CRIMINAL JUSTICE OR CRIMINAL INJUSTICE?
REFLECTION FROM DEBATED DEATH PENALTY CASES IN VIETNAM

A/Prof. Dr. Vu Cong Giao (VNU School of Law, giaovnu@gmail.com)
Nguyen Thuy Duong, PhD Candidate (VNU School of Law, tduong_nguyen@ymail.com)

Abstract

Criminal injustice is very common in death penalty cases all over the world. This paper analyzes its nature, characteristics, causes, based on which it proposes solutions to deal with criminal injustice related to the death penalty in Vietnam – one of the retentionist states.

The authors argue that criminal injustice by its nature is the unfair trial, and therefore the death penalty is criminal injustice since the penalty conflict with most of the universal fair trial standards. As believed by the authors, there are many factors contributed to criminal injustice in death penalty cases in Vietnam, from the loopholes of the criminal justice system, to the limitations in the judicial oversight mechanism, and the lack and inadequacies of legal aid system, etc. The authors, therefore, believes that in order to overcome the problem in Vietnam, a variety of measures is needed, of which the first and foremost is tighten the mechanism of monitoring the compliance of judicial officials with criminal procedure law.

Keywords: criminal injustice, death penalty, fair trial, Vietnam.

Introduction

As one of the states are still retaining the capital punishment in law and practice, Vietnam is facing various procedural flaws and risk in the application of this penalty. However, these issues have not been comprehensively analyzed from the perspective of justice and human rights. Consequently, despite extensive information on its manifestations, the nature, causes and solutions of criminal injustice with regards to the death penalty in Vietnam are not clarified yet.

This paper attempts to fill the above mentioned research gap. It is in fact the inheritance and development of the thematic paper titled “Criminal Injustice of the Death Penalty in ASEAN” by Vu Cong Giao which is contributed to the HEFCW GCRF Project on the Right to Life (2019-2020). Inheriting the theoretical framework of the previous paper, the authors have provided in-depth analysis of the status and causes of the criminal injustice in Vietnam through analyzing two typical controversial death penalty cases that have recently happened in the country. In this paper, the authors try to address the following questions: What constitute the “criminal injustice?”, What are the manifestations and most common factors contributing to criminal injustice in the use of death penalty in Vietnam? And how to solve injustice problems experienced by persons facing the death sentence in the country?

While there are many factors leading to criminal injustice in the death penalty in Vietnam, each of those can be addressed with a corresponding solution; while different
measures need to be applied at the same time. In relation to the last research question, solutions to deal with the criminal injustice in the use of the death penalty in Vietnam are drawn from the analysis of various causes that led to unfair/unjust treatment of those facing capital punishment including the weaknesses of the judicial systems and the monitoring mechanism of death penalty cases; the insufficiency of legal aid resource; and the intolerant and violent culture.

1. The Death Penalty, Criminal Justice and Fair Trial

1.1. The Death Penalty as Criminal Injustice

Justice, in philosophy, is the concept of a proper proportion between a person's deserts (what is merited) and the good and bad things that befall them or are allotted to them (Brian Duignan, “Justice”, Encyclopaedia Britannica). From a social perspective, justice has two different faces, one being the conservation of existing moral norms and practices, the other demanding a reform of these norms and practices (Sidgwick 1874/1907, Raphael 2001, Miller 2017); while from a legal perspective, it is a matter of justice to respect people’s rights under existing law or normative rules; on the other hand, justice often gives us reason to change laws, practices and conventions quite radically, thereby creating new entitlements and expectations.

Justice and injustice are two sides of the same coin. As defined by McCoubrey et al., the situation of either the absence of or the opposite of justice is injustice (McCoubrey et al., 1996, p.276). By contrast, other scholars believe injustice is a quality relating to unfairness or undeserved outcomes, which may be applied in reference to a particular event or situation, or to a larger status quo (Thomas, 1995; Eric, 2012). In this regard, Martin Luther King Jr. said: "Injustice anywhere is a threat to justice everywhere" (Martin, 1963).

Although the sense of injustice is found everywhere and it is a human universal (Judith, 1992; Edmond, 1975; Barrington, 1978), in every country, the context in which injustice is of most interest and discussion, is that of criminal proceedings (criminal injustice), where human rights, and even human life (in the case of the death penalty) may be limited or taken away by judicial bodies. And, unlike the sense of justice which tends to be conceived in more abstract ways, and tends to inspire contemplation rather than action, the sense of injustice is a powerful motivational condition, causing people to take action not just to defend themselves but also others who they perceive to be unfairly treated (Thomas, 1995; Richard, 1998). In many countries, injustice makes people distrust the national judicial system, and is an important factor in creating social unrest. This is because humans who witness others being subjected to injustice can respond as though it was an act of aggression towards themselves (Edmond, 1975).

The death penalty is essentially the deprivation of a person's life by a state in the name of the law. In this regards, Eric Prokosch (Theme Research Coordinator of Amnesty International (AI)) argues that the taking of a person's life by state officials may be done to in situations such as, for example, when law-enforcement officials must act immediately to save their own lives or those of others, or when a country is engaged in armed conflict. The death penalty, however, is not an act of defense against an immediate threat to life. It is the premeditated killing of a prisoner for the purpose of punishment – a purpose which can be met by other means (Prokosch, 1998).
By denying the value of human life, the death penalty is in principle contrary to the right to life enshrined in UDHR, ICCPR. This is because the right to life “concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity”, which is “the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation…” (Human Rights Committee, 1982, 1984, 2018). Therefore, according to the Human Rights Committee, “all measures of abolition [of the death penalty] should be considered as progress in the enjoyment of the right to life within the meaning of Article 40 [of ICCPR]” (Human Rights Committee, 1982, 1984, 2018).

Since justice is based on respect for all human rights, it can therefore be concluded from the above analysis that the unnatural taking of life via the death penalty is unfair trial and a kind of criminal injustice. In this regard, mandatory death sentence, which is “forced to kill”, is the most obvious manifestation of criminal injustice since it is incompatible with fair trial standards (Sadakat, 2016). Specifically, as stated in a particularly authoritative report on the application of the death penalty published in April 2015, UN Secretary-General Ban Ki-moon observed that “A mandatory sentence fails to take into account the defendant’s personal circumstances and the circumstances of the offence. Consequently, it does not permit distinctions to be made between degrees of seriousness of the particular crime for which the penalty is imposed. Hence, it is not compatible with the limitation of capital punishment to the ‘most serious crimes.’” (OHCHR, 2015, para.63).

However, the unjust nature of the death penalty is not only evident merely in the unnatural deprivation of the right to life, but also can be characterized by three distinct features: (i) the cruel, (ii) the discriminatory political motivation and (iii) the irreparable aspects of capital punishment.

In relation to the first feature, an execution – or the threat of one – constitutes terrible physical and psychological cruelty, which can be seen as a violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT, 1948) (Prokosch, 1998). In this regard, the cruelty of the death penalty is manifested not only in the execution but in the time spent under sentence of death, during which the prisoner is constantly contemplating his or her own death at the hands of the state (Prokosch, 1998). In addition, the cruelty in many cases extends beyond death row inmates to the members of their family, to the judges, prosecutors, prison guards and the officials who have to carry out an execution, which is manifested through their deeply disturbing and even traumatic attitude towards the death penalty (Prokosch,1998).

Regarding the second feature, in many countries the death penalty is discriminatory because it is often administered to the most vulnerable in society, including the poor, the ethnic and religious minorities, and people with mental disabilities (Kasper, 2010). Specifically, the death penalty is disproportionately imposed on those who come from less advantaged socio-economic backgrounds or who belong to a racial, ethnic or religious minority (Amnesty International, 2007); among these race discrimination is emphasised by many authors (Radelet and Borg, 2000; FIDH/CCR, 2013).
With respect to the third feature, death penalty is also used for political purposes in many countries, such as to dispose of political enemies or to silence political opponents. One of the most prominent case relates to the death sentence imposed on the former President of Iraq Saddam Hussein which was strongly condemned as “unfair” and politically motivated by Amnesty International (Madoka and Nadia, 2014). Other cases in which death penalty was used to silence political opponents have also been unveiled in many countries including Argentina, the Republic of Korea, Bosnia and Herzegovina, Rwanda, Sierra Leone, and the Northern African States (Madoka and Nadia, 2014) and Saudi Arabia (ESOHR, 2018).

Lastly, criminal injustice is also related to the irreparable aspect of the death penalty. In the countries where justice systems are flawed and unfair trials are rife, the risk of executing an innocent person is high. When the death penalty is carried out, it is final, since mistakes that are made cannot be unmade. An innocent person may be released from prison for a crime they did not commit, but an execution can never be reversed (Amnesty International, 2007). This irreparable nature is therefore the inherent injustice of capital punishment.

The above analysis has clearly demonstrated the unjust aspects of capital punishment, both in terms of its nature and application. It supports the theory of corrective justice in which justice essentially concerns a bilateral relationship between a wrongdoer and their victim, and demands that the fault be cancelled by restoring the victim to the position in which they would have been had the wrongful behavior not occurred (Perry 2000, Ripstein 2004). Within the framework of corrective justice, the death penalty is not accepted since one of its principles is that punishment must not harm an offender more than is required to repair his criminal contribution. However, the above analysis is contrary to the theory of distributive justice, which assumes that those who commit certain kinds of wrongful acts, paradigmatically serious crimes, morally deserve to suffer a proportionate punishment. This means that, in the theory of distributive justice, the death penalty is accepted.

1.2. Unfair Trial as Criminal Injustice in the Death Penalty Case

In practice, however, there is not a comprehensive definition of criminal injustice yet. Instead, some authors provide negative signs of a justice system. Similar to the relationship between justice and injustice, criminal injustice can generally be characterized as the situation of either the absence of criminal justice or the existence of its opposite. In this regard, criminal injustice refers to the situation in which there is a lack of fairness in criminal proceedings. More specifically, from a human rights perspective, some authors demonstrate that criminal injustice means unfair trials (Matthew, 2015; Naughton, 2016). This idea resulted from international human rights law, in which justice is based on respect for the human rights of every individual (as is stated in UDHR 1948: “recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”). In international human rights law, criminal injustice is manifested primarily through violations of the right to a fair trial (AI, 2014, p.xv), which is recognized in UDHR 1948 (Article 10) and ICCPR 1966 (Article 14), and the various regional human rights instruments including Article 6 of the European Convention on Human Rights, Article 8 of the American Convention on Human Rights, Article 7 of
Criminal injustice as unfair trials is therefore the approach of this paper, and is mainly used in the following sections to analyze the situation of criminal injustice of the death penalty in ASEAN.

Since criminal injustice means unfair trials, the manifestations of the criminal injustice can be judged in practice through the guaranteeing of fair trial standards provided in Article 14 of ICCPR, which include the rights: (i) to be equal before the courts and tribunals; (ii) to be granted a hearing by a competent, independent and impartial tribunal established by law; (iii) to be presumed innocent until proven guilty according to law; (iv) to be informed promptly and in detail in a language which one understands of the nature and cause of the charge against one; (v) to have adequate time and facilities for the preparation of one’s defence as well as for the communication with counsel of one’s own choosing; (vi) to be tried without undue delay; (vii) to be tried in one’s presence, and to defend oneself in person or through legal assistance of one’s own choosing; and to have legal assistance assigned in any case where the interests of justice so require, and without payment by oneself in any such case if one does not have sufficient means to pay for it; (ix) to be examined, or have examined, the witnesses against one and to obtain the attendance and examination of witnesses on one’s behalf under the same conditions as witnesses against one; (x) to have the free assistance of an interpreter if one cannot understand or speak the language used in court; (xi) to not be compelled to testify against oneself or to confess guilt; (xii) to have his/her conviction and sentence reviewed by a higher tribunal according to law; (xiii) to be compensated for a miscarriage of justice; (xiv) to not be tried or punished again for an offence for which one has already been convicted or acquitted in accordance with the law and penal procedures of each country. However, not all fair trial standards in Article 14 of ICCPR will be mentioned in the following sections; rather, only those closely associated with the outstanding features of the death penalty in ASEAN will be cited and analyzed.

2. Fair Trial and Death Penalty: the Cases of Ho Duy Hai and Nguyen Thanh Chan in Vietnam

2.1. The Case of Ho Duy Hai: the presumption of innocence principle

In relation to the Principle of Presumption of Innocence, as mentioned earlier, the right to be presumed innocent until proven guilty is part of Article 14 of ICCPR on fair trial standards. In the area of law, presumption of innocence is one of the most sacred principles in the criminal justice system; it is the regarding of a defendant as innocent until proven guilty. In other words, the prosecution must prove, beyond a reasonable doubt, each essential element of the crime with which the accused is charged (Nolo’s Plain-English Law Dictionary). Due to presumption of innocence, a person cannot be compelled to confess guilt or give evidence against themselves, and it is for the state to produce evidence of guilt, not for the defendant to prove innocence (Fair Trials).

In relation to the death penalty, presumption of innocence is stipulated in Resolution 1984/50 on procedural safeguards guaranteeing protection of the rights of those facing the death penalty, adopted by the UN Economic and Social Council on 25 May 1984 (ECOSOC, 1984). The resolution states: “capital punishment may be imposed only
when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts” (ECOSOC, 1984, para.4).

In many retentionist states, violation of the presumption of innocence principle occurs quite commonly in the administration of the death penalty, of which Vietnam is not an exemption. The Ho Duy Hai case is the most controversial ones relating to the presumption of innocence principle.

**Summary of the Ho Duy Hai Case (Tuan V. Nguyen)**

On January 13, 2008, two female postal workers were found murdered inside a post office in Long An Province, Vietnam. More than two months later, on March 21, a youth named Ho Duy Hai was arrested and eight months later, on November 28, he was sentenced to death by a local court, largely because of the statement he made while in police custody that he had killed the women. Hai later repudiated the confession, saying it had been beaten out of him during marathon questioning and that he was coerced to write the confession. However, on April 29, 2009, an appellate court in Ho Chi Minh City upheld the death sentence.

On November 22, 2019, the Supreme People’s Procuracy formally asked for a “Cassation trial” – in effect Vietnam’s Supreme Court. However, on May 8, 2020, the 17-member Judicial Committee the Supreme People’s Court, upheld Hai’s death sentence, effectively denying the petition to the Supreme People’s Procuracy.

Since his first trial in 2008, Hai’s family and his defence lawyer have repeatedly maintained that he was innocent, and that he was wrongly convicted. Certainly, his confession was inconsistent with the evidence. No murder weapon(s) were found. Instead, a knife and a chopping board bought from the local market were displayed as the weapons he had allegedly used. His DNA didn’t match the blood found at the crime scene, no witnesses could testify that he was at the crime scene; evidence indicated that the murderer was left-handed person and Hai was right-handed.

Hai’s case, for the past 12 years, has been a typical example of controversial death penalty cases in Vietnam. The case is also particular related to the presumption of innocence principle (which is stipulated in Article 31 of the current Vietnamese Constitution,), since local courts at all levels have based their judgment on Hai’s confession while ignoring all inconsistent evidential facts (Tuan V. Nguyen). In addition, Hai’s case has also caused controversy about the impartiality of the investigative agency and the court in conducting legal proceedings.

The presumption of innocence which imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, was inadequately applied in the case. *Firstly*, in terms of burden of proving, the investigation had been misconducted since very first phases. The conviction was mainly based on Ho Duy Hai’s confession which was possibly obtained against his will. All the facts that were inconsistent with his confession such as no murder weapon found in crime scene, no witnesses, unmatch DNA with the blood found,… were ignored. In principle, with all these evidences, Ho Duy Hai should be
presumed innocent even when he did make confession of his crime. As pointed out by NA delegate Truong Trong Nghia, evidence collection process has seriously violated to the law. Since the murder weapon was not found, to accuse Ho Duy Hai, were displayed weapons he had allegedly used (a knife and a chopping board) were bought from the local market. Preservation, and forensic analysis of the evidence were misconducted as well by ignoring unmatch DNA in the blood found at the crime scene. Secondly, impartial application of presumption of innocence in the case also caused by insufficient awareness on this principle. Although presumption of innocence was recognized as fundamental rule in criminal proceeding, not only in the investigative stage but also in trial, the accused tends to be proved guilty instead of innocence. At the same time, basic human rights of the accused was violated during investigation, for instance, right to remain silence, freedom from torture or other physical punishments, ...

2.2. The case of Nguyen Thanh Chan: “Confessions” extracted through torture or other ill-treatment

As was demonstrated in Section 1, the right not to be compelled to testify against oneself or to confess guilt is also a part of Article 14 of ICCPR, addressing fair trial standards. Meanwhile, the right of freedom from torture, cruel, inhuman treatment or punishment is guaranteed by Article 7 of ICCPR and all the other major international and regional human rights treaties. In the course of criminal proceedings, the universal and non-derogable prohibition of torture and other inhuman or degrading treatment or punishment is consequently to be respected at all times, without exception even in the direst of circumstances (CAT, Article 2). This means that persons arrested, detained, or otherwise in the hands of police or prosecuting authorities for purposes of interrogation about alleged criminal activities, have the right to always be treated with humanity and without being subjected to any psychological or physical violence, duress or intimidation. In addition, the 1990 UN Guidelines on the Role of Prosecutors contain in particular the following important provision: “When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.”

Unfortunately, “confessions” that may have been extracted through torture or other ill-treatment have been used to convict and sentence people to death in quite many ASEAN retentionist states. For example, with respect to Vietnam, the UN Committee Against Torture (UN-CAT) recently raised concerns about “reports of the physical and psychological suffering of persons sentenced to the death penalty as a result of the particularly harsh conditions of their detention that may amount to torture or ill-treatment, including solitary confinement in unventilated cells; inadequate provision of

food and drink; being shackled round-the-clock; being subjected to physical abuse; such persons often commit suicide and develop psychological disorders as a result.” (CAT, 2018). In practice, in the famous death penalty cases, including Ho Duy Hai (mentioned above) and 4 other wrongful cases that "shocked Vietnamese society" including the the Nguyen Thanh Chan case, the Nguyen Minh Hung case, and the Han Duc Long case, and Huynh Van Nen case, all the victims reported being tortured by investigators. Below we analyze the most typical case of Nguyen Thanh Chan.

Summary of the Nguyen Thanh Chan Case (Thanh Nien News)

On the night of August 15th, 2003, Nguyen Thi Hoan, born in 1972, was found killed in Me village, Nghia Trung commune, Viet Yen district, Bac Giang province. After investigation, the Bac Giang province’s police agency has accused Nguyen Thanh Chan of murder. As a result, he was arrested and detained since September 28th, 2003. After that, in both hearing in first instance by Bac Giang Province People’s Court and in appeal by the Supreme People’s Court, Nguyen Thanh Chan was convicted of murder and was sentenced to life imprisonment. According to the record of the case, at first Nguyen Thanh Chan confessed his crime, but later, he kept changing his testimony during investigation and claimed himself innocent. At the beginning of the first instance trial, he also claimed that he had been bowed, beaten, threatened while detaining, and even was forced to practice stabbing straw with a knife so that he could perform again before the court. At the same time, many witnesses could testify for his alibi defense. During his imprisonment in Vinh Quang Prison, Nguyen Thanh Chan and his family continuously filed complaint to the authority for many years, but to no avail.

On July 9th, 2013, investigation agency of the Supreme People’s Procuracy received a typed petition of more than 200 words from Nguyen Thi Chien, Nguyen Thanh Chan’s wife. In which, she briefly stated that her husband was enduring unjust conviction by revealing her knowledge on new important evidence which was discovered by her family in June 2013. She urged the agency to reconduct investigation in order to save her husband. On September 30th 2013, a task group was sent to Bac Giang Province to verify the information as provided by Nguyen Thi Chien and Than Thi Hai (a relative of the family). The clue leaded the investigation to new suspect, Ly Nguyen Chung, whose stepmother, Nguyen Thi Lanh, accidentally heard he (Ly Nguyen Chung) told his father (Ly Van Chuc) how he commited crime in ethnic languages. Being threatened by her husband, Nguyen Thi Lanh could not speak out. In October 2013, investigation agency has persuaded her to tell what she knew by ensuring her safety. The information was later confirmed by Ly Van Chuc, Ly Nguyen Chung’s father. Finally, Ly Nguyen Chung turned himself in on October 25, 2013. According to the verdict, on August 15th 2013, Chung, then 15, went to victim’s shop in to buy shampoo. After seeing her money box, he suddenly took out a knife and stabbed the woman. He continued to stab her several times, hit her head with empty beer bottles, and suffocated her with a cushion before stealing her two gold rings, the court heard. A day later, he took a bus to Lang Son Province before moving to the Central Highlands province of Dak Lak.
Nguyen Thanh Chan was released in November 2013 after 10 year of imprisonment and was compensated with VND 7.2 billion (about US $ 320,000). In the case of Nguyen Thanh Chan, “presumption of guilt” was applied instead of presumption of innocence principle, in spite of the fact that the principle was adopted by law at that time.\(^2\) Nguyen Thanh Chan was wrongfully convicted by subjective conclusions of investigation agency which were based on insuffice evidence. Besides, other basic rights of accused persons in criminal proceeding were also severely violated such as: right to fair trial, freedom from torture, freedom from self-incrimination; right of self-defense,…. In this case, Nguyen Thanh Chan was forced to act against himself before the court, for instance, he was made to practice the stabbing while detaining in order to perform again in the court. Meanwhile, every kind of undue pressure exercised to obtain a statement from an accused persons should be considered illegal according to the law. Record from the lawyer also pointed out shortcomings in the investigation process and in criminal proceeding but unfortunately, it was ignored at that time, which violated the right to self-defense of the suspect as well. Consequently, the burden of proof was taken by his family instead of responsible actors. And it took as long as more than 10 year to clear his name but after all, nothing can compare with what he and his family had suffered during that time.

3. Main factors leading to Criminal Injustice in Death Penalty Cases in Vietnam

Many authors have discussed the causes leading to injustice in the criminal justice system. For example, John, Fricker and Fyle emphasise the factors of discrimination based on race and class (Hagan, 1982; Fricker, 2007; Fyfe, 2019), while Denov focuses on prejudice of the jury, erroneous eyewitness identification and testimony, police and prosecutorial misconduct, false confessions, over-reliance on in-custody informants, unsound forensic science, and inquisitorial systems (Denov 2005; John, 1996).

The above-mentioned factors can be seen in all criminal cases, including death penalty ones. According to AI, the main factors leading to injustices in death penalty cases in many retentionist states, include: inadequate legal representation; police and prosecutorial misconduct; perjured testimony and mistaken eyewitness testimony; racial prejudice; jailhouse “snitch” testimony; suppression and/or misinterpretation of mitigating evidence; community/political pressure to solve a case (Amnesty International, 2003). Similarly, the Cornell Center demonstrated the determined systemic risk factors for criminal injustices in many death penalty jurisdictions including: ineffective assistance of legal counsel; torture and coercion leading to false confessions; mistaken eyewitness identification; misconduct by officials (prosecutors, police, or the judiciary); lengthy pretrial detention; obstacles to appeal and post-conviction review; false testimony from informants or co-defendants; racial and ethnic discrimination (Cornell Center on the Death Penalty Worldwide, 2018).

From the analysis in Section 2, the main causes of criminal injustice in death penalty cases in Vietnam include: torture and coercion leading to false confessions; misconduct by officials (prosecutors, police, or the judiciary). In addition, there are other factors contributed to the wrongful convictions in death penalty cases in Vietnam such as

---

\(^2\) According to Article 10 Criminal Procedure Code of 1988 and Article 9 Criminal Procedure Code of 2003, no one is considered guilty and subject to punishment until the conviction of the Court has been legally effective.
inadequate legal representation; suppression and/or misinterpretation of mitigating evidence; community/political pressure to solve a case; prejudices of the public and judicial authorities against serious crimes such as murder and drug trafficking.

- In relation to the issue of inadequate legal representation in death penalty cases: this is the result of various factors, including the shortage of financial resources to the legal aid program, the lack of lawyers, especially those with experience and enthusiasm; and complicated and cumbersome criminal procedures that hinder the capital defendant's access to a lawyer.

Right to defense counsel is guaranteed to all the accused in all kind of criminal cases. In case the accused charged with offences punishable by death do not seek the assistance of defense counsel, the investigating bodies, procuracies or courts must request bar associations to assign law offices to appoint defense counsel for such persons or request the Vietnam Fatherland Front Committees or the Front’s member organizations to appoint defense counsel for their organizations’ members, according to Art. 76 Criminal Procedure Code 2015. As such, in capital case, defense counsel is compulsorily required. If defense counsel is absent, the trial panels must postpone the court sessions. However, to access to legal representation in criminal case in Vietnam has many difficulties in practice. From January 1st 2018 to May 31th 2019, there were 27,868 cases in whole country, of which, 15,796 cases (about 57%) have defense counsel. Among 16,042/27,868 cases which came to final judgment, legal assistants have taken part in 13,292 cases (83%), lawyers have only taken part in 2,750 cases (17%). Although the rate of lawyers who took part in criminal cases has increased in comparison with previous years, it’s still low. (Nguyen Thi Pha, 2019)

The fact that the right to legal aid has not been recognized by the Constitution leads to insufficient awareness of this right of both procedure-conducting actors and procedure-participants. The accuseds may unaware of their rights to have defense counsel and such rights are guaranteed by procedure-conducting agencies. Such limitation in right enjoyment of the accuseds has been derived from the lack of human rights based approach in protecting human rights in criminal proceedings. This also caused poor implementation of related provisions on legal counsel in practice. Besides, quality of representation a defendant receives in a capital case continuously remain poor despite the fact that quality of such representation can make the difference between life and death. Especially, in capital cases, the lawyer should be required more strictly than other cases. The lawyer who is proven to hold a biased view toward his/her client or simply has no experience with capital cases can not receive the case. Finally, the shortage of financial resources is making it more and more difficult to ensure the right to legal aid in practice, especially when Vietnam became middle-income country since 2010, sponsor from abroad for legal aid programme has been drastically reduced.

- The other issues – police and prosecutorial misconduct; suppression and/or misinterpretation of mitigating evidence; obstacles to appeal and post-conviction review; and false testimony from informants or co-defendants – mainly resulted from the lack of effective mechanisms to monitor and control the activities of judicial bodies.
Wrong convictions in recent years such as the case of Nguyen Thanh Chan, the case of Huynh Van Nen, the case of Han Duc Long have raised the questions about the performances of police and investigative agencies. Although the burden of proof is imposed on prosecutorial actors, investigation process is hardly monitored or reviewed later due to lack of effective mechanism. The above cases shows that in many criminal cases, confession made by the accused is consider more important than evidences. The so-calles “presumption of guilt” is likely to be applied more often than the principle of presumption of innocence. The state of police and prosecutorial misconduct has also been exacerbated by the lack of protection mechanism of human rights in criminal proceedings such as freedom from torture, right to remain silent,.....

Relating to the issue of monitoring the activities of judicial bodies – which is very important to prevent injustice in death penalty cases – in some retentionist states, there are effective monitoring mechanisms which involve the active participation of the local media and civil society organizations, as well as international and regional human rights organizations working in the area of the death penalty, like Amnesty International and ADPAN, etc. However, in Vietnam, it is more difficult to monitor death penalty cases because it is a sensitive issue. The death penalty data is even listed as state secret. In this context, unfair trial in death penalty cases can not be uncovered and campaigned for elimination.

From a broader perspective, in Vietnam, the inquisitorial system that they follow is also a cause. In the inquisitorial system, the trial is independently presided over by the judge and the verdict is also passed by said judge, therefore the opportunity to defend themselves given to the accused is limited (Yubaraj, 2016, pp.20-21). Meanwhile, the modern trend in the world is that of the adversarial system in which the prosecution, on behalf of the state, accuses the defendant, and must convince an independent judge (or maybe a panel of judges or a jury) of the person’s guilt beyond reasonable doubt (Moore, 1997, p. 50), and the accused is given a fair opportunity to defend himself/herself. The inquisitorial system, therefore, is more prone to injustice compared to the adversarial system.

**Concluding Remarks**

In many retentionist states including Vietnam, capital defendants are at risk of criminal injustice, with the risk level being more or less different throughout those states. Although it is not unique, criminal injustice faced by capital defendants in Vietnam is rather serious.

Criminal injustice in death penalty cases is part of criminal injustice in general, as well as one of typical human rights problems, which is emphasised in almost all the reports of international organizations on human rights in Vietnam.

---

3 Huynh Van Nen was accused of murder in 1998 and was sentenced life imprisonment. After the real perpetrator was found, Huynh Van Nen was released and compensated for 17 years of imprisonment.

4 Han Duc Long was accused of child sexual abuse and murder in 2005 and was sentenced capital punishment. In hearing in both first instance and appeal, he claimed that he made his confession after being tortured while detaining. Finally, in 2017, he was announced to be wrongly convicted and was released after 11 years of imprisonment.
Criminal injustice in death penalty cases not only deprives innocent people of their lives, but also conflicts with the universal right to life and many other human rights in criminal proceedings (or fair trial standards). In Vietnam, criminal injustice in death penalty cases also leads to a bad precedent of arbitrary and ethical and legal disregard in the administration of justice.

Since the right to life and international fair trial standards are attracting the special attention of the international community, criminal injustice in death penalty cases seriously undermines the reputation and image of Vietnam before the international community. Furthermore, the death penalty and criminal injustice also make it difficult for Vietnam to cooperate with other states in many areas, such as in repatriation of their citizen criminals, especially corruption offenders, who flee overseas.

As mentioned above, there are many factors leading to criminal injustice in death penalty cases in Vietnam. From a legal perspective, the ineffectiveness of the national justice system, the insufficiency of financial and human resources with respect to legal aid programs, and the weakness of the mechanism supervising death penalty cases are also main reasons. Meanwhile, from a cultural perspective, prejudice of the public and judicial authorities against offenders who have committed serious crimes – e.g. murder, drug trafficking, corruption, etc., is also an important element which contributes to the maintaining the death penalty as well as criminal injustice in using the capital punishment.

In the above context, there are some essential solutions which should be adopted, in order to deal with criminal injustice in death penalty cases in Vietnam:

First and foremost, it is pivotal to tighten the mechanism of monitoring the compliance of judicial officials with criminal procedure law. In fact, Vietnam has adopted criminal procedural law with quite comprehensive provisions applicable to death penalty cases. However, due to poor supervision, many regulations are not fully complied with by judicial officials, leading to criminal injustices. Therefore, strengthening the monitoring mechanism for the compliance of criminal procedural law of judicial bodies and judicial officials is significant in reducing criminal injustice in death penalty cases in the country.

Secondly, adequate legal aid resource and training for capital defense lawyers must be provided. This is because the common problem in death penalty cases in Vietnam is insufficient legal aid resources and a limited capacity of capital defense lawyers. High-quality legal representation is the first and most important defense against criminal injustice in death penalty cases, and according to ICCPR, state parties have an international obligation to ensure that capital defendants receive competent counsel with adequate time and resources to prepare their defense.

Third, it is vital to provide training for judicial officials (prosecutors, police, and judges) and impose strict sanctions for misconduct. Experiences from Vietnam show that various violations of fair trial standards in death penalty cases result from misconduct of judicial officials. Training on international human rights standards in criminal proceedings for judicial officials is therefore very important in order to reduce criminal injustice in death penalty cases.
Fourth, it is essential to eliminate prejudice against offenders having committed serious crimes and are facing the death penalty in Vietnam. In addition, it is necessary to foster a tolerant and non-violent culture, as well as a proper understanding of the brutal, meaningless nature of the death penalty. This is because in every country, the issues of the death penalty, including criminal injustice, depend very much on the awareness and attitudes of the public and of public officials.

Fifth, capital defendants who are wrongly convicted or unfairly treated and members of their family must be compensated as provided in the Article 14(6) of the ICCPR. Although the law of Vietnam provides compensation for victims of wrongful conviction in criminal proceedings, the compensation is often slow to be granted and inadequate. In addition, compensation is only for the victims themselves, not for members of their family. This is not appropriate because in the case of death sentences, relatives of capital defendants often face serious suffering and damage, material and mental, so they also deserve to be compensated.

Compensation for capital defendants wrongly convicted or unfairly treated is also significant to force judicial agencies and judicial officials to strictly abide by the related human rights standards in order to avoid the legal consequences that they may face in handling death penalty cases. In this way criminal injustice in death penalty cases can be reduced.

Author Biography

Vu Cong Giao has been teaching and doing research in the area of human rights in Vietnam since 1996. He is now working for the School of Law under the Vietnam National University, Hanoi as the Head of the Department of Constitutional and Administrative Law and Director of the Research Center for Human and Citizen’s Rights.

Nguyen Thuy Duong has been teaching and doing research in the area of human rights in Vietnam since 2015. She is now working for the School of Law under the Vietnam National University, Hanoi as a lecturer on Constitutional Law and Human Rights Law.

REFERENCES

Amnesty International:
- (1997), AGAINST THE TIDE: The death penalty in Southeast Asia, AI Index: ASA 03/01/97
- (2007): THE DEATH PENALTY, Questions and Answers, AI Index: ACT 50/010/2007,
American Civil Liberties Union (ACLU), (2020), The Case Against the Death Penalty


BBC (2012) Singapore plans changes to mandatory death penalty, BBC, 10 July 2012


Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984


Eric Prokosch (1998), HUMAN RIGHTS V. THE DEATH PENALTY: Abolition and Restriction in Law and Practice, Amnesty International,


FIDH:


Human Rights Committee:

- (1982), General comment No. 6 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life
- (1984), General comment No. 14 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life
- (1987), Robinson v Jamaica, Communication No. 223/1987, paras. 10.2-10.3, Abdool Saleem Yasseen and Noel Thomas v Guyana, UN Doc. CCPR/C/62/D/676/1996, para. 7.8
- (2007), General Comment No. 32. Article 14, Right to equality before courts and tribunals and to fair trial.
- (2018), General comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life.


Lao People’s Democratic Republic, Penal Law, art. 40, Law No. 12/NA, Nov. 9, 2005.


Martin Luther King, Jr., Letter from a Birmingham Jail (1963).


Ngoc Quang (2014), 5 vụ án oan nổi tiếng làm chấn động Việt Nam (5 famous injustice cases shocked Vietnam), giaoducnet.vn, 04/08/2014


UN Basic Principles on the Role of Lawyers, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990


UN Economic and Social Council (1984), Resolution 1984/50 of 25 May 1984 on Safeguards guaranteeing protection of the rights of those facing the death penalty


UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted by UN General Assembly in the Resolution 40/34 of 29 November 1985, herein after the Declaration 1985)

Vietnamese Constitution 2013

Vietnamese Penal Code 2015 (revised 2017)

Vietnamese Criminal Procedures Code 2015


Yiswaree Palansamy, End of Malaysia’s mandatory death sentence on the horizon, Malay Mail, 17/11/2015

Yubaraj Sangroula (2016), Trial procedure: challenges and prospect of enhancing the procedures in Asian criminal justice systems, Journal of Civil & Legal Sciences, DOI: 10.4172/2169-0170.1000193