

Why Vietnam justifies the death penalty?

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Abstract

The death penalty is widely recognized as one of the first sanctions to keep social order and protect justice since the primitive era. It has been becoming a controversial topic for many years. Many countries have abolished this punishment while others maintain it. Vietnam is one of the countries, which still apply the death penalty. The death penalty is applied to many types of crimes and in practice every year, a lot of death sentences are declared and executed. This paper will examine the question why Vietnam justifies the death penalty. The paper will approach this punishment under different perspectives such as criminal justice policy, criminology, human rights, and history to explain the question above. Furthermore, it analyzes Vietnam's socio-economic background to provide a comprehensive understanding of maintaining the death penalty in this country.

Keywords: death penalty; policy; criminology; human rights; Vietnam

1. Introduction

Capital punishment, or death penalty, is an execution of an offender sentenced to death after conviction by a court of law of a criminal offense.¹ It is a criminal penalty and the most severe form of punishment. The historical development of capital sentence is affected by different factors such as culture, politics, religion, and ideology. Before the state authority interfering the conviction process, this punishment is considered as extra-judicial and personal revenge. Nowadays, the global conceptualization of human rights² and rule of law³ impacts on both academic and social perspective on death penalty.

Capital punishment is a major concern in light of depriving the right to life—the most fundamental human rights—since the enactment of Magna Carta. According to Amnesty International, more than two thirds of the countries in the world have now abolished the death penalty in law or practice.⁴ To be more specific, the number of abolitionists for all crimes and retentionists is 106 and 56 countries respectively. Vietnam is still considered as retentionist, a

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¹ Encyclopedia Britannica, 'Capital Punishment' <<https://www.britannica.com/topic/capital-punishment>> accessed 18/1/2021.

² Dallmayr F., "'Asian Values' and Global Human Rights' (2002) 52 (2) *Philosophy East and West* 173.

³ Bui T.H., 'Deconstructing the 'Socialist' Rule of Law in Vietnam: The Changing Discourse on Human Rights in Vietnam's Constitutional Reform Process' (2014) 36 (1) *Contemporary Southeast Asia* 77.

⁴ Amnesty International, *Amnesty International Global Report: Death Sentences and Executions 2019* (2020) <<https://www.amnesty.org/download/Documents/ACT5018472020ENGLISH.PDF>>

country that retain death penalty for ordinary crimes. The death penalty's abolishment is now a global trend due to the human rights protection tendency. Despite the movement of many countries towards the capital punishment, Vietnam applies this sentence in practice. Therefore, conducting a research on this subject is inevitably crucial.

This paper will examine the question why Vietnam justifies the death penalty. The article will approach this punishment under different perspectives such as criminal justice policy, criminology, human rights, and history to explain the question above. Furthermore, it analyzes Vietnam's socio-economic background to provide a comprehensive understanding of maintaining the death penalty in this country.

2. Legal framework of the death penalty in Vietnam

Historical development

Vietnam's feudal criminal law has a strong reference to China's law due to the rule of their neighbour in almost 1000 years. This can be explained by the perspective of lawmakers in this historical period. There were many terms exported from China. Take Quoc trieu hinh luat⁵, a well-known criminal law of Vietnam, as a prime example. The Le Dynasty adopted this criminal code which includes the "Ten Abominations": (1) Rebellion; (2) Great sedition; (3) Treason; (4) Parricide; (5) Depravity; (6) Great irreverence; (7) Lack of filial piety; (8) Discord; (9) Unrighteousness; (10) Incest. These were offenses under traditional Chinese law and the first three were capital offenses. This code contains 722 provisions with reference from the Tang and the Ming Dynasty of China. In addition, criminal law was not clearly distinguished with civil law⁶, which is a signature of Vietnam jurisdiction. This can be explained by the fact that Quoc trieu hinh luat encompassed different law fields norms such as criminal law, civil law, administrative law, and procedure criminal law. Thus, it evidently proves that Vietnam criminal law in this monarchy period was not built on their own basis of philosophy and law-making. However, Vietnam still had their traditional perspective on law adoption.

Before independence, the 80-year-French-colonial-period impacted on Vietnam law profoundly. The Civil law tradition was incorporated this South-East Asian country through the invasion of France. This phenomenon was found by Rene David. This comparative law scholar argued that the Civil law tradition extended its scope by two ways and the invasion of European continental countries was the first path⁷. The French imposed a parallel legal system in which a civil law system governed French citizens, while the Nguyen Code and customary practice continued to govern Vietnamese people.⁸ Indeed, they not only transplanted a rights-based law⁹ and Western-modelled institutions into Vietnam, but also opened a law school in Hanoi for training

⁵ Quoc trieu hinh luat can be known as Hong Duc Code, or Le trieu hinh luat—adopted by the Le Dynasty—which includes different law fields norms such as criminal law, civil law, and procedure criminal law.

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⁶ Vũ Văn Mẫu, *Cổ-luật Việt-Nam thông-khảo và tư-pháp sử*, Quyển thứ nhất, Tập thứ nhất (Sài Gòn, 1974).

⁷ Rene David, John E.C. Brierley, *Major Legal Systems in the World Today – An Introduction to the Comparative Study of Law* (2nd edition, The Free Press, 1978).

⁸ John G., 'Private Commercial Rights in Vietnam: A Comparative Analysis' (1994) 30 *Stan. J. Int'l L.* 325.

⁹ *Ibid.*

legal personnel to administer the legal system. Although the influence of France focused on private law¹⁰, the long-last product is the tendency of codifying different law fields, which leads to the adoption of different criminal code in Vietnam.

Since independence¹¹, Vietnam criminal law is heavily influenced by Soviet criminal law. This could be explained by four following reasons. Firstly, when Democratic Republic of Vietnam was born, this country's economy was started to find an escape for development. Therefore, the aid of communist-brother countries was inexorably precious. Vietnam sent many students to Soviet in order to study and research; therefore, these future lawmakers, lawyers, and lecturers acquired knowledge with Soviet's perspective. Secondly, Vietnam criminal law's approach is similar to Soviet jurisdiction. In the past, Vietnamese scholars considered criminal law as a public law field in light of the state power to keep the social order and national security. This perspective is a sign of communist countries such as Soviet, China, and Vietnam. The third evidence is the similar structure of the Criminal Code of Vietnam and Soviet. Each criminal code mentions the general provisions, crime, punishment, and the assignment of the punishment and release from punishment.¹² Lastly, with the supreme lead of the Communist Party of Vietnam (CPV), criminal law is a powerful tool to create political stability. To fight against the enemy force, the CPV needs to impose law to stamp their identity¹³ and protect the political regime¹⁴. The dictation of CPV is a constitutional fact when the 2013 Constitution is enacted. To be more specific, the Article 4.2 2013 Constitution stipulates that "The Communist Party of Vietnam - the Vanguard of the working class, concurrently the vanguard of the laboring people and Vietnamese nation, faithfully representing the interests of the working class, laboring people and entire nation, and acting upon the Marxist-Leninist doctrine and Ho Chi Minh Thought, is the force leading the State and society." This tendency nowadays can be seen in China, a communist close friend of Vietnam, with the undoubted lead of the Chinese Communist Party¹⁵.

Death penalty legal framework in Vietnam

Abolition of death penalty is a strong tendency globally and Vietnam criminal law caught up with this trend since 1945. While the first Criminal Code of Vietnam adopted in 1985 stipulated 44 capital offenses, the next 1999 Criminal Code only had 29 provisions¹⁶. With the judicial reform

¹⁰ See Do G.N., *Control of Standard Terms in Consumer Contracts in Vietnamses Law: Lessons Learnt from European Experiences* Ph.D. thesis (Utrecht University, 2017).

¹¹ See Rose C.V., 'The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study' (1998) 32 (1) *Law & Society Review* 93.

¹² Nikiforov B.S., 'Fundamental Principles of Soviet Criminal Law' (1960) 23 (1) *The Modern Law Review* 31.

¹³ Son B.N., 'Contextualizing the Global Constitution Making Process: The Case of Vietnam' (2016) 64 (4) *The American Journal of Comparative Law* 931.

¹⁴ This perspective is springing from Lenin and also seen in the case of Soviet. See Burbank J., 'Lenin and the Law in Revolutionary Russia (1995) 54 (1) *Slavic Review* 23.

¹⁵ Kuo-chun C., 'Leadership in the Chinese Communist Party' (1959) 321 *The Annals of the American Academy of Political and Social Science* 40.

¹⁶ Phương Thảo, 'Thu hẹp phạm vi áp dụng hình phạt tử hình trong Bộ luật hình sự năm 1999' (*Trang thông tin điện tử tổng hợp – Ban Nội chính Trung Ương*, 2013) < <https://noichinh.vn/nghien-cuu-trao-doi/2013/12/thu-hep-pham-vi-ap-dung-hinh-phat-tu-hinh-trong-bo-luat-hinh-su-nam-1999-293434/>> accessed 2 February 2021.

request from the Resolution enacted by the Communist Party of Vietnam, the Criminal Code decreased the number of capital offenses.

According to the 2015 Criminal Code, *death sentence is a special sentence imposed upon people committing extremely serious crimes that infringe national security, human life, drug-related crimes, corruption-related crimes, and some other extremely serious crimes defined by this Code* (Article 40.1). *Life imprisonment shall not be imposed upon juvenile offenders, women who are pregnant or raising children under 36 months of age, and people from 75 years of age or older when they commit the crime or during trial* (Article 40.2). *The life sentence shall not be executed in any of the following cases: (a) The convict is pregnant or a woman raising a child under 36 months of age; (b) The sentenced person is 75 years of age or older; (c) The person sentenced to death for embezzlement or taking bribes, after being sentenced, has returned at least on third of the property embezzled or bribes taken, closely cooperates with the authorities in the process of investigation or trial, or has made reparation in an effort to atone for the crime* (Article 40.3). *In the cases specified in Clause 3 of this Article or death sentence is commuted, the death sentence shall be replaced with life imprisonment* (Article 40.4).

Death sentence is provided in the Criminal Code and declared by the Court. It has its own characteristics: (1) Because death penalty is the most severe in the sentence system by depriving sentenced people of life, it can only apply for people committing extremely serious crimes; (2) Death sentence prevents effectively sentenced people's recidivism. This punishment has no purpose of improvement and education; therefore, it takes the opportunity to rehabilitate and restore from the sentenced; (3) Capital sentence has great efficiency in general prevention; (4) Capital punishment is unaltered and has no opportunity to fix wrong conviction in judicial activities.

The 2015 Criminal Code narrowed the scope of death sentence by removing seven capital offenses: Robbery (Article 168); Manufacturing and trading of counterfeit food or food additives (Article 193); Illegal storage of narcotic substances (Article 249); Appropriation of narcotic substances (Article 252); Destruction of works, facilities, or vehicles important to national security (Article 303); Insubordination (Article 394); Surrendering to enemy (Article 399).

According to the 2015 Criminal Code, there are 18 death offenses divided into 8 offenses group. *Offenses against national security*: High treason (Article 108); Activities against the people's government (Article 109); Espionage (Article 110); Rebellion (Article 112); Terrorism to oppose the people's government (Article 113); Sabotaging facilities of Socialist Republic of Vietnam (Article 114). *Offenses against the person and reputation*: Murder (Article 123); Rape of a person aged under 16 (Article 142). *Drug-related offenses*: Illegal manufacturing of narcotic substances (Article 248); Illegal storage of narcotic substances (Article 249); Illegal deal in narcotic substances (Article 251). *Other offenses against public safety*: Terrorism (Article 299). *Offenses related to abuse of power*: Embezzlement (Article 353); Taking bribes (Article 354). *Disruption of peace, crimes against humanity, and war crimes*: Disruption of peace, provocation of war of aggression (Article 421); Crimes against humanity (Article 422); War crimes (Article 423).

Capital sentence is switched from execution by a firing squad to the administration of lethal injection in 2011 according to the Decree no. 82/2011/NĐ-CP. Then Decree no. 47/2013/NĐ-CP

stipulates that death sentence is done with the administration of a combination of three drugs: one that paralyzes the musculoskeletal system, another causes unconsciousness and yet another that stops the heart from beating. One dose using the aforementioned three drugs is to be used for one person. The drugs would be produced nationally. Additionally, according to Decree no. 42/2020/NĐ-CP, there are three doses, two of which are backups. If the heart is beating 10 minutes after the first dose, the second dose will be administered, and if that does not work either, the third. If the person is still alive 10 minutes after the third dose, the execution would be temporarily suspended. Doctors would then report the state of the prisoner to the council responsible for conducting the capital sentence.

The right to a fair trial

From criminal law perspective, the right to a fair trial is essential in criminal procedures in order to guarantee objectivity and accuracy of the whole process which influences subsequently the court's decision. It plays a pivotal role in death penalty in light of this sentence's irreparable characteristic. The right to a fair trial prevents the state's abuse of power in criminal proceedings to protect the accused's legitimate interest¹⁷.

The right to a fair trial is a fundamental and universal principle which is mentioned in a plethora of international conventions. For instance, Article 10 of the Universal Declaration of Human Rights stated that *everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him*. In addition, Article 14 of the International Covenant on Civil and Political Rights provided that *all persons shall be equal before the courts and tribunals*.

The right to a fair trial is a constitutional principle. Article 31. 2 of the 2013 Constitution stated that *a person charged with a criminal offense shall be promptly tried in an impartial and public manner by a court within a legally established time limit. In case of a closed trial in accordance with law, the verdict shall be publicly pronounced*. Furthermore, the right is insisted in the 2015 Criminal Code. Article 9 of the 2015 Criminal Procedure Code provided that *Criminal procedure occurs on the principle under which all people are subject to the same laws of justice, regardless of race, gender, belief, religion, social class and status; every person committing crime is treated under the law; every juridical person is equal before the law, regardless of its form of ownership and economic class*.

Model of criminal procedure

As mentioned above, Vietnam jurisdiction is heavily influenced by Civil law tradition; therefore, they apply inquisitorial procedure¹⁸. This model reigns supreme in civil law countries. Its evident shortcoming is that the judge's over-interference poses a serious threat to the trial's objectivity. This can be explained by the fact that the judge's arguments base on the evidence provided by the

¹⁷ Kidd C.J.F., 'Disciplinary Proceedings and the Right to a Fair Criminal Trial under the European Convention on Human Rights' (1987) 36 (4) *The International and Comparative Law Quarterly* 856.

¹⁸ Encyclopedia Britannica, 'Inquisitorial procedure' <<https://www.britannica.com/topic/inquisitorial-procedure>>

Procuracy, but the Court and Procuracy are on the same side—the State—which bears the burden of proof in criminal cases.

With the judicial reform request from the CPV and the Politburo, Vietnam criminal law changed their model procedure to improve the justice equality. The 2015 Criminal Code and 2015 Criminal Procedure Code stipulates the adversarial procedure¹⁹. This new model creates the balance between three main parties in a trial: The Court (judges), the accused, and the State which bears the burden of proof. The adversarial model assures the presumption of innocence – a universal principle globally and the law of evidence because the court’s decision does not depend on the judge’s thinking as much as the inquisitorial model.

3. Discussion

Despite the global movement and judicial reform, Vietnam still maintains death penalty. This tendency can be explained by three main arguments.

Firstly, Vietnam does not have the appropriate context to abolish the death sentence. The prerequisite background does not meet the abolition requirement. For instance, the economic, social, cultural, and legal conditions stay at low level; therefore, Vietnam can not create the alternative sanctions to assure the punishment’s purpose and keep the social order. The feudal and confucian’s heavy influence has invaded the citizens’ mind for thousand years. In fact, many Vietnamese argue that the capital sentence is essential to create the social serenity as well as the national security. One of the most well-known crime is the Dang Tran Hoai case in 2012. The defendant was condemned by conducting three crimes which are murder, rape of a child, and robbery. After considering, the judges decided that the capital punishment would be applied because Hoai carried out extremely serious crimes. The similar cases threaten the national security and social order; hence, many citizens stand with the execution of death sentence.

Secondly, although, maintaining the capital sentence is necessary, lawmakers need to narrow the application scope. This process needs to be conducted on two aspects.

- (1) On the legislative perspective, lawmakers need to conduct survey and fully evaluate to create a basis for abolishing provisions applied the death penalty. The evaluation should concentrate on the economic, political, and social conditions of Vietnam; the alternative to punish and educate prisoners; the citizens’ attitude on the abolition of a precise provisions; the corporation of international conventions that Vietnam ratified.
- (2) On the law application, Vietnam criminal law should abolish the death penalty if the law established the modern and strict infrastructure. Initially, the Court needs to receive instruction to consider the application of capital punishment as the last option. Furthermore, the death sentence requires the legitimate, appropriate process of appeal and cassation procedures.

Thirdly, abolishing or narrowing the capital sentence should base on the public consultation. The law amendment in terms of crime and penalty is usually provided in the Constitution and Law on

¹⁹ Encyclopedia Britannica, ‘Adversarial Procedure’ <<https://www.britannica.com/topic/adversary-procedure>>

Organisation of National Assembly. Nevertheless, the death penalty affects also the inhabitants' psychology and sentiment as well as the national diplomatic strategy. Therefore, the decision of abolishing or narrowing the capital punishment should be conducted by public consultation (provided in the 1992 Constitution). The consultation shows the importance of people towards this issue as well as a good reference for an appropriate policy. To democratize the reference, the amendment of Constitution needs to set out a logical, transparent, and simple mechanism for the people.

4. Conclusion

Despite the irreversible global tendency and democracy wave, it is not a simple matter to suddenly apply a rights-based approach to a deeply rooted Confucian legal culture like Vietnamese society. Capital sentence emerged as a severe and worthy punishment in Vietnamese people's mind for years. It would be hard for the citizens to understand comprehensively different perspective of death penalty. On the behalf of the State, the death penalty is a useful tool to punish and educate the convicted as well as to prevent the future extremely serious crime.

While South Korea – nation with seemingly similar cultural values abolished the death penalty²⁰, the progressive thinking is not soaked enough to create changes in Vietnam and other Asian countries such as Japan and China²¹. This can be explained by the political regime of Vietnam. As mentioned above, the CPV interferes vigorously to the law-making process, especially criminal law in light of its ability to protect the national security, to keep the social order and notably the political regime. Additionally, most of Vietnamese people are Buddhist, but the Buddhism philosophy does not have any impacts on the abolition of death sentence. This comes from the override interference from political field on religious belief.

Furthermore, the pattern of executions is also distinct in Vietnam. All executions take place in extreme secrecy and silence; therefore, the scholars face difficulties in collecting information and conducting analytics on the number of cases in which applies the death penalty. In fact, the international organisations' report usually have to base on the 'unorthodox' sources. Therefore, Vietnam needs to publish the data as soon as possible in order to provide transparency to the public.

To conclude, Vietnam is moving towards the abolition of capital sentence by gradually narrowing the scope of death offenses in criminal code since 1985. The actual abolition would occur when people's concept on capital punishment changed. Simultaneously, scholars and lawmakers need to research deeply on alternative sentences which should be applied in the future. These punishments have to meet the economic, cultural, political, and social requirements of Vietnam society as well as assure the panlizing, prevention and education purpose of criminal law.

²⁰ Bae S., 'International Norms, Domestic Politics, and the Death Penalty: Comparing Japan, South Korea, and Taiwan' (2011) 44 (1) *Comparative Politics* 41.

²¹ Amnesty International, *Amnesty International Global Report: Death Sentences and Executions 2019* (2020) <<https://www.amnesty.org/download/Documents/ACT5018472020ENGLISH.PDF>>

References

Encyclopedia Britannica, 'Capital Punishment' <<https://www.britannica.com/topic/capital-punishment>>

Encyclopedia Britannica, 'Inquisitorial procedure' <<https://www.britannica.com/topic/inquisitorial-procedure>>

Encyclopedia Britannica, 'Adversarial Procedure' <<https://www.britannica.com/topic/adversary-procedure>>

Dallmayr F., "'Asian Values" and Global Human Rights' (2002) 52 (2) *Philosophy East and West* 173.

Bui T.H., 'Deconstructing the 'Socialist' Rule of Law in Vietnam: The Changing Discourse on Human Rights in Vietnam's Constitutional Reform Process' (2014) 36 (1) *Contemporary Southeast Asia* 77.

Bae S., 'International Norms, Domestic Politics, and the Death Penalty: Comparing Japan, South Korea, and Taiwan' (2011) 44 (1) *Comparative Politics* 41.

Amnesty International, *Amnesty International Global Report: Death Sentences and Executions 2019* (2020)
<<https://www.amnesty.org/download/Documents/ACT5018472020ENGLISH.PDF>>

Quoc trieu hinh luat <<file:///Users/thanhcuvu/Downloads/Quoctrieuhinhluat.pdf>>

Vũ Văn Mẫu, *Cổ-luật Việt-Nam thông-khảo và tư-pháp sử, Quyển thứ nhất, Tập thứ nhất* (Sài Gòn, 1974).

Rene David, John E.C. Brierley, *Major Legal Systems in the World Today – An Introduction to the Comparative Study of Law* (2nd edition, The Free Press, 1978).

John G., 'Private Commercial Rights in Vietnam: A Comparative Analysis' (1994) 30 *Stan. J. Int'l L.* 325.

Do G.N., *Control of Standard Terms in Consumer Contracts in Vietnamses Law: Lessons Learnt from European Experiences* Ph.D. thesis (Utrecht University, 2017).

Rose C.V., 'The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study' (1998) 32 (1) *Law & Society Review* 93.

Nikiforov B.S., 'Fundamental Principles of Soviet Criminal Law' (1960) 23 (1) *The Modern Law Review* 31.

Son B.N., 'Contextualizing the Global Constitution Making Process: The Case of Vietnam' (2016) 64 (4) *The Amercian Journal of Compartive Law* 931.

Burbank J., 'Lenin and the Law in Revolutionary Russia (1995) 54 (1) *Slavic Review* 23.

Kuo-chun C., 'Leadership in the Chinese Communist Party' (1959) 321 *The Annals of the American Academy of Political and Social Science* 40.

Phuong Thảo, 'Thu hẹp phạm vi áp dụng hình phạt tử hình trong Bộ luật hình sự năm 1999' (*Trang thông tin điện tử tổng hợp – Ban Nội chính Trung Ương*, 2013)

<<https://noichinh.vn/nghien-cuu-trao-doi/201312/thu-hep-pham-vi-ap-dung-hinh-phat-tu-hinh-trong-bo-luat-hinh-su-nam-1999-293434/>>

Kidd C.J.F., 'Disciplinary Proceedings and the Right to a Fair Criminal Trial under the European Convention on Human Rights' (1987) 36 (4) *The International and Comparative Law Quarterly* 856.

Nguyễn Ngọc Chí, 'Một số suy nghĩ về hình phạt tử hình trong Luật hình sự Việt Nam' (2012) 28 (1) *VNU Journal of Science: Legal Studies* 42.

Nguyễn Ngọc Chí, Lê Lan Chi, *Giáo trình Luật Tố tụng Hình sự Việt Nam* (NXB Đại học Quốc gia Hà Nội, 2019).

Cao Thị Oanh, Lê Đăng Doanh, *Bình luận khoa học: Bộ Luật Hình sự năm 2015* (NXB Lao Động, 2016).

Đại học Luật Hà Nội, *Giáo trình Luật hình sự Việt Nam* (NXB Công an Nhân dân, 2016).