

# DEATH PENALTY IN CONFUCIAN LEGAL CULTURE IN CHINA AND VIETNAM

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## ABSTRACT:

The East Asian legal culture is perceived to be deeply and perpetually influenced by Confucian political and legal ideology with “*DeZhuXingFu/德主刑辅*” (morality is primary, punishment is secondary), “*ZhongDeQingXing/重德輕刑*” (respect morality, disregard punishment) with the approach of “*YanYongSha/焉用杀*” (it is unnecessary to kill) or “*XuXing/恤刑*” (punishment of mercy). Nonetheless, China and Vietnam are two East Asian countries that still regulate and execute the death penalty, especially China – one which has been condemned for maintaining this type of penalty. The writing poses the following questions: how does the nature of Confucianism perceive capital punishment? In this field, does Confucianism truly have a leading role in East Asian legal culture according to the “*YangRuYinFa/阴儒 阳法*” formula and dominate the rule by law ideology of Legalism? (fundamentally, Legalism upheld punishments and capital punishment according to the “*XingQiWuXing/刑期無刑*” philosophy (introduction and execution of the penalty is aimed at governing a society without penalty). In the modern era, how does the Confucian legal culture result in and influence the maintenance of capital punishment in the criminal legal system of the two countries? Through initial research, it can be seen that the existence of the death penalty at present is the connection with East Asian cultural traditions in which Confucian moral values combine with heavy penaltyism of Legalism and the need to regard criminal justice as a practical tool of dictatorship in modern society. Thus, it is definitely uneasy to limit and progress to the abolition of capital punishment and necessary to take into account the cultural and legal aspects in these two countries.

KEYWORDS: Death penalty, Confucianism, Punishment, China, Vietnam.

## CONFUCIANISM AND PERSPECTIVE ON CAPITAL PUNISHMENT

Derived from the concept of “*天地之大德曰生*” (respect for life is the greatest morality within the world) in the Book of Changes (I Ching), Confucianism expressed respect for human life and love for the people. “The Confucian principle of “*Ren*” involves benevolence or humaneness. Ren was believed to be crucial to an orderly and virtuous society”. (Lu, H., & Miethe, T. D. (2010). “Ren” is one of the central categories of Confucian ideology and the norm in human interactions, according to which, “*仁者二人者*” (respect for interpersonal relationships), human beings have to care for, love and tolerate each other. If people can treat each other that way, the society will be orderly, harmonious and people can live in peace. Confucius was the one who introduced the policy of leading the people by Morality and guiding the people into order by Rite. “Ren” is the core of the legal value system, the essence of values and the logical starting point of Confucius when contemplating Law (Du, 2020, p 257).

Given the respect for “Ren”, Confucianism especially attached great importance to the Rule of Virtue and the Rule of Rite. Confucius states, “Guide them by edicts, keep them in line with punishments, and the common people will stay out of trouble but will have no sense of shame. Guide them by virtue, keep them in line with the rites, and they will, besides having a sense of shame, reform themselves” (Analects II, 3). Given the context of Qi state where the number of people having their legs cut off as a form of punishment got so high that in markets of the capital city, shoes were cheap and crutches were expensive (the Book “Zuo zhuan”), Confucius criticized the so-called “道政齊行” or “道之以政，齊之以刑” (the use of orders to govern and the use of punishments to lead). This way of ruling only makes people refrain from wrongdoings due to temporary fear. The radical solution is to make people feel humiliated if they do something wrong, thus they will not do it. Therefore, it is necessary to apply “道德齊禮” (to make use of morality to lead and use rite to rule the people). However, this does not mean that Confucius denied the role of punishment. Du (2020, p 25) also pointed out that Confucius did not reject punishment and punishment was not placed in the top priority. The answer to the Rule of Rite was “禮法雙行，德刑相互” (Rite is accompanied by Law while Morality and Penalty complement each other), yet Rite and Morality were more important than Law and Penalty. The ruling model with its emphasis on Rite and Morality as the priority and Law and Penalty as the subordinate was called the Rule of Rite doctrine for short.

Derived from the role of education, Confucianism generally did not favor punishing the offender by the death penalty if the offender had not previously received education from the ruler of society. Confucius condemned the policy of “不教而殺謂之虐” (the rulers who do not educate the people, allow them to commit crimes and then kill them are tyrannical). Killing without educating is tyrannical, forcing people to do what one wants without disciplining them is atrocious and forcing people to be on time while making slow administrative orders is detrimental (Analects XX, 4). Mencius had the same policy with Confucius and assumed that “教而後誅” (education before punishment, if a person is educated but does not show repentance, such person then shall be killed). In the conception of Confucianism, the State must focus on educating people and making them “克己” (stoic), “內省” (self-critical), “自律” (self-disciplined) and “自訟” (self-blaming) for self-control. Thus, education must be given prominence and the State is responsible for educating its people. If education cannot reform the people then the death penalty shall be brought up and such penalty is the last resort.

The golden mean of the Confucian school “Zhongyong/中庸” requires the State and government apparatus to behave in accordance with its essential duties and roles, fairness and integrity; not to deviate in any direction, to always keep a harmonious attitude, not being too excessive or inadequate in the relationship with the people or when dealing with issues. Therefore, if the ruler does what is righteous, upright and unbiased, the people shall not be pushed to resentment and react in an extreme manner which result in crime and punishment. The Analects records Confucius's response to Lu State's ruler, Ji Kangzi when Ji Kangzi questioned Confucius about politics. Confucius replied: “In administering your government, what need is there for you to kill? Just desire the good yourself and the common people will be good” (Analects XII, 19).

The fact that Confucian scholars did not support the death penalty stems from the Confucian conception that the ruler is also responsible for creating a social environment which is the situation leading to the crime of the people. Mencius affirmed that: “人之初性本善” (Human nature is good) while Confucius believed that: “性相近也，習相遠也” (By nature, men are nearly alike; by practice, they get to be wide apart). Therefore, when applying punishments to the people,

the rulers must feel heart-rending or even criticize themselves as they have to do such thing, “哀矜折獄” (feel heart-rending instead of happy); when making judgments and punishing the offenders, “哀矜勿喜”(one must feel anguished to think about the cause of the crime). People commit crimes due to lack of education, tyrannical policies, unrighteous rulers and moral transgression of the superior. Therefore, the kings and the mandarins must regulate the livelihood of the people, so as to make sure that, for those above them, they shall have sufficient wherewith to serve their parents, and, for those below them, sufficient wherewith to support their wives and children; that in good years they shall always be abundantly satisfied, and that in bad years they shall escape the danger of perishing. The people have to be financially stable before they can be emotionally stable. When they thus have been involved in crime, to follow them up and punish them - this is to entrap the people. Therefore, the application of heavy punishments including the death penalty was not supported by Confucians as they saw the responsibility of the politicians and the educators therein.

Mencius believed that “Human nature is good”, meanwhile, with respect to Legalism, Han Fei assumed that the human nature is greedy, selfish and evil, humans do bad and evil things by nature and it is necessary to use law and penalty to punish offenders, educate and deter others, thus punishments must be strict and the use of punishment is inevitable. Shang Yang strongly underlined the role of heavy punishments in refraining the people from transgressing so that there will be no punishment. Therefore, if “以刑止刑” (use punishments to end the use of punishments) and “用刑其欲無刑” (use punishments so that there will be no punishments) are intended to be applied, the punishments must be severe. Thus, the death penalty - the most severe punishment must be prescribed and applied, stemming from the educational role through the deterrent nature of this penalty. Meanwhile, Confucianism did not support capital punishment. This originates from the word “Ren” in Confucian conception, at the same time, it also comes from the fact that Confucianism did not appreciate the educational role through the deterrent nature of the death penalty. Effective education must come from the ruler’s love for the people and through the Rule of Rite and Rule of Virtue so that the educated people can be stoic, self-critical, self-disciplined and self-blaming in order to control their thoughts and actions and return to their inherently good nature.

Capital punishment is the heaviest and representative of the punitive nature of penalties. Stemming from the Confucian philosophy of “Zhongyong”, Confucianism also did not promote this penalty because of the approach for the degree of punishment in Confucianism were “刑中” (moderate punishment), “威而不猛” (strict but not cruel), “緩猛相濟” (a combination of light and heavy punishments), “捨小過” (condone minor errors, it is normal for the superior to get along with those of an inferior position). “Li Ji” (the Book of Rites) developed the questioning of Confucius and re-expressed the Confucian thought on the degree of punishment as follows: “愛百姓故刑罰中，刑罰中故庶民安” (moderate punishment because of the love for the people, loved by the people because of the moderate punishment). Mencius also had the same way of approaching the problem with Confucius, but he introduced the concept of “省刑” (lighten the punishments as they should be light and only applied to those who commit crimes). Mencius condemned an overkill on capital punishment: “今夫天下之人目，未有不嗜殺人也?” (“Now among the shepherds of men throughout the nation, there is not one who does not find pleasure in killing men). Mencius believed that punishments should be applicable to only those who commit the crime “刑罰罪不挈” (the wives and children of criminals were not involved in their guilt). “If there were one who did not find pleasure in killing men, all the people in the nation would look

towards him with outstretched necks. Such being indeed the case, the people would flock to him, as water flows downwards with a rush, which no one can repress” (the Book “Liang Hui Wang” II).

Regarding the purpose of the death penalty, Confucianism posed the issue: “生道殺民”. Like most Confucian matters and ancient doctrines, “生道殺民” is interpreted in different ways as “Like most ancient doctrines, Confucianism can be subject to various interpretations. It is a fact that different ways of punctuating the Confucian classics can produce different meanings (Hu, 2007). The first explanation is that before deciding whether to kill the offender or not, it is necessary to find applicable evidence and arguments to spare such person’s life. In his book “Longgang Qianbiao”, Ou Yangxiu of the Song dynasty recounted how his father told his mother: “This is a death penalty, I wanted to find a way to spare the criminal’s life but I could not... I tried to find every way that could save their life but I failed to do so, thus both the dead person and I have no regrets”. Thus, the first explanation pertains to each specific case of death penalty, with the judge’s responsibility and the penalty decision. The second explanation also includes the content of the first one, but is more extensive in the way that: the death penalty - murder is applied to save and ensure the lives of others. Zhu Xi of the Song Dynasty said: “A criminal deserves to die, I failed to save his life, then I killed him to reassure the masses and warn others. That is to kill by ethics, there is nothing to resent.” The second explanation, in our opinion, is broader and more comprehensive. “天地之大德曰生.....該死之所以生之也，苟非其人實有害於生人，絕不忍置之於死地。死一人所以生千萬人也。是故，無益於生人必不輕置人於死” (Heaven and earth’s great virtue is life. If a person truly does not harm the lives of others, then do not force that person to die). According to the book “Mengzi Ji” of Zhao Qi, “殺此罪人者，其意欲民生也，故雖伏罪而死，不怨殺者” (killing criminals is to let others live, therefore the ones who get killed are not allowed to resent those who kill them). In short, “生道殺民” is the principle that before carrying out the death penalty, it is necessary to consider if the offender has a chance to live. If the crime is too serious and capital punishment must be applied, then this penalty should be regarded as the last resort for the criminal and the execution of the death penalty is for the lives of the people. In such case, the person sentenced to death shall be completely convinced and has no resentment.

However, Mencius and Xun Kuang had a clearer view of capital crimes which include the cases that do not require education or can not be educated, “不教而誅” (kill without the need for education). “Kang gao” chapter (the Book of Documents) recorded the idea of Mencius that: “Those who kill and rob properties of the passersby, who are resented by everyone, must be killed without prior education”. As for Xun Kuang, he presented a relatively comprehensive viewpoint regarding this problem, which he both opposed killing without educating and teaching without killing. When talking about “Sikou” (the head of the judiciary, administrative and judicial branch), Xun Kuang stated that: “To prevent fraudsters, violence, adultery, five types of punishments must be applied to change those who are violent and refrain evil detentions from occurring”.

Regarding the decision on penalty, especially the death penalty, Confucianism demanded “慎罰” (to be careful when it comes to making a decision on the type of punishment). Mencius referred to “慎罰” in “省刑慎罰” (simple and light punishments, to be careful when it comes to punishment). Confucius believed that “慎罰” is the careful, objective and comprehensive consideration of the opinions of the parties before making a decision on the type of penalty. He introduced the thought of “眾惡之，必查焉；眾好之，必查焉” (the bad must be investigated

and the good must be investigated) or “聽獄之兩詞” (listen to both sides to judge, avoid listening to just one side when judging). Mencius said that: “左右皆曰可殺，勿聽。諸侯大夫皆曰可殺，勿聽。國人皆曰可殺，然後殺之，見可殺焉，然後殺之” (When all those about you say, “this man deserves death”, don't listen to them. When all your great officers say, “This man deserves death”, don't listen to them. When the people all say, “This man deserves death”, then inquire into the case, and when you see that the man deserves death, put him to death” (the Book “Liang Hui Wang” II). Xun Kuang inquired that: “聽之精，明其情，參悟明謹施其刑。顯者必得，隱者浮現民反成” (the trial of a case must clarify the actual situation, it is necessary to consider clearly and carefully when deciding the type of punishment). The decision on the type of punishment must be based on the principle of “權” (power) and “時” (time): to be flexible according to time, place and circumstances when committing the crime so that “一張一弛” (there shall be both strictness and flexibility at times).

Thus, we believe that Confucianism has posed relatively specific views on the death penalty in a way that it does not promote such type of punishment. Confucianism advocates that punishments should be light, moderate, and should not be the primary means of managing society. It is required that the State take care of the people's lives and educate them. The death penalty applied to the criminals is the last resort and the State must realize its responsibility to fulfill the duty of shepherding and educating the people more effectively as well as to be cautious in deciding the type of punishment and finding the chances to live for the criminals.

## CAPITAL PUNISHMENT IN THE HISTORY OF THE LAWS OF CHINA AND VIETNAM

To date, “Confucianism has had an influence in Taiwan and Singapore, but also in Korea, Japan, and Vietnam, in different degrees and in different ways, as well as in Chinese communities scattered all around the world” (Tu & Du (eds.), 1996). Due to geopolitical factors, Vietnam was ruled by Chinese feudal dynasties for nearly 1000 years, this period is called the Northern colonial period and lasted until the year 938, when Ngo Quyen defeated the Southern Han in the Bach Dang battle and started a period of long-term independence and autonomy. However, even after gaining independence, the Vietnamese feudal dynasties were still deeply influenced by Confucianism, Confucian laws and legal culture from China. Although Confucianism had a far-reaching influence in the political-legal life of China, the death penalty was a punishment present throughout the history of the laws of China. The death penalty was also a punishment existing throughout the history of the laws of Vietnam.

With respect to the criminal laws of Chinese feudal dynasties, the number of capital crimes was collected by Lu & Miethe (2010) from various historical sources with the statistics as follows: The Tang Code (653 AD) included a total of 233 capital offenses. The Song Dynasty (960 – 1279) retained all capital offenses from the Tang Dynasty and gradually added sixty other offenses, making a total of 293 capital offenses. The number of separate capital provisions then dropped dramatically to a low of 135 offenses in the Yuan Dynasty (1279 – 1368). The number of separate capital codes increased again, including 282 capital. Historical and legal development of the death penalty 33 offenses during the Ming Dynasty (1368 – 1644) and then skyrocketed to over 800 separate offenses in the Qing Dynasty (1644 – 1911). The Criminal Code of the Tang Dynasty set forth a penalty system with 5 main penalties (the Five Punishments), namely Chi, Zhang, Du, Liu, Si (beating with light stick, beating with heavy stick, penal servitude, life exile and death) with

long-term influence on later criminal laws of China and “was still considered authoritative as late as the fourteenth century and was used as a model by the Ming dynasty (1368-1644)”, “the Five Punishments in the Tang Code, and in fact all the codes thereafter until the Qing dynasty (1644-1911) (Muhlhahn, 2009, p 31). However, it is believed that the Sui Dynasty (prior to the Tang Dynasty) set up the system of the Five Punishments, while before the Sui Dynasty, the ancient Five Punishments regime with Mo, Yi, Fei, Gong, Da Pei had already been present in the Shang Dynasty. In particular, Mo means tattooing, Fei is amputation of leg, Yi (Ty) is amputation of the nose, Gong is male genital castration and female genital mutilation, and especially Da Pei which is the death penalty (Vuong & Dich, 2004, p 358).

Muhlhahn (209, p 31) also argued that the Tang Code was “proved remarkably influential not only in China but also in East Asia” and the Five Punishments of this Code “was adopted with some modifications by Japan in the early eighth century and later by Korea and Vietnam”. In the Le Dynasty (1418–1656 AD), “Quoc Trieu Hinh Luat” (the National Penal Code), or “Bo luat Hong Duc” (Hong Duc Code) were adopted under the order of King Le Thanh Tong (Hong Duc) in 1483 in Vietnam. “What is of importance is that regardless of the nature of the social relation in question, it is all regulated by the threat of imposing a criminal punishment, in case it is violated, with the most severe one: Death. And the Code threatened people with 149 capital crimes out of 722 provisions (Tran, & Vu, 2019). Later on, as regards to the Nguyen Dynasty (1802–1945 AD), there existed an important but often criticized code, namely “Hoang Viet Luat le” (also known as Gia Long code), promulgated under the order of King Gia Long in 1815. It consists of 22 volumes and 398 provisions. This can be considered as the last code of the feudal regime in Vietnam and similar to the previous codes, it stipulated 105 crimes that can be given capital punishment (Vu, 1971 in Tran & Vu, 2019). In general, all aforementioned feudal codes follow the system of Five Punishments, including (1) “Chi” (flogging penalty), (2) “Zhang” (cudgel penalty), (3) “Tu” (servitude penalty), (4) “Liu” (exile penalty), and (5) “Si” (capital punishment). The category/system of crimes for which capital punishment is applied varied in different dynasties. However, in general, capital punishment may be applied to a number of crimes and certain types of crimes were laid down in all codes for which capital punishment is applied. Before the Le dynasty were the Dinh, Tien Le, Ly, Tran and Vietnam can no longer retain the criminal code of the Tran and Dinh dynasties or the rules of the Dinh and Tien Le dynasties. History books only recorded that the Tran dynasty also prescribed brutal types of the death penalty such as burying alive or crucifying prisoners on a wooden board and then taking them to the market before execution as well as brutal or destructive physical punishments. The Dinh dynasty set forth the types of capital punishment such as putting the criminal in a cauldron of oil, putting the criminal in an iron crib and letting them be eaten by tigers, while in the Tien Le dynasty, execution were implemented by wrapping straw with oil in it around the body of the offender then setting it on fire (Le, 2018, p 56).

Regarding the death penalty in China and Vietnam, we believe that both countries share things in common. In particular, first, the regulations on the forms of the execution of the death penalty are often included in the criminal laws and other forms of capital punishment equivalent to different degrees of the death penalty (for example, strangulation is considered lighter than decapitation, decapitation is less severe than lingchi (death by a thousand cuts). Indeed, this phenomenon is caused by the fact that feudal penal codes in China and Vietnam were the general rules for all social relations and there was no separate code of criminal procedure (Lu & Miethe, 2010). Second, the death penalty is also a punishment that not only results in the death of but can also inflict physical pain for the convicted person, thus, it can be categorized into the group of

physical punishments - the punishment those which cause physical pain and destroys the body as recorded in the history such as the penalties mentioned by Le (2018, p 56) including decapitation of limbs, toes and fingers in the Tran dynasty of imperial Vietnam. In China, “供刑” (castration) was initially applied to punish men and women for adultery, then later used to punish protesters in the Qin and Han dynasties, typically the case of Sima Qian. The Sui dynasty removed castration in the criminal law and later such punishment was not mentioned in the criminal laws of other dynasties, but until the Ming and Qing dynasties, evidence of the existence of this kind of punishment remained to be found (Vuong & Dich, 2004, p 360). Third, many forms of the execution of the death penalty were of a deterrent nature to others, such as decapitation with putting a decapitated head in public and crucifying the criminal on a wooden board and displaying in the market before execution (Nguyen & Gian 1992, p 290). Fourth, the death penalty was not only applied to the offenders but also to others related to the offender based on the principle of joint responsibility or collective responsibility such as “誅夷三族” (three familial exterminations), or even nine familial exterminations. Vuong & Dich (2004, p 360) referred to Zhu Di, the third king of the Ming Dynasty who even carried out ten familial exterminations to college professor Fang Xiaoru, which killed all 10 generations and friends, students with the death toll being over 870 people.

So, with the above-mentioned characteristics of the death penalty, what is the affect of Confucianism? It can be said that Confucianism does not play an important role in the regulation of punishment in general and the death penalty in particular in the law. The great success of Confucianism is that it protects Confucian moral values in legal regulations. The relations between a ruler and his minister, father and child, husband and wife, in which the submission of the minister to the ruler, the child to the father, and the wife to the husband with the values of loyalty, filial piety, and getting along with siblings were protected by the criminal laws through severe penalties for violations including capital punishment. The making of laws and regulating penalties were based on the principles of Legalism more than Confucianism. Legalism states that it is necessary to “以法治國” (rule the country by law) and not to rule the country by virtue and rite. In Legalism’s point of view, law means penalty. Heavy punishments are not only for the sole purpose of punishing criminals. The Book of Lord Shang, the most representative writing of Legalism, highlighted two major features of legalists views on law and punishment. It states that in a well-governed society, “punishments are many and rewards are few” and people should be compelled under heavy penalties to “spy upon and inform against their relatives and neighbors”. Accordingly, law of the intelligent sovereign, in suppressing rebels, is not disciplining only those who are being suppressed, for to discipline only the suppressed is the same as to discipline dead men only; in penalizing robbers, it is not disciplining only those who are being penalized, for to discipline only the penalized is the same as to discipline convicts only.... For the heavily punished are robbers, but the terrified and trembling are good people” (Lu & Miethe, 2010). Therefore, we believe that this is the answer to the fact that the forms of the enforcement of the death penalty were present in the regulations on death penalty and considered to be different degrees of this punishment as well as the fact that there were too many capital crimes.

“History witnessed a fierce battle in the ideology and practice of the Rule of Virtue and the Rule of Law, and history also shows the failure of the extreme application of either means” (Do, 2013, p 284). The Han dynasty rejected Han Feizi’s Rule of Law style and promoted the Rule of Virtue in the style of Confucius. Was Liu Bang more virtuous than Qin Shi Huang? That is actually not true, the king of the Han dynasty was no less brutal than the king of the Qin dynasty. But why did he prefer the Rule of Virtue to the Rule of Law? Because Confucius taught him that in order

to rule the people, the Rule of Virtue was more effective than the Rule of Law (Vu, 1997, p 123). The legal culture in feudal dynasties in China and Vietnam was Confucian because the moral values according to Confucian standards and the Virtue category of Confucianism were highly valued. In Confucian legal culture, as moral values assigned by Confucian standards were upheld and protected, Legalism was therefore pushed downwards in the formal and populism formula of “DeZhuXingFu/德主刑辅” (morality is primary, punishment is secondary). Given the fact that criminal law was used to regulate almost all social relations and the death penalty was a common punishment and enforced in many barbaric forms, the formula showing the essence of Confucian legal culture, at least, in the criminal justice field was “刑主德辅/Xing Zhu De Fu” (the supremacy of “刑” (punishment or penalty) and the subservience of “德” (morality)). Law or criminal laws demonstrated the authoritarian power of the emperors, so “Xing” (upholding punishments, incapacitation, deterrence, and prevention with the severity of penalty) shows the main role, expressed in a major, common and permanent manner; “De” (virtues and rites) as a supplementary role, expressed in a minor, uncommon, non-permanent manner in stipulations on punishments and their enforcement

Imperial China does introduce a gentle formula “DeZhuXingFu/德主刑辅” while in true nature, the positions between “德” (morality) and “刑” (punishment) were reversed. This legal system not only dominated China, but also had a great influence on East Asian countries (North Korea, Japan and Vietnam). Modern jurists call it Chinese Legal System (Dam, 1993, p 44). The National Penal Code of Nguyen Dynasty in imperial Vietnam, with its preface written by King Gia Long himself, despite expressing the Confucian thought on the possibility of human rehabilitation, has its nature imbued with the spirit of the Legalism about the role of punishment and their enforcement in inducing fear to deter people from committing crimes. Emperor Gia Long states in the Preface of Hoang Viet Luat Le (National Penal Code of Nguyen Dynasty): “I personally did the final revision of the Code so that everyone would learn in order to prevent mistakes. The Code shines like the sun and the moon, leaving no shadow anywhere, and the strict punishments are as dazzling as lightning, resounding like thunder which spare no wrongdoing. And the obstinate can easily be look upon to avoid crimes and punishments. Therefrom they can go down the path of self-education and avoid committing wrongdoings, thus, the officials have few reasons to intervene. Then all things will go well without the enforcement of laws. Is that not a good thing?” (*Hoang Viet Luat Le*, 2002, p 21). This Confucian king, ironically, was very proud of the strict punishments “as dazzling as lightning, resounding like thunder”.

## CAPITAL PUNISHMENT IN MODERN CRIMINAL LAWS: RECOMMENDATIONS FROM THE CONFUCIAN LEGAL CULTURE VIEWPOINT

Currently, both China and Vietnam are maintaining capital punishment. The death penalty is specified only for “the most heinous crimes” (the 1997 Criminal Law of the People's Republic of China, Article 48) and for persons committing extremely serious crimes (the 2017 Penal Code of the Socialist Republic of Vietnam, Article 40). China set out the exceptions in which the death penalty is not imposed on persons who have not reached the age of 18 at the time the crime is committed or on women who are pregnant at the time of trial. Meanwhile in Vietnam, Vietnam still supports humanitarian policies that juveniles, the elderly and women who are pregnant when they commit or are tried will not receive the death penalty. Besides, women raising children under 36 month-old at the time of committing the crime or of being adjudicated, are exempted from the death penalty. In these cases, persons sentenced to death receive commutations of the death penalty

to life imprisonment (Luong, 2021). In addition, both countries set forth provisions on reconsideration of the death penalty judgment in a way that gives the offender who is subject to the death penalty a chance to live. “In the case of a criminal element who should be sentenced to death, if immediate execution is not essential, a two-year suspension of execution may be announced at the same time the sentence of death is imposed. If a person sentenced to death with a suspension of execution does not intentionally commit a crime during the period of suspension, he is to be given a reduction of sentence to life imprisonment upon the expiration of the two-year period; if he demonstrates meritorious service, he is to be given a reduction of sentence to not less than fifteen years and not more than twenty years of fixed-term imprisonment upon the expiration of the two-year period; if there is verified evidence that he has intentionally committed a crime, the death penalty is to be executed upon the approval of the Supreme People's Court” (the 1997 Criminal Law of the People's Republic of China, Article 48, 50). Vietnam also sets out regulations on the reconsideration of death sentences in accordance with cassation and retrial by the Justice Council of the Supreme People's Court and reduces the death penalty to a life imprisonment under the State President's authority (the 2015 Criminal Procedure Code of the Socialist Republic of Vietnam, Article 367). Both countries are in the process of reducing the number of capital crimes. In Vietnam, the reduction in capital crimes is from 44 in the 1985 Penalty Code to 29 provisions in the 1999 Penalty Code, and subsequently, to 25 provisions in the amended 1999 Penalty Code which was adopted in the latest session of 12th National Assembly in 2009 and to 18 crimes in the 2015 Criminal Code (Tran & Vu, 2019). In China, as Luong (2021) states, in February 2011, China abolished the death penalty for 13 non-violent crimes, reducing the number of crimes punishable by death from 68 to 55. However, it is indisputable that both China and Vietnam are still upholding the death penalty both in law and in practice. The question is, does Confucian legal culture still exist, and what impact may it have on the maintenance and limitation of the death penalty in these two countries?

At present, in China and Vietnam, Confucianism has been no longer the official ideology, and the Confucian legal system has been no longer implemented. The jurisprudential, structural, substantial and cultural elements of the current legal systems in both China and Vietnam are significantly informed by socialist and global elements... There is another field of the legal system in which the impact of Confucianism is prominent, namely legal culture. The triumph of Communism, the reception of socialist law as well as the diffusion of international laws have considerably removed Confucian, structural, and substantial elements from the legal system. However, the Confucian legal culture constantly exists in the people's thinking for thousand years and operates at a sub-conscious level, and therefore, is not easy to be eradicated within a short time. As the result, the Confucian legal culture remains its long-lasting influences in the two countries (Son, 2013). Currently, the Confucian moral values are replaced. In the cultural area, the ideals of a “new kind of socialist man” has substituted the outdated Confucian gentleman. Socialist collectivism replaced the three yokes and five relationships (tam-cuong, ngu-thuong) of Confucianism (Nghia, 2005). However, the modern political values namely “Socialist collectivism” and the traditional political values of Confucianism are similar in terms of emphasizing collectivism. Confucianism has shaped the relationship between the people and the State as one between the individual and the collective, between the private and the common for more than 2000 years. In this relationship, “the primacy of public or common interests over individual interests, the broad and active role of the ruler or state to serve the common interests of the people, and the conception that law is just one of the tools used by the state to maintain social order. This also explains why the Confucian authoritarian style of government may also have

contributed its characteristics to Asian Communism (Peerenboom, 2002 in Nghia, 2005). As for Vietnam, it is obvious that the shortcoming in the history of the Vietnamese political system is that the Rule of Law of our state apparatus has never had a civil society in history (Vu, 2009, p 83). In China, “collective rights tend to be granted more importance than individual ones, amounting to rights abuses at the expense of individual interests” (Jiang, 2016, p109). Confucian legal culture helps the people to accept the death penalty more easily with the philosophy of collective interest as Confucianism introduces the concept “生道殺民” (death penalty should be regarded as the last resort and the execution of the death penalty is for the lives of the people). On the other hand, the people’s acceptance of “the thought that law is just one of the tools used by the state to maintain social order” and the [state’s](#) death penalty, after all, is also the legacy of Confucianism with the ideology of “君父” (the king is the father), “子民” (the people are the children), “父尊子卑” (give prominence to the father and belittle the children), the people **must be** submissive to the king: “Parents kill the child because the child is disobedient, the child should not be resentful as the child would not exist without the parents, thus when the parents kill their child, it is as if the child was not born at all” (Preface of the Book of Wei (Wei Shu) in (Du, 2020, p 22)). China is still a so-called paternalistic state in which the law enforcement system is likely to have both real and symbolic status as the protector of anonymous collective interests, such as public security or social stability (Wu & Vander Beken, 2012).

As we have analyzed, Confucian legal culture is one where the values of social order according to Confucian concept are respected and protected, but it does not mean that they are protected in the way that Confucianism proposed which is “DeZhuXingFu/德主刑輔”. It is the presence of the death penalty in the history of feudal laws that has proven that penalties and punishments are effective tools to protect Confucian moral values. The rulers used Law and Penalty to rule, Heavy Penaltyism and the death penalty were exalted in practice. Today, in China, socialist orders are protected by dictatorship of the proletariat where the legal system, especially criminal laws, is an important tool of authoritarianism. The Constitution of the People’s Republic of China (admended 2018) enshrines: “The People’s Republic of China is a socialist state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants” (Article 1). “Democratic dictatorship” is considered the continuation of Mao Zedong ‘s thought on the nature and role of dictatorship in the combat against the enemies of the revolution, in order to reinforce the Socialist regime and the leadership of the Communist Party” (Wu & Vander Beken, 2018). In Vietnam, as Son’s opinion in 2013, socialist legality **was** borrowed from the former Soviet Union **and** broadened its influence. **T**he Soviet doctrine regarded the law as an instrument that the [state](#) could apply to **sa**fe**g**uard socialist revolution. Under this doctrine, the legal system existed to serve the working class’s rights and interests. Such a system had to be enforced, even through dictatorship of the proletariat in case of necessity.

## CONCLUSION AND RECOMMENDATION

Originating from the ideology of [“仁” \(benevolence\)](#), Confucianism does not encourage severe punishments including the death penalty. This is highly respectable and consistent with the general trend of the modern world which is to reduce and moves towards the abolition of the death penalty. However, while the western countries reduces and moves towards the abolition of the death penalty according to the philosophy of natural law, the rights to life, the right not be deprived of life without due process of law, Confucianism stems from the role of the ruler in ensuring that people can settle down, have a job, be financially and emotionally stable and

educated so that they will not commit crimes. It is really essential to avoid the situation when the State does not fulfilled its role, which results in people committing crimes, being punished and then killed. Qiu Jun of the Ming dynasty (in the Book “Daxue Yanyi Bu”) wrote that: “If people have to suffer from hunger and cold, heavy labor and various taxes, things will be scattered. Such occurrence will lead to an absence of sentiment, without sentiment there shall not be any gratitude. Without sentiment and gratitude, contradictions shall happen and litigations arise. That is what makes the investigator who can determine the truth of the case grieve and such person shall not be happy and must feel anguished because the people are unfortunate and uneducated” (Du, 2020, p 314). The responsibility of the State in taking care of the people from the Confucian point of view is completely consistent with the nature of the socialist state stipulated in the Constitutions of the two countries. These are the epistemologies with important implications for these two countries in the regulation of criminal policies in general and policies for the death penalty in particular and to reduce the death penalty towards the abolition of this penalty.

In our opinion, the concept of “生道殺民” mentioned by Confucianism is also an important principle in the construction of modern criminal laws when identifying crimes on which the death penalty can be imposed. The death penalty should only be applied to acts that infringe on the right to life of others and seriously threaten the social order and safety. This principle is set out to continue the reduction of the scope of capital crimes and it is the basis for further elimination of a number of legal regulations that stipulate the death penalty in the Criminal Code.

Given the viewpoint of “慎罰” (to be careful when it comes to punishment), Confucianism also requires high caution when it comes to making decision on the death penalty, based on the principle of “慎罰” to find a way to live for the offender in specific cases. For each offender, it is required that the truth of the case must be accurately determined, mitigating circumstances and facts proving the innocence of the offender must be searched for in the process of solving criminal cases. “慎罰” requires “緩猛相濟” (a combination of light and heavy punishments), when applying the death penalty, it is crucial to consider the factors of “权” (power) and “时” (time) during trial and require “哀矜勿喜”( the judge must feel anguished but not glad to think about the cause of the crime) when imposing the death penalty. These are the requirements imposed on the entire criminal justice system. The criteria as well as the subject of the application of the death penalty must be clearly defined in the way that only very special subjects and in highly necessary situations should the death penalty be applied, there should be instructions for the court to apply this penalty only as a last resort after having had an accurate assessment of all details in the case (Nguyen, 2012).

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