

## Briefing Paper

### The Functions of Death Penalty Clemency in Southeast Asia: Comparative Lessons for Vietnam

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# THE FUNCTIONS OF DEATH PENALTY CLEMENCY IN SOUTHEAST ASIA: COMPARATIVE LESSONS FOR VIETNAM

## ABSTRACT

*Despite being the final procedural barrier separating life and death in capital cases, executive clemency has traditionally not received the attention it deserves from comparative law and comparative criminal justice scholars, including those writing about Southeast Asia. This article aims to build upon previous empirical scholarship on death penalty clemency in Southeast Asia in two ways: by focusing on the ‘who’ question in clemency awards in the region rather than on ‘how many’ prisoners benefit, and also by updating previous findings in light of any new clemency data available since 2013. After relating the contemporary and possible future clemency practice of each ‘actively retentionist’ Southeast Asian nation, this article concludes by reflecting on what this regional use of clemency might mean for Vietnam’s future clemency policy in death penalty cases.*

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# THE FUNCTIONS OF DEATH PENALTY CLEMENCY IN SOUTHEAST ASIA: COMPARATIVE LESSONS FOR VIETNAM

DR DANIEL PASCOE

## INTRODUCTION

As the final procedural barrier separating life and death in capital cases, executive clemency has traditionally not received the attention it deserves from comparative law and comparative criminal justice scholars. This article aims to build upon previous scholarship on death penalty clemency in Southeast Asia in two ways: by focusing on the 'who' question for clemency awards in the region rather than on 'how many' prisoners benefit, and also by updating previous empirical findings in light of any new clemency data available since 2013.<sup>1</sup> Below, Part B introduces the clemency power and describes its four modern functions. Part C relays the contemporary and possible future clemency practice of each 'actively retentionist' Southeast Asian nation.<sup>2</sup> Finally, Part D provides brief reflections on what this regional use of clemency might mean for Vietnam's future clemency policy.

## THE FOUR FUNCTIONS OF CLEMENCY

Clemency is an umbrella term for a variety of executive powers which reduce legally-imposed punishment. In death penalty cases, the most important of these are commutations (reducing a death sentence to a lesser punishment) and pardons (releasing the condemned perpetrator from prison altogether). What, then, is the purpose of clemency? When both historical and modern clemency practice are considered, together with the views of criminal justice theorists, clemency performs four identifiable functions in death penalty cases:<sup>3</sup>

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- 1 Pascoe D, 'Clemency in Southeast Asian Death Penalty Cases' (2014) 4 *Centre for Indonesian Law Islam and Society Policy Papers* 4 <<http://law.unimelb.edu.au/centres/cilis/research/publications/cilis-policy-papers>> accessed 1 March 2017.
  - 2 'Actively retentionist' jurisdictions are defined by Amnesty International as those jurisdictions which have executed at least one prisoner during the past 10 years (Hood R, and C Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, Oxford University Press 2015) 503).
  - 3 See Pascoe D, 'Explaining Death Penalty Clemency in the Socialist Republic of Vietnam' (2016) 10(2) *Vienna Journal on International Constitutional Law* 165, 180-182, for specific examples.

- A. Clemency as 'Mercy from the Sovereign';
- B. Clemency as Retributivism;
- C. Clemency as Redemption; and,
- D. Clemency as Political Advantage or Utilitarianism.

Pursuant to the first function, clemency is granted as a merciful 'gift' from the state to the prisoner. It is an expression of the ruler's benevolence, and his or her desire for social control and to exercise the 'power over life and death', rather than any particularly deserving features of the case. Clemency granted by an unelected monarch or autocratic ruler, often to an entire class of condemned persons, generally comports with this classification.

Where 'mercy from the sovereign' is dispensed on a whimsical and even arbitrary basis, clemency as *retributivism* demands the commutation of a death sentence to a term of imprisonment in a number of pre-determined circumstances, where strict conformity with the original sentence imposed would result in undeserved or disproportionate punishment. On this basis, commutations or pardons are justified on the basis that they enhance retributive justice, rather than detract from it. However, as national legal systems have developed separate means of individualising sentences, of taking into account a prisoner's suffering over time, and of reviewing the safety of convictions, clemency numbers on this basis, while still relevant in exceptional cases, have atrophied.<sup>4</sup>

Within the third category, clemency as *redemption* is granted in reference to the prisoner's character, behaviour or meritorious activities before or after arrest. Although parole or other forms of release now perform many of these functions, clemency as *redemption* remains an extremely relevant remedy within death penalty, life without parole and mandatory minimum sentences, and also as part of the growing restorative justice movement in criminal justice.<sup>5</sup>

Finally, clemency for *political advantage or utilitarianism* is the secular form of mercy from the (semi-divine) sovereign. Here, clemency is granted to gain political benefit for the executive, to provide a broader public benefit, and to incentivise actions by prisoners that benefit the greater public, rather than on the basis of any redeeming

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4 Strange C, 'Introduction' in *Qualities of Mercy: Justice, Punishment, and Discretion* (UBC Press 1996) 14-15; Colgate-Love M, 'The Twilight of the Pardon Power' (2010) 100(3) *Journal of Criminal Law and Criminology* 1169, 1204.

5 Novak A, *Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective* (Routledge 2016) 195-197.

qualities of the prisoner or the prisoner's case.

Bearing in mind these four functions of clemency, in the following section I consider which of these roles death penalty clemency has performed in each 'actively retentionist' Southeast Asian nation from 1991 onwards, with special mention of recent developments since 2013. There are five ASEAN nations which continue to retain and use the death penalty, primarily for murder, drug trafficking and state security or firearms offences: Thailand, Singapore, Malaysia, Indonesia and Vietnam.

## CLEMENCY FUNCTIONS IN FIVE SOUTHEAST ASIAN DEATH PENALTY JURISDICTIONS

### Thailand

In Thailand, death penalty clemency is granted as a 'Royal Pardon' by the King of Thailand, presently Maha Vajiralongkorn. The King may grant commutation or pardon either as an 'Individual Royal Pardon' following a prisoner's petition, or as a 'Collective Royal Pardon' whereby the decree benefits many prisoners all at once. Sometimes a Collective Royal Pardon will even empty Thailand's entire death row.

Generally speaking, death penalty clemency practice in Thailand follows a different pattern from the other four ASEAN jurisdictions under study. In Thailand, since 1991 and also well before that date,<sup>6</sup> commutation has been the *expected* outcome for death row prisoners who have exhausted all judicial appeals, with very few prisoners executed compared with the number granted Individual or Collective Royal Pardon. 50 prisoners have been executed since 1991, but the most recent executions took place in 2009.<sup>7</sup> Of the five nations under study, Thailand's clemency practice is easiest to classify: Thailand is an example of a jurisdiction where clemency is granted as 'mercy from the sovereign', even if the monarch usually plays only a ceremonial role as signatory.<sup>8</sup> Although Individual Royal Pardons may be granted for reasons resembling the *retributivist*, *redemptive* and *utilitarian* justifications for clemency, and Collective Royal Pardons (when these do not empty death row entirely) depend upon good behaviour in prison,<sup>9</sup> clemency's overarching purpose for many decades has been

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6 Interview with Academic Expert on Thailand (Canberra 16 September 2009); Interview with Thai Human Rights Lawyer (Bangkok 23 September 2012); Johnson DT, and FE Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (Oxford University Press 2009) 405.

7 Johnson and Zimring (n6) 403; Cornell Center on the Death Penalty Worldwide, 'Death Penalty Database' (Cornell Law School 2017) <<https://www.deathpenaltyworldwide.org/search.cfm>> accessed 1 March 2017.

8 Interview with Academic Expert on Thailand (n6); Interview with Thailand Department of Corrections Staff (Bangkok 24 September 2012).

9 Pascoe D, 'Comparing Death Penalty Clemency in Singapore and Thailand' in J Lu, M Travers

to boost the Thai monarch's public image of compassion, benevolence and Buddhist piety.<sup>10</sup> Under Maha Vajiralongkorn's father, Bhumibol Adulyadej (whose reign as King extended 70 years from 1946 to his death in October 2016), the monarchy proved a unifying influence within an unstable political system beset by frequent military coups. Granting Royal Pardons was a key means of boosting its prestige.

Since 2013, this historical pattern has only continued. King Bhumibol's ailing health in the final decade or more of his reign meant that Individual Royal Pardon petitions usually went unanswered.<sup>11</sup> Although Thai law permits an execution after 60 days in these circumstances,<sup>12</sup> the Thai Government has instead issued a number of Collective Royal Pardons which have periodically emptied Thailand's death row. Based on media reports, the final Collective Royal Pardon which commuted death sentences under King Bhumibol took place in August 2012, benefiting all 58 capital prisoners who had exhausted legal appeals.<sup>13</sup> Moreover, upon ascending to the throne in December 2016, the new King issued a decree commuting all remaining death sentences to life imprisonment, alongside releasing from prison altogether various minor offenders, those experiencing mental or medical problems in prison, and very young and very old prisoners.<sup>14</sup>

Thailand's Second and Third National Human Rights Action Plans (2009-2013 and 2014-2018) outline concrete plans to abolish the death penalty,<sup>15</sup> as does Thailand's 2016 Universal Periodic Review statement.<sup>16</sup> Nevertheless, how soon the incumbent

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and L Chang (eds), *Comparative Criminology in Asia* (Springer 2017) 170-173.

- 10 Chotibal P, 'The Royal Prerogative of Pardon in Thailand' (Master of Laws Thesis, Department of Law, Chulalongkorn University 1990).
- 11 Breen D, 'Thailand and the Death Penalty' (Taiwan Alliance to End the Death Penalty, 16 May 2013) <<http://www.taedp.org.tw/en/story/2541>> accessed 1 March 2017.
- 12 Criminal Procedure Code 1934 (Thailand), s 247(1).
- 13 Hands off Cain, 'Thailand – Retentionist' (NGO Country Profile 1999-2017) <<http://www.handsoffcain.info/bancadati/schedastato.php?idstato=12000037&idcontinente=23>> accessed 1 March 2017.
- 14 Ibid.
- 15 Cornell Center on the Death Penalty Worldwide (n7).
- 16 ADPAN, 'ADPAN Welcomes Thailand's Commitment To The Abolition Of The Death Penalty At The UN Human Rights Council's Universal Periodic Review (UPR) of Thailand in Geneva on 11/5/2016' (NGO Media Statement, 20 May 2016) <<https://adpan.org/2016/05/21/adpan-welcomes-thailands-commitment-to-the-abolition-of-the-death-penalty-at-the-un-human-rights-councils-universal-periodic-review-upr-of-thailand-in-geneva-on-1152016/>> accessed 1 March 2017.

military government takes this step is far from certain. In the meantime, under the new King, Individual and Collective Royal Pardons will continue to diminish and periodically empty Thailand's death row in a display of royal benevolence.

## Singapore

Article 22P of Singapore's 1965 Constitution empowers the President to grant clemency in death penalty cases 'on the advice of the Cabinet'. In this context, 'on advice' means that, pursuant to the Westminster model of government, the Singaporean Cabinet will collectively make the decision and the President must follow it.<sup>17</sup>

As a polar opposite to Thailand, clemency in capital cases is exceptionally rare in Singapore. It has been granted in only six death penalty cases since independence in 1965, and in only three cases since 1991,<sup>18</sup> whereas hundreds of petitions have been rejected over the same period.<sup>19</sup> Although Cabinet deliberations and the official reasons for granting clemency are kept secret from both prisoners and the public, from the six successful cases since 1965, it is possible to deduce that commutations have historically been granted in *very select* cases of:

- terminal illness;
- youth or first offence;
- murder committed in spontaneous or provoked circumstances; or,
- the accused being an accomplice, rather than the primary offender.<sup>20</sup>

Singapore's past practice therefore fits firmly within the *retributivist* conception of clemency. The most recent clemency grant was made by President Ong Teng Cheong in 1998, and hence there are no notable cases to report since 2013.<sup>21</sup> However, with new legislation that came into effect in 2013 enabling trial judges to exercise discretion in selected homicide and drug trafficking cases previously subject to the mandatory

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17 Chan W-C, 'The Death Penalty in Singapore: in Decline but Still Too Soon for Optimism' (2016) 11 *Asian Journal of Criminology* 179, 201.

18 Ibid, 200.

19 Ibid, 183.

20 Pascoe (n9). One further possibility is that three of the six prisoners were granted clemency after cooperating with police and prosecutors in securing the convictions of their accomplices in the crime. Article 22P(1)(a) of the 1965 Constitution of Singapore explicitly allows for clemency in these circumstances.

21 Chan (n17) 200.

death penalty,<sup>22</sup> clemency may become even rarer in the future, as judicial officers and prosecutors use their discretion to filter undeserving cases away from death. Already, offenders previously on death row have been 're-sentenced' using the procedure, with at least 13 death sentences reduced to lesser punishments by November 2015.<sup>23</sup>

## Malaysia

Unlike Singapore, clemency is granted on a provincial basis in Malaysia. The formal clemency decision-maker is the Islamic Hereditary Ruler (the relevant State Sultan, *Raja* or *Yang di-Pertuan Besar*) within nine States, the appointed State Governor (*Yang di-Pertuan Negeri*) in four States without a Hereditary Ruler, or the Malaysian King (the *Yang di-Pertuan Agong*) in federal, military and security cases. Each decision-maker is advised by a Pardons Board established by Article 42(1) of the 1957 Malaysian Constitution. All death sentences are automatically considered for clemency,<sup>24</sup> which was granted in 95 capital cases between 2010 and 2016,<sup>25</sup> a far greater number than in neighbouring Singapore.

Historically, scholars and journalists have seen *non-legal* factors as being of greatest importance to the decision-making of the State and Federal Pardons Boards.<sup>26</sup> The non-legal factors relevant within a number of post-1991 grants of death sentence commutations and pardons consist of the maintenance of good international relations with a foreign prisoner's home government, and the previous public service and political

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22 Penal Code (Amendment) Act 2012 (Singapore); Misuse of Drugs (Amendment) Act 2012 (Singapore).

23 Amnesty International, 'Singapore: Imminent hanging of Malaysian national undermines death penalty reforms' AI-Index ASA 36/2818/2015 (5 November 2015). A total of 34 death row prisoners were eligible for re-sentencing under the new laws (Amnesty International, 'Cooperate or Die: Singapore's Flawed Reforms to the Mandatory Death Penalty' AI-Index ACT 50/7158/2017 (2017) 5).

24 Criminal Procedure Code 1999 (Malaysia), s 281(c).

25 New J-L, 'Anwar's last hope is a pardon from the Agong, but do these things come easy? We check' (CILISOS Current Issues, 15 December 2016) <<https://cilisos.my/is-a-royal-pardon-the-last-resort-for-anwar-but-how-easy-is-it-to-get-pardoned/>> accessed 1 March 2017.

26 Talib NH, 'The Powers and Functions of the Pardons Board in Malaysia – A Review' (Master of Laws Dissertation, University of Malaya 1989) 31; 'Death or Life: Decision on Penang Pair "This Weekend"' *The Advertiser* (19 June 1986); 'Insults could see convicted men hang: lawyer' *The Advertiser* (14 January 1986); Aisbett N, 'Echoes of Barlow and Chambers' *The West Australian* (14 July 2001); Azlan S, 'The Role of Constitutional Rulers in Malaysia' in FA Trinidad and HP Lee (eds), *The Constitution of Malaysia: Further Perspectives and Developments* (Oxford University Press 1986) 86-87.

connections of the prisoner.<sup>27</sup> These represent justifications within the *redemptive* and *political advantage and utilitarian* paradigms identified above – quite similar functions to those clemency performs in Vietnam, as I explain below. With clemency also granted on the Hereditary Rulers' birthdays and as part of coronation celebrations,<sup>28</sup> as with Thailand the *mercy from the sovereign* paradigm is arguably also relevant. The Hereditary Rulers are the guardians of Islam in their nine states, and mercy is an important value within Islamic jurisprudence.<sup>29</sup> Moreover, granting Royal Pardon is one small way in which the Hereditary Rulers may still exercise power over their subjects, given that Malaysia's elected government has curtailed their formal legal role over the decades.<sup>30</sup>

However, a focus on these non-legal matters by commentators may simply reflect the greater newsworthiness of 'public interest' cases, rather than more mundane petitions decided on the basis of *retributivist* factors where punishment is remitted as undeserved (as in Singapore), or else further *redemptive* factors such as a good behaviour and work record in prison 'earning' the prisoner remission or release. Since 1991, cases where capital clemency has been granted for *retributivist* reasons have involved the youth of a prisoner, situations where a complete or partial defence, while argued by defence lawyers at trial, could not be proven, procedural irregularities, and other cases where pressing legal criteria demanding commutation have emerged during trial.<sup>31</sup>

Despite the present Malaysian government's stated plan to abolish the mandatory death penalty in favour of allowing judicial discretion in all cases,<sup>32</sup> executions continue to take place in Malaysia, with at least nine recorded in 2016,<sup>33</sup> and an average of two

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27 See Pascoe D, 'What the Rejection of Anwar Ibrahim's Petition for Pardon Tells Us About Malaysia's Royal Pardons System' (2016) 18(1) *Asian-Pacific Law and Policy Journal* 63, 72-79, for specific examples.

28 New (n25).

29 Abu-Nimer M, 'A Framework for Nonviolence and Peacebuilding in Islam' (2001) 15 *Journal of Law and Religion* 217, 248.

30 Kershaw R, *Monarchy in South-East Asia: The Faces of Tradition in Transition* (Routledge 2001) 160; Richardson M, 'Malaysia Prepares to Strip Sultans of their Immunity' *International Herald Tribune* (15 December 1992).

31 See Pascoe (n27) 72-79, for specific examples.

32 Hands off Cain, 'Malaysia – Retentionist' (NGO Country Profile 2000-2017) <<http://www.handsoffcain.info/bancadati/schedastato.php?idcontinente=23&nome=Malaysia>> accessed 1 March 2017.

33 Amnesty International, 'Death Sentences and Executions 2016' AI-Index ACT 50/5740/2017 (NGO Report, April 2017) <<https://www.amnesty.org/download/Documents/>

per year taking place from 1998 to 2015.<sup>34</sup> Since 2013, Malaysian opposition politicians have continued to pressure the government to release accurate figures on annual executions and clemency appeals through questions tabled in parliament.<sup>35</sup> However, the entire process still remains opaque. What we do know about recent clemency practice suggests that the Hereditary Rulers, State Governors and *Yang di-Pertuan Agong* are taking their responsibilities to convene and chair Pardons Board meetings more seriously, with fewer petitioners having to wait many years, if not decades, for their cases to be considered for mercy. According to NGO Hands off Cain: 'In general about two years pass between the passing of a death sentence and the execution of the person condemned. Some appeals processes, however, exceeded 10 years.'<sup>36</sup> If accurate, a two-year norm is a substantial improvement on previous practice, with waits for up to 15 years for Pardons Board consideration once being common,<sup>37</sup> as the Hereditary Rulers, in particular, allegedly accorded a low priority to convening meetings.<sup>38</sup>

If this latter trend continues, then in the medium-term expect to see fewer grants of clemency for *redemptive* purposes based on good behaviour over a long period of incarceration. Unless the Malaysian government dramatically increases the pace of executions, as long as the mandatory death penalty remains, the death row population will continue to grow. In May 2016, it stood at over 1000 persons at various stages of appeal. Of this number, over 400 were foreign nationals.<sup>39</sup> This group will keep the Pardons Boards busy as the Malaysian Government considers how to balance its diplomatic and law enforcement interests. The 600 Malaysian nationals, on the other

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ACT5057402017ENGLISH.PDF> accessed 29 June 2017.

- 34 Palansamy Y, 'End of Malaysia's Mandatory Death Sentence on the Horizon' Malay Mail Online (17 November 2015) <<http://www.themalaymailonline.com/malaysia/article/end-of-malysias-mandatory-death-sentence-on-horizon>> accessed 1 March 2017.
- 35 Hands off Cain (n32).
- 36 Ibid.
- 37 Pascoe (n27) 90 n130. Notably, from 2010 to 2016, 95 *capital prisoners* were granted commutation or pardon, compared with 98 prisoners *overall* from 2001 to 2012. Many of the latter group would include non-capital prisoners (New (n25); MADPET 'Only 98 pardons since 2001 in Malaysia' (Blog Post, 29 July 2012) <<http://madpet06.blogspot.com/2012/07/only-98-pardons-since-2001-in-malaysia.html>> accessed 1 March 2017).
- 38 Interview with Member of the Malaysian Bar Council (Kuala Lumpur 26 October 2011); Interview with Malaysian NGO Staff (Kuala Lumpur 25 October 2011).
- 39 'Kasthuri: Cabinet shifting goal post on death penalty' *Free Malaysia Today* (11 July 2016) <<http://www.freemalaysiatoday.com/category/nation/2016/07/11/kasthuri-cabinet-shifting-goal-post-on-death-penalty/>> accessed 1 March 2017.

hand, will hope that the mandatory death penalty's proposed abolition allows them to be retrospectively 're-sentenced' to lesser punishments, as with some prisoners in Singapore, detailed above.

## Indonesia

Clemency is granted by the Indonesian President, pursuant to Article 14(1) of the 1945 Constitution. In doing so, the Head of State must consider 'the advice of the Supreme Court', although this means that the President is free to disregard the opinion of the Court's Criminal Chambers and issue a contrary decision,<sup>40</sup> or else rely on the advice of various other official parties in granting or denying clemency.<sup>41</sup>

Indonesia's clemency practice since 1991, spanning autocratic (Suharto) and democratic (post-Suharto Reform Era) governments, as well as shifting law and order priorities, is the most eclectic of the five jurisdictions under study here. Presidential clemency in death penalty cases over this period provides examples<sup>42</sup> of clemency as *utilitarianism* (via clemency in transitioning to democracy, and clemency to protect Indonesian death row convicts abroad), *retributivism* (clemency for wrongful conviction, the availability of an arguable defence, or a disproportionate sentence given to a drug 'mule'), and *redemption* (clemency for expressed remorse and good behaviour in prison). Nonetheless, if Indonesia's new Draft Criminal Code passes through the national legislature (the DPR) without significant amendments, capital prisoners' sentences will be automatically commuted to life or 20 years' imprisonment upon good behaviour during the first 10 years spent on death row.<sup>43</sup> This procedure, resembling China's 'suspended death penalty' sentence,<sup>44</sup> may result in clemency for *redemptive* purposes becoming ever rarer, as rehabilitation and remorse are instead rewarded in a

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40 Lindsey T, and P Nicholson, *Drugs Law and Legal Practice in Southeast Asia* (Hart 2016) 104.

41 Interview with Former Indonesian Cabinet Minister (Melbourne 21 November 2016); Interview with Indonesian Cabinet Minister (Jakarta 15 April 2013).

42 See Pascoe (n1) 10, 14, 17; Amnesty International, *Indonesia: A Briefing on the Death Penalty*, AI-Index ASA 21/040/2004 (30 September 2004) 9; 'Clemency for drug convicts part of diplomatic effort, says govt' *The Jakarta Post* (19 October 2012); Aritonang M, and B Saragih, 'Drug dealer clemency "a setback"' *The Jakarta Post* (13 October 2012); 'Dua Terpidana Mati Dapat Grasi dari Presiden Jokowi' *Seruu* (12 May 2016) <<http://utama.seruu.com/read/2016/05/12/282865/dua-terpidana-mati-dapat-grasi-dari-presiden-jokowi>> accessed 1 March 2017.

43 Draft Criminal Code (Indonesia), Article 91. See further Tilemann H, 'Indonesia's long wait for its own criminal code' (Indonesia at Melbourne Blog, 10 November 2016) <<http://indonesiatmelbourne.unimelb.edu.au/indonesias-long-wait-for-its-own-criminal-code/>> accessed 14 March 2017.

44 Criminal Law 1997 (PRC), Article 48.

less arbitrary manner.

Since coming to power in 2014, current Indonesian President Joko 'Jokowi' Widodo has made several public statements to the effect that he would not grant clemency to any drug traffickers sentenced to death<sup>45</sup> – a group comprising more than 40 percent of Indonesia's 165+ death row prisoners.<sup>46</sup> However, compared with his predecessor Susilo Bambang Yudhoyono, Jokowi has ironically proven more merciful towards murder convicts. By the time of writing, Jokowi had already commuted the death sentences of seven murderers.<sup>47</sup> In the absence of any official reasons, various mitigating factors in the cases and good behaviour in prison (given that Indonesian death row prisoners are not eligible to receive sentence remissions on Indonesia's Independence Day each year) are the most likely justifications.

### Vietnam

Vietnam's most recent Constitution was adopted in 2013, authorising the State President the power to grant clemency in Article 88(3). Clemency must be sought by the prisoner within seven days of the determination of a final appeal in death penalty cases,<sup>48</sup> and if the request is successful, the death sentence is converted to life imprisonment.<sup>49</sup> Similar constitutional and legislative provisions applied during the 1980s and 1990s, although notably the Council of State as Vietnam's 'Collective Presidency' exercised the power to grant clemency from 1980 to 1992.<sup>50</sup>

While little is known about the internal decision-making structure within the Vietnamese government as it relates to clemency, at a very minimum the Supreme People's Court Chief Justice must make a recommendation to the State President whether to accept or

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45 Pascoe D, 'Three Coming Legal Challenges to Indonesia's Death Penalty Regime' (2015) 2(2) *Indonesian Journal of International and Comparative Law* 239, 278.

46 Lamb K, 'Indonesia: families told that 14 death row prisoners will be executed tonight' *The Guardian* (28 July 2016).

47 Mulyana A, 'KIP Sidangkan Setneg Soal Transparansi Pemberian Grasi,' *RMOL* (15 February 2016) <<http://hukum.rmol.co/read/2016/02/15/235813/KIP-Sidangkan-Setneg-Soal-Transparansi-Pemberian-Grasi->> accessed 1 March 2017; 'Jokowi Berikan Grasi Dua Terpidana Mati Asal Sumut' *Inilah Medan* (12 May 2016) <<http://www.inilahmedan.com/2016/05/jokowi-berikan-grasi-dua-terpidana-mati.html>> accessed 30 October 2017.

48 Criminal Procedure Code 2003 (Vietnam), Article 258(1).

49 Penal Code 1999 (Vietnam), s 35.

50 Sidel M, *The Constitution of Vietnam: A Contextual Analysis* (Hart 2009) 71-72.

reject a prisoner's application for clemency.<sup>51</sup> Moreover, within a complex organisation such as the Vietnamese Communist Party, presumably different government agencies and ministries make additional recommendations to the State President (or formerly, the Council of State) as to whether a death sentence should be commuted or not.

Many of the reported grants of clemency in Vietnamese death penalty cases since 1991 appear to fall within the *political advantage and utilitarianism* category. The Vietnamese Government has made each of these clemency grants strategically, in order to benefit the state in subtle ways, rather than acting primarily for the prisoner's benefit. Examples are various clemency grants made to Western, Vietnamese and Asian prisoners at the request of foreign governments and multinational corporations, persons sentenced to death who have provided information on their accomplices and recruiters, and those mass grants of clemency retrospectively made when the number of death penalty-eligible crimes has been periodically reduced.<sup>52</sup>

On the other hand, examples where prisoners may have 'earned' redemptive clemency (before arrest) arise where the prisoner or a close relative has made valuable contributions to the country, especially through state-owned enterprises. Conspicuously absent from Vietnam's past practice are clemency grants made because the punishment is 'undeserved', either at the time of imposition, or later before execution (*retributivist* clemency). Finally, while we cannot be certain of the reasons for which every single clemency petition has been granted in Vietnamese death penalty cases, the very fact that reasons are not publicly provided in some cases, together with the timing of some such grants around National Day celebrations in September and at the beginning of the Lunar New Year festival seems to accord with the hypothesis that the Vietnamese government stands to gain power and legitimacy over its constituents by granting clemency as '*mercy from the sovereign*', in addition to utilitarian and redemptive justifications within particular cases,<sup>53</sup> as with the Thai King and Malaysia's Hereditary Rulers.

Of the five jurisdictions under study, Vietnam's clemency practice is the most difficult on which to provide recent updates. In 2004, the government decreed death penalty information a state secret, a move widely thought to be brought about following strident criticism by human rights NGOs and European Governments.<sup>54</sup> Since 2010

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51 Hiebert M, 'Merchants of Death: Officials may be executed in war grave fraud case' *Far Eastern Economic Review* (22 April 1993); Sidel M, 'Law, the Press and Police Murder in Vietnam: The Vietnamese Press and the Trial of Nguyen Tung Duong' in DG Marr (ed), *Mass Media in Vietnam* (Australian National University 1998) 115-116.

52 Pascoe (n3) 175-179.

53 Ibid 175-179, 188.

54 Johnson and Zimring (n6) 389.

there have been no English-language media reports of death penalty clemency. One possible explanation is that the Vietnamese Government has instead granted clemency more covertly, with a recent unverified government report listing 179 Presidential commutations from July 2011 to June 2016.<sup>55</sup> Notably, foreign prisoners continue to survive death sentences without these punishments being overturned at higher court levels, even though clemency itself remains publicly unreported.<sup>56</sup> However, as Vietnam continues its reductionist approach to the death penalty through measures such as steadily reducing the number of capital crimes, banning the execution of new mothers or of prisoners over 75 years of age, and automatically mitigating the sentences of corruption prisoners who repay stolen money to the state,<sup>57</sup> more and more of the mitigating circumstances in which executive clemency might traditionally be granted are now being dealt with by legislation.

### CONCLUSION: COMPARATIVE LESSONS FOR VIETNAM

Although I am a death penalty abolitionist, perhaps the best that abolitionists can expect from a one-party state like Vietnam in the short term is a policy of continuous reductionism. Here, clemency has a potentially important role to play. However, the Vietnamese Government has so far neglected to utilise death penalty clemency in the full range of circumstances that demand it. There are two potential lessons from the preceding discussion involving four other Southeast Asian jurisdictions.

First, with Vietnam's two-year pause in executions between July 2011 and August 2013 as the country sought to move from firing squads to lethal injection,<sup>58</sup> Vietnam's death row population ballooned to in excess of 700.<sup>59</sup> In mid-2016, 684 prisoners were still under sentence of death.<sup>60</sup> Such a large death row population has made human rights

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55 Vietnam Ministry of Public Security, 'Tổng kết 05 năm thi hành Luật Thi hành án hình sự trong Công an nhân dân (2011 - 2016)' [Five Year Review of the Law on Execution of Criminal Judgments in the People's Public Security Forces (2011-2016)] (Hanoi, 4 January 2017) 10.

56 Pascoe (n3) 178, 178 n94.

57 Quan M, 'Corrupt officials can escape death if they are contrite, Vietnam lawmakers decide' *Thanh Nien News* (27 November 2015); 'Vietnam lawmakers ease death penalty on corruption' *The Manila Times* (28 November 2015); Penal Code 1999 (Vietnam), Article 35.

58 *The Manila Times*, *ibid*.

59 'Compassionate Communists' *The Economist* (20 June 2015).

60 'A 73-Year-Old Australian Woman Has Been Sentenced to Death in Vietnam' *Vice* (30 June 2016) <[https://www.vice.com/en\\_us/article/73-year-old-australian-women-gets-the-death-penalty-in-vietnam](https://www.vice.com/en_us/article/73-year-old-australian-women-gets-the-death-penalty-in-vietnam)> accessed 1 March 2017.

activists fear a rash of executions to 'clear the books' of capital prisoners.<sup>61</sup> In fact, in 2013, legislator and Vice Minister of Defence Nguyen Van Hien stated that many prisoners had been awaiting execution for five to six years, sometimes 'begging to be executed'.<sup>62</sup> By 2017, potentially hundreds of death row prisoners will have spent three *additional* years under sentence of death since then, far beyond a 2003 estimate of five months to four years within the appeals process, and one further year awaiting execution.<sup>63</sup>

As outlined above, in other Southeast Asian jurisdictions such as Malaysia, Indonesia and Thailand, clemency sometimes operates as a *redemptive* measure in death penalty cases, not only for prisoners who have personal connections to the ruling party (as in some Vietnamese cases), but also for prisoners who have behaved well and have rehabilitated themselves over many years in prison. Rather than dealing with the 'mental anguish' of prisoners awaiting death by lethal injection by speeding up the execution process as Nguyen Van Hien suggested,<sup>64</sup> the more humane approach would be to grant a mass sentence commutation benefiting those prisoners who have rehabilitated themselves and expressed remorse for their crimes. A precedent for group commutation already exists in Vietnam, with mass grants occurring every time the number of death-eligible crimes is reduced. Whereas rehabilitation and good behaviour play a significant role in justifying prisoner release as part of a general or special prison amnesty in Vietnam,<sup>65</sup> and have informed preliminary debates on

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61 These fears may have been confirmed by an as-yet unverified February 2017 media report noting 429 executions by lethal injection from August 2013 to July 2016 (The K, 'Vietnam to build five more lethal injection venues' *dti news* (9 February 2017) <<http://www.dtinews.vn/en/news/017/49419/vietnam-to-build-five-more-lethal-injection-venues.html>> accessed 1 March 2017; Vietnam Ministry of Public Security (n55)). Prior to the 2011-2013 'pause' in executions, Lindsey and Nicholson estimated approximately 60 executions per year in Vietnam (Lindsey and Nicholson (n40) 9). Furthermore, an Amnesty International report from 2012 estimated that 100 new death sentences were issued per year (Amnesty International, 'Death Sentences and Executions in 2011' AI-Index ACT 50/001/2012 (NGO Report, 27 March 2012) <<https://www.amnesty.org/en/documents/ACT50/001/2012/en/>> accessed 19 March 2017).

62 Delaney B, 'Changing Attitudes to the Death Penalty in Southeast Asia' SBS (Comment, 26 July 2013) <<http://www.sbs.com.au/news/article/2013/07/25/comment-changing-attitudes-death-penalty-southeast-asia>> accessed 1 March 2017.

63 Johnson and Zimring (n6) 390 n11.

64 Delaney (n62).

65 Nguyen NA, 'Getting out of jail: the law on special amnesty revisited' *Vietnam Law and Legal Forum* (24 October 2006) <<http://vietnamlawmagazine.vn/getting-out-of-jail-the-law-on-special-amnesty-revisited-3225.html>> accessed 1 March 2017; Nicholson P, and K Truong, 'Drugs Prosecutions in Vietnam: The Modern Propaganda Trial' (2008) 34 *Monash University Law Review* 430, 448; Nguyen TPH, 'Drug-Related Crimes Under Vietnamese Criminal Law:

legislating a new 'suspended' death sentence,<sup>66</sup> reform in prison is not currently taken into account within death penalty commutation.<sup>67</sup>

The second comparative lesson from other Southeast Asian jurisdictions (and from clemency's theoretical literature) is that commutations and pardons are not only means of achieving utilitarian aims for the state, and to reward party loyalty, but are also vital due process safeguards against undeserved or disproportionate punishment imposed by the judiciary. Vietnam's trial and appeal system does not presently operate to effectively filter out cases where there are procedural improprieties or doubts over guilt.<sup>68</sup> Although Vietnamese judges now commonly exercise the power to return case files to the procuracy for further investigation if there is insufficient incriminating evidence,<sup>69</sup> once the trial actually proceeds, judges and lawyers typically believe 'it is a foregone conclusion that the case constitutes a crime.'<sup>70</sup> Moreover, up to 99.93 percent of appeals in criminal cases fail in Vietnam.<sup>71</sup> As such, prisoners often assume that asking for clemency implies an admission of guilt.<sup>72</sup>

Even within semi-authoritarian societies such as Singapore and Malaysia, or within

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Sentencing and Clemency in Law and Practice' (2014) 8 *Centre for Indonesian Law Islam and Society Policy Papers* 39 <<http://law.unimelb.edu.au/centres/cilis/research/publications/cilis-policy-papers>> accessed 1 March 2017.

66 Nicholson and Lindsey (n40) 11.

67 A mass sentence commutation can also be justified retributively, with the 'death row effect' increasing the sentence's harshness and cruelty the longer the prisoner's status remains undetermined (Hood and Hoyle (n2) 204-218). However, based on the available data from actively retentionist jurisdictions, retributive commutation or pardon on the basis of the 'death row effect' has not yet entered Southeast Asian clemency practice.

68 Johnson and Zimring (n6) 390; Nicholson and Truong (n65) 455-456; Abuza Z, 'Vietnam Today' *The History Place: Points of View* (2004) <<http://www.historyplace.com/pointsofview/vietnam.htm>> accessed 1 March 2017.

69 Lindsey and Nicholson (n40) 250-251.

70 Nguyen HQ, 'Lawyers and Prosecutors under Legal Reform in Vietnam: The Problem of Equality' in S Balme and M Sidel (eds), *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave Macmillan 2007) 169; Lindsey and Nicholson (n40) 237. As Lindsey and Nicholson (at 5) note: 'In the case of Vietnam, the presumption of innocence has, in any case, only existed constitutionally since 2014 and it is not yet clear how it will work in practice.'

71 Nicholson and Truong (n65) 442.

72 Hands off Cain, 'Vietnam – Retentionist' (NGO Country Profile 2000-2017) <<http://www.handsoffcain.info/bancadati/schedastato.php?idstato=1136&idcontinente=23>> accessed 1 March 2017.

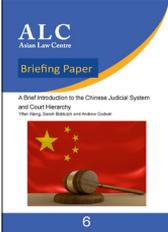
a genuinely authoritarian regime such as Suharto's Indonesia, clemency has been granted as an outright pardon where doubts have arisen over the prisoner's guilt, or as a death sentence commutation given arguable yet unsuccessful defences, relatively minor involvement in the offence, or procedural irregularities. At least as an interim measure before more comprehensive legal reforms, Presidential clemency is well placed to perform these remedial roles in Vietnam. Although clemency presently only allows a death sentence to be reduced to life imprisonment, a prisoner's commuted sentence can later be further reduced or abrogated entirely through general or special amnesty.<sup>73</sup> By studying state practice in neighbouring jurisdictions, the Vietnamese Government might see that granting clemency in death penalty cases does not diminish the state's authority over its citizens (in fact, it may strengthen it),<sup>74</sup> and nor does clemency necessarily lead to the demise of capital punishment altogether, if granted for deserved rehabilitative or retributive purposes.

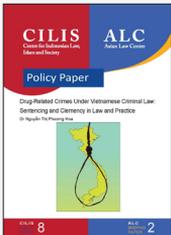
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73 Lindsey and Nicholson (n40) 285. For example: An Dien, 'Jury out as Vietnam holds fast to white-collar noose' *Thanhnieu News* (26 February 2015).

74 Sitze A, 'Keeping the Peace' in A Sarat and N Hussain (eds), *Forgiveness, Mercy and Clemency* (Stanford University Press 2007) 186.

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