Stoicescu & Lasco, 2019), raising questions around who is diverted for treatment and who is destined for prison or the death penalty in Indonesia, and what shapes those decisions?

In this article, at the macro level, we consider the role of moralities (Stevens, 2024) in the development and implementation of criminal laws and penal policy for drug offences in Indonesia. Moving on to the practices of criminal justice institutions in implementing them, we explore how moralities can shape decision-making in the discretionary spaces left by policy gaps. We consider their 'everyday' moral assessments about blameworthiness and culpability, discursive framing that goes beyond legal criteria for assessing aggravating and mitigating factors.

Growing recognition of morality and moralism in drug policy: a review of the literature

The values underpinning the implementation of drug policy have become a key focus of inquiry within social science (Ritter, 2022). Morality, traditionally situated within the conceptual realm of 'sin politics' (Meier, 1999), has been co-opted within discourse on drug-related activities at the ethical binary of 'right' versus 'wrong', 'pure' versus 'evil'. Recently, however, attempts have been made to introduce theoretical and conceptual sophistication into discussions around drug policy moralities (Lerikkanen & Storbjörk, 2023; Stevens, 2024; Zampini, 2018). Some scholarly consensus is emerging on diverse framings or 'governing images' (Ritter, 2022); that is, ways of perceiving and managing drug-related activities, or in our context, responses to drug crime, that go beyond a single ideological orientation. Positions conventionally deemed morality-free are being redefined to showcase the 'central, but often masked role' of values (Ritter, 2022), creating novel lenses to analyse the behaviour of drug policy actors. We follow this approach to make sense of the application of different punishments for drug crimes in Indonesia: at the macro level, the moralism that influences policy; at the micro, the moralities that influence decision-making across cases.

Much scholarship has focused on policymaking, with less attention to how policies are put into practice. It suggests the need to diversify the stakeholders at the centre of empirical analysis and theorising; to 'move beyond examining the frames employed by legislative advocates' and consider how other actors frame typical morality policy issues (Ferraiolo, 2014, p. 213; see also, Euchner et al., 2013; Lerikkanen & Storbjörk, 2023). In interviewing justice professionals about both policy and practice, we contribute to the diversification of knowledge.

Theoretical analyses of moralities in drug policy have mostly attended to drug *consumption*, with less consideration of governing images among stakeholders in relation to *trafficking*. An exception is Flacks's study of the construction and

deployment of childhood in drug policy (2021), considering framings around trafficking, with childhood as 'the site on to which adults project their hope for humanity, and themselves, as well as their fears about moral fragility and degradation' (2021, p. 8). In this biopolitical context, traffickers are perceived as 'parasites' that expose young people to 'contagion' (ibid:12), thereby constructed as worthy of harsh sentencing (ibid:18). Fleetwood's (2014) work of narrative criminology, drawing on interviews with women in prison for drug trafficking in Ecuador, found that moralities shaped women's lived experiences of incarceration. The law treated them as drug traffickers (even those who were arrested for possession or dealing) and long sentences stigmatised them as particularly dangerous or serious offenders (Fleetwood, 2014, p. 50).

Morality and the death penalty

In considering practices and justifications for punishment in different contexts with particular histories, especially in jurisdictions characterised by penal harshness, we must attend to concrete and contingent particularities (Duff, 2005). Consequentialist justifications typically focus on deterrence, though incapacitation or even norm reinforcement feature in moral discourses on punishment (Hood & Hoyle, 2015). In a rejection of consequentialist concerns, retributive theorists care little about the potential to change the offender or influence others similarly inclined, preferring penal responses that inflict pain commensurate with the harms caused by the offence.

Kramer (2011) favours a 'purgative' rationale based on moralities: society must be purged of its most evil members and capital punishment 'is appropriate when the application of it brings to an end the defilingly evil existence of someone who has committed...extravagantly evil actions...'. In his view, the most egregious offenders must be eliminated by extinguishing their lives, because by not eliminating them, the moral community that harbours them is stained. Indeed, he argues, communities have 'a moral obligation to resort to capital punishment', to avoid complicity with the offender's disparagement of humanity and to preserve moral order (2011, p. 1, 8).

International law allows the death penalty for only the most serious offences, interpreted as intentional homicide. In most jurisdictions, this precludes drug offences, but in Southeast Asia governments assert that drug trafficking *is* one of the most serious offences, causing the loss of many lives, and therefore deserving of death (Hoyle, 2021a).

Drug policy moralities in Southeast Asia

The retention of the death penalty for drugs in Indonesia and the wider region serves as a reminder that empirical and theoretical work developed in the global north may not fully explicate the meanings of punishment in the global south. We must attend to literature from Asian countries with appreciably different penal policies, rationales and conceptions of morality.

Focusing on China, Miao (2017) finds that while those who commit drug offences are labelled 'enemies of the people',

with the desire to protect the community and 'Asian values' appropriated to justify harsh penal responses, consideration of their moral weakness can mitigate their culpability. Ochoa and Ong's (2022) analysis of Duterte's war on drugs in the Philippines through the spectrum of 'negotiated harms' similarly finds that a human rights frame is subordinate to community security. In post-colonial Vietnam, drugs were perceived as a means by which colonialists could exploit and weaken the nation-state; the war on drugs conceptualised as an attempt to strengthen national culture against immoral Western capitalism (Truong et al., 2020). In Singapore too, the post-colonial expansion of capital punishment for drug crimes is justified as necessary protection of the new nation-state from the 'drug menace' (Yap & Tan, 2020, p. 137).

The emerging literature on Southeast Asia, allows for consideration of distinctive moral framings between traffickers and users. It explores the conflation of different 'offenders' within the moral 'othering' (Eriksson, 2016) of those who consume and trade in drugs, but also of the construction of the immoral foreigner, who generates 'social evils' and jeopardises 'the future of newly independent states post-colonial rule' (Truong et al., 2020, p. 7). Othering can more crudely take the form of the construction of those involved with drugs as 'non-human' (Ochoa & Ong, 2022, p. 556). In Singapore, drug traffickers and users are constructed as enemies that threaten the survival of the 'young vulnerable' (Yap & Tan, 2020, p. 141). The Southeast Asian literature suggests values shape moralities beyond simple understandings of 'sin', but has focused on top-down, government discourse (Miao, 2017; Truong et al., 2020; Yap & Tan 2020),¹ reinforcing the calls of Euchner et al. (2013) and Ferraiolo (2014) for the diversification of stakeholders in morality and value-focused drug policy research.

A methodological and conceptual approach to understanding Indonesia's response to drug offending

To better understand the justification for capital punishment for drug traffickers alongside treatment for some drug users, we examined professionals' views on how moralities about drugs and drug crime shape legislation, policy, penal practice and wider political discourse within an increasingly conservative political landscape, where drug use is stigmatised and criminalised and where the secularity of government is being challenged by arguments derived from Islam on the immorality of drugs (Butt, 2023). Over two research trips to Indonesia, in February 2023 and in May-June 2023, we conducted 36 individual semi-structured interviews and nine focus group discussions, with contributions from 136 criminal justice professionals in total, including lawyers (25), drug policy experts (6), civil society organisations (51), high level judges (8), prosecutors (32) and narcotics police (14).

Ethical reasoning on the moralities of drug policy can be shaped by deontological and consequentialist approaches (Ritter, 2022). Like her neighbours in Southeast Asia, Indonesia has defended punitive drug policies by reference to their deterrent effect (McRae, 2012). While we expected to find such consequentialist justifications among our interviewees,

time spent in Indonesia and neighbouring jurisdictions over the past years, working with local civil society organisations (Hoyle, 2023) had persuaded us that harsh retributivist accounts rooted in traditionalism would be more prevalent and influential in policy and practice than consequentialism.

We ascertained participants' perceptions on: what and who are the key determinants of drug policy in Indonesia (what is the role of different actors; politics; history; international relations)? How is the 'drugs issue' framed in Indonesia (a public health issue; a matter of national security; a human rights issue)? How effective is Indonesian drug policy in achieving its aims (deterrence, rehabilitation, etc.)? Beyond a set of broad questions and topics for discussion, participants were encouraged to identify what they considered to be the pertinent issues in drug penal policy and practice and time was given to allowing conversations to flow in a relatively unstructured manner.

In establishing the criteria for selection and recruitment of participants, we worked with our local community partners who advised us on the criminal justice agencies to approach and used their contacts within those agencies to select for interview the 'key players', ensuring that we had a range of participants in different roles and 'ranks' and from diverse regions of Indonesia.

Each justice professional was approached with information about the study included in a Participant Information sheet and invited to participate in either a one-to-one interview or a focus group discussion with others from their organisation. Once they expressed an interest, they were provided with a Consent Form, seeking permission to interview and to digitally record, with a commitment to anonymise interview data. We began interviewing before we had gathered a complete sample, allowing us to use the 'snowballing' method to secure further interviews. Interviews were conducted by our research team – sometimes with the aid of a professional translator – and, following training, the focus groups were co-facilitated by our community partners in Indonesia.

In what follows, we do not distinguish between material gathered by interview or by focus group as to do so could reveal participant identities and breach our commitment to preserve participants' anonymity. We had expected that professionals in the focus groups would be less willing to be critical of government laws and policies than those involved in one-to-one interviews, mindful of being judged by colleagues. In the main, this was not the case. In what follows, we identify the professional affiliation of our respondents in most cases, unless it could compromise anonymity. Some quotations are redacted to preserve anonymity.

After conducting the fieldwork, our translator fully transcribed and translated responses or discussion in Bahasa Indonesia, after which we analysed all data through thematic coding. Adopting a 'grounded theory approach' (Glaser & Strauss, 1968), recurring and pervasive motifs and tropes emerged concerning morality and evidence that our participants were guided by notions of 'compassion' and 'traditionalism'. This prompted a return to Stevens's (2024) work on the role of power and morality in drug policy and we then explicitly analysed our data to identify material which might indicate any of his five 'ethico-political' bases for policy positions

(compassion, traditionalism, paternalism, progressive social justice and liberty).

We looked for evidence of libertarian positions – that the supply and possession of drugs should be legalised, and for progressive social justice positions, including support for the human rights of users, decriminalisation for drug possession, enhanced harm reduction services, and concerns about the discriminatory treatment of drug users. We too looked for signs of paternalism – the belief that people need protecting from themselves, if unable to act in their own best interests, and that the state should assume that duty to protect them. But we were particularly alert to evidence of *compassion* and *traditionalism*, given that Indonesia is a socially conservative country with punitive laws and high levels of stigmatisation of drug users, and these had emerged at first readings of the interviews.

As Stevens describes, *traditionalism* reflects respect for authority and a belief that people should conform to the laws and traditions of society. Within such a frame, drug use is regarded as immoral, with strong support for harsh punishments and a zero-tolerance approach. Indeed, drugs are seen as the root of social ills and as such, harm reduction approaches unwelcome; there is a preference for abstinence. Traditionalism displays little concern for harms, apart from those inflicted on victims of crime, and here we were mindful that we might encounter an expansive definition of victims that embraced whole communities and the nation. In analysis, we sought evidence concerning Stevens's position that *compassion* is a central value shared by policy actors, not restricted to particular ideological frames. In his view, even traditionalists can espouse compassion though their policy responses may look different to paternalists, for example. Compassion, whether reflected in a desire for lesser punishments or a justification for harsher sentences to protect society – both drug users and wider communities – from the suffering associated with drug consumption and trading, can co-exist with traditionalism. In such cases, policy or practical implications are likely to be a combination of compassion and toughness (Stevens, 2024, p. 62). While Stevens focuses on drug policy in terms of the outcomes of decision-making processes, we attend to the moral *justifications* advanced for the development and administration of policies for the treatment and punishment of drug offenders.

Traditionalist values in legislation, policy and practice: research findings

Just over three decades after independence from Dutch colonial control, Indonesia created its own laws to regulate drug offences (Law No. 9/1976), which while focused primarily on harsh punishments, allowed some opportunities for rehabilitation. The updated drugs law of 1997, which came in response to the 1988 UN Convention on the Eradication of Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signalled Indonesia's increasingly zero-tolerance approach to drugs (Gunawan & Pamintori, 2019; Stoicescu & Palmer, 2019) but failed to curb the drugs trade. This resulted in further legislation in 2009 (Law No. 35/2009), aimed at protecting the nation from drug abuse and eradicating illicit trafficking. It

established the National Narcotics Agency (Badan Narkotika Nasional – 'BNN') to deliver these goals.

As they currently stand and are likely to remain, drugs laws since 1976 have allowed for a dual-track system of hefty prison or death sentences for most, and diversion to mandatory rehabilitation centres for minor drug users following conviction, as well as for those who self-report to the authorities or who are reported by their families. That said, mandatory rehabilitation has only been available in practice since 2010 when practical regulations were introduced following the passing of Law No. 35/2009. At this point, government ministries for health and for social affairs cooperated with BNN to establish hundreds of drug treatment centres across the country (Lai et al., 2013).

However, it is claimed that the absence of clear guidelines to distinguish between drug users (occasional from regular, to those who may be addicted) and drug couriers militates against effective harm reduction, while moralistic assessments of desert and appropriate 'punishments' among police, prosecutors and judiciary have led to the underapplication of the rehabilitation track (Stoicescu & Lasco, 2019; LBHM (Lembaga Bantuan Hukum Masyarakat) & Reprieve, 2020). To date such claims, while drawing on extensive practical experience, have lacked empirical corroboration. Furthermore, it has been unclear the extent to which policymakers and practitioners are guided by retributive or consequentialist concerns and if the former, what moral frameworks inform notions of what punishments are deserved ('desert theory'), what is proportionate to the offence (von Hirsch, 2007). In the following three sections, we present interviewees' perspectives on how moralities may have informed the legislation and penal policy, the development of guidelines for applying those policies, and the practices of criminal justice professionals in interpreting policy and operating within the law and its guidelines.

Moralities in the development of penal policies for drugs

President² Joko Widodo's apparent commitment to consequentialism has been in evidence throughout his time in office. For example, in 2014 he announced his intention to refuse clemency to drug offenders on death row, arguing that capital punishment was a necessary deterrent to the 'narcotic emergency' (Nasir, 2016). This resulted in the executions of 18 drug traffickers in 2015–2016. However, most of our interviews revealed retributive rationales; criminal justice personnel in particular spoke of the desire to have a 'pure society', and to reject the 'evil', 'immoral behaviour' of drug traffickers. Those working within civil society organisations claimed that policymaking on drugs had been influenced by retributive rationales, morality discourse justifying harsh punishments:

There has been a massive campaign on the evils of drugs and so people support the death penalty.

The narrative that we hear from the state is that drug use is evil.

[C]ommunity and religious leaders... have this paradigm that drug users are criminal sinners.

This clear exposition of retribution and traditionalism relies on framing drug crime as one of the most serious offences and framing drug offenders as 'sinners', as morally in conflict

with the values and traditions of the country either because they are 'foreign' or because their values do not align with traditional Islamic values.

The most serious offences

Article 6(2) of the International Covenant on Civil and Political Rights states that '[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes, the intention being to restrict its application until abolition. The UN Economic and Social Council has defined the scope of 'most serious crimes' as 'intentional crimes with lethal or other extremely grave consequences'. In Indonesia and neighbouring jurisdictions, states claim that the death penalty for drug trafficking is justified because it has lethal consequences, notwithstanding the requirement that the consequences be 'intentional'.

Furthermore, while political rhetoric and judicial sentencing in Indonesia rely on official statistics of the apparently high rates of drug-related deaths (Hoyle, 2021a), these statistics have been derived by questionable methods (Stoicescu, 2015). Though Indonesia has not advanced any workable or precise definition of 'drug-related deaths', BNN narcotics police repeat the claim that trafficking causes many thousands of deaths each year (Stoicescu, 2015).

Not surprisingly, some of our interviewees concurred with the government's interpretation of drug trafficking as an 'extraordinary crime', asserting its alignment with terrorism, and justifying the most punitive responses for deterrent purposes. As one narcotics officer explained: 'Narcotics, as extraordinary crimes, need extraordinary measures [for] the deterrent effect'. However, more often their comments implied a retributivist perspective, drawing on traditionalism but also compassion in justifying harsh punishments to protect people (not only those directly harmed, but 'future generations') from the suffering associated with drug consumption and trading, both drug users and the wider communities:

From the state's perspective, we see that dealers are [committing] grave crimes. The effect could destroy future generations and the lives of many. Therefore, the perpetrators violate the rights of others. They deserve the severest punishment.

[D]rug distribution...creates other crimes...that target the youth. So,...drugs' impacts are not only addiction, sufferings, death, but also murder, rape and even HIV/AIDS due to [infected] syringes.

While these responses reflect desert theory (von Hirsch, 2007), they draw for ammunition on multiple, and arguably exaggerated harms to vulnerable populations to justify harsh punishments.

One policymaker supported the death penalty for 'serious crime, narcotics or terrorism', drawing on traditionalism and compassion (for victims of drug trafficking):

1g of shabu (methamphetamine) or cocaine could contaminate 40 people. ... every year, the illegal import is more than 500 kilos and so imagine how many victims, young people, sell[ing] to children in elementary school; could destroy a whole generation in the years to come.

Similarly, a prosecutor lamented: 'What will our future generation be like if they are not protected as early as

possible? ... what will it be if the young generation has been damaged?' In this regard, Indonesian policymakers and justice practitioners reflected Flack's (2021) findings on the construction and deployment of childhood in drug policy, discussed above. Since Nixon's 'war on drugs', 'the narrative of threat' to children has been prominent in international drug diplomacy (Barrett, 2017, p. 266), with protection of children's rights justification for repressive drug policies, though 'with little discussion as to what it meant in practical terms for children to have a human right to protection from drugs' (ibid).

A member of an Islamic civil society organisation similarly drew on harms to young people, telling us that while he was opposed to the death penalty, 'the majority [of Islamic people] still see capital punishment as the right way to punish extraordinary crimes including drugs...dealers, cartels, big players, not drug users'. He elaborated:

It is considered an extraordinary crime because of the victims that these crimes create – young persons, students, unemployed people....The narrative is that 'drugs destroy generations' and you lose your future. This is the normative view of drugs in Indonesia.

Others were not persuaded, critical of moral crusaders, such as 'legislators [who] see themselves as the 'public defenders' against drugs', as one experienced lawyer explained:

The government are still categorising drugs as extraordinary crimes,...but this is a fatal mistake because there is no [evidence] that drugs are extraordinary and serious crimes. But it gets repeated in all the judgments of drug cases in Indonesia.

Participants expressed frustration with the government's inaccurate claims about the harms caused by drug use (see Stevens, 2024). As one lawyer working for a human rights NGO put it: the government believes 'faulty statistics ... [which] have been overused' and 'tends to use moral based arguments in viewing [drug offenders'] conduct'.

Immoral drug offenders

Our research provided some evidence of the 'social production of immorality' (Bauman, 1989; see also Cohen, 1972). Bauman (1989) explains morality as consistent with a sense of responsibility to, and ethical duty to care for others, particularly the weak and powerless. This duty, he describes, is an essential part of being human. In contrast, a process of 'othering', of distancing ourselves from those we find to be morally repugnant allows us to ignore that moral duty to feel responsible for their welfare. Hence, certain 'immoral drug dealers' can be socially and culturally defined as 'outsiders' or 'others' (Eriksson, 2016), deserving of contempt and punishment, rather than attention to their well-being. The perceived immorality of drug offenders is evident in references to their 'foreignness', whether literally as those from beyond Indonesia's borders or as those whose values do not align with traditional Islam.

Across Southeast Asia, the 'drugs emergency' is portrayed as an external threat and most people executed for drug trafficking over the past decade have been foreign nationals (McRae, 2017). The narcotics police we interviewed used the language of warfare in depicting a threat from beyond their borders:

We get two losses when drugs enter Indonesia. First, when substances enter, our money is leaving. [Drugs] from Pakistan, Golden Triangle...create loss for our society. The effect is bad for health....Next, this could be a 'proxy war' to beguile our nation so that we will not develop. The hallucination effect will make us lazy, stupid, etc. They become rich while we become addicts....This is why we need extraordinary measures...We are like being attacked since the supplies keep coming.

Many other officers drew on a war analogy: 'This is a proxy war, that is not blatant as usual war. The more drugs get into our country the more dangerous it is. If everyone is contaminated, then no one will be able to think and defend our country'. In this recurring war motif, we saw signs of intolerance for foreign drug traffickers but also a desire to protect (moral) citizens from the 'harms' of drugs. Interviewees were adamant that foreigners were exploiting and harming Indonesians, 'making our society a target for an international narcotics market [such that] Indonesia is one of the countries with the most narcotics users'. Likewise, prosecutors discussed how '[p]rosecuting narcotics crime and the death penalty aims to maintain national security as well as guaranteeing public order domestically and peace too', while also stating that 'if the circulation involves international networks, of course...the maximum penalty of death [should apply]'. The framing of drug trafficking as an 'external' threat is not new, it is used by governments around the world, as the foreign drug trafficker provides a 'cheap, expendable, diversionary scapegoat' (Green, 1996, p. 18; Truong et al., 2020). In our interviews, it was not simply a matter of criminality but of morality.

Some participants felt that the government's construction of the immoral 'other' in drug policy is shaped in part by the rise of radical Islam since 1999 (Fealy, 2004; Heiduk, 2012), particularly since the autonomous province of Aceh was authorised to implement Islamic criminal law in 2001 (Mann & Afrianty, 2021). Indeed, this had led to the establishment of Islamic boarding schools for drug users (Laksana, 2021) and the mentally ill, a conflation of distinct issues suggesting the perception of drug use as a product of faulty cognitive functioning or poor mental health, not lifestyle choice. Some interviewees were of the view that Muslim leaders influenced drug policy, viewing drug users as 'having weak faith': 'We understand that Indonesia is a Muslim-majority country so the majority find drugs deviant or evil. If politicians want to further their interests and retain their seats, they would not champion [liberal] drug policy reform'. Undoubtedly true, but most of our interviews were not espousing libertarian drug policies either.

Drug 'users' or 'traffickers': institutional guidelines for a bifurcated response

If drug policy in Indonesia mandated harsh punishments for everybody prosecuted for drug offences, including possession for personal use, it would reflect a wholly traditional morality frame. However, for some time, policies have allowed for drug treatment, rather than imprisonment, for some of those committing very minor offences. Our interviews suggested that this bifurcated system was a product of compassion working

alongside traditionalism, with some thought insufficiently culpable and suitably vulnerable, and deserving of treatment. However, they described significant challenges to determining who deserved diversion as the law created a discretionary gap. Interpretation of what is deserved was shaped by moralities.

Interviewees held diverse views on the premise and efficacy of a bifurcated system whereby only 'minor' drug users are allowed rehabilitation within treatment centres. One narcotics officer offered traditionalist and compassionate rationales:

Our law has both humanist and strict side. We are quite humanist towards those who abuse drugs for personal use, but we are strict towards sellers and dealers....For drug *dealer*, our law is strict in punishment.

On the question of treatment for drug users, we found some evidence of both libertarian and progressive social justice positions among just a few interviewees working in drug charities. The bifurcated sentencing approach creates the conditions whereby anyone who escapes a death or custodial sentence will receive a *mandatory* drug treatment centre order, whether that would be fitting for their drug use or not. As one NGO worker explained: 'The existing law does not facilitate the needs of all drug users. Only 13% of people who use drugs actually need rehab..., yet according to the narcotics law, the only option is rehab or prison'. Another concurred: 'We need to remove terms like 'abuser', 'addict', 'victims' – let's just use 'users'. After conducting an assessment, we will know whether some users might need treatment, although many will not'.

Implementing a bifurcated system

Regardless of their stance on the moral appropriateness of harsh punishments for some and rehabilitation for the few, most criminal justice professionals we interviewed agreed that the bifurcated process was difficult to administer. The lack of clarity in the legal regulations and guidelines regarding the different roles of those involved in the drugs trade allowed for the influence of moralities on the categorisation process. For many interviewees, particularly those with a legal background, key difficulties pertained to differentiating 'between people who use drugs, drug dealers, drug couriers'. They referred to Law No.35 of 2009 as lacking clarity in its formulation, with: 'no guidance regarding whether someone should be labelled a drug user or a drug trafficker – vague wording'.

Key guidelines for criminal justice practitioners in processing those suspected of drug offences were introduced recently (Guidelines No. 11/2021). They take into consideration the quantity of drugs alongside aggravating and mitigating factors, but seem not to have improved the process, introducing similar inconsistencies and arbitrariness into the criminal process and sentencing. As one judge explained, 'So because the drug policy is quite unclear, the implementation is a mess! Because...different institutions...have their own perceptions and interpretations of the law, disparities are unavoidable. What we need is legal unity'.

This has implications for sentencing. Some judges spoke about the poor differentiation in the law for defining drug users and dealers, with a few espousing progressive social justice positions or showing compassion in their desire for lesser sentences for low-level offenders, motivated by economic need:

most of who is caught are couriers...not play[ing] an important role...usually first-timers in narcotic cases, but most due to the economic needs that they are doing this work...in poverty.

Notwithstanding the harshness of the criminal law and the dearth of options for mitigating evidence, he claimed he tried to give more lenient sentences to couriers motivated by poverty. Another judge explained that he would never give the death penalty unless:

[the offence] involves the large network of the drugs cartel. And there are a history of criminal records and the amount of the drugs itself is very big....I think you can use [the death penalty] in a case like that. Otherwise it is unfair.

However, some lower court judges said that while they would impose more lenient sentences for such offenders, these were often successfully appealed to the higher courts. It was suggested that some Supreme Court justices 'do not view themselves as guardians of human rights'. Indeed, Supreme Court justices told us that they did not see the task of establishing whether someone is a user only or a dealer as their responsibility, considering that 'investigating and arresting [is the role of] the police – so our duty is to sign [off on their decisions]':

Conversely, one lawyer told us that 'It was a Supreme Court letter that established the maximum daily use and below that amount people would be sent to rehab and above that amount they are considered drug dealers'. Another lawyer had asked the Supreme Court where the drug thresholds came from, to clarify the scientific base for the criteria, but had received no answers. Meanwhile, BNN had told her that the criteria for labelling someone as a dealer were based on drug seizures. For her part, she was clear that 'moral categories [were] conflated with arbitrary arrest and seizure calculations'.

The 'everyday' moral assessments of criminal justice actors

In a war on drugs, where legal regulations allow for considerable discretion in determining who is merely a drug user, suitable for treatment; who is a dealer, destined for prison; and who is deserving of the harshest of punishments; everyday moral assessments matter. As one interviewee explained:

Complexity based on unclear regulation [is] interpreted by each institution, each different person based on their interests. That is why it is hard to find the direction of narcotics policy – whether we should see [drug offenders] as the victims of society, or...as criminal and evil-minded.

The reference to decision-makers' 'interests' may be opaque but the comment about drug offenders being either 'evil' or 'victims' speaks to moral judgment, the discourse of sin (Meier, 1999).

Almost everyone we interviewed referred to the moral divide between drug users and traffickers, from which stemmed justification and support for a bifurcated punishment system. But in the absence of clear guidelines, assessments tended to be instinctive or based on moral judgements, typically displaying both traditionalism and compassion, informed by notions of vulnerability and a hierarchy of culpability. While many interviewees focused on harm when discussing drug policy, they shifted their attention to notions of culpability when considering the implementation of drug laws. Here we saw some progressive social justice instincts, but also evidence of the social construction of the evil kingpin.

Progressive social justice impulses

Lawyers tasked with distinguishing 'users' from 'dealers' drew on traditionalist adjectives of morality to decline representation to those deemed within the law to be drug dealers and therefore not eligible for rehabilitation:

We usually only defend drug users if the weight they were carrying is lower than one kilogram. If the person is not a user but part of the trade, we would say they are more evil than ones who are just using, because they are persuading others to use drugs. For drug users with small amounts, we prefer rehab because they are just starting out....

Mitigating factors within the guidelines (No. 11/2021) include socio-economic difficulties, vulnerability to coercion by the more powerful, and age. We would expect lawyers to refer to these legally relevant criteria in describing efforts to provide the best representation for their clients and in anticipating judicial responses in those cases. Instead, we found a reluctance to represent some clients. A few lawyers were clear that they preferred not to represent male 'drug traffickers', though were typically happy to represent women and girls accused of trafficking. Their justifications reflected their stance on 'vulnerability' and women's precarious socio-economic position (Harry, 2022), but also recognition that drug convictions can be experienced as more stigmatising for women (Fleetwood, 2014).

One lawyer discussed a case of an 18-year-old girl who claimed the drugs she was carrying belonged to her partner. He was not arrested while she – from a 'very poor, broken home, and a carer for her younger brother' – was sentenced to 15 years in prison. The lawyer wanted to represent her at appeal: 'I have a principle that I don't want to take care of the drug traffickers, except female or juvenile... Most of the cases I [accept] are from poorer communities'. Another said his cases were generally 'pro bono', involving children, describing the accused in such cases as 'victims'. In their words, we hear not only compassion but progressive social justice influences. However, we do not hear a commitment to the right of all defendants to fair trial and equal protection before the law.

Among our interviewees we detected a tension between an instinctive aversion to the death penalty and acceptance that it was a 'necessary evil' for high-level drug traffickers, if only it could be determined who they were. Some judges claimed to be abolitionist only to state that the 'top' traffickers should be eradicated:

There should be the death penalty, ...but there has to be very strict parameters; [only] for the top person in the narcotics syndicate [because] you cannot deny that the impact of narcotics on our children and our youth is pretty dangerous... [We should use the death penalty] to eradicate this – chop it at the head... the death penalty is for the top person in the narcotics syndicate.

This attempt to distinguish the ‘top person’, legally and morally culpable, from others in the drugs chain speaks to Kramer’s concept of the ‘defilingly evil’ offender who must be extinguished to preserve moral order. By labelling drug traffickers as ‘defilingly evil’, and creating a narrative of multiple deaths caused by drugs, practitioners in Indonesia, like the policymakers, situate drug offences within the realm of exceptional crimes with exceptional criminals.

Constructing the ‘kingpin’

A high-level BNN official told us that the death penalty should not be for a ‘drug user’, but if it is for a ‘drug trafficker’ then ‘I don’t really mind’, explaining that what differentiated the latter from the former was their ‘criminal mind’. Other interviewees referred to the high levels of risk presented by ‘devious drug traffickers’, comparing them to terrorists and justifying their incarceration in specialised high security narcotics prisons (‘Lapas Narkotika’). This was necessary, we were told, because of their propensity for *continuing* drug trading while in prison, an explanation that clearly undermines the government’s deterrent rationale. Indeed, many of our interviewees, particularly judges, spoke of the production of, and trading in drugs within prisons, with some drug *users* incarcerated only to become traffickers while incarcerated. For some, this justified the death penalty; for others, the system was responsible for creating drug traffickers; as one judge explained:

[harsh sentences are] futile and due to this high sanction, it creates new problems. For example, for possession of 5g I could be in prison for 4 years, I feel like I’m hopeless.... I interact with other criminals who are traffickers or dealers, I become involved in the network myself. So, ... in the long term, many drug dealers are created because of the long [prison sentence]!

Other judges concurred: ‘we know in prisons it is easier for them to become traffickers because the police cannot reach them, and it gives them the opportunity to create new networks’.

One Supreme Court judge was adamant that while harsh prison sentences were not deterring drug offending, the death penalty could be justified for prisoners who committed further offences from prison. He cited the case of Freddy Budiman, who while in prison serving a sentence for possession of methamphetamine continued to organise his trade in drugs, using his wealth and influence to extend his dealer network and to bribe police and customs officers. Convicted of smuggling 1.4 million ecstasy pills from China while incarcerated, he was sentenced to death in 2012 and executed in 2016. One judge told us: ‘can you imagine if [they are] punished or imprisoned, [but] still become a distributor! ... if [they] still direct the drug business from inside the prison then there is no other option but to [give] the death penalty’.

Given the apparently widespread practice of drug dealing within prisons, and corruption across the justice process, deterrence is on shaky ground, with Kramer’s (moral) purgative rationale better able to justify this stance.

Many interviewees, particularly those working in law enforcement, portrayed drug trafficking in ‘semi-mythical terms’ (del Olmo, 1993, p. 1), suggesting that Indonesia was home to many rich and powerful cartels. One District Court judge said the death penalty should be retained in case there surfaced an ‘Indonesian Escobar’. Indeed, in our focus group discussion with BNN members, Latin American drug cartels were cited repeatedly as justifying punitive positions. Judges from smaller metropolitan areas admitted they had not tried ‘big trafficking cases’, but argued the death penalty was needed for the ‘bigger cities like Jakarta’. Yet when we discussed this with BNN officers in Jakarta, they argued that the ‘bigger trafficking’ cases were at the border. Meanwhile, we were told that border police are bribed to let the kingpins’ drugs through. Each person we spoke to claimed the powerful kingpins were active though none admitted to having arrested, prosecuted or tried one. As an experienced prosecutor put it, ‘You rarely get the top [kingpins], only the middle ... But now why do we carry out the death penalty? So that the top will know that the government really pays attention to punishment for narcotics cases’.

While drug cartels may well exist in Indonesia, most of our interviewees said those at the top are not usually arrested, charged or convicted, as they are likely to bribe corrupt officers, both at the borders and within country. Furthermore, research suggests that loose *informal* connections rather than organised cartels are more prevalent in the drug economy (Fleetwood, 2014, p. 70) and our evidence suggests this is true of Indonesia. It appears that harsh punishments are retained for an imagined ‘folk devil’ (Cohen, 1972), framed in opposition to the victimised and corrupted ‘drug user’, while polarised moral assessments have resulted in traditionalist policies which allow for compassion for the few, violating the human rights of the majority by applying disproportionately punitive sentences, sentences that few believe offer deterrent value.

Reflections on the findings and their limitations

Over the past two decades, Indonesia has witnessed growing social conservatism and the rise of religious intolerance among the Muslim majority with the creation of new ‘morality’ offences (Lindsey & Pausacker, 2016). It saw a spate of executions following the election of President Jokowi, with his ‘law and order’ mandate and commitment to continuing the ‘war on drugs’. Our previous research (Hoyle, 2021a, 2021b, 2023) suggested that while the government focuses on deterrence, exploring moralities within a retributive framework would help us make sense of drug policy and its implementation.

Within this study, libertarian views were rare and not *all* those working in the drugs support space were aligned with a progressive social justice position. While a few interviewees expressed paternalistic beliefs that people need protecting

from themselves, and that the state should assume that duty to protect them, this was not the dominant frame. Unequivocally, our analysis showed that *compassion* and *traditionalism* were the typical ideological positions framing policy and practice, with drugs regarded as the root of social ills for the nation-state and all but the most vulnerable drug dealers framed in explicitly moralistic terms as evil. Compassion in calls for penal punitivism is found in concerns to protect the vulnerable from a sinful trade, but also to 'cure' through rehabilitation those who are only users.

The challenges of influencing policy

By attending to the moral rationales for punishment for drug users and drug dealers, this article suggests that policy change may be difficult without a shift in the framing of drug use and trading, taking it out of the realm of morals and into the realm of health, for example. Without that, the overly moralistic stance on drug dealers may present a barrier to reducing recourse to harsh punishment. Policymakers discourse on traffickers speaks to Kramer's (2011) crude and – in our view – morally indefensible purgative rationale. Even if it were to be proven that the death penalty or other harsh punishments did not deter drug offenders, dissuading policymakers and practitioners from adopting the language of consequentialism, the moralistic, retributivist justifications would likely remain. And it is these rationales that seem to shape policy and practice.

Corruption in the justice process: limitations of the data

But what of other less 'moral' justifications such as financial or organisational motivations for the construction of the 'other', the foreign and morally corrupt kingpin? On this, our data do not allow us to do more than speculate. In Indonesia, corruption among the police and other criminal justice professionals is an open secret. It is commonly asserted that border police, when bribed, allow considerable amounts of drugs to pass through, selecting those for prosecution who are 'disposable' or without protection from corrupt actors. Similarly, it is claimed that police officers respond to bribes from some offenders with decisions not to prosecute or to divert to drug treatment centres. Indonesians believe that the poor and powerless are convicted on the basis of inadequate evidence and disregard for their rights while the wealthy and politically powerful are acquitted notwithstanding compelling evidence of guilt (Lindsey & Pausacker, 2021). Our previous research with those convicted of drug offences in Indonesia suggest corruption is endemic (Hoyle, 2023) and while some of our professional interviewees alluded to this, many were not prepared to be drawn on the matter.

Espoused moral concerns about the harms caused by drugs as a justification for punitive policies and practices might be evidence of moral stances being mobilised for more pragmatic interests. This may be particularly evident in the arguments made by BNN officers who have an interest in amplifying the moralistic discourse on drugs to promote their law enforcement efforts and justify increased budgets and even powers, as well as their oftentimes disregard for due process protections.

Stevens (2024) alerts us to the use of 'factoids', such as less than accurate claims about the number of drug-related deaths or about drug trafficking harms more generally, to justify harsh punishments, and we see a clear example of this in government estimates on the number of people addicted to drugs and in need of rehabilitation as well as those committing drug crimes, figures derived from BNN (Wirawan et al., 2015). However, following release of these figures, the BNN budget was tripled, suggesting a direct relationship between government statements on the harms of drugs and financial support for the policing of those drugs (Kapoor, 2016).

While our interviewees did not reflect directly on the relationship between propaganda about drugs and funding for BNN, they were critical of the government's failure to implement evidence-based policy, relying instead on BNN's inaccurate data on drug overdoses while pursuing an explicitly moral approach that regards drug offenders as 'folk devils' (Cohen, 1972).

Conclusion

New Indonesian drugs laws are expected in 2024 (Gunawan & Pamintori, 2021). With the rise of the Islamic right, and the more repressive stance reflected by the recent revision of the Criminal Code (Law No. 1/2023), these laws are unlikely to be more liberal. The Code, operational from 2026, takes a 'zero tolerance' approach to drugs, although it may reduce recourse to capital punishment which should be a last resort. Furthermore, death sentences must be imposed with a 10-year 'probationary' period, with conversion to a life sentence after that period granted by Presidential decree (Pascoe 2023). Meanwhile President-elect Prabowo's authoritarian record suggests he will follow regressive social policies for 'morality offences'. Evidently, the essence of the bifurcated penal policy for drugs will not change, with treatment still reserved for relatively few.

The likely survival of the status quo makes it all the more important to understand it, and to move beyond a simplistic assertion that countries such as Indonesia pay insufficient regard to international law and human rights. While a human rights frame has normative power for those inclined towards abolition of the death penalty and more rehabilitative approaches to drug use and trading, it is less helpful as an explanatory framework for making sense of drug policy and practice in the global south. This article has highlighted the analytical potential of moralities such as 'compassion' and 'traditionalism' in criminal justice research and policy. We have suggested that the bifurcated response to drug offending is operationalised according to moral assessments of who is deserving of compassion, and who is not. Most of our participants considered the death penalty to be justified for those 'extraordinary' and 'semi-mythical' offenders who must be 'purged' from society (Kramer, 2011), notwithstanding that most who fit the legal definition of 'trafficker' in Indonesia are a far cry from Pablo Escobar. Hence, exposing the moral judgement reserved for those imagined offenders – the 'real drug traffickers' – may be a helpful strategy for less punitive drug laws, and perhaps even for abolition, in Indonesia and the wider region.

Notes

1. Research by Mustafa et al. (2020) on the moral framing of drug users from poorer backgrounds among judges provides one of a few exceptions.
2. Elections in February 2024 resulted in a new President-elect—Prabowo Subianto; to take office in autumn 2024.

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