

THE HUMANITY IN THE PROVISIONS OF THE CRIMINAL CODE OF VIETNAM ON THE DEATH PENALTY

Tran Van Hai¹ - Ho Minh Thanh²

Abstract:

The death penalty is the most deterrent and most severe of the types of punishment applied to people committing particularly serious offenders. However, the application of this penalty has caused controversy as it directly violates one of the fundamental human rights - the right to life. With the death penalty still applied in Vietnam, many legal issues have raised such as whether this penalty continues to be consistent with international law and the world's trend of abolition? Has it infringed on the human right to life? In order to comprehensively and properly recognize these issues, the authors will point out the constant changes in the process of building and implementing the criminal law of the Socialist Republic of Vietnam on death penalty on the basis of both ensuring the purpose of deterrence and ensuring humanity. Besides, on the basis of analysis and comparison with the provisions of international law, the article also shows the conformity of Vietnamese law with the basic principles in applying this death penalty.

Keywords: Vietnam; Death penalty; Humanitarian; Compatibility

¹ PhD, Lecturer at University of Law, Hue University, Vietnam.

² LLM (Bournemouth), Lecturer at University of Law, Hue University, Vietnam. Email: thanhhm@hul.edu.vn

1. Introduction

In the legislative history of the nations of the world, the death penalty is the one commonly used by states to maintain dominance, as well as to maintain social order. In different countries, the scope of criminals subject to the death penalty and the method of execution is also different. However, along with the development of human civilization, as human perception of the death penalty has changed, in general, the death penalty tends to be less and less applied. According to statistics of over 195 member states of the United Nations, 55 countries still maintain the death penalty, 104 countries by law have repealed this penalty for all crimes, 8 countries repealed for those common criminal crimes (except for special crimes or war crimes) and 28 countries have practically abolished the death penalty³. Vietnam is among the countries that still maintain the death penalty. This raises the legal question of whether it is in line with the world's trends? Does it infringe the human right to life? These issues will be clarified by the authors through analysis and assessment of the suitability and humanity in the provisions of Vietnam's criminal law for the death penalty.

2. The death penalty in Vietnamese criminal law

Vietnam's criminal legislative history has undergone three legalization times with important changes expressing new directions and policies to suit the country's social situation. Along with those legalizations, the regulations on the death penalty have also changed significantly.

Penal Code 1985

³ Amnesty International, "Abolitionist and retentionist countries as of July 2018", 1 July 2018, <<https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf>> (accessed on 21 August 2019).

In the first Penal Code of Vietnam in 1985, the death penalty was considered "*a special penalty applied to offenders in particularly serious cases*".⁴ There are 29 laws providing for the death penalty (accounting for nearly 15% of the laws on crime). In addition, the law also introduces some restrictions on this penalty through not imposing the death penalty for juvenile offenders, pregnant women when committing the crime or being tried. trial. To postpone the application of the death penalty for pregnant women and women nursing children under twelve months. in case a person sentenced to death is given concessions, the death penalty becomes life imprisonment. The death penalty will be executed immediately after a trial only in special cases that have a separate law.⁵

It is surprising that after four amendments and additions to the 1985 Penal Code, there has been a sharp increase in the number of offenses that are subject to the death penalty (44 articles, *accounting for 20.37% out of 216 articles about crimes*).

Penal Code 1999

If the spirit of the Penal Code in 1985 showed deterrence for some particularly serious crimes through strengthening the death penalty in the process of completing the law (with four amendments and additions to 1989, 1991, 1992 and 1997), the 1999 Penal Code has softened (de-criminalized) by narrowing the scope and conditions for applying this penalty. Specifically, in addition to the two subjects specified by the 1985 Penal Code not to apply the death penalty: (i) juvenile offenders; and (ii) a woman who becomes pregnant during an offence or on trial, the 1999 Penal Code has added a provision that this penalty does not apply to women who are raising children (including adopted children) under 36 months of age when

⁴ Article 27, Penal Code 1985

⁵ Article 27 of the 1985 Penal Code.

they commit[ted] the crime or [at the time of] trial. While the 1985 Penal Code stipulates that criminals who are pregnant/nursing children under 12 months of age can only postpone the execution of the death penalty⁶, the 1999 Penal Code stipulates that the death penalty will be converted into life imprisonment.⁷

Also, besides narrowing the scope of application objects of the death penalty, after the 2nd codification, Penal Code in 1999 had only 22 articles about the crime applying the death penalty, accounting for more than 8 % of articles about the crime.

Penal Code 2015

After 15 years, the reduction of the scope of regulations and the application of the death penalty is a major policy recognized in many important Party documents and has been institutionalized when developing, amending, and supplementing the Penal Code through periods. The Penal Code 2015 continues to reduce the scope of the death penalty application by adding several subjects that do not apply the death penalty and reducing the number of crimes subject to this penalty.

- In the general section, apart from the two subjects who are under the age of 18 who commit the crime and the woman who is pregnant/rasing a child under 36 months of age as prescribed in previous legal documents, the 2015 Penal Code has added two additional cases apply the death penalty: (1) The death penalty does not apply to ***persons aged 75 or over*** when committing an offence or at the time of trial. Even when serving the sentence, if the offender is aged full 75 years or older, the death penalty will be not executed and the death penalty is transferred to life imprisonment; (2) Do not apply the death penalty for ***persons convicted to death on charges of embezzlement of assets, taking bribes*** in the case that after being convicted, actively returned at least three-quarters of the embezzlement, received bribes, and actively cooperated with authorities in detecting, investigating, dealing

⁶ Article 27, Penal Code 1985.

⁷ Article 35, Penal Code 1999.

with crimes or making great achievements. At this time, the death penalty is converted to life imprisonment.⁸

- In the specific crime, the Penal Code 2015 removed the death penalty in 7 crimes: (1) Property robbery; (2) Production and trading of banned goods that are food, food, food additives; (3) Illegally possessing narcotics; (4) Appropriation of narcotics; (5) Destroying structures, facilities, or means important to national security; (6) Crime of disobeying orders; (7) Surrender to the enemy. In addition, a crime that previously provided the death penalty, conducting banditry activities⁹, has also been abolished. Thus, the Penal Code 2015 still maintains the death penalty for 18 out of 314 crimes (accounting for more than 5.7%) specified in the 2015 Penal Code of 7/14 criminal groups.

Thus, the expansion of the scope of the non-applicable subjects and the execution of the death penalty in the General Section and the elimination of the death penalty in some crimes in specific crimes of the Penal Code 2015 has shown the institutionalization of the policy of restricting the application of the death penalty of the Politburo's Resolution No.49/ NQ-TW¹⁰ to ensure the leniency and humanity of the Vietnamese criminal law.

⁸ Article 40, Penal Code 2015.

⁹ According to Clause 1, Article 83 of the 1999 Penal Code, amended and supplemented in 2009, "Organizers and people who actively work against the people's administration but carry out armed activities in mountainous, marine and regional areas. other dangers, murder, robbery of property, or cause serious consequences, the offenders shall be sentenced to between twelve and twenty years of imprisonment, life imprisonment or capital punishment "

¹⁰ Regarding the judicial reform strategy to 2020 and adhering to the spirit of the contents of the 2013 Constitution on the right to life of people, June 2/2005.

3. The humanity of the Penal Code 2015 and its compatibility with international law on the death penalty

There has been a multitude of criticism on the violation of death penalty against the human right to life.¹¹ At the end of 2019, 106 countries (a majority of the world's states) had abolished the death penalty in law for all crimes, and 142 countries (more than two-thirds) had abolished the death penalty in law or practice.¹² However, many views support the death penalty aiming for the deterrent and prevention of crimes against the human right to life. In other words, death penalty is also a means of ensuring the right to life for people whom dangerous crimes in society may threaten.

As previously mentioned for the research objectives, the authors will not focus on debating whether the death penalty should be retained. Rather, it would analyze the humanity and compatibility of the death penalty under Vietnam's Penal Code 2015 with the economic, social and political status in Vietnam. The authors would also like to introduce some comparisons with international laws and regulations on the death penalty in countries around the world.

The death penalty prescribed in Article 40 of the Penal Code 2015 is a specialized punishment only applicable to persons committing particularly serious crimes within the group of crimes violating national security, human lives, drug-related crimes, corruption, and other particularly serious crimes under this Code.

¹¹ Johnson, Robert (2014) "Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House," Seattle Journal for Social Justice: Vol. 13, Iss. 2, Article 14. Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol13/iss2/14> (accessed on 21 January 2021).

¹² Amnesty International, *Death penalty in 2019: Facts and figures*, Available at: <https://www.amnesty.org/en/latest/news/2020/04/death-penalty-in-2019-facts-and-figures/#:~:text=At%20the%20end%20of%202019,penalty%20in%20law%20or%20practice>. (accessed on 25 January 2021)

Similar to the Penal Code 1999, the humanity of the Penal Code 2015 is that the death penalty shall not be applied for criminals under 18 years old¹³ and women who are pregnant or nursing children under 36 months old at the time of the crime or court trial, nor shall the death penalty be executed for these persons. One of the most remarkable cases related to the death penalty exemption is the murder and robbery case that happened at the Ngoc Bich Gold Shop (Phuong Son, Luc Nam) on August 24, 2011. In this case, Le Van Luyen murdered the husband and wife, who were the store owners and their 18-month-old child. Their eight-year-old daughter had her arm cut off. This is a severe case, causing a wave of public anger and affecting local security order as well as opinions that criminal laws should be amended. A critical factor, in this case, is that Le Van Luyen committed a crime when he was not yet 18 years old.¹⁴ Therefore, Luyen was sentenced to a maximum of 18 years in prison according to Vietnam's laws at that time.

The verdict against Le Van Luyen expressed the law's humanity to certain subjects who need legal priority to protect their legitimate rights and interests. These two subjects would be analyzed as follows:

- For criminals under 18 years of age

In the past, Vietnamese criminal laws referred to them as juveniles. People at this age are considered underdeveloped regarding their awareness and cognitive control, so there must be a separate regulation to prescribe the appropriate criminal liability and punishment for them. This humanitarian regulation is not only reflected in Vietnamese law but also international law. According to the United Nations

¹³ The 1999 Penal Code is called "juvenile".

¹⁴ According to Clause 1, Article 74 of the 1999 Vietnam Penal Code, stipulates a termed imprisonment stating: "For a person from full 16 years old to under 18 years old when committing a crime, if applicable law provides for a penalty life imprisonment or the death penalty, the maximum applicable penalty does not exceed eighteen years of imprisonment; if it is a termed prison, the maximum penalty applicable shall not exceed three-quarters of the imprisonment level defined by the law".

Convention on the Rights of the Child (CRC), *“Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age”*¹⁵. In the African Charter on the rights and welfare of the child, it also states: *“The death sentence shall not be pronounced for crimes committed by children”*.¹⁶ Alternatively, the Geneva Convention of 12/8/1948 Relative to the Protection of Civilian Persons in Time of War also states: *“The death penalty may not be pronounced against a protected person who was under 18 years of age at the time of the offense”*¹⁷.

The above principles of international law are unanimously supported by member nations. As a result, countries that retain the death penalty have pronounced that their laws ban the application of the death penalty to criminals who are under 18 years of age. Vietnam strictly complies with such regulations on the non-application of the death penalty to criminals under 18 years of age. Through the authors’ studies, Vietnam has not experienced a single case of people under 18 years of age subjected to death penalty. According to Amnesty International (AI), in the period 1999-2003, 16 juvenile criminals were executed, of which 10 were in the United States, 3 were in Israel, 1 was in China, 1 in the Democratic Republic of Congo, and 1 in Pakistan¹⁸. In India, although their judicial law bans the death penalty to persons under 16 years of age¹⁹, the United Nations has recorded one death row inmate executed who was under 15 at the time of crime. In this case, the United Nations Special Rapporteur sent an urgent recommendation to the Indian

¹⁵ Article 37 (a), United Nations Convention on the Rights of the Child (CRC).

¹⁶ Article 5 (3) African Charter of the Rights and Welfare of Children (Article 2 of this document defines a child as a person under the age of 18).

¹⁷ Article 68, Geneva Convention of August 12, 1948 on the Protection of Civilians during the War (Geneva Convention IV).

¹⁸ The death penalty in international law (2008), Vietnam Lawyers' Association, Reference Book, Hong Duc Publishing House, page 212.

¹⁹ Amnesty International, news about the death penalty, ACT 53/003/2001 (June 2001)

government in 2001²⁰. Statistics have shown that although international law and national laws of many countries have banned the death penalty to juvenile criminals; in fact, criminals under 18 years old have been subject to the death penalty in some countries.

- For criminals who are pregnant women or nursing children under 36 months old.

These people need to be cared for, protected and granted particular legal policies. Because women are subject to motherhood, they suffer health damage and significant mental changes affecting their perception and cognitive control when pregnant and having children. On the other hand, the specific legal policy for these subjects also aims to protect the fetus as well as the health and development of the child under 36 months of age. Therefore, with a humanitarian spirit, the Vietnamese criminal law stipulates not to apply the death penalty nor enforce it for women who are pregnant or mother of children under 36 months old. This regulation is also recognized by international law. The International Covenant on Civil and Political Rights (ICCPR) states: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women"²¹. Alternatively, Article 6.4 of Protocol II Additional to the Geneva Conventions of August 12, 1948 also states: "The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children". Regarding this regulation, the laws of some countries are also recognized, such as the laws of Japan, Thailand, Trinidad & Tobago. According to reports from these countries, pregnant women are not subject to the death penalty, but mothers of young children might be applied. In Egypt, "the execution of the death penalty

²⁰ (n 18), page 213.

²¹ Article 6 (5), International Covenant on Civil and Political Rights (ICCPR).

against pregnant women is postponed two months after the woman has given birth", or at least one year after the childbirth in the Philippines.²²

With the international and national laws, it can be seen that, in addition to inheriting and adapting the death penalty regulations, Vietnam's criminal law has separate regulations demonstrating profound humanity towards offenders under 18 years of age and women who are pregnant or nursing children under 36 months old.

Besides, the Penal Code 2015 has added two other circumstances that shall be exempted from the death penalty²³, including:

- Do not apply and enforce the death penalty for people aged 75 years and older. According to Vietnamese lawmakers, people aged 75 and over suffer limited health, as well as limited awareness, especially their lifetime is coming to an end. Therefore, it is necessary to grant them the State's concern and tolerance. This is not recognized in international law. There are very few countries in the world where the maximum age limit is subject to the death penalty, only one country, the Philippines, is recorded through authors' studies. The Philippines reported that, under its law, the death penalty was not imposed on those 70 years of age and older.²⁴ Thus, Vietnam is among the very few countries that limit the maximum age to apply the death penalty. It once again affirms the profound humanitarian nature of Vietnam's criminal law.

- Do not apply the death penalty and convert to life imprisonment for *"offenders sentenced to death for embezzlement or taking bribes, after being sentenced, has returned at least three quarter of the property embezzled or bribes taken, closely cooperates with authorities in the process of investigation or trial, or has made reparation in an effort to atone for the crime"*. This is a type of non-violent

²² (n 18), p. 214.

²³ Article 40, Clause 2, Points b, c, Penal Code 2015.

²⁴ (n 18), p.214.

crime that seriously violates the operation of State agencies; causing loss or damage to property of the State or the organization; lose people's trust in the Party and State, and undermine the morals of public officials and leaders. Therefore, Vietnam's criminal law policy is stringent with regard to these crimes. However, on the basis of suitability and humanitarianism, the Penal Code 2015 has added such provision aimed at compensating the damage caused by a crime, but also ensuring deterrence; also, criminals have the opportunity to correct mistakes, closely cooperate in crime detection with public authorities.

In addition, the humanity regarding death penalty in the general part of the Penal Code in 2015, and the previous documents, has been exposed through the ex post facto law. The retroactive effect is that if a new piece of legislation is more favorable to the offender in the course of application, the authorities must apply the new one, even though at the time of crime such documents have not yet taken effect. Thus, if the offender has committed an offense before the Penal Code 2015, but the investigation and trial occur after such Penal Code, the Penal Code 2015 shall be applied when it is more favorable to offenders. An example to clarify this issue: On June 20, 2013, Nguyen Van A (30 years old) committed a robbery under Article 133.4 of the Penal Code 1999 (amended and supplemented in 2009) with the severest punishment is death penalty. However, the offense should not be discovered until 2019 and then A was brought to trial. At that time, the 2015 Penal Code has taken effect, in which the death penalty for property robbery is removed ²⁵. Therefore, at trial, the Court must apply the Penal Code 2015 on the robbery of property and not apply the death penalty to A. Thus, the retroactive application once again demonstrates the humanity of Vietnam's criminal law. The retroactive effect is also prescribed under the ICCPR, whereby the death penalty can only be pronounced if

²⁵ See also the crime of robbery of property in Clause 4, Article 168 of the Penal Code 2015.

it is “in accordance with the law in force at the time of the commission of the crime”.²⁶ Furthermore, Article 5.1 of this convention also stipulates that “after the offense, if the penalty for it is modified towards a lesser extent, the defendant shall be entitled to that penalty”. These ICCPR's regulations have shown that the Vietnamese criminal law has compatible regulations to ensure humanity and suitability.

In the specific crime part, the Penal Code 2015 has also introduced major changes in narrowing the scope of death penalty application. Accordingly, the Penal Code 2015 has removed the death penalty in 07 crimes that were previously prescribed. Crimes with the death penalty mainly focus on crimes against national security, human lives, drug-related crimes, corruption, and some other particularly serious crimes. The reduction of crimes subject to the death penalty is one of the major changes of the Penal Code 2015 to ensure its suitability to Vietnam's economic, political and social status, in accordance with the nature of the crimes and especially the global trends as well as demonstrating the State's humanity towards the offenders.

On the basis of international law, and the experience from other countries, Vietnam's criminal law has manipulated the application of the death penalty. Although Vietnam has still retained the death penalty so far, the above points have proved humanity relevant to the current economic, political and social conditions of Vietnam.

However, for the improvement of the criminal law on the death penalty, ensuring humanitarian principles, the upcoming amendment and supplement of Vietnam's Penal needs add offenders, who are "mentally retarded" but not to the point of losing cognitive ability, to the group of subjects not subject to the death penalty. Such subject has been recognized by a number of international treaties, such

²⁶ Clause 2, Article 6 of ICCPR.

as the safeguards guaranteeing protection of the rights of those facing the death penalty under ECOSOC pronounces: “Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.”. Or in Resolution 1989/64 of May 24, 1989, ECOSOC recommended that United Nations member states abolish the death penalty for “persons suffering from mental retardation or extremely limited mental competence whether at the stage of sentence or execution”. Thus, international law has introduced recommendations on the elimination of the death penalty for this subject, so it is essential to consider and supplement to restrict the application of the death penalty and further ensure humanitarian principles in Vietnamese criminal law.

4. Concluding Remarks

With assessments and analysis of Vietnam's criminal law provisions on the death penalty, we can see the trend of minimizing the application of the penalty in both the number of subjects applied and the number of crimes. This has reflected the humanitarian policies and guidelines of Vietnam. In addition, by comparison with some national regulations and international law, Vietnamese laws on the death penalty show a compatibility. However, characterized by a penalty that directly violates people's right to life, law enforcement and enforcement agencies need to show fairness and objectivity to ensure humanity and accuracy when applying the death penalty for offenders. This is because we have not had a chance to correct the error in the proceedings when we have executed the death penalty against the offender. In addition, a number of crimes need to be researched and statistically specific to aim at the elimination of the death penalty when it is proven unnecessary.